

3-1-2013

The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress

Rob Richie

Executive Director, FairVote

Andrew Spencer

Legal Fellow, FairVote

Follow this and additional works at: <https://scholarship.richmond.edu/lawreview>

 Part of the [Election Law Commons](#), and the [Law and Politics Commons](#)

Recommended Citation

Rob Richie & Andrew Spencer, *The Right Choice for Elections: How Choice Voting Will End Gerrymandering and Expand Minority Voting Rights, from City Councils to Congress*, 47 U. Rich. L. Rev. 959 (2013).

Available at: <https://scholarship.richmond.edu/lawreview/vol47/iss3/8>

This Article is brought to you for free and open access by the Law School Journals at UR Scholarship Repository. It has been accepted for inclusion in University of Richmond Law Review by an authorized editor of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

THE RIGHT CHOICE FOR ELECTIONS: HOW CHOICE VOTING WILL END GERRYMANDERING AND EXPAND MINORITY VOTING RIGHTS, FROM CITY COUNCILS TO CONGRESS

*Rob Richie **

*Andrew Spencer ***

“Every voice will be heard, every right will be seen, and every wrong felt; and then the House of Representatives will become what the Framers of the Constitution intended it should be—a bright and honest mirror, reflecting all the lights and shades of the multifarious interests of this mighty people, as they lie spread out over this broad land.”

—Senator Jacob W. Miller of New Jersey¹

When the United States Congress first imposed single-member congressional districts on the states in 1842, it had the loftiest of intentions. The several states that at the time elected U.S. House Representatives on a statewide, at-large basis often had only one party win seats due to winner-take-all election rules.² Proponents argued that single-member districts would ensure fair representation of every viewpoint, majority or minority, making Congress a “mirror of the people.”³ Experience has since proven their hopes misguided.⁴

* Executive Director, FairVote. B.A., 1987, Haverford College.

** Legal Fellow, FairVote. J.D., 2012, University of Arizona School of Law; B.S., B.A., 2006, University of Arizona.

1. CONG. GLOBE, 27TH CONG., 2D SESS. app. at 790 (1842) (speaking in favor of a mandate for single-member congressional districts).

2. See Nicolas Flores, *A History of One-Winner Districts for Congress* ch. 3 (unpublished thesis, Stanford University) (citing ROSEMARIE ZAGARRI, *THE POLITICS OF SIZE: REPRESENTATION IN THE UNITED STATES, 1776–1850*, at 126, 154–57 (1987)), available at <http://www.fairvote.org/library/history/flores/apportn.html> (last visited Feb. 18, 2013).

3. *Id.*

4. Cf. *The Untouchables*, FAIRVOTE, <http://archive.fairvote.org/index.php?page=1904> (last visited Feb. 18, 2013).

Instead, congressional elections have been characterized by largely uncompetitive races, distortions in partisan representation, declines in centrist representatives able to advance compromise, and low levels of representation for women and racial minorities.⁵ Such outcomes are not inevitable, but rather are a direct product of winner-take-all, single-member district elections that have a long history of resulting in noncompetitive elections and—even if not as problematic as at-large, winner-take-all elections—distortions in representation.⁶ Despite such problems and the U.S. Constitution's silence on methods of election, federal law continues to treat the single-member district system as the preferred method for electing candidates at all levels of government, with legislators and judges seemingly still hypnotized by the failed promise of Senator Miller's vision in 1842.⁷ For congressional elections, federal law since 1967 has blocked states from even considering any other method for congressional elections.⁸ At the state and local level, judges routinely order creation of single-member, winner-take-all districts as the judicially preferred remedy to violations of the Voting Rights Act despite evidence of the shortcomings of these districts.⁹

This article recommends a different approach, grounded in replacing winner-take-all voting rules with choice voting,¹⁰ both as a generally applied voting method and as a preferred remedy in Voting Rights Act cases. In Section I, it reviews the major winner-take-all methods for electing legislative candidates, both at-large and by district. It places these methods in historical and legal

5. See *infra* Sections I.B., I.C.

6. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 121 (1994).

7. See Pub. L. No. 90-196, 81 Stat. 581 (codified at 2 U.S.C. § 2c (2006)); *supra* notes 1-4 and accompanying text.

8. *Id.*

9. See, e.g., *Dillard v. Baldwin Cnty. Comm'n*, 833 So. 2d 11, 13-14, 18 (Ala. 2002); *Hickel v. Se. Conference*, 846 P.2d 38, 70 (Ala. 1992); *Stephenson v. Bartlett*, 263 S.E.2d 377, 397 (N.C. 2002); see also *infra* Section I.B.

10. What we refer to as "choice voting" throughout this article is a method of voting in multi-member districts that has alternatively been referred to as "preference voting," "single transferable vote," or by reference to one particular tabulation method, such as the "Hare system." See Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 341-42 (1998) (describing "preference voting"); *Single Transferable Vote*, ELECTORAL REFORM SOC'Y, <http://www.electoral-reform.org.uk/single-transferable-vote/> (last visited Feb. 18, 2013) (describing "single transferable vote"); *Johnson v. City of New York*, 9 N.E.2d 30, 38 (1937) (describing the "Hare system").

context, and critiques them based on their policy implications for voters and candidates. In Section II, it provides the same for modified, non-winner-take-all methods of electing candidates and demonstrates that choice voting in multi-member districts provides voters with greater choice and more representative legislative bodies. In Section III, it addresses choice voting as a remedy in Voting Rights Act cases and argues not only that it is legal under both the Federal Voting Rights Act and the California Voting Rights Act, but also that it often would effectuate the policies of those Acts better than single-member districts. Section IV will demonstrate how choice voting can and should be implemented for electing legislative bodies more generally, how it is fully constitutional, and how it can be implemented with relatively modest changes to legislative districts that are fully consistent with American political traditions. Finally, this article concludes by appealing to courts and legislatures to look to choice voting as a model for how to create a fairer and more representative republican form of government at every jurisdictional level.

I. WINNER-TAKE-ALL

The term winner-take-all refers to an election system in which the candidate or party with the most support becomes the exclusive winner of the election, such that any other candidate or party gains no representation at all, no matter how substantial its share of the vote.¹¹ All elections with a single winner, such as a governor or mayor's race, are necessarily winner-take-all; however, elections for multi-member bodies, such as a state legislature or city council or school board, may or may not be winner-take-all depending on how the jurisdiction conducts its elections. This section reviews, compares, and critiques the most common winner-take-all methods for electing legislative bodies: (1) winner-take-all, at-large and multi-member elections and (2) winner-take-all, single-member district elections.

11. See GUINIER, *supra* note 6, at 11–12; *Winner-Take-All Systems*, FAIRVOTE, <http://archive.fairvote.org/?page=568> (last visited, Feb. 18, 2013).

A. *Winner-Take-All, At-Large Elections*

An at-large election is one in which every voter in the jurisdiction can vote for any of the candidates.¹² For example, some smaller city councils consist of five council members elected under a general ticket system, in which all candidates for those five seats appear on the ballot together, voters citywide may cast one vote each for up to five candidates, and the five candidates with the most votes are elected.¹³ Other cities use numbered posts, in which candidates must run for one specific city council position;¹⁴ as long as every voter in the city may vote for every such position, this is also an at-large election.¹⁵

The general ticket and numbered post systems are winner-take-all elections.¹⁶ To illustrate this point, consider a city with a five-seat city council in which 60% of voters generally prefer Democratic candidates and 40% generally prefer Republican candidates. A fair reflection of these preferences would be three Democrats and two Republicans. However, in an at-large, winner-take-all election, the five Democratic candidates will each receive about 60% of the vote and the five Republicans each about 40%. As a result, Democrats will win all five seats and represent everyone, including the 40% of the city's voters who prefer Republicans. These voters are effectively left with no voice on the city council.

In places with racially polarized voting, the power of electoral majorities to shut out voters in the minority can allow those can-

12. See Michael E. Lewyn, *When Is Cumulative Voting Preferable to Single-Member Districting?*, 25 N.M. L. REV. 197, 198 (1995); *At-large Election Systems*, FAIRVOTE, <http://archive.fairvote.org/?page=766> (last visited Feb. 18, 2013).

13. A number of towns in California use this system, such as Arcadia and San Gabriel. ARCADIA, CAL. CITY CHARTER art. IV, § 400 (1998), available at http://www.ci.arcadia.ca.us/docs/170456102008city_charter.pdf; see *City Council*, CITY OF SAN GABRIEL, CAL., <http://www.sangabrielcity.com/index.aspx?nid=87> (last visited Feb. 18, 2013).

14. See Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1919–20 (1998).

15. See Lewyn, *supra* note 12, at 198; Mulroy, *supra* note 14, at 1920. Often, the numbered posts are tied to geographic districts, so that candidates are elected at-large, but each must reside in a different district. Alhambra, California elects its city council this way. *Alhambra City Council*, CITY OF ALHAMBRA, http://www.cityofalhambra.org/government/city_council/index.html (last visited Feb. 18, 2013).

16. See Mulroy, *supra* note 10, at 337.

didates preferred by the white majority to win 100% of the seats, despite a substantial number of racial minorities preferring other candidates.¹⁷ Such outcomes make a mockery of the principle of one person, one vote,¹⁸ while every voter has the same number of votes, voters in the majority have five votes that each help elect a candidate, while voters in the minority can elect none.

1. Early History of Use in Congressional Elections

When Congress was first established, the states used a variety of creative methods for electing their representatives.¹⁹ From the second Congress until 1842, most states with large populations used single-member districts, while those with smaller populations often elected their congressional representatives by general ticket.²⁰ Some states had a majority requirement, requiring repeated elections until one in which the top voter-getter earned more than half the votes.²¹ All such elections were winner-take-all, as alternative methods had not yet been devised,²² and they took place over a two-year period, as Congress had yet to pass a law establishing a single general election date.²³

17. Lisa Handley & Bernard Grofman, *The Impact of the Voting Rights Act on Minority Representation*, in QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990, at 338 (Chandler Davidson & Bernard Grofman, eds., 1994) [hereinafter QUIET REVOLUTION].

18. See *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (holding that equality in voting requires “one person, one vote”).

19. For a colorful example of an early creative approach to congressional representation, consider the Massachusetts election from 1792: “The voters of Districts One and Two each could vote for four candidates, but the votes had to be distributed as follows: one vote for a candidate from each of the three counties in the district and one additional vote for any candidate from any part of the district. In the Third District each voter had two votes; one had to be cast for a candidate from Barnstable, Dukes and Nantucket counties and the other for a candidate from Bristol and Plymouth. In addition all voters in the above three districts cast one additional vote for any candidate from anywhere in the three districts, listed in the returns as at-large. Voters of the Fourth District had three votes, one for a candidate from York, another from Cumberland and the other from any of the remaining counties of this district.” MICHAEL J. DUBIN, UNITED STATES CONGRESSIONAL ELECTIONS, 1788–1997, at 9 n.7 (1998).

20. ZAGARRI, *supra* note 2, at 107–08; see Flores, *supra* note 2 (citing JOHN L. MOORE, ET AL., CONGRESSIONAL QUARTERLY’S GUIDE TO U.S. ELECTIONS 943–74 (2001)).

21. DUBIN, *supra* note 19, at 126–32.

22. Flores, *supra* note 2 (citing MOORE, ET AL., *supra* note 20, at 943–74); Tory Mast, *The History of Single Member Districts for Congress*, FAIRVOTE, <http://archive.fairvote.org/?page=526> (last visited Feb. 18, 2013).

23. See Act of Jan. 23, 1845, ch. 1, 5 Stat. 721 (1845).

As parties developed and became dominant forces in elections, the impact of voting rules became more clearly measurable.²⁴ Not surprisingly, the general ticket elections consistently resulted in partisan sweeps, in which the entire delegation from a state would come from a single political party.²⁵ For example, when New Jersey elected six U.S. House Representatives in 1830, the National Republican party won all six seats with vote totals for their candidates ranging from a low of 50.25% to a high of 52.86%.²⁶ All six Democratic Party candidates lost, despite receiving as much as 49.38% of the vote.²⁷ In the 1839 election for the 26th Congress, Alabama used a single-member district system and elected three Democrats and two Whig Party members.²⁸ Prior to the next congressional election, the Democrat-controlled Alabama legislature switched to the general ticket method, and in 1841 Alabama elected a solid slate of five Democrats.²⁹ In U.S. House elections over the course of 1840 and 1841, seven states conducted congressional elections by general ticket, and all seven elected single-party slates.³⁰

After Alabama successfully shut out the minority Whig Party by switching to a general ticket, Members of Congress became concerned that other states would follow suit.³¹ Representative Garrett Davis of Kentucky noted that if large states began electing slates of candidates, as few as five states could control a majority of the U.S. House.³² This concern led to passage of the 1842 Apportionment Act, which included a clause mandating that states only elect representatives from single-member districts.³³

24. See ZAGARRI, *supra* note 2, at 126.

25. *See id.*

26. DUBIN, *supra* note 19, at 97.

27. *Id.*

28. *Id.* at 122.

29. *Id.* at 128.

30. Those seven were Georgia (nine Whigs), Missouri (two Democrats), New Jersey (six Whigs), Alabama (five Democrats), Mississippi (two Democrats), New Hampshire (five Democrats), and Rhode Island (two Whigs). *Id.* at 126–30.

31. Flores, *supra* note 2.

32. CONG. GLOBE, 27TH CONG., 2D SESS. 340 (1842) (“Under the proposed ratio, Massachusetts, New York, Pennsylvania, Ohio, and Indiana, by adopting the general-ticket system, would have the majority in this house.”). Today, the congressional delegations from the most populous nine states would constitute a majority of the House. *Apportionment Data*, U.S. CENSUS BUREAU (2010), <http://www.census.gov/2010census/data/apportionment-data-text.php>.

33. Act of June 25, 1842, ch. 47, 5 Stat. 491 (1842); Flores, *supra* note 2.

The law was controversial, however, with President Tyler seeing it as infringing on a power traditionally left to states.³⁴ Some small states ignored the mandate, and Congress recognized their representatives anyway.³⁵ Nonetheless, 1842 marked the point at which the general ticket method for congressional elections became disfavored. The requirement came and went from federal law, and by 1967, only Hawaii and New Mexico continued to elect their representatives by general ticket.³⁶

2. The Civil Rights Era

The lack of minority representation under winner-take-all, at-large elections has always been seen as a problem for a republican system of government.³⁷ However, this problem took on new significance when it became apparent that the system could be used—and was used—to deny representation to *racial* minorities.³⁸ After the passage of the Fifteenth Amendment which forbade states from denying the right to vote based on race, many jurisdictions attempted to prevent racial minorities from gaining the full benefits of suffrage.³⁹

The first tactics against fair representation of African Americans were the most overt: for example, terrorism by groups like the Ku Klux Klan, as state governments looked the other way.⁴⁰ The federal government responded by enacting statutes such as the Civil Rights Act of 1871, ensuring that victims of race-based violence would have recourse in federal court.⁴¹ Southern states

34. Emanuel Celler, *Congressional Apportionment—Past, Present, and Future*, 17 LAW & CONTEMP. PROBS. 268, 272 (1952); Flores, *supra* note 2.

35. Flores, *supra* note 2.

36. *Id.* at ch. 4.

37. See generally ZAGARRI, *supra* note 2, at 127 (quoting early criticisms of winner-take-all, at-large elections).

38. Flores, *supra* note 2, at ch. 4.

39. See generally Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOW. L.J. 541, 550–54 (1985) (describing the Supreme Court's early treatment of the Fifteenth Amendment).

40. See generally *South Carolina v. Katzenbach*, 383 U.S. 301, 310–12 (1966) (reviewing the history of racial disenfranchisement following the passage of the Fifteenth Amendment); *Briscoe v. LaHue*, 460 U.S. 325, 337 (1983) (describing the history of violence toward minorities leading to passage of the Civil Rights Act of 1871).

41. Act of Apr. 20, 1871, Pub. L. No. 42-22, 17 Stat. 13 (codified as amended at 42 U.S.C. §§ 1983, 1985 (2006)).

ultimately adopted so-called Jim Crow laws, such as poll taxes, literacy tests, and grandfather clauses that put severe limits on African American suffrage for decades.⁴² Many of these laws were ultimately declared unconstitutional,⁴³ and the rest were finally made illegal under federal law with the passage of the Voting Rights Act of 1965 ("VRA").⁴⁴

Consequently, many southern jurisdictions began shifting to elections by winner-take-all, at-large methods that would allow racial minorities to cast a ballot, but deny them any reasonable possibility of actually electing anyone. Immediately following the passage of the VRA, for example, many local jurisdictions in Georgia, North Carolina, South Carolina, Louisiana, and Mississippi switched to winner-take-all, at-large elections.⁴⁵ In investigating the causes of the 1967 riots, the National Advisory Commission on Civil Disorders found that winner-take-all, at-large voting contributed to many black "ghetto residents" feeling unrepresented throughout many American cities: "[I]t is clear that at-large representation, currently the practice in many American cities, does not give members of the minority community a feeling of involvement or stake in city government. Further, this form of representation dilutes the normal political impact of pressures generated by a particular neighborhood or district."⁴⁶

42. See *Katzenbach*, 383 U.S. at 310-12.

43. See, e.g., *id.* at 311-12; *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 665-66 (1966) (holding that Virginia's use of poll taxes violated the Equal Protection Clause of the Fourteenth Amendment); *Guinn v. United States*, 238 U.S. 347, 363-64 (1915) (holding that the Grandfather Clause exceptions to literacy tests violate the Fifteenth Amendment).

44. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2006)).

45. See Orville Vernon Burton, et al., *South Carolina*, in *QUIET REVOLUTION*, *supra* note 17, at 191, 201 (noting that in the eight years after passage of the VRA, eleven of the eighteen counties that previously used single-member districts switched to at-large elections); Chandler Davidson, *The Recent Evolution of Voting Rights Law Affecting Racial and Language Minorities*, in *QUIET REVOLUTION*, *supra* note 17, at 21, 25 (noting that the North Carolina legislature held a special session following passage of the VRA to authorize the use of at-large elections in counties and mandate their use in school board elections); Laughlin McDonald, et al., *Georgia*, in *QUIET REVOLUTION*, *supra* note 17, at 67, 82 (noting that the thirteen counties with most significant black populations switched to at-large elections after passage of the VRA); Frank R. Parker, et al., *Mississippi*, in *QUIET REVOLUTION*, *supra* note 17, at 136, 138 (noting that twenty-two of the twenty-six largest cities in Mississippi held at-large city council elections in 1965).

46. ANDREW KULL, *THE COLOR-BLIND CONSTITUTION* 211 (1992).

In the wake of these revelations, Congress imposed a federal requirement that states use single-seat districts in 1967, in part motivated by civil rights concerns to head off statewide winner-take-all elections in the South.⁴⁷ The Supreme Court in 1969 stepped in to declare that jurisdictions covered under section 5 of the VRA ("Section 5") could not switch to winner-take-all, at-large elections if doing so would dilute the votes of racial minorities.⁴⁸ In 1973, the Court went even further, holding that an electoral system may violate the Equal Protection Clause of the Fourteenth Amendment if it denies racial minorities an equal opportunity "to participate in the political processes and to elect legislators of their choice," as determined by a totality of circumstances test.⁴⁹ Following these cases, the courts became a battleground for challenging winner-take-all electoral schemes.⁵⁰

These options narrowed in 1980 when the Supreme Court decided *City of Mobile v. Bolden*.⁵¹ In this case, a plurality of the Court held that in order to establish a constitutional violation, plaintiffs must not merely show minority vote dilution based on the totality of circumstances; they must also prove intent to discriminate.⁵² With the difficulty inherent in proving discriminatory intent, litigation slowed.⁵³ In 1982, however, Congress eliminated the impact of *Bolden* by amending section 2 of the VRA ("Section 2") to make illegal any electoral system that results in discrimination, irrespective of intent.⁵⁴

Since the 1982 amendments, Section 2 has been the dominant weapon for combating discriminatory use of winner-take-all, at-

47. See Flores, *supra* note 2, at ch. 4.

48. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

49. *White v. Regester*, 412 U.S. 755, 766, 769–70 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149–50 (1971)).

50. Flores, *supra* note 2, at ch. 5 ("[T]he amount of litigation skyrocketed after *White* as a growing number of minority plaintiffs began to challenge electoral systems, chiefly at-large and multimember schemes, that they claimed diluted the impact of their votes.")

51. 446 U.S. 55 (1980) (plurality opinion).

52. *Id.* at 62–65.

53. Flores, *supra* note 2, at ch. 5 ("As a result, litigious challenges to delusory electoral schemes quickly dried up as plaintiffs soon realized how inhibiting this requirement was.")

54. Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1988)). The legislative history describes the intent standard as "inordinately difficult" and "unnecessarily divisive." S. REP. NO. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214.

large elections.⁵⁵ Such systems are not per se illegal under the VRA, as Section 2 only addresses the ability for racial minorities to elect candidates of choice.⁵⁶ But to the extent a link can be made between a jurisdiction's use of winner-take-all, at-large elections and a lack of victories for preferred candidates of racial minorities, federal courts have jurisdiction to order a change tailored to remedy that lack of representation.⁵⁷

B. Winner-Take-All Districts

The most common remedy for a Section 2 violation premised on winner-take-all, at-large electoral schemes is to replace them with winner-take-all, single-member districts.⁵⁸ Winner-take-all districts are also the system that Congress ultimately foisted upon every state to prevent them from using winner-take-all, at-large elections for their congressional representatives.⁵⁹ As a result, jurisdictions found to violate Section 2 have generally been divided into single-member districts, providing racial minorities with opportunities to elect preferred candidates through creation of some number of majority-minority districts (districts drawn to ensure that racial minority voters will be able to elect their preferred candidate).⁶⁰

A district-based electoral system is any in which members of a legislative body are elected by only some sub-section of the jurisdiction's voters based on where those voters reside.⁶¹ Districts may be either multi-member or single-member.⁶² Single-member districts elect only one representative.⁶³ As single-member districts only elect one person, they are necessarily winner-take-all

55. Flores, *supra* note 2, at ch. 5. There is also evidence that the amendment led to jurisdictions switching away from winner-take-all, at-large, and multi-member districts without any suit being brought in order to avoid litigation before it happened. *Id.*

56. Thornburg v. Gingles, 478 U.S. 30, 44, 48 (1986).

57. *Id.* at 48.

58. See Connor v. Williams, 404 U.S. 549, 551–52 (1971) (citing Connor v. Johnson, 402 U.S. 690, 692 (1971)).

59. See 2 U.S.C. § 2c (2006).

60. *E.g.*, League of United Latin Am. Citizens v. Perry, 548 U.S. 399, 415 (2006); see Chapman v. Meier, 420 U.S. 1, 19 (1975).

61. *Single Member Districts*, FAIRVOTE, <http://archive.fairvote.org/?page=765> (last visited Feb. 18, 2013).

62. See *id.* *At-large Election Systems*, FAIRVOTE, *supra* note 12.

63. See *Single Member Districts*, FAIRVOTE, *supra* note 61.

in nature. Winner-take-all, multi-member district election systems elect two or more representatives from each district in a method similar to the general ticket, at-large method; voters have the same number of votes as seats and are restricted to giving one vote per candidate.⁶⁴ They are used today by several states to elect state legislators and were used at one time by many additional states.⁶⁵

Winner-take-all, multi-member district elections can generate concerns about fair representation similar to those generated by winner-take-all, at-large elections. Partisan elections from winner-take-all, multi-member districts tend to result in sweeps similar to at-large elections, preventing minority voices from within a district from electing any members.⁶⁶ For example, the New Jersey state legislature consists of forty districts, each electing two members of the assembly and one senator.⁶⁷ After the 2011 elections, every single district was represented by two assembly members of the same political party, with thirty-eight of those districts having a senator of that same party.⁶⁸

Another example of extreme distortion in representation may be found in the New Hampshire House of Representatives, which elects many of its 400 members in winner-take-all, multi-member districts that contain up to eleven representatives.⁶⁹ Many of New Hampshire's multi-member districts are represented by only one

64. See *At-large Election Systems*, FAIRVOTE, *supra* note 12.

65. E.g., ARIZ. CONST. art. 4, pt. 2, § 1 (“The house of representatives shall be composed of two members elected from each of the thirty legislative districts established pursuant to this section.”).

66. *At-large Election Systems*, FAIRVOTE, *supra* note 12.

67. NEW JERSEY CONST. art. 4, § 2. (“Two members of the General Assembly shall be elected by the legally qualified voters of each Assembly district”); *Our Legislature*, N.J. LEGISLATURE, <http://www.njleg.state.nj.us/legislativepub/our.asp> (last visited Feb. 18, 2013).

68. *Compare Candidate Returns for General Assembly for November 2011 General Election*, ST. N.J. (Dec. 14, 2011), <http://www.state.nj.us/state/elections/election-results/2011-official-gen-elect-gen-assembly-results-121411.pdf>, with *Candidate Returns for State Senate for November 2011 General Election*, ST. N.J. (Dec. 14, 2011), <http://www.state.nj.us/state/elections/election-results/2011-official-gen-elect-state-senate-results-121411.pdf>.

69. See *NH House Roster Downloads*, ST. N.H., <http://www.gencourt.state.nh.us/house/members/rosterdownloads.html> (last visited Feb. 18, 2013). The New Hampshire House of Representatives is the fourth largest English-speaking legislative body in the world. *New Hampshire Almanac*, NH.GOV, <http://www.nh.gov/nhinfo/stgovt.html> (last visited Feb. 18, 2013).

political party.⁷⁰ For example, after the 2010 elections, the fourth district in Rockingham elected thirteen representatives—all Republican⁷¹—and in 2012, Republicans swept all nine seats in Rockingham's eighth district.⁷²

Although partisan dominance clearly is possible in such elections, the use of multi-member districts does carry an interesting advantage: a party may run a relatively diverse slate of candidates to widen support for its ticket.⁷³ This strategy affects nomination calculations, from presidential candidates' selection of vice-presidential running mates to parties promoting a mix of candidates for statewide offices being held at the same time.⁷⁴ In legislative elections, studies show that women candidates both run and win more often in multi-seat districts.⁷⁵ Today, more than half the population has a female representative in several states with multi-seat legislative districts, including Arizona, Maryland, New Jersey, and Washington.⁷⁶ Even in the South, where racially polarized voting is often the norm, there are instances in state legislative elections—for example, in states like North Carolina and Virginia in the 1980s—where Democrats won with slates of both white and African American nominees in multi-member districts in which African Americans were well under half of the

70. See *NH House Roster Downloads*, ST. N.H., *supra* note 69.

71. *2010 General Election Results*, N.H. SECRETARY ST., <http://sos.nh.gov/2010GenElectionResults.aspx> (last visited Feb. 18, 2013).

72. *State Representative—2012 General Election*, N.H. SECRETARY ST., <http://sos.nh.gov/2012RepGen.aspx?id=28248> (last visited Feb. 18, 2013).

73. Richard J. Timponi, *Electoral Systems Matter*, FAIRVOTE, <http://archive.fairvote.org/?page=532> (last visited Feb. 18, 2013).

74. DOUGLAS J. AMY, *BEHIND THE BALLOT BOX 7* (2000).

75. Timponi, *supra* note 73 ("Scholars have often argued that women candidates do better in multi-member district elections than in single member districts . . .").

76. See FAIRVOTE, *DUBIOUS DEMOCRACY 1982–2012* (forthcoming Apr. 2013), <http://www.fairvote.org/dubious-democracy> (last visited Feb. 18, 2013) [hereinafter *DUBIOUS DEMOCRACY 2012*]; *House Roster*, ARIZONA ST. LEGISLATURE, <http://www.azleg.gov/memberroster.asp?body=H> (last visited Feb. 18, 2013) (eighteen out of thirty); *Legislative District Roster*, MD. GEN. ASSEMBLY, <http://mgaleg.maryland.gov/pubs-current/current-roster-house.pdf> (last visited Feb. 18, 2013) (thirty-six out of forty-seven); *Legislative Roster*, N.J. LEGISLATURE, <http://www.njleg.state.nj.us/members/roster.asp> (last visited Feb. 18, 2013) (twenty-eight out of forty); *Roster of All Members*, WASH. ST. LEGISLATURE, <http://apps.leg.wa.gov/rosters/Members.aspx> (last visited Feb. 18, 2013) (twenty-nine out of forty-nine). The raw data analyzed in *DUBIOUS DEMOCRACY 2012* is currently available online. See *Dubious Democracy: Updated FairVote Report Shows Dysfunctional House Elections*, FAIRVOTE (Feb. 11, 2013), <http://www.fairvote.org/dubious-democracy-updated-fairvote-report-shows-dysfunctional-house-elections>.

electorate.⁷⁷ But when the electorate is more racially polarized, multi-member elections often result in racial minority vote dilution and, to the extent they do, are subject to judicial scrutiny under Section 2.⁷⁸ Indeed, it was a multi-member district system that the Supreme Court struck down in 1973 as violating the Equal Protection Clause of the Fourteenth Amendment.⁷⁹

Given the gross distortions typical of winner-take-all, at-large elections, the use of single-member districts has historically been championed as the only way to guarantee some measure of representation to minority interests, whether racial or otherwise.⁸⁰ District systems may avoid sweeps for the entire legislative body, making their winner-take-all nature less readily obvious. However, winner-take-all districts only guarantee minority representation to the extent that the minority in question makes up a majority of the voting population of at least one district; within other districts, all voters in the minority remain unrepresented.⁸¹ As a result, district systems only guarantee diversity to the extent that people remain segregated enough to allow those in charge of re-districting to group like-minded voters such that majorities of different groups are put into different legislative districts. Consequently, single-member districts are properly categorized as winner-take-all systems, as Republicans in Massachusetts and

77. See DUBIOUS DEMOCRACY 2012, *supra* note 76; *cf.* *Gingles v. Edmisten*, 590 F. Supp. 345, 365 (E.D.N.C.), *aff'd in part, rev'd in part sub nom.* *Thornburg v. Gingles*, 478 U.S. 30 (1986) (noting that in 1982, North Carolina elected eleven black citizens to the state house of representatives and six of them were elected from majority-white multi-member districts). The *Gingles* court also found that while white North Carolina Democrats occasionally elected black candidates, “two-thirds of white voters did not vote for black candidates in general elections even after the candidate had won the Democratic primary and the only choice was to vote for a Republican or no one. *Id.* at 368. Similarly, in Virginia, Delegate Bobby C. Scott of Newport News was elected to a multi-member state senate district in which African Americans constituted a minority of the electorate. *Cf.*, Thomas R. Morris and Neil Bradley, *Virginia, in QUIET REVOLUTION*, *supra* note 17, at 271, 282; Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111, 121 tbl.6 (1991) (noting that in 1980 Virginia had one court-ordered multi-member state senate district representing the Norfolk area).

78. See, e.g., *Thornburg*, 478 U.S. at 48.

79. *White v. Regester*, 412 U.S. 755, 769–70 (1973).

80. Flores, *supra* note 2, at ch. 2 (“[S]ingle-member districts have long been praised for their ability to improve minority representation within the American winner-take-all paradigm.”).

81. See Edward Still, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION 249, 249 (Chandler Davidson, ed., 1984).

Democrats in Oklahoma—who are shut out of any U.S. House representation—are particularly quick to understand.⁸²

To the extent that a district encompasses a broad majority favoring a certain type of candidate or political party—creating safe districts, in which incumbents are routinely reelected—voting becomes a mere formality, a kind of rubber stamp for decisions made by those drawing districts.⁸³ This problem occurs to some extent in every district system, but becomes especially problematic in jurisdictions where incumbents are in control of drawing their own districts.⁸⁴ These incumbents can use their power to group voters in districts in order to increase their own chances of re-election, to help political allies, and to hurt political enemies.⁸⁵

C. *The Modern Effect of Single-Member Districts in U.S. House and State Legislative Elections*

As a result of winner-take-all rules and the single-seat district mandate, most U.S. House elections today are locked up for one party's candidate. In each of the four national elections between 1998 and 2004, more than 90% of all races were won by non-competitive margins of more than 10%.⁸⁶ In 2012, the average victory margin topped 36%, and large areas of the nation were dominated by one party.⁸⁷ Democrats swept all twenty-one U.S. House seats in New England while Republicans won all twenty-two seats in the belt of states running from Arkansas through Oklahoma, Kansas, Nebraska, the Dakotas, Montana, Wyoming, and Idaho.⁸⁸ Neither party won a single new U.S. House seat in the other party's turf—that is, there were no gains by the minority party in the 177 most Republican districts and the 176 most Democratic districts.⁸⁹

82. See AMY, *supra* note 74, at 35.

83. *Id.* at 39.

84. See *id.* at 37 (defining and explaining the practice of gerrymandering).

85. See *id.*

86. *The Untouchables*, *supra* note 4. The average victory margin from 1998 to 2004 was 40%. *Id.*

87. DUBIOUS DEMOCRACY 2012, *supra* note 76.

88. *U.S. House: Full Results*, CNN, <http://www.cnn.com/election/2012/results/race/house> (last visited Feb. 18, 2013).

89. Devin McCarthy, *The 2012 Elections and the Vanishing Congressional Moderate*,

State legislative races provide even starker examples of how single-seat, winner-take-all districts can utterly stifle democratic participation. Nationally, nearly 40% of state legislative elections only had one major party candidate in 2012, the highest rate of such uncontested elections in recent history.⁹⁰ Georgia Democrats controlled their state legislature about a decade ago,⁹¹ but in 2012 did not even contest half of the seats.⁹² This lack of competition is rooted in the near futility of one party seeking to win where the other party has an edge. For example, consider that in North Carolina's 2012 House elections, at least 118 of 120 seats went to the nominee of the party holding a partisan advantage in that district.⁹³

Democrats similarly dominate their strongholds. In 2012, they won 101 of 113 state legislative seats in Rhode Island;⁹⁴ in Massachusetts, Republicans fielded only 86 state legislative candidates for 200 seats.⁹⁵ Republicans last won a U.S. House seat in Massachusetts in 1994.⁹⁶ The Maryland State Senate has been led by

FAIRVOTE (Nov. 15, 2012), <http://www.fairvote.org/the-2012-elections-and-the-vanishing-congressional-moderate>; see Rob Richie, *Eliminating Bias in House Races*, WASH. POST, Nov. 15, 2012, at A19.

90. Richard Winger, *No Dem-Rep Contest in 40% of State Legislative Races*, 28 BALLOT ACCESS NEWS, no. 6, Nov. 29, 2012, available at <http://www.ballot-access.org/2012/11/29/november-2012-ballot-access-news-print-edition/>.

91. Eric Johnson, *The Georgia Republican Party: 1856-2006: 150 Years to Victory*, REPUBLICAN PARTY GILMER COUNTY, at 10-11, http://www.gilmergagop.org/files/GA_GOP_History.pdf (last visited Feb. 13, 2013).

92. See *Georgia Election Results*, ST. GA., <http://results.enr.clarityelections.com/GA/42277/112167/en/summary.html> (last visited Nov. 15, 2012). About half of Georgia's 2012 legislative "races" involved only one Republican candidate, about a quarter involved only one Democrat, and only the remaining quarter included any actual contest. See *id.*

93. DUBIOUS DEMOCRACY 2012, *supra* note 76; see also Rob Richie, *Rigging Democracy*, IN THESE TIMES (Jan. 14, 2013), <http://www.inthesetimes.com/article/14410/rigging-democracy/>.

94. *2012 Election Results, Senator in General Assembly*, R.I. BOARD ELECTIONS (Nov. 26, 2012, 1:52 PM), http://www.ri.gov/election/results/2012/general_election/general_assembly/senator/ (State Senate election results); *2012 Election Results, Representative in General Assembly*, R.I. BOARD ELECTIONS (Nov. 26, 2012, 1:52 PM), http://www.ri.gov/election/results/2012/general_election/general_assembly/representative/ (State House of Representatives election results).

95. See *2012 State Election Candidates*, SECRETARY COMMONWEALTH MASS., http://www.sec.state.ma.us/ele/ele12/state_election_cand_12.htm (last visited Feb. 18, 2012).

96. See Bob Salsberg, *Tisei Concedes Mass. 6th District Race to Tierney*, BOSTON.COM (Nov. 7, 2012), <http://www.boston.com/news/local/massachusetts/2012/11/07/tisei-concedes-mass-district-race-tierney/EFBXqFjUPawNAqmlD4X3aN/story.html>; cf. Rob Richie & Devin McCarthy, *Nine House Races to Watch (and Five You Don't Have To) On Election*

Mike Miller, a Democrat, since 1987.⁹⁷ Michael Madigan, also a Democrat, has been speaker of the Illinois House of Representatives for all but two years since 1983.⁹⁸

These trends can take on a distinctly racial character. In the South, where VRA litigation has been most active in ensuring opportunities for racial minorities to elect candidates of choice through the use of majority-minority districts,⁹⁹ many states today are polarized into representation dominated by white Republicans in white majority districts and racial minority Democrats in majority-minority districts.¹⁰⁰ Only very rarely is a minority Republican or a white Democrat elected.¹⁰¹ The Louisiana Senate, for example, is composed of twenty-four Republicans, all of whom are white, and fifteen Democrats, ten of whom are African American.¹⁰² In Congress, white Republicans in 2013 will represent sixty-six of seventy majority-white U.S. House districts in the adjoining nine states of South Carolina, Georgia, Alabama, Louisiana, Mississippi, Arkansas, Texas, Oklahoma, and Missouri.¹⁰³ Of thirty-eight majority-white districts in the five states of North Carolina, Virginia, Tennessee, West Virginia, and Kentucky, white Republicans hold thirty-one seats and white Democrats seven.¹⁰⁴ Southern, white-majority districts are also overwhelmingly lopsided in their partisanship, making further partisan changes unlikely over the next decade.¹⁰⁵

Night, FAIRVOTE (Nov. 3, 2012), <http://www.fairvote.org/nine-house-races-to-watch-and-five-you-don-t-have-to-on-election-night> (noting that before 2012, Republicans last had a chance of winning a U.S. House seat in 1994).

97. Maryland Senate President, Thomas V. Mike Miller, Jr., MD. ST. ARCHIVES, <http://msa.maryland.gov/msa/mdmanual/05sen/html/msa01619.html> (last visited Feb. 18, 2013).

98. *Rep. Michael J. Madigan*, ILL. HOUSE DEMOCRATS, <http://www.housedem.state.il.us/members/madiganm/> (last visited Feb. 18, 2013).

99. See Naftali Bendavid, *Southern White Democrats Face End of Era in Congress*, WALL ST. J., Aug. 9, 2012, at A1.

100. See *id.*; Campbell Robertson, *White Democrats Lost More Ground in South*, N.Y. TIMES, Nov. 7, 2010, at A20.

101. See Bendavid, *supra* note 99.

102. DUBIOUS DEMOCRACY 2012, *supra* note 76.

103. *Id.* The four other districts are Texas District 17 (represented by Latino Republican Bill Flores), South Carolina District 1 (represented by African American Republican Tim Scott), Missouri District 5 (represented by African American Democrat Emanuel Cleaver), and Georgia District 12 (represented by white Democrat John Barrow). *Id.*

104. *Id.*

105. Compare, e.g., ACS Demographic and Housing Estimates, Congressional District

Setting aside Virginia, the thirteen remaining states' ninety-eight white-majority districts are overwhelmingly non-competitive.¹⁰⁶ Based on the 2008 presidential results in these districts, ninety-five of them are among the safest Republican districts in the nation and nearly all were won by Mitt Romney in 2012 by more than 10%.¹⁰⁷

The remaining twenty-five districts in these fourteen states are majority-minority districts.¹⁰⁸ They are represented by fifteen African American Democrats, five Latino Democrats, five white Democrats, and no Republicans.¹⁰⁹ White Democrats hold 8 (29%) of these states' 28 U.S. Senate seats, but only 12 (9%) of 133 U.S.

11 (111th Congress), Texas, U.S. CENSUS BUREAU, <http://www.census.gov/fastfacts/> (last visited Feb. 18, 2013) (find the "Locate a District" box at the top of the screen; select "Texas" under "State" and click "Go"; select "Congressional District 11" under "District" and click "Go"; find the "Fact Sheets" box below the "Locate a District" box; follow "ACS Demographic Estimates: Profiles of Selected ACS Demographic Characteristics" hyperlink), and ACS Demographic and Housing Estimates, Congressional District 13 (111th Congress), Texas, U.S. CENSUS BUREAU, <http://www.census.gov/fastfacts/> (last visited Feb. 18, 2013) (find the "Locate a District" box at the top of the screen; select "Texas" under "State" and click "Go"; select "Congressional District 13" under "District" and click "Go"; find the "Fact Sheets" box below the "Locate a District" box; follow "ACS Demographic Estimates: Profiles of Selected ACS Demographic Characteristics" hyperlink), and ACS Demographic and Housing Estimates, Congressional District 6 (111th Congress), Alabama, U.S. CENSUS BUREAU, <http://www.census.gov/fastfacts/> (last visited Feb. 18, 2013) (find the "Locate a District" box at the top of the screen; select "Alabama" under "State" and click "Go"; select "Congressional District 6" under "District" and click "Go"; find the "Fact Sheets" box below the "Locate a District" box; follow "ACS Demographic Estimates: Profiles of Selected ACS Demographic Characteristics" hyperlink), with Partisan Voting Index, Districts of the 113th Congress: 2004 & 2008, COOK POL. REP., http://cookpolitical.com/application/writable/uploads/2012_PVI_by_PVI_Value.pdf (last visited Feb. 18, 2013). The Cook Report indicates Texas's Districts 13 and 11 and Alabama's District 6 were the top three most partisan congressional districts in the 2008 presidential election. *Id.* All three districts leaned heavily Republican. *Id.*

106. *See id.*; *see also* FAIRVOTE, DUBIOUS DEMOCRACY 2010 (May 31, 2011), available at <http://www.fairvote.org/assets/Uploads/DubiousDemocracy2010.pdf> (rating the competitiveness of each State's congressional races).

107. David Nir, *Daily Kos Elections' Presidential Results by Congressional District for the 2012 and 2008 Elections*, DAILY KOS (Nov. 19, 2012, 9:30 AM), <http://www.dailykos.com/story/2012/11/19/1163009/Daily-kos-elections-presidential-results-by-congressional-district-for-the-2012-2008-elections>. This is based on partisanship results from 2008 presidential election. All ten districts won by John McCain by a margin of at least 40% are included in these ninety-eight districts. The three that Mitt Romney did not carry all lean Democratic and are represented by Democratic members. *Id.*

108. DUBIOUS DEMOCRACY 2012, *supra* note 76. Majority-minority districts are designated as congressional districts in which less than 50% of the voting age population is white.

109. *See id.*; *Guide to the New Congress*, CQ ROLL CALL 17 (Nov. 8, 2012), <http://www.cq.com/flatfiles/editorialfiles/membersFactFiles/guidetothewcongress11082012.pdf>.

House seats.¹¹⁰ If one adds the 17 U.S. House Republicans from Florida, nearly half (116) of the entire 2013 Republican U.S. House caucus of 234 members will come from the South—in sharp contrast to 1991 when southern Republicans held just forty-seven U.S. House seats compared to ninety-five Democrats, eighty-five of whom were white.¹¹¹

Women congressional candidates also fare very poorly in this region. In the U.S. House as a whole, men will hold approximately 82% of seats in 2013, but will represent more than 90% of seats in the same fourteen southern states.¹¹² Not a single woman holds one of the fifty-one U.S. House seats in Arkansas, Georgia, Louisiana, Mississippi, Oklahoma, South Carolina, and Virginia.¹¹³ The South Carolina State Senate in 2012 was the nation's only state legislative chamber without a single woman representative.¹¹⁴

The use of single-member district elections also has created an overall bias in U.S. House elections that challenges democratic norms. In 2012, Democratic U.S. House candidates won about a million more votes nationwide than Republicans and would have increased that margin to four percentage points if all races had been contested and incumbent bias eliminated.¹¹⁵

Yet despite that preference and the Democratic Party's success in elections for president and the U.S. Senate, U.S. House Republicans won a comfortable majority of seats, with 234 seats to Democrats' 201.¹¹⁶ Ticket-splitting was not the cause, as there

110. See Danny Dougherty & Alex Tribou, *Balance of Power: 113th Congress*, BLOOMBERG (Dec. 10, 2012), <http://go.bloomberg.com/multimedia/the-balance-of-power-for-the-113th-congress/>; see also *Guide to the New Congress*, CQ ROLL CALL, *supra* note 109.

111. See MILDRED L. AMER, CONG. RESEARCH SERV., RL30378, AFRICAN AMERICAN MEMBERS OF THE UNITED STATES CONGRESS: 1870–2008, at 42–46, 51 (2008); DUBIOUS DEMOCRACY 2012, *supra* note 76; Dougherty & Tribou, *supra* note 110.

112. See *Women in Congress*, NAT'L J., www.nationaljournal.com/almanac/women (last visited Feb. 18, 2013); Alex Burn, *113th Congress Welcomes Benches Full of Women*, PBS NEWSHOUR (Nov. 16, 2012, 1:15 AM), <http://www.pbs.org/newshours/mndown/2012/11/in-the-113th-Congress---benches-full-of-women.html>.

113. See *Women in Congress*, NAT'L L.J., *supra* note 112.

114. CTR. FOR AM. WOMEN IN POLITICS, *WOMEN IN STATE LEGISLATURES 2012* (Sept. 2012), http://www.cawp.rutgers.edu/fast_facts/levels_of_office/documents/stleg.pdf.

115. Rob Richie & Devin McCarthy, *The House GOP Can't Be Beat: It's Worse than Gerrymandering*, SALON (Jan. 13, 2013), http://www.salon.com/2013/01/13/the_house_gop_cant_be_beat_its_worse_than_gerrymandering/.

116. *Id.*

were fewer than twenty-five districts in which one party's nominee carried the presidential vote and the other party's nominee won the congressional race.¹¹⁷ The real problem for Democrats was that in a year in which Barack Obama won a decisive presidential election victory, he carried no more than 207 of 435 congressional districts.¹¹⁸ Analyses by FairVote and the Brennan Center suggest that gerrymandering was the cause of some of this bias, but that the Democrats' biggest problem was their relative "clustering" in metropolitan areas that led to inefficient distribution of voting power across congressional districts.¹¹⁹ In a detailed analysis of the upcoming congressional midterm elections, Emory University Professor Alan Abramowitz determined that Democrats would be unlikely to earn a majority of U.S. House seats without earning a two-party preference of more than 56% to 44% in 2014.¹²⁰

D. Gerrymandering

Gerrymandering traditionally refers to the drawing of districts in such a way as to favor the election of a particular type of candidate.¹²¹ It can also be applied to other factors, including grouping voters by race, when those factors become more important than following geographical features or existing political boundaries.¹²²

Race-based gerrymandering initially served as a tool for diminishing racial minority votes in states using district systems to maximize the number of districts in which whites make up a majority.¹²³ Where it is used to diminish representation on the basis

117. *Id.*

118. *Id.*

119. *Id.*

120. See Alan I. Abramowitz, *Midterm Forecast: Democrats May Gain House Seats in 2014 but Majority Probably Out of Reach*, U. VA. CENTER FOR POL. (Feb. 7, 2013), <http://www.centerforpolitics.org/crystalball/articles/midterm-forecast-democrats-may-gain-house-seats-in-2014-but-majority-probably-out-of-reach/>.

121. AMY, *supra* note 74, at 37; *Redistricting Glossary*, FAIRVOTE, <http://www.fairvote.org/redistricting-glossary/#.UKo98uSA5c0> (last visited Feb. 18, 2013).

122. See *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (determining the presence of racial gerrymandering by comparing the degree to which race was considered versus traditional redistricting considerations).

123. See *Shaw v. Reno*, 509 U.S. 630, 640 (1993) (describing the history of racial gerrymandering).

of race, such gerrymandering may result in liability under the VRA.¹²⁴ Jurisdictions covered under Section 5 must especially prove that their districting is not intended to diminish racial minority electoral opportunities or federal courts may impose a new map on them, as occurred in Texas following its 2011 redistricting.¹²⁵

Within the confines of limiting voting rights remedies to winner-take-all systems, race-conscious districting became the vehicle for racial minorities to dramatically expand their representation in federal, state, and local elections in the half century since passage of the VRA.¹²⁶ However, the Supreme Court later held that the intentional creation of majority-minority districts itself may constitute illegal race-based gerrymandering.¹²⁷ In order to use a district system to remedy a VRA violation based on winner-take-all, at-large elections, the districts must be drawn in such a way as to ensure the existence of some number of majority-minority districts.¹²⁸ This necessarily requires drawing distinctions among voters based on race, and “[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.”¹²⁹ As a result, racial gerrymanders, “even for remedial purposes,” will be subject to strict scrutiny.¹³⁰ This complicates the use of district systems to ensure racial minority representation, as members of the racial minority in question either must be sufficiently segregated into a particular area such that a majority-minority district can be drawn without the need for crossing a vaguely defined line of excessive use of race in redistricting decisions, or they must be sufficiently polar-

124. See *id.* at 680–81 & n.3 (Souter, J., dissenting); Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in *MINORITY VOTE DILUTION*, *supra* note 81, at 145, 150.

125. See *Texas v. United States*, No. 11-1303, 2012 WL 3671924, at *1–2 (D.D.C. Aug. 28, 2012); Derfner, *supra* note 124, at 149.

126. *AMY*, *supra* note 74, at 6.

127. See *Shaw*, 509 U.S. at 641 (comparing remedial majority-minority districts to “the most egregious racial gerrymanders of the past”).

128. See, e.g., *Miller v. Johnson*, 515 U.S. 900, 923 (1995) (describing plans that increase the number of majority-minority districts as “ameliorative”); *Johnson v. De Grandy*, 512 U.S. 997, 1016, 1029 (1994) (analyzing how many majority-minority districts are needed to satisfy Section 2).

129. *Miller*, 515 U.S. at 904 (quoting *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 291 (1978)).

130. *Shaw*, 509 U.S. at 657.

ized by political party to allow the use of partisanship as a proxy.¹³¹

Unlike race-based gerrymandering, partisan gerrymandering is currently legal. It may be unconstitutional if “excessive,”¹³² but so far no plan has been struck down purely for excessive partisan gerrymandering despite countless examples of transparently hyper-partisan maps.¹³³ Partisan gerrymandering occurs whenever districts are intentionally designed to ensure the election of a candidate from a particular political party.¹³⁴ This occurs most clearly in states where the elected legislative body designs the district map. For example, the Republican-controlled legislature of North Carolina redrew its districts in 2011, resulting in a number of strangely shaped districts designed to maximize Republican advantage.¹³⁵ North Carolina voters divide their two-party preference approximately 53% Republican to 47% Democratic, and a majority of its popular vote went to Democratic U.S. House candidates in 2012,¹³⁶ yet the state’s thirteen congressional districts include ten heavily Republican districts, nine of which are now represented by Republicans.¹³⁷ Similarly, Maryland’s Democrat-controlled legislature also redistricted the state in 2011, creating a map maximizing Democratic advantage: Maryland voters divide approximately 59% Democratic to 41% Repub-

131. Mulroy, *supra* note 10, at 348.

132. See *Vieth v. Jubelirer*, 541 U.S. 267, 285–86, 293 (2004) (plurality opinion); *id.* at 307 (Kennedy, J., concurring in the judgment); *id.* at 344 (Souter, J., dissenting), *id.* at 355 (Breyer, J., dissenting); see also *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting) (“[In *Vieth*], all but one of the Justices agreed that [politics] is a . . . constitutional [redistricting criterion], so long as it does not go too far.”).

133. See *e.g.*, *Vieth*, 541 U.S. at 279–81 (finding that there is no judicially manageable standard for adjudicating claims of political gerrymandering). *But see Cox*, 542 U.S. at 947, 952 (affirming the district court’s rejection of a state reapportionment plan, but basing its decision on the plan’s violation of the one-person, one-vote principle and not reaching the question of whether the plan was the result of an unconstitutional partisan gerrymander).

134. BLACK’S LAW DICTIONARY 696 (7th ed. 1999).

135. See Michael Cooper, *Carving Up Urban Areas as Parties Seek Influence*, N.Y. TIMES, Dec. 4, 2011, at A22.

136. *2011 Redistricting and 2012 Elections in North Carolina*, FAIRVOTE (Sept. 2012), <http://www.fairvote.org/assets/2012-Redistricting/NCRedistrictingAnalysis.pdf>; *Election 2012 News*, CHARLOTTE OBSERVER, <http://elections.charlotteobserver.com/2012/general/html/nc/> (last visited Feb. 18, 2013).

137. *Election 2012 News*, CHARLOTTE OBSERVER, *supra* note 136.

lican, yet Democrats in 2012 won seven of the state's eight seats.¹³⁸

Partisan gerrymandering can be partially remedied by putting redistricting in the hands of nonpartisan commissions; however, states with commissions often face legal battles and questions as to whether the commission has really acted independently of partisanship.¹³⁹ Even when districts are drawn without any consideration of voter characteristics, district systems inevitably will still have a major problem with noncompetitive or safe districts, and they give no guarantee of a level playing field. For example, California used a commission to draw congressional districts in 2011.¹⁴⁰ While Republican candidates for President and U.S. Senate both earned about 37% of the vote in 2012, Republicans only won fifteen (28%) of the state's fifty-three U.S. House seats and less than one-third of state legislative seats.¹⁴¹

Single-seat districts have other limitations as well. As mentioned earlier, more women candidates run and win in multi-member districts.¹⁴² And while districts that are drawn to boost racial minorities can indeed help elect those voters' candidates of choice, doing so requires encircling an area that has a majority of racial minority voters.¹⁴³ Outside of those districts, racial minority voters will often continue to be without real opportunities to elect candidates of choice.¹⁴⁴ Consider that each state is a kind of winner-take-all district for the purposes of electing U.S. Senators. Of fifty states, forty-nine have a white voting plurality—and in the

138. *2011 Redistricting and 2012 Elections in Maryland*, FAIRVOTE (Sept. 2012), <http://www.fairvote.org/assets/2012-Redistricting/MDRedistrictingAnalysis.pdf>; *Official 2012 Presidential General Election Results for Representative in Congress*; MD. ST. BOARD ELECTIONS, http://www.elections.state.md.us/elections/2012/results/general/gen_results_2012_4_008X.html (last visited Feb. 18, 2013).

139. See, e.g., Mary Jo Pitzl, *Arizona Redistricting Chief Ousted*, AZCENTRAL.COM (Nov. 2, 2011, 12:00 AM), <http://www.azcentral.com/news/election/azelections/articles/20111101-arizona-redistricting-brewer-wants-chair-Mathis-removed.html>; Olga Pierce & Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, PROPUBLICA (Dec. 21, 2011, 2:38 PM), <http://www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission>.

140. See Evan Halper & Richard Simon, *Maps Draw a New Political Landscape*, L.A. TIMES, June 11, 2011, at A1.

141. CALIFORNIA SECRETARY OF STATE, STATEMENT OF THE VOTE (Nov. 6, 2012), <http://www.sos.ca.gov/elections/sov/2012-general/sov-complete.pdf>.

142. See *supra* note 75 and accompanying text.

143. See *supra* note 99 and accompanying text.

144. See *supra* note 99–100 and accompanying text.

113th Congress, ninety-five of these senators are white, with three Cuban Americans.¹⁴⁵ Hawaii has an Asian American voting plurality, and until the recent death of Senator Daniel K. Inouye, it had been represented by two senators of Asian American descent since 1990.¹⁴⁶ Only three African Americans have been elected to the U.S. Senate since Reconstruction, and two were defeated in bids for re-election.¹⁴⁷ Such results suggest that a switch to single-seat districts does not automatically create fair representation, and far too often the election is effectively decided by whichever elite group is in charge of redistricting, rather than the much larger group that votes.

II. NON-WINNER-TAKE-ALL VOTING

The United States has a history of using alternative approaches to winner-take-all elections.¹⁴⁸ These alternative approaches require some form of at-large or multi-member districts and use of a voting system in which 51% of voters cannot dominate 100% of representation.¹⁴⁹ American localities today use three non-winner-take-all election methods: choice voting, limited voting, and cumulative voting.¹⁵⁰ Choice voting, which is the focus of this article, is the most reliable of these three methods for accurately

145. See *Ethnic Diversity in the Senate*, U.S. SENATE, http://www.senate.gov/artandhistory/history/common/briefing/minority_senators.htm (last visited Feb. 18, 2013); see also *About Ted*, U.S. SENATE, <http://www.cruz.senate.gov/about.cfm> (last visited Feb. 18, 2013) (biography of Texas Senator Ted Cruz); *Biography*, U.S. SENATE, <http://www.rubio.senate.gov/public/index.cfm/about?p=biography> (last visited Feb. 18, 2013) (biography of Florida Senator Marco Rubio); Shailagh Murray & Karen DeYoung, *Momentum Grows for Relaxing Cuba Policy: Senate Measure Would Eliminate Travel Ban*, WASH. POST (Mar. 30, 2009), <http://www.washingtonpost.com/wp-dyn/content/article/2009/03/29/AR2009032902460.html> (describing New Jersey Senator Bob Menendez as a Cuban American).

146. See *Ethnic Diversity in the Senate*, U.S. SENATE, *supra* note 145. Inouye's seat was filled by Senator Brian Schatz, a white Democrat. *Brian Schatz*, U.S. SENATE, http://www.senate.gov/senators/112/Schatz_Brian.htm (last visited Feb. 18, 2013).

147. *Breaking New Ground—African American Senators*, U.S. SENATE, http://www.senate.gov/pagelayout/history/h_multi_sections_and_teasers/Photo_Exhibit_African_American_Senators.htm (last visited Feb. 18, 2013). They were Edward Brooke in 1967, Carol Moseley Braun in 1992, and Barack Obama in 2004. *Id.*

148. See Mulroy, *supra* note 14, at 1868; Robert Richie & Steven Hill, *The Case for Proportional Representation*, in REFLECTING ALL OF US: THE CASE FOR PROPORTIONAL REPRESENTATION 3, 23 (Joshua Cohen & Joel Rogers eds., 1999).

149. See Mulroy, *supra* note 10, at 338–39.

150. *Id.* at 339.

representing voters and upholding the principle of one person, one vote.¹⁵¹

Choice voting permits candidates or parties who receive less than majority support to receive some degree of representation.¹⁵² It minimizes wasted votes, avoids tactical voting, and renders highly representative results when turnout is equitable and diverse candidates seek office.¹⁵³ Choice voting has been used in cities throughout the United States, including city council elections in New York, Cincinnati, and Cleveland.¹⁵⁴ It currently is used by voters in Minneapolis, Minnesota and Cambridge, Massachusetts and, overseas, by every voter in at least one governmental election in Australia, Ireland, New Zealand, Scotland, and Northern Ireland.¹⁵⁵

151. As indicated earlier, what we refer to as “choice voting” throughout has alternatively been referred to as “preference voting,” “single transferable vote,” or by reference to one particular tabulation method, such as “the Hare system.” See *supra* note 10. Outside the scope of this article are the many other systems of non-winner-take-all voting that are common around the world, but have not yet been tried in the United States. For example, drawing on the example of the mixed member systems used in Germany and other nations, a state legislature could have some number of single-member district seats and some number of accountability seats awarded to ensure that the partisanship of the state’s legislature accurately reflects the partisanship of the statewide vote. See *Reforms to Enhance Independent Redistricting Proposals*, FAIRVOTE, <http://www.fairvote.org/re-forms-to-enhance-independent-redistricting-proposals/> (last visited Feb. 18, 2013) (describing the use of a district plus system to achieve proportional representation). Alternatively, drawing on the unordered open list system used in Finland, voters could vote for one partisan candidate in multi-member districts, and the district would elect candidates from parties in proportion to each party’s candidate votes, with a party’s share of seats filled by candidates from the parties that received the most votes. See U. COLLEGE LONDON, *THE CONSTITUTION UNIT, ELECTIONS UNDER REGIONAL LISTS 2, 4* (Jan. 1998), available at <http://www.ucl.ac.uk/spp/publications/unit-publications/20.pdf> (describing the various forms of list systems).

152. See Mulroy, *supra* note 10, at 333 n.1.

153. See *id.* at 341–42, 350; Mulroy, *supra* note 14, at 1911–12.

154. See Mulroy, *supra* note 10, at 341–42; Kevin Reyes, Note, *Redistricting or Rethinking? Why Proportional Representation May Be a Better Solution than California’s Independent Redistricting Commission*, 20 S. CAL. INTERDISC. L.J. 655, 674 (2011).

155. See *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 685–86 (Minn. 2009); Reyes, *supra* note 154, at 675; *Proportional Representation in Most Robust Democracies*, FAIRVOTE, <http://www.fairvote.org/PR-in-most-robust-democracies> (last visited Feb. 18, 2013); *Scotland Holds Proportional Voting Elections*, FAIRVOTE, <http://www.fairvote.org/Scotland-holds-proportional-voting-elections> (last visited Feb. 18, 2013); *The 2007 Northern Ireland Elections: Proportional Voting Helps Moderates*, FAIRVOTE, <http://www.fairvote.org/the-2007-northern-ireland-elections-proportional-voting-helps-moderates> (last visited Feb. 18, 2013).

Choice voting will maximize the number of voters who elect one of their favorite candidates under two conditions: (1) when there are candidates who reflect the diversity of views within a jurisdiction; and (2) when voters rank candidates reflecting their views in order of preference.¹⁵⁶ Voters' power in a choice voting election derives from the fact that choice voting guarantees election of every candidate who achieves greater support than the threshold of exclusion.¹⁵⁷ The threshold of exclusion refers to the minimum percent of the vote necessary to win a seat in a multi-member district or at-large body.¹⁵⁸ For winner-take-all systems, the threshold of exclusion is generally 50% plus one vote or higher, virtually guaranteeing a sweep of the election to the candidates that reflect the interests of the majority, irrespective of how well they represent minority viewpoints.¹⁵⁹ For choice voting, the threshold of exclusion depends on the number of seats being elected.¹⁶⁰ Candidates will be elected if they receive one more than a percentage of the vote equal to one divided by one more than the number of candidates.¹⁶¹ If choice voting were applied to a single-member district, the winning candidate would need one vote more than one-half, or 50% plus one vote;¹⁶² in a two-seat election, a candidate would need one vote more than one-third, or 33.33% plus one vote; in a three-seat election the candidate would need one vote more than one-fourth, or 25% plus one vote; in a four-seat election the candidate would need one vote more than one-fifth, or 20% plus one vote; and so on, with representation becom-

156. See Mulroy, *supra* note 10, at 342, 350.

157. See *id.* at 339, 342.

158. *Id.* at 339.

159. See *id.* at 336–38.

160. See *id.* at 341–42.

161. *Id.* at 342. This represents the fewest votes that only the winning number of candidates can obtain. For example, it is mathematically impossible for four (or more) candidates to receive *more* than 25% of the vote each. Consequently, one vote more than 25% is the threshold of election for three seats, because only three candidates can possibly achieve that threshold. In contrast, a winner-take-all election for three at-large seats can result in the defeat of a candidate who receives a vote from as many as 74% of voters.

162. *Id.* When applied to an election with a single winner, choice voting is equivalent to instant runoff voting, the system used for single-member districts in the California Bay Area, as well as a number of other jurisdiction in the U.S. See, e.g., *Dudum v. Arntz*, 640 F.3d 1098, 1100–01 (9th Cir. 2011); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 685–86 (Minn. 2009); *Ranked Choice Voting in Bay Area Elections*, FAIRVOTE, <http://www.fairvote.org/ranked-choice-voting-in-bay-area-elections> (last visited Feb. 18, 2013).

ing more proportional the greater the number of seats to be filled. Cincinnati, Ohio and Cambridge, Massachusetts have each used choice voting to elect nine-seat bodies, making their thresholds of exclusion 10% plus one vote.¹⁶³

Because choice voting allows like-minded voters to elect candidates in rough proportion to their share of the electorate, it is often described as “proportional representation.”¹⁶⁴ Although proportional representation often conjures up images of the closed party list systems used throughout Europe,¹⁶⁵ choice voting is a candidate-based system that has nothing to do with parliamentary forms of government; it requires candidates to compete for a higher threshold of votes than the European multiparty systems; and it can be used in wholly non-partisan elections.¹⁶⁶

A. Choice Voting Mechanics

Choice voting allows voters to rank candidates in order of preference.¹⁶⁷ It reliably provides fair representation because, in addition to guaranteeing representation based on the threshold of exclusion, it also minimizes wasted votes.¹⁶⁸ Very popular candidates who receive more first-choice support than the thresh-

163. See Reyes, *supra* note 154, at 675, 681; *Cambridge Municipal Elections*, CITY OF CAMBRIDGE, MASS. <http://www.cambridgema.gov/election/programsandservices/cambridge MUNICIPALELECTIONS.aspx> (click “How to Vote in a Proportional Election”) (last visited Feb. 18, 2013) (describing the election process for the nine-seat City Council).

164. See, e.g., *Johnson v. City of New York*, 9 N.E. 2d 30, 31, 34–36 (N.Y. 1937) (describing choice voting throughout as “proportional representation”).

165. See, e.g., Lesley Dingle & Bradley Miller, *A Summary of Recent Constitutional Reform in the United Kingdom*, 33 INT’L J. LEGAL INFO. 71, 94 (2005); NICOLAS STRAUCH & ROBERTAS POGORELIS, OFFICE FOR PROMOTION OF PARLIAMENTARY DEMOCRACY, *ELECTORAL SYSTEMS: THE LINK BETWEEN GOVERNANCE, ELECTED MEMBERS AND VOTERS* 19, 78 (2011); cf. Mulroy, *supra* note 14, at 1877 n.48 (warning that preference voting should not be confused with European party-list parliamentary systems).

166. AMY, *supra* note 74, at 100.

167. *Id.* at 96. In jurisdictions that cannot accommodate ranked ballots, an alternative system called the free vote requires voters to only mark one candidate and then transfers votes based on the relative vote totals of the candidates’ political parties or teams. *Fair Voting in the United States*, FAIRVOTE (Oct. 2012), <http://www.fairvote.org/assets/2012-Redistricting/FairVotingMethods.pdf>. This system is less preferable to choice voting because it does not allow voters to express their own preferences; but to the extent that party or team preference tracks voter preference, it can serve as an adequate substitute.

168. Wasted votes are those cast for a candidate whose outcome was assured even without them, such as an extremely popular standout candidate is certain to win or a longshot candidate with little chance of winning. See AMY, *supra* note 74, at 97–99; Reyes, *supra* note 154, at 685.

old of exclusion for the election have their surplus votes (that is, those votes beyond the threshold of exclusion) added to the totals of their voters' second choices;¹⁶⁹ candidates with little support have their votes added to their voters' next-ranked choices.¹⁷⁰ As a result of these transfers, voters can place their preferences honestly and still be confident that they will help to elect one of their top choice candidates.¹⁷¹

By minimizing wasted votes, choice voting minimizes incentives for tactical voting and for limiting voter choice to avoid vote-splitting, thereby allowing minority viewpoints a fair level of representation without the downsides associated with both winner-take-all and less effective, non-winner-take-all methods.¹⁷² Under other voting methods, candidates and voters must try to minimize the possibility of wasted votes on their own, by limiting the number of candidates running or by voting for a less-preferred candidate who is more likely to win rather than a more-preferred candidate who has little chance of success.¹⁷³ By dealing with wasted votes directly, choice voting renders those tactics unnecessary.

Furthermore, choice voting has repeatedly been used effectively by voters with a range of educational backgrounds.¹⁷⁴ Voters will cast a fully effective ballot by doing just what the ballot should instruct them to do: ranking candidates in order of choice.

169. The actual mechanism by which votes are transferred may vary, but the most accurate methods are based on distributing all ballots to the next-ranked candidate at an equally reduced value, with the result being that a portion of a person's vote elects their first-choice candidate and a portion is transferred to count for their next-choice candidate. See, e.g., Voters' Choice Act, H.R. 2545, 104th Cong. (1st Sess. 1995).

170. See, e.g., AMY, *supra* note 74, at 98–99.

171. *Id.* at 100.

172. See Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1161, 1165–66 (1998) (noting that tactical voting and limiting voter choice are possible, but unlikely, in multi-member districts); Reyes, *supra* note 154, at 684; Troy M. Yoshino, *Still Keeping the Faith?: Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking*, 6 ASIAN L.J. 1, 59 (1999).

173. Tony Anderson Solgård & Paul Landskroener, *Municipal Voting System Reform: Overcoming the Legal Obstacles*, 59 BENCH & B. OF MINN. (Minn. State Bar Assoc.), Oct. 2002 (noting that winner-take-all systems result in one-party domination and little choice for voters).

174. NEW AM. FOUND. & FAIRVOTE, INSTANT RUNOFF VOTING AND ITS IMPACT ON RACIAL MINORITIES 3 n.5 (June 2008), available at <http://archive.fairvote.org/media/irv/irvracememo.pdf>.

Experience has shown that, on a well-designed ballot, voters are able to easily rank candidates.¹⁷⁵

B. *Comparison of Choice Voting to Cumulative Voting and Limited Voting*

The two other American forms of non-winner-take-all voting are cumulative voting and limited voting.¹⁷⁶ With cumulative voting, a voter may cast a number of votes equal to the number of seats to be filled, and the voter may arrange those votes freely, including by giving more than one vote to a single candidate.¹⁷⁷ Cumulative voting is commonly used in corporate elections to prevent majority shareholders from controlling the entire board of directors.¹⁷⁸ With the one-vote form of limited voting, a voter may cast only one vote, irrespective of the number of seats to be elected; other limited voting systems allow voters to cast more than one vote, but never more than one vote per candidate.¹⁷⁹ With both cumulative and limited voting, the candidates who receive the most votes are the winners.

These systems tend to result in minority viewpoints gaining more representation; consequently they have received a good deal of attention for use in VRA cases as a way to remedy minority vote dilution without resorting to majority-minority districts in small jurisdictions.¹⁸⁰ They have been adopted to resolve nearly one hundred VRA cases since 1986, almost always where racial minorities only have sufficient voting strength to elect one candidate.¹⁸¹ When one racial minority candidate has run in these elections, and that minority's share of voters is above the threshold of

175. *Id.* at 3.

176. Mulroy, *supra* note 14, at 1876–77.

177. *Id.* at 1878.

178. Amihai Glazer, *Cumulative Voting in Corporate Elections: Introducing Strategy Into the Equation*, 35 S.C. L. REV. 295, 295 (1984); see *Holder v. Hall*, 512 U.S. 874, 909 n.15 (1994) (Thomas, J., concurring).

179. Mulroy, *supra* note 14, at 1877.

180. *Id.* at 1880.

181. *Ten Proposals for Electoral Reform State Legislation*, FAIRVOTE, 2, http://archive.fairvote.org/media/general/Ten_State_Reforms.pdf; see generally Edward Still, *Cumulative Voting and Limited Voting in Alabama*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 183 (Wilma Rule & Joseph F. Zimmerman eds., 1992) [hereinafter UNITED STATES ELECTORAL SYSTEMS] (describing the successful use of limited and cumulative voting in VRA settlements).

exclusion, alternative voting systems have reliably elected the minority group's candidate of choice.¹⁸²

However, both cumulative voting and limited voting are vulnerable to issues with vote-splitting where too many like-minded candidates run.¹⁸³ As a result, they can fail to provide fair representation or can result in efforts to suppress candidates to avoid a spoiler candidacy.¹⁸⁴ For example, suppose racial minority voters make up 25% of a jurisdiction that has a history of racially polarized voting and that uses limited voting or cumulative voting to elect a five-member city council. With a threshold of exclusion of 17%, either one or two of the minority voters' candidates of choice should be elected. However, by running two candidates, they risk electing zero candidates of choice, because if the 25% vote is split evenly between the two candidates, neither would be elected.

In contrast, choice voting has worked well in complex jurisdictions with diverse racial minority communities, where the potential for split votes would otherwise be more likely.¹⁸⁵ Likewise, choice voting is far more flexible than other alternative systems in accommodating realistic scenarios. Suppose a racial minority has the potential to elect two or more seats, but there are "too many" candidates backed by racial minority voters or there is a very popular candidate who receives far more first choice support than necessary to win. Alternatively, suppose there is an emerging racial minority that seems to have insufficient support to win, but sponsors a candidate who runs hard in an effort to win. These situations may result in wasted votes and no victories under limited or cumulative voting because those systems are "all or nothing"—that is, they do not provide the opportunity for voters to indicate second-choice support, and they often encourage tactics such as suppressing candidates or telling voters to cast votes for someone other than their first choice.¹⁸⁶ Choice voting handles such situations through the simple tool of having voters indicate

182. Still, *supra* note 181, at 191.

183. See Mulroy, *supra* note 14, at 1910.

184. See *id.*; Jeffrey C. O'Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 329 n.5 (2006).

185. See Mulroy, *supra* note 10, at 342.

186. Robert Richie, *Full Representation: The Future of Proportional Election Systems*, 87 NAT'L CIVIC REV. 85, 87 (1998); see Mulroy, *supra* note 14, at 1911–12.

backup choices in addition to their first choice.¹⁸⁷ As a result, each like-minded group's chance for representation is preserved while still allowing the opportunity to help second or third choices, thereby making it possible for candidates to run freely and to campaign positively to be the second choices of more voters, including voters from other racial groups.

For these reasons, the use of cumulative or limited voting—while often an improvement on winner-take-all, at-large systems and single-member districts—is less likely than choice voting to promote voter choice and to achieve full and fair representation.

III. CHOICE VOTING AS A REMEDY IN VOTING RIGHTS ACT CASES

Section 2 prohibits states and political subdivisions from enacting any “standard, practice, or procedure . . . which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.”¹⁸⁸ Since 1969, the Supreme Court has acknowledged that electoral systems which dilute the efficacy of the votes of racial minorities could come under the umbrella of this prohibition.¹⁸⁹

Initially, the Court interpreted this clause to have no legal effect aside from restating the law of the Fifteenth Amendment.¹⁹⁰ However, when Congress amended the VRA in 1982, it used Section 2 to limit the effect of the Court's decision in *City of Mobile v. Bolden*, which had required a showing of discriminatory purpose in order to establish a violation of the Fifteenth Amendment.¹⁹¹ The amendment required that electoral schemes be reviewed under a totality of circumstances test to determine whether they violate Section 2, and it recommended a variety of typical factors

187. *Choice Voting*, FAIRVOTE, <http://www.fairvote.org/what-is-choice-voting> (last visited Feb. 18, 2013).

188. Voting Rights Act of 1965, 42 U.S.C. § 1973(a) (2006).

189. *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

190. *City of Mobile v. Bolden*, 446 U.S. 55, 60–61 (1980) (“[T]he language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself.” (footnote omitted)).

191. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (“The amendment was largely a response to . . . *Mobile v. Bolden*, which had declared that, in order to establish a violation either of § 2 or of the Fourteenth or Fifteenth Amendments, minority voters must prove that a contested electoral mechanism was intentionally adopted or maintained by state officials for a discriminatory purpose.” (citation omitted)).

useful to determine liability.¹⁹² In 1986, the Court decided *Thornburg v. Gingles*, in which it distilled this statutory mandate to a simple test for finding liability in the context of challenges to at-large and multi-member, winner-take-all election systems.¹⁹³ Reflecting a focus only on variations of winner-take-all elections, it included the need to show a winner-take-all remedy in establishing liability.¹⁹⁴ Its three-pronged test is: (1) the minority group must be large enough and geographically cohesive enough to constitute a majority-minority district; (2) the minority group must be politically cohesive; and (3) the minority must demonstrate that the white majority engages in bloc voting to frustrate the election of minority candidates of choice.¹⁹⁵

In 2013, the Supreme Court will be reviewing the constitutionality of Section 5, which requires covered jurisdictions to seek preclearance of changes to electoral law and procedures.¹⁹⁶ If the Court strikes down or weakens Section 5, it will likely do so in part on the ground that Section 2 provides sufficient protection of racial minorities' voting rights.¹⁹⁷ Accordingly, without ongoing oversight of redistricting decisions made by states and localities in the covered jurisdictions, it may become critical for Section 2 to provide the best possible remedies for racial minority vote dilution that are not dependent on Department of Justice oversight of redistricting. Choice voting may prove indispensable to that goal as it has contributed directly to representation of racial minorities in a variety of settings, including New York City, Cleveland, and Cincinnati.¹⁹⁸ As the Kerner Commission noted of Cincinnati in 1968:

Although the city's Negro population had been rising swiftly—in 1967, 135,000 out of the city's 500,000 residents were Negroes—there was only one Negro on the city council. In the 1950's, with a far smaller Negro population, there had been two. Negroes attributed

192. S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07; *Gingles*, 478 U.S. at 36–37.

193. *Gingles*, 478 U.S. at 50–51.

194. *See id.* at 50 & n.17.

195. *Id.* at 50–51.

196. *Shelby Cnty. v. Holder*, 679 F.3d 848, 852–53 (D.C. Cir. 2012), *cert. granted*, ___ U.S. ___, 133 S. Ct. 594 (Nov. 9, 2012).

197. *Id.* at 863–64 (noting that the constitutionality of Section 5 may turn on the adequacy of Section 2).

198. *See generally* KATHLEEN L. BARBER, *PROPORTIONAL REPRESENTATION AND ELECTION REFORM IN OHIO* (1995) (describing the use of choice voting in five Ohio cities as well as New York City).

this to dilution of the Negro vote through abolition of the proportional representation system of electing the nine councilmen.¹⁹⁹

Indeed, the Department of Justice in 1999 denied preclearance to New York City when it sought to replace choice voting with limited voting for its local school board elections in order to be able to count ballots on the city's lever machines.²⁰⁰ Where fair representation is the goal, choice voting is the most reliable option. It should therefore be considered a favored remedy under the VRA.

A. *Consistency of Choice Voting with Thornburg v. Gingles*

The first *Gingles* factor—requiring sufficient size and compactness for drawing a majority-minority district—seems to suppose that single-seat districts operate as a default electoral form with only at-large and multi-member districts judged in comparison. The Supreme Court justified this factor by stating that if it is not met, then the racial minority voters cannot demonstrate potential to elect representatives “in the absence of the [challenged] structure.”²⁰¹ Although the Court never states that a district system must be used as a remedy, it does assert that a single-seat district “is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected.”²⁰²

1. Compactness as a Benchmark for Liability

Courts have often used geographic compactness in a single-seat district as a benchmark for determining whether liability exists

199. REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 26 (1968).

200. Letter from Bill Lann Lee, Acting Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to Eric Proshansky, Assistant Corporation Counsel, City of New York (Feb. 4, 1999), available at http://www.usdoj.gov/crt/voting/sec_5/ny_obj2.htm; Rob Richie, *Winning Fair Representation with Alternative Voting Systems*, 22 SOUTHERN CHANGES, no. 4, 2000, at 24; Douglas Amy et al., *New Means for Political Empowerment: Proportional Voting*, FAIRVOTE, http://archive.fairvote.org/index.php?page=39&articlemode=showspecifc&sho_warticle=1832 (last visited Feb. 18, 2013).

201. *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986).

202. *Id.*

under Section 2.²⁰³ This interpretation derives, in part, from Justice O'Connor's explanation of the factors in concurrence:

In order to evaluate a claim that a particular multimember district or single-member district has diluted the minority group's voting strength to a degree that violates § 2, however, it is also necessary to construct a measure of "undiluted" minority voting strength. . . . Put simply, in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it "should" be for minority voters to elect their preferred candidates under an acceptable system.²⁰⁴

The Court later cited this passage in *Holder v. Hall* for the proposition that the *Gingles* criteria require a court to "find a reasonable alternative practice *as a benchmark* against which to measure the existing voting practice."²⁰⁵ This interpretation of *Gingles* suggests that its three-pronged test only affects the liability stage of litigation, when a court must determine whether it would be fair to find liability under Section 2, irrespective of what remedy the court may later impose.²⁰⁶ Accordingly, choice voting should not be excluded as a remedy to Section 2 liability.

2. Relevance of Compactness for Single-Seat Remedies Only

An even more promising interpretation of the first *Gingles* factor would be the sensible decision to apply the factor only in cases requesting single-member districts as a remedy. Although the Court seemed to assume plaintiffs and defendants would focus on single-member district remedies, nothing in the language of Section 2 limits remedies in such a way.²⁰⁷ For that reason, a different standard of liability should also be necessary if the parties to

203. See, e.g., *Cottier v. City of Martin*, 604 F.3d 553, 558 (8th Cir. 2010) (en banc) (finding a lack of Section 2 liability but expressing no opinion on the propriety of district court's imposition of cumulative voting); *S. Christian Leadership Conference v. Sessions*, 56 F.3d 1281, 1302 (11th Cir. 1995) (Hatchett, J., dissenting) (quoting *Holder v. Hall*, 512 U.S. 874, 880 (1994) (plurality opinion); *id.* at 886–88 (O'Connor, J., concurring)) (suggesting that the compactness requirement looks to a hypothetical single-member district as a "benchmark"); *Cousin v. McWherther*, 904 F. Supp. 686, 713 (E.D. Tenn. 1995) (describing the factor as "a threshold showing"), *rev'd on other grounds, vacated sub nom.* *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998).

204. *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring).

205. 512 U.S. 874, 880 (1994) (plurality opinion) (emphasis added).

206. See *id.* at 880–81.

207. See 42 U.S.C. § 1973 (2006).

the case focus on a different remedy. This reading would interpret the factor as merely stating that without *some alternative* to the challenged structure, no injury can lie. The fact that the Court used the possibility of majority-minority districts as the alternative in *Gingles* reflects only that such districts were the only remedy being sought in early cases to come before the Court.²⁰⁸

This interpretation has a great deal of support in Supreme Court reasoning. First, in *Gingles* itself, the Court merely held that plaintiffs must demonstrate that they would have the potential to elect in the absence of the challenged structure, with single-seat districts “generally” being the appropriate standard for comparison.²⁰⁹ Further, in *Holder*, the Court explored the notion of a more flexible standard for comparison, explaining that challenges brought under Section 2 must have an “objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice,” in order to find an injury.²¹⁰ Justice O’Connor, in concurrence, described the use of single-seat districts as the alternative to at-large elections as “self-evident.”²¹¹ However, Justice Thomas noted in concurrence that “there is no principle inherent in our constitutional system, or even in the history of the Nation’s electoral practices, that makes single-member districts the ‘proper’ mechanism for electing representatives to governmental bodies.”²¹² He further pointed out that “from the earliest days of the Republic, multimember districts were a common feature of our political systems.”²¹³

Justice Thomas used this concurrence to criticize the degree to which the Court was making political judgments, but his argument for turning to non-winner-take-all systems like choice voting is compelling.²¹⁴ He described these systems as being able to “produce proportional results without requiring division of the electorate into racially segregated districts.”²¹⁵ He noted that

208. See *Holder*, 512 U.S. at 909 (Thomas, J., concurring); *Burns v. Richardson*, 384 U.S. 73, 88 (1966).

209. *Gingles*, 478 U.S. at 50 n.17 (majority opinion).

210. *Holder*, 512 U.S. at 881 (plurality opinion).

211. *Id.* at 888 (O’Connor, J., concurring).

212. *Id.* at 897 (Thomas, J., concurring).

213. *Id.* at 897–98.

214. *Id.* at 909–10.

215. *Id.* at 910.

“nothing in our present understanding of the Voting Rights Act . . . would prevent [states] from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes.”²¹⁶ In fact, he pointed out that it would be difficult for courts “to find a principled reason for holding that a geographically dispersed minority cannot challenge districting itself as a dilutive electoral practice,” especially because “cumulative voting and other non-district-based methods . . . are simply more efficient and straight-forward mechanisms for achieving . . . our tacit objective.”²¹⁷ Although Justice Thomas was wrong to suggest that choice voting would necessarily render proportional results by race, he is right that it would often provide racial minorities the opportunity to elect candidates of choice more efficiently than majority-minority districts.²¹⁸ Justice Thomas’s recognition that the availability of non-district-based remedies would permit liability for geographically dispersed minorities suggests that, at least in his view, geographical compactness is only required for liability where the plaintiffs seek district-based remedies.²¹⁹

Understanding the compactness criteria in the context of the remedy sought also makes sense when viewing Section 2 liability more broadly. Under Section 2, liability may be premised on more than just the at-large nature of elections.²²⁰ For example, it may be based on a jurisdiction’s use of runoff requirements, numbered posts, or staggered terms.²²¹ Because the imposition of districts would not remedy minority vote dilution brought on these bases, geographical compactness is not an element of liability.²²² In a case with a geographically dispersed minority in a jurisdiction using winner-take-all, at-large elections, single-member districts

216. *Id.*

217. *Id.* at 912.

218. See Drew Spencer & Rob Richie, *A Representative Congress: Enhancing African American Voting Rights in the South with Choice Voting*, FAIRVOTE (Nov. 27, 2012), <http://www.fairvote.org/a-representative-congress-enhancing-african-american-voting-rights-in-the-south-with-choice-voting>.

219. *Holder*, 512 U.S. at 909.

220. Mulroy, *supra* note 10, at 365–66.

221. *Id.*

222. *Id.* at 365–67 (citing lower court opinions that have not applied compactness as a precondition to liability).

would similarly fail to remedy the impermissible vote dilution.²²³ When non-winner-take-all, at-large voting is the requested remedy, liability is not premised on the fact that the elections are at-large; rather, liability is premised on the fact that there is racially polarized voting and the elections are conducted by a method that is winner-take-all.²²⁴ The second and third *Gingles* factors would still be relevant, but use of the first would not make sense in such a claim.

This nonsensical notion—requiring eligibility for one particular remedy as a precondition liability, even when parties may seek a different remedy—contributed to California’s decision to adopt the California Voting Rights Act (“CVRA”).²²⁵ As the California Assembly Committee on the Judiciary noted in their analysis of the bill, “[G]eographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large election system.”²²⁶ The availability of a particular remedy should be a matter for the remedies stage of litigation, not the liability stage. For the same reason, it does not make sense to premise liability on the availability of a remedy that the plaintiffs do not seek.

B. *Consistency with the Dole Proviso to Section 2*

The last two sentences of Section 2 read:

The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.²²⁷

223. See *id.* at 374–75 (illustrating the failure of Section 2 liability preconditioned on geographic compactness to remedy vote dilution of geographically dispersed minorities).

224. See *id.*

225. California Voting Rights Act of 2001, 2002 Cal. Legis. Serv. ch. 129 (West) (codified at CAL. ELEC. CODE §§ 14025–32 (West 2003)); see ASSEMB. COMM. ON JUDICIARY, 2001–2002 REG. SESS., BILL ANALYSIS OF S.B. 976, at 2–3 (as amended Apr. 9, 2002) [hereinafter BILL ANALYSIS OF S.B. 976] (prepared by Kevin G. Baker), available at http://www.leginfo.ca.gov/pub/01-02/bill/sen/sb_0951-1000/sb_976_cfa_20020603_131744_asm_comm.html.

226. BILL ANALYSIS OF S.B. 976, *supra* note 225, at 3.

227. 42 U.S.C. § 1973(b) (2006).

The last clause is popularly referred to as the Dole proviso, because it was added in a 1982 amendment sponsored by Senator Bob Dole.²²⁸ The clause restates prior court sentiments that the VRA does not guarantee proportional representation by race and ensures that courts will not use Section 2 to enforce a racial quota on elected bodies.²²⁹

Non-winner-take-all elections do not classify anyone by their status as members of a protected class or by race, much less require any quota of elected officials to be members of any particular race. By requiring less than a majority for election, non-winner-take-all systems allow candidates to be elected roughly in proportion to the amount of support they receive.²³⁰ For example, in a jurisdiction with a five-seat city council in which development is a big issue, if 40% of voters favor pro-growth policies and 60% favor slow-growth policies, a non-winner-take-all system will tend to elect about 40% pro-growth candidates and about 60% slow-growth candidates. However, these results are not guaranteed—it is up to voters to make their decisions and establish their priorities, and those decisions and priorities may change in any given election. Similarly, in jurisdictions with racially polarized voting, non-winner-take-all systems give the racial minority the *opportunity* to elect preferred candidates more closely in proportion to their numbers, which is also the goal of districting remedies;²³¹ creation of this opportunity is what makes non-winner-take-all systems appropriate remedies to racial minority voter dilution. However, it in no way guarantees that any number of racial minority candidates actually will be elected. Election results depend entirely on which candidates run and what level of support they receive from voters, with voters free to decide how to place their support.

228. See Mulroy, *supra* note 10, at 373.

229. S. REP. NO. 97-417, at 31, *reprinted in* 1982 U.S.C.C.A.N. 177, 208 (“This disclaimer is entirely consistent with the above mentioned Supreme Court and Court of Appeals precedents, which contain similar statements regarding the absence of any right to proportional representation. It puts to rest any concerns that have been voiced about racial quotas.”); see *League of Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006).

230. See *Cane v. Worcester Cnty.*, 847 F. Supp. 369, 372 (D. Md. 1994) (explaining a proposed non-winner-take-all system in which a group of 16.7% of voters could elect a candidate), *aff'd in part, rev'd in part*, 35 F.3d 921 (4th Cir. 1994).

231. See *Johnson v. DeGrandy*, 512 U.S. 997, 1025 (1994) (O'Connor, J., concurring) (noting that lack of proportionality is always probative evidence of vote dilution).

In *Cousin v. Sundquist*, a case involving vote dilution in judicial elections, the Sixth Circuit interpreted the Dole proviso as precluding use of the VRA to achieve “proportional representation.”²³² The court stated in dicta that the imposition of cumulative voting would achieve proportional representation and, therefore, held that cumulative voting was not available as a remedy, at least in the context of judicial elections.²³³

The Sixth Circuit’s decision on cumulative voting mixed two different meanings of the term “proportional representation.”²³⁴ Non-winner-take-all systems are sometimes referred to as “proportional representation” because they result in legislative bodies that more accurately reflect their voting populations’ preferences, whatever those may be.²³⁵ The Dole proviso merely clarifies that the VRA does not establish an enforceable right to have members of a protected class elected in proportion to their numbers in the population.²³⁶ Non-winner-take-all systems do not establish such racial entitlements; indeed they require no classification by race, which cannot be said of majority-minority district remedies.²³⁷

Even within the flawed logic of the opinion, it is unclear whether *Sundquist’s* statements applied only to judicial elections.²³⁸ Although some of the opinion’s language refers to elections in general, most of the Sixth Circuit’s analysis concerned only judicial elections.²³⁹ The opinion also distinguished a contrary case from the District of Maryland merely by pointing out that that case involved legislative, rather than judicial, elections and

232. 145 F.3d 818, 829–30 (6th Cir. 1998).

233. *Id.* at 829–31. *But see* *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 752 n.11 (N.D. Ohio 2009) (noting that cumulative voting is an acceptable VRA remedy notwithstanding the dicta from *Sundquist*).

234. *See* Mulroy, *supra* note 14, at 1899 (“The section 2 proviso does not refer to ‘proportionality’ in the political science sense of classifying electoral systems.”).

235. *See* Mulroy, *supra* note 10, at 334 n.1.

236. *See* *Thornburg v. Gingles*, 478 U.S. 30, 83–84 (1986) (O’Connor, J., concurring); Mulroy, *supra* note 10, at 373–74.

237. *See* Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 434 (1995) (book review) (noting that majority-minority districts approximate a quota system much more closely than non-winner-take-all systems).

238. *See* *Sundquist*, 145 F.3d at 834.

239. The first paragraph of its remedies analysis concerns the Dole proviso and cumulative voting in general; the second paragraph expresses skepticism that cumulative voting would actually result in the election of any racial minority judges; the remaining five paragraphs concern issues specific to judicial elections. *Id.* at 829–31.

by noting that the Maryland case had been reversed on other grounds.²⁴⁰

So far, no case has repeated the flawed reasoning expressed in dicta in *Sundquist*. Rather, in the remedy phase of two cases brought by the Department of Justice since *Sundquist*, federal judges have ordered imposition of non-winner-take-all remedies.²⁴¹ A district court ordered implementation of cumulative voting in Port Chester, New York as a Section 2 remedy.²⁴² Another district court in the Sixth Circuit noted the continuing acceptability of non-winner-take-all remedies, notwithstanding *Sundquist*, when ordering implementation of limited voting in Euclid, Ohio.²⁴³ Because the Sixth Circuit misapplied the Dole proviso due to confusion over its scope and the effect of non-winner-take-all systems, other circuits should continue to reject these statements from *Sundquist*. The Dole proviso merely prohibits racial quotas;²⁴⁴ it should not be interpreted to bar an entire category of potential remedies that do not classify anyone by race or require the election of any classes of persons.

C. Consistency with the Shaw Cases

In 1993, the Supreme Court held that the use of race in creating remedial measures may be unconstitutional racial gerrymandering under the Fourteenth Amendment.²⁴⁵ Historically, jurisdictions used racial gerrymandering in order to maximize the electoral power of the racial majority and to effectively disenfran-

240. *Id.* at 830 (“[W]e have discovered only one other district court, in a case involving not judicial elections but apportionment of the county legislature, that has ordered this remedy for a Section 2 violation, a disposition subsequently reversed by the Court of Appeals.”) (citing *Cane v. Worcester Cnty.*, 847 F. Supp. 369 (D. Md. 1994), *aff’d in part, rev’d in part*, 35 F.3d 921 (4th Cir. 1994)). The Fourth Circuit in *Cane* reversed because the district court failed to defer to the defendant jurisdiction’s choice of remedies, and expressly declined “to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision,” because that question was not before it. *Cane*, 35 F.3d at 928.

241. See *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 453 (S.D.N.Y. 2010); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 752 n.11.

242. *Vill. of Port Chester*, 704 F. Supp. 2d at 453.

243. *Euclid City Sch. Bd.*, 632 F. Supp. 2d at 752 n.11.

244. See 42 U.S.C. § 1973(b) (2006); *supra* notes 226–27 and accompanying text.

245. *Shaw v. Reno*, 509 U.S. 630, 649 (1993).

chise racial minorities.²⁴⁶ The VRA was passed, in part, to put an end to this sort of racial gerrymandering.²⁴⁷ However, the Court's Equal Protection jurisprudence applies strict scrutiny in any case involving a race-based classification, irrespective of whether the classification serves a remedial purpose.²⁴⁸ Consequently, to the extent a remedy to a VRA case classifies individuals by race, it will be subject to strict scrutiny and likely will be found unconstitutional.²⁴⁹

If a jurisdiction purposefully uses race as a "predominant factor" in drawing single-member district boundaries, the Equal Protection Clause of the Fourteenth Amendment compels courts to review the electoral scheme under strict scrutiny.²⁵⁰ This remains true even if the racial majority has not suffered any voting dilution as a result of the redistricting.²⁵¹ Furthermore, the Court seems to be treating majority-minority districts with greater Equal Protection scrutiny as more cases come before it.²⁵² Consequently, the use of single-member districts as a remedy to VRA cases has become tenuous.

As *Shaw* itself recognized, at-large and multi-member electoral systems do not classify anyone by race at all.²⁵³ At-large or multi-member choice voting elections guarantee that minority *viewpoints* have the opportunity to achieve representation.²⁵⁴ They do not require drawing lines around particular individuals or considering the race of any particular individuals.²⁵⁵ Choice voting does not rely on any racial stereotypes or balkanize racial groups by putting them into racially defined districts.²⁵⁶ By using choice voting, jurisdictions can avoid the segregating effects single-

246. *Id.* at 639–40.

247. *See id.* at 641.

248. *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).

249. *See Shaw*, 509 U.S. at 653.

250. *See Miller v. Johnson*, 515 U.S. 900, 915–16 (1995).

251. *Shaw*, 509 U.S. at 649–50.

252. *See, e.g., Easley v. Cromartie*, 532 U.S. 234, 241, 258 (2001); *Miller*, 515 U.S. at 916.

253. *Shaw*, 509 U.S. at 649 ("At-large and multimember schemes, however, do not classify voters on the basis of race.").

254. *See supra* Section II.

255. *Id.*

256. *See Mulroy, supra* note 14, at 1912 (noting that choice voting helps create cross-racial coalitions that act as "anti-balkanizers").

member districts create and can avoid strict scrutiny review of their efforts to remedy to racial vote dilution.²⁵⁷

D. *Use in Settlements or When Preferred by the Defendant*

Non-winner-take-all voting systems have been used as judicially imposed remedies for Section 2 violations.²⁵⁸ As mentioned earlier, Justice Thomas has expressed the opinion that a court can order choice voting as a remedy to such a violation.²⁵⁹ Justice O'Connor expressed a similar opinion in her dissent to *Branch v. Smith*.²⁶⁰ However, many courts have expressed a preference for the use of single-seat districts when fashioning a remedy, typically without consideration of non-winner-take-all methods unless the jurisdiction specifically requests districts rather than a non-winner-take-all method.²⁶¹ Both courts and jurisdictions should reconsider this preference in light of the benefits of choice voting as a remedy.²⁶² Furthermore, remedies in Section 2 cases need not be imposed by a court. Often, the parties reach a settlement wherein the defendant jurisdiction voluntarily alters its elections method,²⁶³ courts have sanctioned the use of non-winner-take-all voting systems in these settlements.²⁶⁴

257. See Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM. & MARY L. REV. 621, 645 (1978).

258. *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 942–43 (D.S.D. 2007), *vacated en banc*, 604 F.3d 553 (8th Cir. 2010). The court's decision on liability was reversed on appeal, with the court of appeals declining to decide the issue of remedies. *Cottier v. City of Martin*, 604 F.3d 553, 562 (8th Cir. 2010) (en banc) (“[W]e need not consider . . . any remedies proposed by the plaintiffs.”).

259. *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring).

260. 538 U.S. 254, 309–10 (2003) (O'Connor, J., dissenting).

261. *E.g.*, *Chapman v. Meier*, 420 U.S. 1, 18–19 (1975); *Mahan v. Howell*, 410 U.S. 315, 333 (1973). *But cf.* *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160–61 (1971) (preserving a jurisdiction's valid use of at-large elections)).

262. See generally Richard L. Engstrom, *The Single Transferable Vote: An Alternative Remedy for Minority Vote Dilution*, 27 U.S.F. L. REV. 781, 807 (1993).

263. See *e.g.*, *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 453 (S.D.N.Y. 2010); Docket at 11–12, *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469 (8th Cir. 1986) (No. 84-1025), ECF No. 1, available at http://www.clearinghouse.net/chDocs/not_public/VR-SD-0021-9001.pdf.

264. *E.g.*, *Vill. of Port Chester*, 704 F. Supp. 2d at 453; *Dillard v. Chilton Cnty. Comm'n*, 699 F. Supp 870, 875–76 (M.D. Ala. 1988).

Even where no settlement can be reached, the first choice of remedies goes to the defendant jurisdiction.²⁶⁵ Based on a policy of allowing jurisdictions the freedom to choose their own methods of election, courts will defer to a defendant's appropriate choice of remedy even if the court itself would prefer some other remedy.²⁶⁶ To be appropriate, a proposed remedy need only comply with federal law, including the VRA and the U.S. Constitution.²⁶⁷ For example, when the city of Port Chester, New York was found liable for a violation of Section 2, it requested a non-winner-take-all system of elections as a remedy.²⁶⁸ This choice was respected by the presiding judge, who then imposed it as a remedy.²⁶⁹

Jurisdictions subject to VRA liability should consider choice voting as a preferred remedy in settlement or in final judgment. Doing so would enable them to maintain the at-large or multi-member nature of their elections.²⁷⁰ As a race neutral solution, it would also protect them from future litigation on equal protection grounds and avoid the need for decennial redistricting that could result in further litigation.²⁷¹ Both plaintiffs and defendants should be ready to ask for choice voting, both as an effective remedy and as a remedy that is not reliant on how districts might be drawn in the future, possibly in the absence of Section 5 preclearance authority.

E. State Voting Rights Acts

Currently, California is the only state to have enacted its own version of the VRA.²⁷² However, a state voting rights act has gar-

265. See *Upham*, 456 U.S. at 41–42 (quoting *White v. Weiser*, 412 U.S. 783, 794–95 (1973)); *Cottier v. City of Martin*, 445 F.3d 1113, 1123 (8th Cir. 2006), *vacated en banc*, 604 F.3d 553 (8th Cir. 2010); *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 490–91 (5th Cir. 1991); *Vill. of Port Chester*, 704 F. Supp. 2d at 448; *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 744–45 (N.D. Ohio 2009).

266. *Upham*, 456 U.S. at 40–41.

267. *Id.* at 42 (citing *White v. Weiser*, 412 U.S. 783, 797 (1973)).

268. *Vill. of Port Chester*, 704 F. Supp. 2d at 416.

269. *Id.* at 453.

270. See *id.*; Engstrom, *supra* note 262, at 788 (stating that single transferable voting is a preferred voting system for multi-seat elections).

271. See Engstrom, *supra* note 262, at 791, 807.

272. CAL. ELEC. CODE §§ 14025–32 (West 2003). Illinois has also adopted a law titled the Illinois Voting Rights Act, but it merely requires the use of majority-minority districts, crossover districts, and influence districts whenever redistricting takes place, rather than

nered support in Washington.²⁷³ Enacting a state voting rights act allows states to have racial vote dilution claims brought in state court, and, if crafted to be inclusive of non-winner-take-all remedies, to tailor the standards for liability and remedies to the states' own preferences.²⁷⁴

The CVRA improves upon the federal VRA by explicitly omitting the requirement that the racial minority be geographically compact, explicitly opening the door to non-winner-take-all voting systems, at the very least when there is no such geographic compactness.²⁷⁵ Although no California court has yet imposed a non-winner-take-all voting system, one has noted the possibility without criticism.²⁷⁶

Unfortunately, the CVRA explicitly only allows liability for at-large systems, without qualification, while leaving single-member district systems unaddressed.²⁷⁷ Because of this, jurisdictions in California often adopt single-member district elections, not because they necessarily see them as better, but because doing so effectively grants them immunity under the CVRA and ensures that no liability will follow in state court.²⁷⁸ The CVRA also suggests the use of single-member districts as remedies, but does not foreclose the use of modified, at-large remedies.²⁷⁹

States interested in adopting their own voting rights acts should adapt the CVRA model. It has been effective in helping

providing a cause of action for racial minority vote dilution. 10 ILL. COMP. STAT. ANN. §§ 120/5-1 to /5-10 (West 2012).

273. H.B. 2612, 62d Leg., 2012 Sess. (Wash. 2012); S.B. 6381, 62d Leg., 2012 Sess. (Wash. 2012).

274. See, e.g., *Sanchez v. City of Modesto*, 51 Cal. Rptr. 3d 821, 828 (Cal. Ct. App. 2006).

275. See *id.* (noting plaintiff's argument that in the absence of a compactness requirement, courts could impose modified, at-large remedies).

276. See *id.* at 829, 843.

277. CAL. ELEC. CODE § 14027 ("An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice."). No such prohibition exists for district systems. See *id.* §§ 14025–32.

278. Cf. Memorandum from Jeffrey R. Epp & Jennifer K. McCain to the Honorable Mayor and Members of the City Council of Escondido (May 23, 2012), available at <http://www.escondido.org/Data/Sites/1/media/PDFs/CCStaffReport052312.pdf> ("Cumulative voting is still considered at-large voting, however, and its implementation would not prevent future challenges based on the California Voting Rights Act.").

279. CAL. ELEC. CODE § 14029 ("[T]he court shall implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation.").

many jurisdictions with racially polarized voting move to more inclusive systems without the need to go to federal court.²⁸⁰ But any new state voting rights acts should explicitly establish the legality of non-winner-take-all systems such as like choice voting and should permit liability for any systems that result in racial minority vote dilution. These modifications would avoid incentivizing jurisdictions to use only single-member districts.

IV. CHOICE VOTING FOR CONGRESS AND THE STATES

The application of choice voting to state legislative elections and congressional elections should generally take the form of multi-member districts composed of between three and five members each.²⁸¹ For states, this may require a change to the state constitution specifying how one or both bodies is elected.²⁸² For the U.S. House, it would require only statutory changes and state action, as the U.S. Constitution does not specify how states must assign their congressional delegations, and many states historically did not use single-member districts.²⁸³ In either case, choice voting in multi-member districts represents a constitutional method of breaking the polarizing deadlock of single-seat districts and of achieving a body that fairly represents its constituents.

A. *Why Choice Voting in Multi-Member Districts Should Be Used*

The U.S. House has reached a remarkable level of partisan polarization—one that also has a decided tilt toward one political party, in violation of the principles of representative democracy.²⁸⁴ In November 2012, for example, not a single one of the 177 most Democratic and 177 most Republican districts elected a new

280. See Kareem V. Crayton, *Reinventing Voting Rights Preclearance*, 44 IND. L. REV. 201, 240 (2010).

281. FairVote's website includes an interactive map demonstrating how such districts could be drawn for U.S. congressional seats in all fifty states. *The Fair Voting Solution for U.S. House Elections*, FAIRVOTE, <http://www.fairvote.org/fair-voting-solution#.UKvmNuSA5c1> (last visited Feb. 18, 2013).

282. See, e.g., CAL. CONST. art. IV, § 6.

283. The Constitution only requires that representatives be chosen "by the People of the several States." U.S. CONST. art. 1, § 2. States have used at-large and multi-member elections in the past. See *supra* Section II.

284. McCarthy, *supra* note 89.

member from that district's minority party.²⁸⁵ Districts that only narrowly lean toward one party become virtually out of reach for the minority party absent a strong national tide.²⁸⁶ The result is an utter lack of competition in most districts, with average victory margins regularly more than two-to-one, and an unrepresentative division of the nation into Republican Red and Democratic Blue—a distorted reflection of the actual balance of political opinion that would more accurately translate into different shades of purple.²⁸⁷ Furthermore, partisan bias toward one major party is grounded in the fact that Democrats disproportionately live in concentrated urban areas, thereby having an inefficient distribution of their voting constituents.²⁸⁸ Inefficient distribution is likely to sustain this bias for the foreseeable future, now that neither party is showing the ability to win in districts leaning toward the other party.²⁸⁹ FairVote's analysis suggests that Democratic candidates for the U.S. House in 2012 likely needed to be preferred by more than 54% of voters to win even a slim majority.²⁹⁰ Furthermore, women candidates once again won relatively few races and in 2013 will hold only 18% of U.S. House seats.²⁹¹

History suggests the value of choice voting to confront these problems. In the mid-nineteenth century, Illinois suffered from severe partisan polarization between the northern half of the state, largely controlled by Republicans, and the southern half, largely controlled by Democrats—a situation that resulted in gridlock and corruption.²⁹² In 1870, when the state convened a

285. *Id.*

286. *See id.*

287. *See* Mark Newman, *Maps of the 2012 U.S. Presidential Election Results*, <http://www-personal.umich.edu/~mejn/election/2012/> (last visited Feb. 18, 2013).

288. Rob Richie & Devin McCarthy, *FairVote's Unique Methodology Shows That 52% of Voters Wanted a Democratic House*, FAIRVOTE (Nov. 13, 2012), <http://www.fairvote.org/fairvote-s-unique-methodology-shows-that-52-of-voters-wanted-a-democratic-house/>.

289. *See* Micah Cohen, *The 2012 Election, In a Relative Sense*, FIVETHIRTYEIGHT BLOG, N.Y. TIMES (Nov. 19, 2012, 11:32 AM), <http://fivethirtyeight.blogs.nytimes.com/2012/11/19/the-2012-election-in-a-relative-sense/>.

290. Rob Richie, *Clashing Mandates and the Role of Voting Structures*, FAIRVOTE (Nov. 20, 2012), <http://www.fairvote.org/clashing-mandates-and-the-role-of-voting-structures/>.

291. *See* Patricia Hart, *Gains for Women in Senate Help Make Our Case for Representation 2020*, FAIRVOTE (Nov. 8, 2012), <http://www.fairvote.org/gains-for-women-in-senate-help-make-our-case-for-representation-2020/>; *supra* note 112 and accompanying text.

292. UNIV. OF ILL., INST. OF GOV'T & PUB. AFFAIRS, ILLINOIS ASSEMBLY ON POLITICAL REPRESENTATION AND ALTERNATIVE ELECTORAL SYSTEMS: EXECUTIVE SUMMARY 15 (2001), available at <http://archive.fairvote.org/op-ed sexecsum.pdf>.

Constitutional Convention, it found a solution to the problem by changing its house of representatives to a body elected in multi-member, three-seat districts, each of which was elected by cumulative voting.²⁹³ The result, according to a 2001 commission report, was more proportional representation by party, more candidate independence from party leaders, and better efforts at statewide consensus—all values that speak well to many Americans' concerns about Congress today.²⁹⁴

FairVote has simulated the likely results of congressional elections for the U.S. House held in multi-member districts that use choice voting ("Fair Voting Plans").²⁹⁵ Under FairVote's proposed system, states would use choice voting to elect between three and five representatives from each district. The result is a U.S. House in which every district in every region elects at least one Republican and one Democrat, reliably reflecting the left, right, and center of each district, and ending the locked-in, safe district races and party polarization characteristic of single-member districts.²⁹⁶

Use of choice voting under a Fair Voting Plan would likely mean greater electoral opportunities for the moderate Democrats and Republicans who fare so poorly in modern elections, especially in the South. In Louisiana, for example, instead of the recurring pattern of polarization by race and party in six single-member districts, five of which safely elect conservative Republicans with the sixth safely electing a liberal Democrat, the state would have two multi-member districts electing three representatives each.²⁹⁷ Each third of the electorate would have the power to

293. *See id.*

294. *See id.* Illinois rescinded the use of this system through an initiative titled the "Cutback Amendment" which was largely advertised as an effort to reduce the size of the legislature by one-third. *Id.* at 16–17. The commission was headed by former Republican Governor Jim Edgar and former Federal Judge Abner Mikva, and the report recommended that Illinois restore non-winner-take-all voting for its House elections. *Id.* at 5, 12–13 (citing the benefits of cumulative voting previously seen, as well as greater voter choice and easier access by candidates).

295. *Fair Voting 2012*, FAIRVOTE, <http://www.fairvote.org/fair-voting-2012#.UKv1aeSA5c0> (last visited Feb. 18, 2013).

296. *See id.* Every district electing at least three members has shared representation; states only allowed one or two representatives do not. *See United States Redistricting & the Fair Voting Alternative*, FAIRVOTE (Oct. 2012), <http://www.fairvote.org/assets/2012-Redistricting/USAFairVotingOnePager.pdf>.

297. *2011 Redistricting and 2012 Elections in Louisiana*, FAIRVOTE (Sept. 2012), <http://www.fairvote.org/assets/2012-Redistricting/>. Although FairVote has generally used exist-

elect a candidate of choice. With African Americans above the threshold of exclusion in both districts, the state would likely elect two preferred African American Democratic candidates, two traditional Republicans, and two candidates reflective of the remaining voters—likely more moderate Republicans able to earn the support of centrist Democrats.²⁹⁸ The result would be a far more accurate reflection of the state.

Similarly, the Massachusetts Fair Voting Plan would create three districts, each with three seats.²⁹⁹ It would likely result in three Republican wins in a state that has not elected a Republican to the U.S. House since 1994, yet still give a clear majority of six seats to Democratic candidates.³⁰⁰ As a group, these legislators would more accurately reflect the diversity of opinion within the state's Democratic voters.

Nationally, these Fair Voting Plans eliminate the partisan skew that currently tilts the electoral playing field in U.S. House elections. Although in constructing the plans FairVote focused only on developing a sensible plan for each state individually, the aggregate totals are revealing. Currently, there are 195 districts that are at least 54% Republican, as compared to only 166 district that are at least 54% Democratic.³⁰¹ The Fair Voting Plans result in a nearly even divide in relatively safe seats for each party, making it much more likely that any party with a national majority preference would earn a majority of seats.³⁰²

From a perspective of minority voting rights, these fair voting plans would have a remarkable impact. For example, in the five

ing district maps and simply erased lines to create multi-member districts, they did create a fair voting multi-member district map for Louisiana from scratch as a demonstration. *Creating a "Perfect" Fair Voting Plan*, FAIRVOTE (Oct. 2012), <http://www.fairvote.org/assets/2012-Redistricting/CreatingLouisianaPlanFromScratch.pdf>.

298. *Creating a "Perfect" Fair Voting Plan*, FAIRVOTE, *supra* note 297.

299. *2011 Redistricting and 2012 Elections in Massachusetts*, FAIRVOTE (Oct. 2012), <http://www.fairvote.org/assets/2012-Redistricting/MARedistrictingAnalysis.pdf>.

300. *Id.*; see BIOGRAPHICAL DIR. OF THE U.S. CONG., <http://bioguide.congress.gov/biosearch/biosearch1.asp> (search "Representative" for "Position," "Massachusetts" for "State," and "Republican" for "Party") (showing the last Republicans' terms ending in 1996) (last visited Feb. 18, 2013).

301. See *Fair Voting Plans Vs. Current House Districts: United States Analysis*, FAIRVOTE (Oct. 2012), <http://www.fairvote.org/assets/2012-Redistricting/USASatePartisanComparison.pdf>.

302. *Id.*

southern states running from North Carolina through South Carolina, Georgia, Alabama, and Mississippi, our proposed fair voting plans put African Americans over or very close to the threshold of exclusion in every multi-seat district in every state.³⁰³ Not only would that likely increase the number of candidates elected with strong African American support from ten to fourteen, but it would also put every single African American voter in these states in a position to elect candidates of choice, more than doubling the number from the current district plans.³⁰⁴ It would do this while maintaining the ability of every white voter to elect candidates of choice and every African American Republican to help elect a like-minded candidate as well.³⁰⁵

ENHANCING AFRICAN AMERICAN VOTING RIGHTS
WITH CHOICE VOTING³⁰⁶

State	Louisiana	Mississippi	Alabama	Georgia	South Carolina	North Carolina
Seats/Superdistricts	6 / 2	4 / 1	7 / 2	14 / 4	7 / 2	13 / 3
Majority-minority Districts (Currently)	1	1	1	4	1	2
Candidates of Choice Under Choice Voting	2	1	2	4	2	3
African American Voting Strength* (Currently)	32%	43%	35%	40%	30%	19%
African American Voting Strength* Under Choice Voting	100%	100%	100%	100%	100%	100%

* Measures percentage of African Americans living in district where power to elect a preferred candidate under conditions of racially polarized voting

This enhanced power can also be true in parts of other states. For example, five white-majority districts lie on the eastern edge of Texas; combining these districts into a single super district using choice voting would permit the election of a racial minority candidate of choice.³⁰⁷ In much of this region, African Americans

303. See Spencer & Richie, *supra* note 218.

304. See *id.*

305. See *id.*

306. *Id.*

307. *Id.*; 2011-2012 Redistricting and Elections in Texas, FAIRVOTE (Sept. 2012), <http://>

make up a sufficient proportion of the population to earn greater legislative representation, but they are not geographically segregated enough to be drawn into majority-minority districts, making a proportional system the only option for breaking past their current ceiling.³⁰⁸

Even in racially polarized states with a population of racial minorities insufficient to gain actual representation, choice voting would guarantee that racial minorities could influence the outcome in a meaningful way. For example, in Arkansas, every congressional district has over 70% white voting population.³⁰⁹ Given that each representative is elected on a winner-take-all basis, it is not surprising that in 2012 every one of its four districts elected a white Republican. With choice voting, racial minorities still would not compose enough of Arkansas' population to elect a candidate of choice with their votes alone, but choice voting gives voters the power to indicate backup choices who can receive your vote if your first choice is defeated.³¹⁰ African American Democrats would have sufficient numbers to influence elections by joining in cross-racial coalitions of voters able to elect at least one candidate more reflective of their policy preferences.³¹¹

Choice voting also addresses one of the uncomfortable realities of courts ordering states and jurisdictions to use single-member districts: more women run and win with multi-member districts.³¹² Today nine in ten southern districts are represented by

www.fairvote.org/assets/2012-Redistricting/TXRedistrictingAnalysis.pdf (Super-District F).

308. U.S. CENSUS BUREAU, U.S. DEPT OF COMMERCE, *THE BLACK POPULATION: 2010*, at 11 (Sept. 2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf>.

309. See *2010 Census Interactive Population Search*, U.S. CENSUS BUREAU, <http://www.census.gov/2010census/popmap/ipmtext.php?fl=01> (last visited Feb. 18, 2013) (showing that each of Arkansas's four congressional districts had over 70% white voting population).

310. Mulroy, *supra* note 10, at 341–42.

311. See *id.*; Rob Richie, *Rigging Democracy*, 37 INST. FOR PUB. AFF. 18, 18–20 (2013); cf. Ruy Teixeira & John Halpin, *The Return of the Obama Coalition: A Demographic Analysis of Election 2012 Results*, CTR. FOR AM. PROGRESS (Nov. 8, 2012), <http://www.americanprogress.org/press/release/2012/11/08/44388/release-the-return-of-the-obama-coalition-a-demographic-analysis-of-election-2012-results/> (discussing the demographics of President Obama's coalition in the 2012 election).

312. See generally Wilma Rule, *Multimember Legislative Districts: Minority and Anglo Women's and Men's Recruitment Opportunity*, in UNITED STATES ELECTORAL SYSTEMS, *supra* note 181, at 57, 67 (concluding that multi-member districts are best for women).

men, and nearly one in six around the nation.³¹³ Research on women's representation shows that when parties nominate more than one candidate in multi-member districts, more women tend to earn nominations and win office.³¹⁴ Traditional winner-take-all district remedies provide a tradeoff between allowing some racial minority representation while limiting opportunities for women.³¹⁵ Fair voting maximizes electoral opportunities for both.

At a time when jurisdictions seem open to reform, but frustrated with disappointing results, fair voting may have an opening to be tried by states.³¹⁶ Most obstacles to achieving such a result, either at the state or federal level, are political.³¹⁷ However, there are certain significant legal questions that arise under any new election system. The rest of this Section demonstrates that both Congress and the states could adopt multi-member legislative elections by choice voting without running afoul of the "one person, one vote" doctrine. It further considers the states in which choice voting has been deemed unconstitutional, noting that these decisions are no longer legally binding and should not be followed. Finally, it calls for repeal of the 1967 law requiring that the U.S. House be elected exclusively from single-member districts, ideally twinned with establishment of independent redistricting commissions, which would be tasked with creating Fair Voting Plans.

B. *One Person, One Vote*

In 1964, the Supreme Court interpreted the Equal Protection Clause of the Fourteenth Amendment to mean that the United States Constitution guarantees that both federal and state legislative districts must be apportioned equally by population.³¹⁸ It

313. *Women in State Legislatures: 2012 Legislative Session*, NAT'L CONFERENCE OF STATE LEGISLATURES (Sept. 17, 2012), <http://www.ncsl.org/legislatures-elections/win/women-in-state-legislatures-2012.aspx>.

314. R. Darcy, *Electoral Barriers to Women*, in UNITED STATES ELECTORAL SYSTEMS, *supra* note 181, at 221, 228.

315. See generally Rule, *supra* note 312, at 62, 64-65.

316. See, e.g., Andrew Spencer, Note, *Cleaning Elections*, 54 ARIZ. L. REV. 277, 287-88 (2012) (noting the limitations of traditional campaign finance reform); Steven Hill, *California Electoral Reform Fails Its First Test*, SACRAMENTO BEE, Nov. 16, 2012, at A17 (noting disappointment with California's attempts at independent redistricting and the "top two" system).

317. See *infra* note 328 and accompanying text.

318. See *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("[T]he Equal Protection Clause

described this requirement as “one person, one vote,” though that definition is misleading in that the Court required representatives to have an equal number of constituents, not an equal number of eligible voters.³¹⁹ These cases mandate that states draw single-member districts such that each contains an approximately equal number of persons, as of the last census, or multi-member districts such that each has an equal ratio of persons to representatives.³²⁰

This specific mandate falls well short of equal voting power. It fails to take into account variable turnout rates between districts, proportions of disenfranchised persons living in the districts, and mobility among districts between census years.³²¹ The mandate did improve equality of voting power by forbidding states from creating some districts with very low populations and some with very large populations.³²² However, no rule could guarantee equal voting power among everyone within the paradigm of winner-take-all elections.

The use of choice voting complies with the “one person, one vote” constitutional requirement so long as each fair voting district contains the same number of persons per representative. Even though some districts may have greater populations than others, each person will have the same influence in the election in terms of voting strength.³²³ When elections are done at-large, usu-

requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.”); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964) (noting that the Constitution guarantees roughly “equal representation for equal numbers of people”).

319. *Gray v. Sanders*, 372 U.S. 368, 381 (1963); see *White v. Regester*, 412 U.S. 754, 764, 766 (1973). For example, voters in multi-member districts may have more votes than voters in single-seat districts without violating the “one person, one vote” principle. See *Whitcomb v. Chavis*, 403 U.S. 124, 142–43 (1971) (noting that the combined use of multi-member and single-seat districts does not violate equal protection concerns).

320. See *Whitcomb*, 403 U.S. at 142–43. (“That voters in multi-member districts vote for and are represented by more legislators than voters in single-member districts has so far not demonstrated an invidious discrimination against the latter.”).

321. For instance, the mandate has thus far failed to put an end to the practice of “prison-based gerrymandering,” wherein a rural jurisdiction containing a prison receives elevated representation due to its prison population, notwithstanding that the prisoners may not have the legal right to vote. See generally Peter Wagner, *Breaking the Census: Redistricting in an Era of Mass Incarceration*, 38 WM. MITCHELL L. REV. 1241, 1242–45 (2012) (discussing the concept and effect of prison-based gerrymandering).

322. See generally *Wesberry*, 376 U.S. at 3 (noting that one district’s population was “grossly out of balance”).

323. *Whitcomb*, 403 U.S. at 142–43.

ally in smaller jurisdictions, the mandate does not even apply, as it only refers to districts.³²⁴

In fact, choice voting furthers the goals of the Court's mandate much better than single-member districts. By putting multiple candidates within a single, larger legislative district, choice voting plans guarantee that within those districts, each candidate will compete for exactly the same threshold of votes and, ultimately, represent almost exactly the same number of voters. If turnout rates or population demographics change, the number of seats available can be adjusted without redistricting, and the threshold will adapt, as it is based entirely on the number of seats available.

C. *Constitutionality of Choice Voting in States*

In the early twentieth century, a number of jurisdictions throughout the U.S. adopted choice voting, mainly for city council and other local positions.³²⁵ These included nearly two-dozen cities, including Cleveland, Cincinnati, Sacramento, and, at a time when the city's population was larger than most states, New York City.³²⁶ From those cities, only Cambridge, Massachusetts has retained the system to the present day.³²⁷ Most repealed choice voting for political reasons, motivated by discomfort with the election of racial or political minorities.³²⁸ Political parties largely opposed it as it took away the control they had previously held over party nominations.³²⁹ But in a few states, the system was held unconstitutional by state courts.³³⁰

Several states' constitutions contained a provision guaranteeing to voters the right to vote for all offices in their districts or ju-

324. See *Colegrove v. Green*, 328 U.S. 549, 574 (1946) (Black, J., dissenting) (noting that the use of at-large elections "gives all the people an equally effective voice in electing their representatives").

325. Reyes, *supra* note 154, at 674-76 (reviewing the history of the use of the single transferable vote in U.S. cities).

326. *Id.* at 674 & n.144.

327. *Id.* at 675.

328. New York City, for example, repealed the system after the successful election of some representatives from the Communist Party. Reyes, *supra* note 154, at 675 & n.158.

329. *Id.* at 675.

330. See, e.g., *Devine v. Elkus*, 211 P. 34, 39 (Cal. Ct. App. 1922); *Wattles v. Upjohn*, 179 N.W. 335, 342 (Mich. 1920); *Brown v. Smallwood*, 153 N.W. 953, 957 (Minn. 1915).

risdictions.³³¹ These provisions forbade localities from establishing different classifications of voters based on some characteristic.³³² For example, these provisions would forbid limiting school board elections to only those who have children. However, when cities within some of these states adopted choice voting, an argument was made that the choice voting system itself violates the provision.³³³ The plaintiffs argued that in an at-large election, every seat to be filled is a different office.³³⁴ Consequently, to allow voters to vote for every office requires that all voters be able to cast a number of votes equal to the number of offices to be filled; in other words, the provision requires that all at-large elections be held by the winner-take-all, general ticket method.³³⁵

Courts in Ohio, Massachusetts, and New York explicitly rejected these challenges³³⁶ while courts in Michigan and California accepted them,³³⁷ and the Rhode Island Supreme Court followed suit in an advisory opinion.³³⁸ The constitutional language the California court interpreted has since been removed from the California Constitution, as has the language from the Michigan Constitution, so those cases have been effectively superseded, rendering them irrelevant.³³⁹ Elections at the time had a different character, with winner-take-all, at-large elections still having some degree

331. In Ohio, the relevant provision stated that every elector was "entitled to vote at all elections." *Reutener v. City of Cleveland*, 141 N.E. 27, 32 (Ohio 1923). In Massachusetts, it stated that all electors "have an equal right to elect officers." *Moore v. Election Comm'rs of Cambridge*, 35 N.E.2d 222, 230 (Mass. 1941). In Michigan, it stated that each elector "shall be entitled to vote at all elections." *Wattles*, 179 N.W. at 341. In New York, it stated that each elector "shall be entitled to vote at such election in the election district of which he or she shall at the time be a resident . . . for all officers that now are or hereafter may be elective by the people." *Johnson v. City of New York*, 9 N.E.2d 30, 33 (N.Y. 1937). In California, it stated that every qualified elector "shall be entitled to vote at all elections which are now or may hereafter be authorized by law." *Devine*, 211 P. at 35. The Rhode Island Constitution gave all electors "a right to vote in the election of all civil officers." *Op. to the Gov.*, 6 A.2d 147, 149 (R.I. 1939).

332. See *supra* note 331.

333. See, e.g., *Devine*, 211 P. at 39.

334. See, e.g., *id.* at 35 ("The election of nine members of the city council is the election of persons to nine offices. . .").

335. See *Op. to the Gov.*, 6 A.2d at 150 ("[T]he act accords to the elector only one effective vote for only one such councilman. Manifestly there are eight other elective officers under the act, in the election of whom the electors are deprived of a vote.").

336. *Moore*, 35 N.E.2d at 241; *Johnson*, 9 N.E.2d at 38; *Reutener*, 141 N.E. at 32-34.

337. *Devine*, 211 P. at 39; *Wattles v. Upjohn*, 179 N.W. 335, 342 (Mich. 1920).

338. *Op. to the Gov.*, 6 A.2d at 149, 153.

339. See MICH. CONST. art. II; CAL. CONST. art. II.

of support in local jurisdictions.³⁴⁰ Given the degree to which law has changed since the early twentieth century, modern courts are likely to avoid the errors of these early opinions. Indeed, the Massachusetts Supreme Court unanimously rejected a challenge to choice voting in 1996, as did the Minnesota Supreme Court in 2009.³⁴¹

D. *Federal Mandate for Single-Seat Congressional Elections*

As mentioned in Section I of this article, Congress first passed a mandate that every state elect its congressional delegation from single-seat districts in 1842.³⁴² However, this mandate often went unenforced and officially lapsed when the 1929 reapportionment law did not affirm it.³⁴³ In 1967, Congress reimplemented this mandate based on fears that Supreme Court redistricting jurisprudence would lead states to adopt at-large, winner-take-all elections.³⁴⁴ Congress was also motivated by concerns over the effects such elections would have on racial minorities and civil rights—in other words, Congress sought to protect diversity of representation, not to prohibit it.³⁴⁵

However, now that Section 2 forbids states from adopting electoral methods that would diminish the relative voting power of racial minorities, those concerns are largely addressed by federal law.³⁴⁶ Any state adopting at-large or multi-member systems for its congressional election likely would have to use some non-winner-take-all method—ideally choice voting—in order to avoid Section 2 liability.³⁴⁷

Underscoring this point is congressional testimony from 1999, when Representative Melvin L. Watt of North Carolina introduced the States' Choice of Voting Systems Act, which would

340. See Flores, *supra* note 2, at ch. 4.

341. *McSweeney v. City of Cambridge*, 665 N.E.2d 11, 17 (Mass. 1996); *Minn. Voters Alliance v. City of Minneapolis*, 766 N.W.2d 683, 698 (Minn. 2009).

342. See *supra* note 33 and accompanying text.

343. See *Wood v. Broom*, 287 U.S. 1, 8 (1932).

344. Flores, *supra* note 2, at ch. 4.

345. *Id.*

346. See *supra* note 54 and accompanying text.

347. See *supra* notes 55–57 and accompanying text.

have repealed the 1967 single-member district mandate.³⁴⁸ During the congressional hearings on the bill, Anita Hodgkiss gave testimony on behalf of the Department of Justice, Civil Rights Division, to the effect that allowing states to elect their congressional delegations through multi-member districts would not have a diluting effect on the votes of racial minorities so long as those states had to conduct their elections in a way consistent with the VRA.³⁴⁹

Furthermore, as FairVote has noted, Congress could *require* that states use choice voting along with multi-member districts, just as they required winner-take-all, single-seat elections in 1967.³⁵⁰ The best vehicle would be to adapt legislation, such as the John Tanner Fairness and Independence in Redistricting Act,³⁵¹ to establish independent redistricting commissions, which could create Fair Voting Plans for choice voting elections in districts with between three and five seats. Given the current political crisis of party polarization, often with a racial dimension, the underrepresentation of women, the lack of competition in single-member districts, and the distorted partisan representation of those districts, Congress would have strong incentives to do so.

V. CONCLUSION

The promise of a U.S. House serving as a “mirror of the people” has remained out of grasp, and state and local bodies have not fared much better.³⁵² The shift from winner-take-all, at-large, and multi-member elections to single-seat districts succeeded in avoiding slate elections for huge areas.³⁵³ However, the use of the single-seat district as a talisman has come at a cost. It should be revisited both by courts that have wrongly focused only on single-member districts as voting rights remedies, jurisdictions required

348. See States' Choice of Voting Systems Act, H.R. 1173, 106th Cong. (1999).

349. See *States' Choice of Voting Systems Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 106th Cong. 48 (1999) (statement of Anita Hodgkiss, Deputy Assistant Att'y Gen., Civil Rights Div., U.S. Dept. of Justice).

350. *The Law and Fair Voting for Congress: Five Questions Grounded in American History and Law*, FAIRVOTE (Oct. 2012), available at <http://www.fairvote.org/assets/2012-Redistricting/FairVotingLawFiveQuestions.pdf>.

351. H.R. 278, 113th Cong. (1st Sess. 2013).

352. See *supra* Section I.C.

353. See *supra* Section I.

by law to change their winner-take-all systems, and policymakers structuring our voting rules.

As racial polarization remains an enduring feature of American elections, as women continue to hold fewer than 20% of congressional seats and fewer than 25% of state legislature seats, and as party polarization plagues civic activities resulting in gridlock and cynicism, reformers should look to alternatives for some hope.³⁵⁴ Scholars of political science have long suggested fair voting systems such as choice voting as just such an alternative.³⁵⁵ Organizations like FairVote continue to suggest concrete examples of how these reforms could be put into action in ways that are modest, constitutional, and distinctly American.

However, legal roadblocks remain in the way. Judges and lawyers must be willing to see beyond the use of single-seat districts when interpreting legislation that requires minority representation, such as the VRA. Legal scholars can lead the way in proposing new legislation and legal paradigms, such as state Voting Rights Acts and novel legal theories leading toward more flexibility in choice of election system. Legislators must look beyond the electoral system in which they themselves have had to work in order to achieve a legislative body that will break up the patterns of polarization and better represent the left, right, and middle of their jurisdictions.

As John Stuart Mill said in advocating choice voting in 1861, "It is an essential part of democracy that minorities should be adequately represented. No real democracy, nothing but a false show of democracy, is possible without it."³⁵⁶ Choice voting, though still unfamiliar to many outside of those already interested in electoral reform, has an illustrious history in the United States. We expect it will have an even more illustrious future.

354. See *supra* Section I.

355. See generally Briffault, *supra* note 237 (reviewing the career of Lani Guinier in advocating for proportional systems to promote racial minority representation); Engstrom, *supra* note 262 (recommending the single transferable vote as an alternative remedy for minority vote dilution).

356. JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 137-38 (1861).