Current Topics in Law and Policy

The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal

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The Voting Rights Act of 1965[1] was passed to ensure that all Americans would be able to participate in the political process free from discrimination on the basis of race or color.[2] In a series of decisions beginning with *South Carolina v. Katzenbach,*[3] the federal courts upheld and implemented the rights established by the Act. Initially, courts were primarily called upon to dismantle discriminatory restrictions on voter registration and balloting procedures.[4] Over time, the courts' efforts shifted to the elimination of gerrymandering schemes that "diluted" the political power of geographically concentrated minority communities.[5] In 1982, amendments to the Voting Rights Act expanded the availability of relief under the Act by eliminating the requirement that plaintiffs alleging vote dilution demonstrate discriminatory intent.[6] Today, the Voting Rights Act remains an important source of legal protection for minority voters who face barriers to political empowerment.

Current voting rights jurisprudence, however, prevents courts from fully achieving the goals of the 1982 amendments to the Voting Rights Act. In *Thornburg v. Gingles,*[7] the Supreme Court held that vote dilution can be

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1. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

2. This Article primarily addresses the voting rights and political power of racial and ethnic minorities, but the arguments developed here can be applied to situations involving political or ideological minorities as well.

3. 383 U.S. 301 (1966) (holding that enactment of the Voting Rights Act of 1965 did not exceed the powers of Congress).

4. *See, e.g.*, Guinn v. United States, 238 U.S. 347 (1915) (holding grandfather clauses unconstitutional); Smith v. Allwright, 321 U.S. 649 (1944) (holding that the rules of the Democratic Party of Texas excluding Blacks from voting in the primaries violated the Fifteenth Amendment); Louisiana v. United States, 380 U.S. 145 (1965) (holding that an "interpretation test" was an unconstitutional device to deprive Blacks of the right to vote).

5. The term "vote dilution" refers to the effect of a voting scheme that diminishes minority voting strength and potential participation in the political process. *See* McNeil v. Springfield Park Dist., 851 F.2d 937, 938 n.1 (7th Cir. 1988), *cert denied,* 109 U.S. 1769 (1989). *See generally* MINORITY VOTE DILUTION (Chandler Davidson ed. 1984).

6. Pub. L. No. 97-205, 96 Stat. 131 (1982) (codified as amended at 42 U.S.C. § 1973 (1988)).

7. 478 U.S. 30 (1986) (plurality opinion).

shown only where a politically cohesive minority community is capable of constituting a majority in a single-member district.[8] Under *Gingles*, courts can remedy vote dilution only by creating "safe" minority seats in single-member districts with high minority concentrations.[9] Because the *Gingles* "ability to elect" threshold requirement makes geographic compactness an essential element of a vote dilution claim,[10] the courts have prevented dispersed minority communities from obtaining any protection under section 2. In effect, the Court has made residential segregation a prerequisite to the protection of rights established by the Voting Rights Act.[11]

By adopting the requirement of geographic compactness, the *Gingles* decision has placed the political empowerment goals of the Voting Rights Act in conflict with another important goal of the civil rights movement: integration. The integration ideal was established by the federal courts in *Brown v. Board of Education*[12] and strengthened by legislation such as the Civil Rights Act of 1964[13] and the Fair Housing Act of 1968.[14] This ap-

8. The *Gingles* test requires plaintiffs alleging vote dilution to meet an "ability to elect" standard, which requires a showing that the minority community is politically cohesive, geographically compact, and numerous enough to constitute a voting majority in a single-member district. *Id.* at 66-67. This threshold test has been developed and applied by lower courts. *See, e.g.*, Westwego Citizens for Better Gov't v. City of Westwego, 872 F.2d 1201 (5th Cir. 1989); McGhee v. Granville County, N.C., 860 F.2d 110 (4th Cir. 1988); *McNeil*, 851 F.2d 937. *But see* Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert. denied*, 111 S. Ct. 681 (1991) (distinguishing the *Gingles* case so that the test would not apply). Courts have found the "ability-to-elect" essential to vote dilution claims. They will grant summary judgement against plaintiffs who fail to meet the "ability to elect" standard. *See* Frank R. Parker et al., *Section 2 Litigation After* Thornburg v. Gingles, *in* LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, VOTING RIGHTS CONFERENCE HANDBOOK 8 (1990) (on file with author).

9. A "safe" district is a district that has been designed to ensure the election of a representative of a cohesive political group. The rule of thumb applied in drawing safe districts is that a 65% total minority population in a district is necessary to create a safe seat for the minority group. The 65% figure represents a 5% enhancement for lower minority voting age population, 5% for lower minority registration rates, and 5% for lower minority turnout rates. *See* James Blacksher, *Drawing Single Member Districts to Comply with the Voting Rights Amendments of 1982*, 17 URB. L. 347, 357 (1985). The racial composition of a jurisdiction is believed to be the strongest single indicator of black electoral success. For example, there are 24 Blacks in the U.S. House of Representatives in 1991. Of these, 15 were elected from districts with a Black majority and another seven were elected from districts in which Blacks and Hispanics formed a majority. *See* William P. O'Hare et al., *African Americans in the 1990s*, POPULATION BULLETIN, July 1991, at 35. *But see* United Jewish Org. v. Carey, 430 U.S. 144, 186-87 (1977) (Burger dissenting) (arguing that safe-districting "tends to sustain the existence of ghettos by promoting the notion that political clout is to be gained or maintained by marshaling particular racial, ethnic, or religious groups in enclaves.").

10. In addition to showing its ability to elect, a minority alleging vote dilution must also show that its "preferred candidates" are defeated in elections as a result of racial bloc voting. *Gingles*, at 66-67. *See generally* Sushma Soni, Note, *Defining the Minority-Preferred Candidate Under Section 2 of the Voting Rights Act*, 99 YALE L.J. 1651 (1990).

11. S. REP. NO. 417, 97th Cong., 2d Sess. 150-51 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 322-23 (arguing that the proscription of race-based proportional representation will encourage residential segregation).

12. 347 U.S. 483 (1954) (holding that racial segregation in public schools is unconstitutional).

13. Pub. L. No. 88-352, §§ 201-401, 78 Stat. 241, 243-49 (codified as amended at 42 U.S.C. §§ 2000(a)-2000(c) (1988)) (prohibiting discrimination in places of public accommodation, in public facilities, and in public education).

14. Pub. L. No. 90-282, 82 Stat. 81, 42 U.S.C. §§ 3601-3631 (1988) (prohibiting discrimination in public and private housing).

proach committed the federal government to dismantling the legal foundations of racial segregation.[15] Today, legally sanctioned segregation has been eliminated, but segregation still persists in residential patterns and substantially undermines efforts to integrate public education.[16] This connection between residential segregation and educational integration has been a central issue in recent educational integration cases.[17] By making residential segregation a prerequisite for vote dilution remedies, the *Gingles* decision has created a direct conflict between voting rights and the integration ideal.

This Article examines the approach to voting rights established by *Gingles*. Part I argues that the *Gingles* approach not only falls short of the political empowerment goals established by the Voting Rights Act but also conflicts with the integration ideal established under *Brown*. Part II argues that courts should eliminate compactness as a required element in vote dilution claims and consider adopting remedies other than single-member districting plans in

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15. After its decision in *Brown*, the Supreme Court issued a series of decisions aimed at dismantling the legal structure of state-sanctioned segregation. *See, e.g.*, Gayle v. Browder, 352 U.S. 903 (1956) (invalidating segregation on buses); State Athletic Comm'r v. Dorsey, 359 U.S. 533 (1959) (invalidating segregation in athletic contests); Turner v. City of Memphis, 369 U.S. 350 (1962) (invalidating segregation in public restaurants); Schiro v. Bynum, 375 U.S. 395 (1964) (invalidating segregation in public auditoriums).

16. Racial discrimination in housing is prohibited by the Fair Housing Act of 1968, 42 U.S.C. §§ 3601-3631 (1982). Nevertheless, residential segregation remains widespread. According to preliminary analysis of 1990 census data, "there was little, if any, reduction in residential segregation of Blacks during the 1980s." *Segregation by Stealth*, ECONOMIST, April 13, 1991, at 31. *See also* A COMMON DESTINY: BLACKS AND AMERICAN SOCIETY 140-46 (Gerald David Jaynes & Robin M. Williams, Jr. eds. 1989) (providing evidence that Blacks of every economic level are residentially segregated from Whites of similar economic levels). Urban and suburban Blacks and Whites "typically live in different neighborhoods, regardless of their income levels or poverty status. Black Americans remain the most residentially isolated US [sic] minority group. Hispanics and Asians are much more likely to live near each other or non-Hispanic Whites than Blacks. William P. O'Hare, *Demographic Change in the Black Population*, *in* REDISTRICTING IN THE 1990S: A GUIDE FOR MINORITY GROUPS 17 (William P. O'Hare ed. 1989) [hereinafter REDISTRICTING IN THE 1990S]. *See also* O'Hare, *supra* note 9, at 9. Courts have typically used residential segregation as an indicator of segregation in public schools. *See* Bradley v. Milliken, 338 F. Supp. 582 (E.D. Mich. 1971), *rev'd on other grounds*, 418 U.S. 717 (1974) (noting that racially segregated residential patterns interact with racial segregation in public schools); *see generally* Robert R. Harding, Note, *Housing Discrimination as a Basis for School Desegregation Remedies*, 93 YALE L.J. 340 (1983).

17. While courts have found that residential segregation violates constitutional and statutory protections only where it reflects a conscious government policy, courts have also recognized that the existence of residential segregation—whatever its cause—inhibits the integration of public schools. In one case, the Second Circuit required the city of Yonkers to end its practice of concentrating public housing in or near neighborhoods with high concentrations of minority residents. The court found that 96.6% of low-income housing, and all of the sites approved by Yonkers for low-income subsidized housing, were in or near neighborhoods with high percentages of minority residents. United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1185-86 (2d Cir. 1987), *cert denied*, 486 U.S. 1055 (1988). The Second Circuit addressed a similar issue in an earlier case, in which it held that a county's decision to abandon a plan to build family housing lacked discriminatory effect or discriminatory motive and did not violate the Constitution or the Fair Housing Act. Acevedo v. Nassau County, 500 F.2d 1078 (2d Cir. 1974). In contrast to the Yonkers case, the county government in Acevedo had not designed and implemented a conscious strategy of constructing low-income housing projects in a segregative manner. *Id.* at 1081 n.3. The Supreme Court has also recognized the connection between residential and educational integration, but the Court has refused to find any legal violation where residential segregation reflected individual choices rather than government policy. *See* Board of Educ. of Oklahoma City Public Schools v. Dowell, 111. S. Ct. 630 (1991).

response to claims made by dispersed racial and ethnic minorities. Part II then proposes and evaluates an alternative voting scheme based upon the single transferable vote (STV). This article recommends that courts approve plans based on the STV voting system in a limited range of cases: namely, cases in which vote dilution has resulted not from discriminatory gerrymandering but rather from the residential dispersion of minority voters.[18]

I. PROTECTION OF VOTING RIGHTS UNDER SECTION 2 AND *GINGLES*

A. *1982 Amendments to Section 2 of the Voting Rights Act*

Section 2 of the Voting Rights Act originally prohibited only voting practices that had been imposed with discriminatory intent.[19] Because intent was often difficult to prove, plaintiffs who sought to challenge vote dilution schemes frequently relied on constitutional grounds. The Supreme Court was initially receptive to this approach, and issued a series of rulings that found voting systems unconstitutional without requiring proof of discriminatory intent.[20] This receptive attitude toward vote dilution claims changed in 1980, with the Court's decision in *City of Mobile v. Bolden.*[21] In *Mobile,* the Court held that a demonstration of vote dilution required proof that the challenged voting plan was implemented with discriminatory intent.[22]

The *Mobile* decision posed a significant barrier to successful vote dilution

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18. Although this Article will focus primarily on the remedial powers of the courts, local legislative bodies on their own initiative could investigate alternatives to single-member districting systems. Legislative bodies generally have broader discretion to implement innovative voting systems. *See infra* note 65.

19. The original language in section 2 prohibited voting practices that were imposed or applied "to deny or abridge the right of any citizen of the United States to vote on account of race or color . . . ." Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437, 437.

20. *See, e.g.,* Whitcomb v. Chavis, 403 U.S. 124 (1971); White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.*, East Carrol School Bd. v. Marshall, 424 U.S. 636 (1976). These decisions evaluated the constitutionality of challenged voting schemes by considering the "results," "impact," or "totality of the circumstances." While the decisions did not expressly find that a showing of discriminatory intent was never necessary to a finding of vote dilution, the Court applied these tests in a manner that allowed minorities to prove vote dilution without proving that the dilution was intended. *See* Armand Derfner, *Vote Dilution and the Voting Rights Act of 1982, in* MINORITY VOTE DILUTION, *supra* note 5, at 145, 147-49.

21. 446 U.S. 55 (1980) (plurality opinion). *See generally* James Blacksher & Larry Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Commandeered the Fifteenth Amendment?,* 34 HASTINGS L.J. 1 (1982). The development of the definition of minority political participation before *Mobile* is discussed in Kathryn Abrams, *Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act,* 63 N.Y.U. L. REV. 449, 453-57 (1988).

22. 446 U.S. at 66, 70. The Court based its decision on a line of cases holding that violations of the Equal Protection Clause require proof of discriminatory intent. *See* Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (holding that intent to discriminate must be proven in challenge to refusal to rezone an area for integrated low-income housing); Washington v. Davis, 426 U.S. 229 (1976) (holding that intent to discriminate must be proven in challenge to test given to city personnel). Following *Mobile,* the Court relaxed its position somewhat by holding that the discriminatory effects of an electoral districting scheme could support an inference of intentional discrimination. *See* Rogers v. Lodge, 458 U.S. 613, 618 (1982).

suits by minority groups. To remove the intent barrier created by *Mobile,* Congress amended the Voting Rights Act in 1982. The amended statute prohibited any voting practice that operated "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ."[23] The amendment was intended to create a statutory basis for the same rights that plaintiffs had enjoyed on constitutional grounds under the pre-*Mobile* "results test," and thereby to allow minorities to prove vote dilution without meeting the higher "intent" standard.[24]

Although the 1982 amendments did reinstate the "results test" in vote dilution cases, the amendments contained an important limitation. In a compromise reached to secure passage of the amendments,[25] the drafters of the legislation included a disclaimer providing that nothing in section 2 would create "a right to have members of a protected class elected in numbers equal to their proportion in the population."[26] This disclaimer creates a basic tension within section 2 between the objectives of the Act and the restrictions imposed by the disclaimer on the judiciary. To determine whether or not vote dilution has occurred, courts must consider the size of the minority, the minority's proportion in the population, and the success of minority-supported candidates.[27] Yet the statute appears to prohibit the judiciary from directly imposing proportional representation voting systems as remedies for vote dilution. The remainder of this Part examines the way in which the Court has sought to resolve this dilemma, and argues that the Court should have done so differently.

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23. As amended, section 2 of the Voting Rights Act provides in pertinent part:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of the right of any citizen* of the United States to vote on account of race or color . . . as provided in subsection (b) of this section.
> (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to *participate in the political process* and to *elect representatives of their choice.* 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.*

42 U.S.C. § 1973 (1982) (emphasis added) [hereinafter section 2].

24. *See* S. REP. NO. 417, *supra* note 11, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. 205-07; *see also supra* notes 20 and 22.

25. S. REP. NO. 417, *supra* note 11, at 193-95, *reprinted in* 1982 U.S.C.C.A.N. 363-66.

26. *See supra* note 23.

27. *See supra* note 8.

B. *Interpretation of Section 2 in the* Gingles *Decision*

The 1982 amendments to section 2 of the Voting Rights Act[28] require courts to ensure that all voters in a political subdivision have an equal opportunity to (1) "participate in the political process" and (2) "elect representatives of their choice."[29] The Supreme Court first interpreted these requirements of section 2 in *Thornburg v. Gingles.*[30] The *Gingles* decision assured minority communities of some protection against vote dilution, but the decision limited this protection in two ways. First, the *Gingles* decision made it difficult for residentially dispersed minorities to demonstrate vote dilution and obtain relief. As a result, the Court effectively limited the scope of the section 2 protections to minorities who happen to live in the same residential communities. In addition, the *Gingles* decision neglected the distinction between the two stated goals of the amended section 2: the court focused exclusively on the creation of "safe" districts that would allow minorities to elect representatives of their choice, but failed to provide any protection for the other forms of participation by minorities in the political process.[31]

1. *Protection of Electoral Power of Dispersed Minorities.* The decision in *Gingles* makes it difficult for residentially dispersed minorities to obtain a remedy for vote dilution because it requires residential compactness as an element of a showing of vote dilution under section 2. The Court held that minority voters can prove injury under an existing voting scheme only if they can show that they would have a "potential to elect"[32] representatives of their choice if district lines were drawn differently.[33] Under the *Gingles* standard, therefore, a minority population cannot obtain relief if it is dispersed in a manner that makes drawing a "safe" single-member district impossible—for example, if the minority community is residentially integrated or living in

28. *See supra* note 23.

29. *See supra* notes 10 and 23.

30. 478 U.S. 30 (1986) (plurality opinion).

31. The courts' emphasis on registration and voting patterns has caused voting scholarship to focus almost exclusively on two aspects of black political participation: voting patterns and the election of black officials. *See supra* note 4. Although these aspects are important, this narrow focus seriously neglects other forms of political participation protected under section 2 of the Voting Rights Act. For criticism of the tendency to neglect forms of political participation other than voting, see Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1079 (1991) (arguing that "contemporary preoccupation with black electoral success stifles rather than empowers black participation"); JAMES W. BUTTON, BLACKS AND SOCIAL CHANGE 15 (1989) (arguing that the preoccupation with electoral success is a shortcoming of studies on black political participation in the South).

32. 478 U.S. at 50-51 n.17 ("Unless minority voters possess the *potential to elect* representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that practice.") (emphasis added).

33. *See* Abrams, *supra* note 21, at 468.

geographically dispersed pockets or enclaves.[34]

The Court adopted this narrow definition of vote dilution in *Gingles* because it interpreted section 2 as containing a broad ban on all forms of "proportional representation" as remedies for vote dilution. In effect, the Court reasoned that the apparent statutory limitation on its remedial power allowed it to find vote dilution only in situations that could be effectively remedied by single-member districting. This aversion to granting express proportional representation remedies did not, however, prevent the Court from employing a definition of vote dilution based primarily on proportional representation principles. As Justice O'Connor observed in her concurrence, the Court's decision in *Gingles* used proportionality as an implicit standard for deciding whether vote dilution had occurred and how it should be remedied. Justice O'Connor argued that the Court adopted

> a test, based on the level of minority electoral success, for determining when an electoral scheme has sufficiently diminished minority voting strength to constitute dilution . . . . [A]lthough the Court does not acknowledge it expressly, the combination of the Court's definition of minority voting strength and its test for vote dilution results in the creation of a right to a form of proportional representation in favor of all geographically and politically cohesive minority groups that are large enough to constitute majorities if concentrated within one or more single-member districts.[35]

Because the plan approved in *Gingles* aimed to achieve at least rough proportionality in overall election results, it might seem that even this single-member districting remedy would violate the statutory prohibition against proportional representation. Addressing this potential objection, Justice O'Connor argued that the Court's ruling simply reflected a contradiction within section 2 itself. She observed that the statute contains

> an inherent tension between what Congress wished to do and what it wished to avoid, because any theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large.[36]

The Court's reversal of one aspect of the district court's decision further reflects its reliance on proportional considerations. The district court had found evidence of discrimination in an election district that over the preceding six years had elected nearly proportional numbers of minority-supported candidates. The Court reversed the district court, holding that the court had erred by

> ignoring the significance of the *sustained* success black voters have experienced

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34. In the *Gingles* decision, the Court refused to consider whether section 2 permits "a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to influence elections." 478 U.S. at 46-47 n.12. Despite this disclaimer, the substance of the Court's holding in this case has presented an effective barrier to vote dilution suits brought by dispersed minorities.

35. 478 U.S. at 84-85 (O'Connor, J., concurring).

36. *Id.* at 84 (O'Connor, J., concurring).

> in House District 23. In that district, the last six elections have resulted in proportional representation for black residents. This persistent proportional representation is inconsistent with . . . [the] allegation that the ability of black voters in District 23 to elect representatives of their choice is not equal to that enjoyed by the white majority.[37]

In her concurrence, Justice O'Connor agreed that "consistent and sustained success by candidates preferred by the minority voters is presumptively inconsistent with the existence of a section 2 violation."[38] She added that

> I do not propose that consistent and virtually proportional minority election success should always . . . bar finding a § 2 violation. But, as a general rule, such success is entitled to great weight in evaluating whether a challenged electoral mechanism has, on the totality of the circumstances, operated to deny black voters an equal opportunity to participate in the political process and to elect representatives of their choice.[39]

In the *Gingles* decision, the Court resolved the tension between the conflicting demands of section 2 by shrinking the definition of vote dilution to fit the remedies that it believes section 2 permits. The Court apparently found that this resolution represented an unfortunate but necessary compromise required by a basic conflict within the statute. But the limits imposed by section 2 on the courts' remedial powers may not be as strict as the Court assumed in *Gingles*. As this article will argue in part II, the disclaimer in section 2 may actually permit a range of remedial schemes that extends beyond single-member districts and at-large elections. Courts may be able to eliminate vote dilution schemes that affect dispersed minorities by employing a version of proportional representation that reflects the proportional considerations required by section 2 without violating the disclaimer that section 2 also imposes.

2. *Protection of "Political Participation" Interests.* Although the Supreme Court may have intended its decision to apply only to the facts presented in the case, *Gingles* threatens to narrow the concept of "political participation" to electoral success.[40] In *Gingles*, the Court addressed only the barriers to minorities' electoral success and ignored the barriers that impair other forms of political participation. In its decision, the Court stated:

> The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters *to elect their preferred representatives.*[41]

Because it interpreted section 2 as a protection of electoral power alone, the Court relied exclusively on the practice of drawing district lines to ensure

37. *Id.* at 77. Justice Stevens filed a dissenting opinion on this issue, which Justices Marshall and Blackmun joined. *Id.* at 106.

38. *Id.* at 102 (O'Connor, J., concurring).

39. *Id.* at 104 (O'Connor, J., concurring).

40. *See* Abrams, *supra* note 21, at 450-53.

41. 478 U.S. at 47 (emphasis added).

representation through "safe" minority seats.[42] But like all political groups, minorities can accomplish important political objectives by engaging in activities other than voting. These include, for example, activities such as political discussion, lobbying, and coalition-building. Each of these crucial elements of political efficacy is protected by section 2, which guarantees minorities an equal opportunity not only to "elect representatives of their choice," but also to "participate in the political process."[43]

The narrow reading of section 2 adopted by the Court in *Gingles* runs counter not only to the express language of section 2 but also to the apparent intent of Congress. In the legislative history of the 1982 amendments to section 2, there is evidence that Congress intended the statute to proscribe any system that "results in minorities being denied equal access to the political process."[44]

C. *The Impact of* Gingles: *Experience in the Lower Courts*

Several lower courts have attempted to apply the *Gingles* decision to vote dilution claims brought by dispersed minorities. Because *Gingles* indicated that courts could only approve single-member districts or at-large plans, dispersed minorities have generally not requested remedies that involve any other type of voting system. Instead, dispersed minorities have asked courts to impose single-member districts or at-large voting plans that give the minorities an "ability to influence" electoral outcomes. A Louisiana district court has held that a minority unable to establish that it would constitute a majority in a proposed single-member district is nevertheless entitled to relief allowing the minority group an increased opportunity to influence elections.[45] The Seventh Circuit, however, has held in a more recent case that *Gingles* does not allow courts to grant relief for dispersed minorities who claim an "ability to influence" electoral outcomes.[46]

The difficulties of the *Gingles* approach have become especially clear in cases involving both a dispersed minority community and a compact minority community.[47] In one such case, *Wise v. Lipscomb*,[48] Black plaintiffs brought

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42. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 174 (1989) (offering an interpretation of amended section 2 based on the value of Black civic inclusion in both the electoral and governing processes).

43. *See supra* note 23.

44. *See supra* note 24.

45. East Jefferson Coalition v. Parish of Jefferson, 691 F. Supp. 991, 1005-1008 (E.D. La. 1988).

46. McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1991).

47. These difficulties are becoming more widespread, and they are drawing increasing attention in the press. *See* Ginny Carroll, *Hispanics vs. Blacks in Houston*, TIME, Jan. 14, 1991, at 22 (discussing the tensions between Black and Hispanic voters in Houston and observing that these tensions are similar to those in Dallas; noting that it is easier to draw "safe" seats for Blacks than for Hispanics; because in Houston, the Black population is concentrated in a few areas in the city, while Hispanic neighborhoods

a vote dilution claim under section 2 against an at-large voting scheme established by the city charter of Dallas, Texas. As a remedy, the plaintiffs asked that the court impose a single-member districting scheme that would establish "safe" seats for black candidates.

At this remedial stage, however, a group of Mexican-American voters intervened and requested that the court preserve the at-large elections. Because the Mexican-Americans were residentially dispersed,[49] they decided to seek a system of at-large elections rather than a system of single-member districts. While at-large elections would not guarantee that the Mexican-Americans would be able to elect a representative of their own, at-large elections would allow them to exercise some influence in the political process.

To resolve these conflicting interests, the district court accepted a plan for relief proposed by the city. Under this plan, the city would pass an ordinance providing for the election of six council members from single-member districts and three members from at-large districts. The Fifth Circuit struck down this plan, instructing the district court to require the city to reapportion itself into an appropriate number of single-member districts and to have no at-large posts.[50] The Supreme Court reversed the Fifth Circuit and instead upheld the district court's decision to implement six single-member districts and three at-large seats.[51] Although it rested on grounds unrelated to the claims of the Mexican-Americans, the Supreme Court's decision struck a compromise that allowed for the greatest amount of influence on politics for both minorities.

After the Supreme Court's decision, the district court approved a plan proposed by the city for eight single-member districts and three at-large districts. This 8-3 plan was intended to provide participation for Mexican-Americans by satisfying the "legitimate government interest to be served by having *some* at-large representation," and providing a city-wide, "non-sectional" perspective.[52] Under the 8-3 scheme, only one Mexican-American candidate won an at-large seat. Black candidates were elected from the two "safe" black districts in every election under the 8-3 plan, but no black candidate ever won an at-large seat.[53]

In 1988, two defeated black candidates sued the city of Dallas, alleging that

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are more dispersed); *see also* Tom Morganthau, *A Not So Simple Game*, TIME, Jan. 14, 1991, at 20 (discussing local reapportionment); *Racial Politics: The Lash Back*, ECONOMIST, Dec. 1-7, 1990, at 28 (discussing tensions arising from the conflict between interests of Blacks and Hispanics).

48. 437 U.S. 535 (1978).

49. *See supra* note 16 (contrasting the residential patterns of Blacks and Hispanics).

50. Lipscomb v. Wise, 551 F.2d 1043, 1048-49 (5th Cir. 1977) (allowing an exception to the at-large plan for the election of the mayor).

51. 437 U.S. 535 (1978).

52. Williams v. City of Dallas, 734 F. Supp. 1317, 1322 (N.D. Tex. 1990) (emphasis in the original) (citation omitted) (describing the rationale for the district court order implementing the 8-3 plan following *Wise* decision).

53. *Id.* at 1322, 1324-25.

the 8-3 scheme diluted the votes of black voters in violation of section 2. While this litigation was in progress, Dallas held a referendum in which voters approved a 10-4-1 scheme.[54] This scheme provided for ten single-member districts, four regional at-large districts, and one at-large election for mayor. Following the referendum, the district court decided that the 8-3 scheme violated section 2.[55] After the court invalidated the 8-3 plan, the city held another referendum, in which the voters narrowly defeated a proposal for a 14-1 plan. The situation remains unsettled in Dallas, and neither Blacks nor Mexican-Americans have received an adequate remedy.

As the recent Dallas cases show, *Gingles* may make it impossible for courts to fashion any remedy that achieves the goals of section 2. The cases demonstrate that neither an at-large voting scheme nor a single-member districting scheme can fully enable geographically dispersed minorities to achieve the goals of representation and participation.[56] In addition, the cases show that the *Gingles* approach, as applied by lower courts, tends to disregard most forms of political activity other than voting.[57] Finally, the cases reveal that the *Gingles* approach has made the residential integration of minorities a major barrier to the implementation of remedial voting plans.[58]

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54. The district court in *Williams* observed that the August 1989 election was probably the most racially divisive election in the history of the City of Dallas. In that election, the 10-4-1 plan passed with 65% of the total vote. However, 95% of the Blacks and more than 70% of the Hispanics who voted were opposed to the 10-4-1 plan; the plan passed only because it received 85% of the white vote. *Id.* at 1326.

55. *Id.* at 1317.

56. James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in MINORITY VOTE DILUTION, *supra* note 5, at 203, 235-36.

57. The Ninth Circuit discussed the lower court confusion and the shortcomings of *Gingles* in Garza v. County of Los Angeles, 918 F.2d 763, 770 (9th Cir. 1990):

> *Gingles* has spawned confusion in the lower courts. This opinion explicitly reserved the question of whether the standards it set forth would apply to a claim in which minority plaintiffs alleged that an electoral practice impaired their ability to *influence* elections, as opposed to their ability to elect representatives. Nevertheless, it has been applied to preclude such "ability to influence" claims, based upon plaintiff's failure to demonstrate such an ability to elect representatives under the *Gingles* criteria. On the other hand, some courts have dealt differently with the criteria articulated in *Gingles* when facing ability to influence claims.

Id. at 770 n.2 (citations omitted). The *Garza* court also quoted Professor Abrams as to the treatment courts have given the such claims. Abrams has argued that courts have dealt with ability-to-influence claims in opinions that "range from virtually ignoring the electoral standard or ignoring it entirely, to considering it a prerequisite to the application of the totality of the circumstances test . . . to treating it as a, if not the, central element of the test." Abrams, *supra* note 21, at 465. Abrams concludes by stating that "the language from *Gingles* that creates the 'ability to elect' standard may prove to be *Gingles*' most enduring and problematic legacy." *Id.* at 468.

58. "Blacks comprise a growing share of the suburban population . . . . Whether the increased movement of blacks from central cities to suburbs signals a new degree of integration, or simply the expansion of urban ghettos across city lines, is not yet clear. One recent study found that the suburbs were generally less segregated than the central cities but still exhibited a high degree of residential segregation. If black suburbanization results in greater geographic diffusion of blacks, it will be more difficult to construct districts with black population majorities." (citations omitted). William O'Hare, *supra* note 16, at 17.

D. *An Assessment of the* Gingles *Approach*

Commentators have found that "minority voters have been enormously successful in [using *Gingles*] to strike down discriminatory voting schemes, although there have been some instances in which the lower courts have departed from the *Gingles* standards or arbitrarily redefined their elements to reject such challenges."[59] Nevertheless, the *Gingles* decision's heavy reliance on districting remedies to the exclusion of other methods has been criticized on several grounds.

First, critics have argued that the reliance on single-member districting is too narrow of a remedial framework for courts faced with vote dilution.[60] By relying exclusively on single-member districting, the *Gingles* approach has made it difficult for residentially dispersed minorities to demonstrate vote dilution and to obtain relief. As a result, only minorities who happen to live in the same residential communities have been able to obtain remedies for vote dilution. Critics have also argued that "although it ensures more representatives, district-based black electoral success may not necessarily result in more responsive government."[61] Although a "safe" seat is often better than no seat at all, experience with single-member districting indicates that the creation of safe seats sometimes has the unintended effect of cutting minority voters off from the political life of the larger community. By focusing exclusively on the creation of safe seats, the *Gingles* approach has in some ways inhibited the ability of minorities to participate in the political process with other groups in the community.

The *Gingles* approach can be faulted not only for failing to achieve fully the goals of section 2 but also for creating a deterrent to residential integration. The implicit barrier to residential integration created by the *Gingles* voting rights decision is especially striking in light of the directly contrary approach taken by the federal courts in *United States v. Yonkers Board of Education.*[62] In *Yonkers,* a New York district court determined that the practice of confining subsidized housing projects to areas of high minority concentration substantially enhanced racial segregation in public schools.[63] Finding that the residential segregation was the product of racially motivated decisions in the placement of public housing, the district court ordered the city of Yonkers to build its

59. *See* Parker, *supra* note 8, at 6.

60. Karlan, *supra* note 42, at 174 ("reliance on geography both misperceives the nature of the injury suffered by black citizens whose political strength is submerged by majority-white electorates and ultimately imposes too narrow a remedial framework on the courts.").

61. Guinier, *supra* note 31, at 1080 ("Representing a geographically and socially isolated constituency in a racially polarized environment, Blacks elected from single-member districts have little control over policy choices made by their white counterparts.").

62. 837 F.2d 1181 (2d Cir. 1987), *aff'g* 624 F. Supp. 1276 (S.D.N.Y. 1985).

63. The majority of the people in public housing in the city of Yonkers are Black. The city made a practice of placing the housing in minority areas. *See supra* note 17.

proposed public housing throughout the non-minority areas of the community. This order, which was upheld by the Second Circuit, required the city to begin breaking down residential patterns established by years of racial segregation. Although the goals of desegregation and diversity in residential areas and schools may be well served by this decision, the dispersal of a geographically compact minority group directly diminishes the group's ability to allege vote dilution under *Gingles*.[64] Although cases like *Yonkers* are rare, this case is significant because it offers a striking example of a minority population that may be faced with the prospect of having to choose between residential integration and political empowerment.

Finally, the *Gingles* approach can have even deeper and more troubling consequences for the political community. By definition, "safe" single-member districts are geographical subdivisions within which voters of one race possess an assured majority. The creation of "safe" districts therefore creates pockets of both white and black voters for whom voting is virtually pointless.[65] Although it is possible for voters to be represented effectively by someone of a different race,[66] race-based single-member districting tends to emphasize the racial identification of voters and candidates. As a result, voters who are "trapped" in a district created to elect candidates of the other race may feel that they have no effective political voice.[67]

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64. This type of intentionally discriminatory behavior by local government officials would inform a court in a vote dilution case by showing that in the "totality of circumstances" the local government was unresponsive to the black community's needs. *See supra* notes 20 and 22.

See generally John Yinger, *On the Possibility of Achieving Racial Integration Through Subsidized Housing, in* HOUSING DESEGREGATION AND FEDERAL POLICY 290 (John Goering ed. 1986); Rose Helper, *Success and Resistance Factors in the Maintenance of Racially Mixed Neighborhoods, in* HOUSING DESEGREGATION AND FEDERAL POLICY, *supra*, at 170.

65. Courts' remedial measures are generally limited to granting single-member districts. *See* Wise v. Lipscomb, 437 U.S. 535, 539-41 (1978) (holding that federal courts, absent special circumstances, should employ single-member districts when they impose remedial plans). The Court has recognized that a "safe" single-member district for voters of one race can effectively disenfranchise voters of the other race in that district. *See* Davis v. Bandemer, 478 U.S. 109, 130-31 (1986) (observing that drawing "safe" districts for political parties "would leave the minority in each safe district without a representative of its choice.").

66. In *Gingles*, the plurality found that "[u]nder § 2 it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate that is important." 478 U.S. at 68.

Commentators have recognized four senses in which a legislator may be said to represent a minority. First, the legislator may have been the "direct choice" of the minority, selected and elected by the minority (usually through bloc voting). Second, a legislator may possess certain physical characteristics (e.g., race or gender) that elicit assumptions about the loyalty of the legislator to the minority interests. Third, a legislator may advocate the minority's interests in order to assemble or maintain a winning coalition. Finally, a legislator may advance minority interests for non-electoral (e.g., moral) reasons. *See* Peter Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1367-68 (1987); *see also* Karlan, *supra* note 42, at 182 ("To tie representation to small geographic areas within a jurisdiction can impair the development of representatives concerned with the welfare of the entire community.").

67. Voters who are unable to elect representatives of their choice may nevertheless be represented through "virtual representation." This term refers to representation of politically powerless voters by officials who share certain interests or attachments with the powerless group. *See* HANNAH PITKIN, THE

E. *Conclusion*

The approach to vote dilution established by the *Gingles* decision fails to protect fully the rights guaranteed in section 2 of the Voting Rights Act. The *Gingles* approach focuses almost exclusively on minorities' ability to elect candidates of their choice, virtually ignoring the importance of other forms of political participation. As a result, minorities who obtain relief under *Gingles* generally obtain a remedy that addresses only one of the barriers to political empowerment. In addition, the approach established in *Gingles* makes it very difficult for dispersed minority communities to obtain any relief at all. Under *Gingles,* the courts recognize the existence of vote dilution only when the dilution can be remedied by geographically based voting plans. This approach prevents minority communities from obtaining a remedy for vote dilution unless the minority voters reside in geographically compact areas. Paradoxically, residential segregation has become a precondition for the full enjoyment of voting rights.

II. THE SINGLE TRANSFERABLE VOTE: A PROPOSAL FOR RESOLVING THE CONFLICT BETWEEN THE GOALS OF SECTION 2 AND THE INTEGRATION PROCESS

The courts could more fully achieve the goals of section 2 by employing an alternative remedy that achieves its two goals without deterring racial integration. In developing an alternative remedy, the courts should begin by eliminating the compactness requirement from the definition of vote dilution. This redefinition of vote dilution would be consistent with the policies of section 2 because the dilution of votes can occur even where members of a politically cohesive group are widely dispersed. The votes of a politically cohesive black community can be diluted just as much by inadvertent residential dispersal[68] as by intentional gerrymandering aimed at dividing a compact black neighborhood into several majority-white districts. In either case, the division of a politically cohesive community into several electoral districts prevents minority voters from exercising their full electoral power.

If the courts eliminate the compactness requirement from the definition of vote dilution, it will be possible for dispersed minorities to bring successful vote dilution claims. To provide effective relief for these groups, the courts will have to devise a remedy other than single-member districting and at-large schemes. This Article suggests that an alternative remedy should (1) protect the ability of politically cohesive minorities to exercise electoral power,

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CONCEPT OF REPRESENTATION 168-89 (1967) (discussing Edmund Burke's theory of virtual representation).

68. For example, dispersal can occur as a result of voluntary residential integration or court-mandated housing plans as in *Yonkers*. *See supra* notes 62 and 63 and accompanying text.

regardless of residential configuration; (2) protect the ability of politically cohesive minorities to engage in forms of political participation other than voting; and (3) pose no deterrent to residential integration.

The remainder of this Article proposes and discusses an alternative voting scheme that meets these criteria. The proposed scheme allows voters to cast a "single transferable vote" in at-large elections for local multi-seat governing bodies. Although the proposed scheme has shortcomings of its own, it may provide a workable alternative in cases where single-member districting is an inadequate remedy.

A. *Section 2 Restrictions on "Proportional Representation"*

Section 2 specifically states that it does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population."[69] Because of this provision, courts have generally avoided remedial voting plans that seem designed to guarantee proportional representation for minorities. The courts' caution, however, appears to be based upon an excessively broad reading of the statutory disclaimer.

A closer reading of the statute reveals that courts may consider evidence of proportionality in deciding whether vote dilution has occurred. Section 2 specifically provides that courts can consider "[t]he extent to which members of a protected class have been elected to political office in the State or political subdivision" in which vote dilution is alleged.[70] Although this provision does not expressly authorize the courts to define vote dilution in proportional terms, it implicitly recognizes that some proportionality principle is a vital element of any workable definition of vote dilution.[71] In addition, the disclaimer itself is rather narrow: it provides that protected classes have no legal right to a voting system that mechanically produces proportional outcomes. This provision does *not,* however, directly forbid voting schemes that tend to produce roughly proportional results.

Indeed, courts under *Gingles* have consistently evaluated proposed districting schemes in light of their ability to produce proportional outcomes.[72] Furthermore, courts have heavily weighed proportionality in determining

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69. *See supra* note 23.

70. This passage immediately precedes the provision that disclaims any intent to create a right to proportional representation in section 2. *See supra* note 23.

71. In *Gingles,* Justice O'Connor recognized the unavoidable role of proportional considerations in defining vote dilution. *See supra* part I.B.

72. *See* United States v. Dallas County Comm'n, 850 F.2d 1433, *reh'g denied,* 858 F.2d 746 (11th Cir. 1988), *cert. denied,* 490 U.S. 1030 (1989) (mandating districting plan creating two "black" seats, two "white" seats, and one "competitive" seat in a county in which black and white populations were almost equal); Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459 (M.D. Ala. 1988) (holding that district lines can be drawn to create "safe" seats for protected groups and need not meet any aesthetic standard of symmetry or attractiveness).

whether "the totality of the circumstances" reflects the existence of vote dilution.[73] The pervasiveness of proportional considerations in the voting rights jurisprudence since *Gingles* demonstrates that section 2 permits voting plans that are proportional in their aspirations and in their overall effects.

B. *The Single Transferable Vote: How it Works*

The voting system that best achieves the goals of section 2 is based on the single transferable vote (STV).[74] The STV voting plan proposed in this Article allows voters to rank candidates on their ballots, listing them in order of preference beginning with their most favored candidate.[75] The STV voting plan maximizes the effectiveness of individual votes by transferring votes from (1) candidates who have more than enough votes to be elected and (2) candidates who have little or no chance of being elected.[76]

No districts need to be drawn under the STV voting plan because all voters can choose among all candidates in an election.[77] Each voter casts one ballot, on which she is allowed to rank all candidates in descending order according to preference.[78] Voters are asked to rank as many candidates as they wish, but they are not required to vote for more than one.[79] Although ranking several candidates is slightly more complicated than voting for a single candidate, experience with the STV voting plan in other countries indicates that voters have little difficulty adapting to the STV ballot.[80]

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73. *See Gingles*, 478 U.S. at 76, 100-01 (O'Connor, J., concurring) (rejecting district court's finding of vote dilution where elections had consistently produced proportional outcomes); *see also* Overton v. City of Austin, 871 F.2d 529, 538 n.10 (5th Cir. 1989) (affirming lower court's finding that "consistent minority electoral success does not as a matter of law foreclose a section 2 [vote dilution] claim but is 'presumptively inconsistent' with [such] a claim").

74. The single transferable vote system is discussed at length in ENID LAKEMAN, POWER TO ELECT: THE CASE FOR PROPORTIONAL REPRESENTATION 80-103 (1982) and VERNON BOGDANOR, WHAT IS PROPORTIONAL REPRESENTATION? 75-110 (1984). *See also* REIN TAAGEPERA & MATTHEW SOBERG SHUGART, SEATS AND VOTES 26-29 (1989); Edward Still, *Alternatives To Single Member Districts, in* MINORITY VOTE DILUTION, *supra* note 5, at 249, 258-62. For discussions of cumulative, limited and proportional plans, see Note, *Alternative Voting Systems As Remedies For Unlawful At-Large Systems*, 94, YALE L. J. 144, at 148-60 (1982); Parker, *supra* note 8, at 21-22.

75. TAAGEPERA & SHUGART, *supra* note 74, at 26.

76. *Id.*

77. Despite the absence of electoral districts, elections held under the STV system would not be similar in effect to at-large elections. As the Supreme Court has observed, at-large elections and multimember districts "tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district." Rogers v. Lodge, 458 U.S. 613, 616 (1982) (upholding the district court's finding that an at-large voting system diluted the voting strength of the black population). In contrast to at-large elections, elections under the STV system would be designed to enable cohesive minorities to elect representatives of their choice.

78. TAAGEPERA & SHUGART, *supra* note 74, at 27; *see also* LAKEMAN, *supra* note 74, at 46; Still, *supra* note 74, at 258.

79. Unlike cumulative voting, the STV system does not allow the voter to vote strategically because the rankings do not add up. *See* Still, *supra* note 74, at 260.

80. The STV system was implemented in Ireland in the 1970s in the face of considerable concern about its complexity. After a brief advertising campaign designed to explain the process of ranking candidates,

After voting has taken place, election officials count the total number of ballots cast. The total number of ballots is then used to determine the threshold that a candidate must reach to be elected. The electoral threshold establishes the number of votes that winning candidates must receive while avoiding the possibility of having too many winners.[81] The threshold is computed according to the following formula.[82]

$$\frac{\text{total number of ballots cast}}{\text{number of seats to be filled} + 1} + 1$$

Once the threshold has been calculated, election officials count first-choice votes to determine which candidates have enough votes to reach the threshold.[83] All candidates who reach the threshold are declared winners. If there are not enough winners to fill all the seats, then votes are transferred according to the voters' preferences. Two types of votes can be transferred: (1) votes cast for winning candidates in excess of the number needed to reach the threshold, or "surplus votes," and (2) votes cast for candidates who have received the fewest votes, or "wasted votes."

Votes are transferred downward and then upward. First, election officials transfer the winning candidates' surplus votes downward to the other candi-

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voters quickly learned to use the new ballots. A survey found that less than one percent of the ballots cast in the elections under STV were filled out incorrectly. *See* BOGDANOR, *supra* note 74, at 88-89.

81. It might seem as if the threshold should be determined by dividing the number of ballots cast by the number of seats to be filled, so that a candidate for one of five seats would need to receive one-fifth (20%) of the total vote to be elected. However, a candidate can receive fewer votes than this and still be assured of election. A candidate in a five-seat race can win, for example, by receiving 19% of the vote, because it would be impossible for more than five candidates to receive 19%. The fewest votes that a winning candidate can receive is therefore determined by dividing the number of ballots by *one more than* the number of seats to be filled. *See* BOGDANOR, *supra* note 74, at 84.

82. *See* BOGDANOR, *supra* note 74, at 84.

83. The one adjustable element in the formula is the number of seats. If the minority proportion is smaller, a larger number of seats can be used to lower the threshold; likewise, if the minority population is larger, a smaller number of seats can be used to raise the threshold. *See* Parker, *supra* note 8, at 17; *see also* Carrollton Branch of NAACP v. Stallings, 829 F.2d 1547, 1563 (11th Cir. 1987), *cert. denied sub nom.*, Duncan v. City of Carrollton, Ga., Branch of NAACP, 485 U.S. 936 (1988) (ruling that demographic evidence relating to the concentration of voters in proposed new single-member districts is admissible); Dillard v. Baldwin County Comm'n, 694 F. Supp. 836 (M.D. Ala. 1988) (holding that increasing the size of a county commission is legitimate relief for section 2 violations). *But see* McNeil v. Springfield Park Dist., 851 F.2d 937, 946 (7th Cir. 1988) (refusing to order creation of additional seats); Romero v. City of Pomona, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989) (holding that the possibility of enlarging boards should not be considered at stage of proving ability to elect.) Increasing the number of single-member districts has the same result. If the minority is small, decreasing the size and population of voting districts while increasing the number of districts will lower the minority population and concentration needed to achieve the "ability to elect." If the minority population is larger there may be fewer and larger districts. Under the present system, changes of this type would require litigation and subsequent redistricting. However, under a proportional plan, there are no district lines to be drawn; only a referendum, a legislative act, or a judicial order changing the number of seats is needed. Some states or cities may be required to obtain preclearance from the United States District Court for the District of Columbia or the United States Department of Justice to alter their plans. *See* BARBARA Y. PHILLIPS, JOINT CENTER FOR POLITICAL STUDIES, HOW TO USE SECTION 5 OF THE VOTING RIGHTS ACT 3-5 (3d ed. 1983); *see also* Drew S. Days III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act, in* MINORITY VOTE DILUTION, *supra* note 5, at 167-80; and Frank R. Parker, *Changing Standards in Voting Rights Law, in* REDISTRICTING IN THE 1990S, *supra* note 16, at 58-59.

dates. The only difficulty in transferring surplus votes lies in determining *which* of the winners' votes to transfer. This problem is normally resolved by dividing the surplus of each winner among the remaining candidates according to the proportion of second-place votes that they received on the winners' ballots.[84]

After the surplus votes from all winning candidates have been redistributed among the other candidates, some seats may remain unfilled. Votes are then transferred from the candidate who has the fewest votes upward to the other remaining candidates. During the process of transferring votes upward, some candidates receiving the votes will cross the threshold and acquire surplus votes; these surplus votes are transferred downward in the manner described above. The upward transfer of votes continues until enough candidates have reached the threshold to fill all of the remaining seats.

A hypothetical example can help to clarify the process of transferring votes under the STV voting plan. In this example, 400 votes are cast in an election for a three-seat city council; the threshold required for election is therefore 101 votes.[85] An initial count of first-place votes produces the following results:

Amy:	150 votes
Beth:	90 votes
Christi:	75 votes
Donna:	50 votes
Elenne:	35 votes

The count shows that Amy has surpassed the 101-vote threshold and she is declared a winner. To determine the winners of the remaining two seats, votes must be transferred. First, Amy's 49 surplus votes are distributed among the remaining candidates according to the preferences indicated on the ballots. On the 150 ballots cast for Amy, the second-choice votes are distributed as follows:

Beth:	75 votes	(50% of Amy's 150 total votes)
Christi:	30 votes	(20% of Amy's 150 total votes)
Donna:	30 votes	(20% of Amy's 150 total votes)
Elenne:	15 votes	(10% of Amy's 150 total votes)

Amy's 49-vote surplus is then distributed among the four candidates according to the proportion of second-place votes that each received on Amy's ballots.

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84. The formula for determining the allocation of surplus votes is as follows:

$$\frac{\text{(surplus of } A\text{) x (total second-choice votes for } B\text{)}}{\text{total first-choice votes for } A}$$

85. The threshold would be determined as follows:

$$\frac{400 \text{ (ballots)}}{3 \text{ (seats)} + 1} + 1$$

The 49-vote surplus is therefore distributed as follows:[86]

Beth:	24 votes	(50% of Amy's 49 surplus votes)
Christi:	10 votes	(20% of Amy's 49 surplus votes)
Donna:	10 votes	(20% of Amy's 49 surplus votes)
Elenne:	5 votes	(10% of Amy's 49 surplus votes)

Once the surplus from Amy has been distributed, the remaining candidates combine the second-choice votes with the first-choice votes that they already possessed. They are now ranked as follows:

Beth:	114 votes	(90 + 24)
Christi:	85 votes	(75 + 10)
Donna:	60 votes	(50 + 10)
Elenne:	40 votes	(35 + 5)

The results show that Beth has passed the threshold and is declared the winner of the second seat. To determine the winner of the third and final seat, all of Elenne's 40 votes are transferred to Christi and Donna in accordance with the preferences indicated.[87] Assuming (for the sake of simplicity) that the rankings give half of Elenne's 40 votes to Christi and half to Donna, the results show that Christi has surpassed the threshold and won the third seat:

Christi:	105 votes	(85 + 20)
Donna:	80 votes	(60 + 20)

The hypothetical example described here is, of course, highly simplified. It nevertheless provides an accurate portrayal of the basic workings of the STV voting plan. The key to this system is its ability to shift votes to the candidates who can make best use of them, maximizing the efficacy of all ballots and ensuring that politically cohesive groups can form coalitions regardless of their residential configuration.[88]

C. *Application of the STV Voting Plan in Vote Dilution Cases*

The STV voting plan could provide an alternative to single-member districting as a remedy for vote dilution. The following examples explore the operation of the STV voting plan in two distinct factual settings. The first

86. In this example, Beth actually should receive 24.5 votes, Christi and Donna should receive 9.8 votes, and Elenne should receive 4.9 votes. For the sake of simplicity, however, fractions of votes are generally rounded off rather than transferred. Because Beth has the smallest fraction, the fraction of a vote is deducted from her total.

87. Beth's 13 surplus votes would have been transferred to the other candidates in accordance with the preferences indicated if such a transfer would have made a difference to the outcome. In this example, however, the transfer of Beth's 13 votes would have made no difference. If all 13 were awarded to Christi, Christi would still fail to reach the threshold; if all 13 were transferred to Donna or Elenne, the relative rankings among those two candidates would not have changed and Elenne's votes would still have ended up being transferred to Christi and Donna.

88. *See* BOGDANOR, *supra* note 74, at 79-83 (showing results from an actual election held under a STV system).

example considers a city that contains a white majority and a dispersed black minority; elections in the community are characterized by racial bloc voting. The second example is based on the *Wise* case: it considers a city composed of a white majority, a residentially concentrated black minority, and a residentially dispersed Hispanic minority. The black and Hispanic communities in the second example share certain political goals, but each is politically cohesive within itself.

1. *Example 1: White Majority and One Dispersed Minority.* In this hypothetical city, elections for the city council are held under a system of single-member districts. Because city elections are characterized by racial bloc voting, officials have attempted to draw district lines to create "safe" seats for black and white candidates. The black community, however, resides primarily in small enclaves throughout the city so it is impossible to draw "safe" districts for Blacks in proportion to their population size. As a result, Blacks consistently hold one out of five seats on the city council despite composing forty percent of the city electorate.

The Black voters in this city would be unable to demonstrate vote dilution under the *Gingles* standard. The *Gingles* standard for a showing of vote dilution requires proof that (1) the minority group is politically cohesive, (2) the minority group is large enough and compact enough to constitute an electoral majority in a single-member district, and (3) the minority group's preferred candidates are defeated as a result of racial bloc voting by the majority group.[89] Because the black community in this hypothetical city is dispersed, black voters would be unable to satisfy the second requirement of the *Gingles* test. Black voters who live outside the one "safe" black district would therefore be politically impotent—despite the fact that (1) they are politically cohesive, (2) they are large enough to constitute an electoral majority if allowed to vote for a single candidate, and (3) they encounter racial bloc voting by the white majority.

The STV voting plan would provide an effective remedy for the vote dilution suffered by the dispersed Blacks in this city. The black voters who live in the one existing "black" district would no longer waste their votes by merely piling them on to the majority obtained by the black candidate in their district; in addition, black voters who live in one of the existing "white" districts would no longer waste their votes by casting them against an assured winner. Instead, black voters throughout the city would be able to join forces behind candidates of their choice. The STV voting plan would have a variety of other consequences as well, as discussed below in part II.D.

2. *Example 2: White Majority and Two Minorities.* The STV voting plan can also provide an effective remedy for vote dilution when two minority

89. *See Gingles*, 478 U.S. at 66-67; see *supra* notes 8 and 10 and accompanying text.

communities have conflicting electoral interests. Consider a hypothetical city in which Blacks live in a concentrated area and constitute thirty percent of the voting population, while Hispanics are residentially dispersed and constitute ten percent of the voters. As in the *Wise* case, it would be impossible for a court to devise any combination of at-large and single-member seats that would fully satisfy both minority communities. Even if the minority groups succeeded in demonstrating that vote dilution is occurring, they would be unable to obtain adequate relief under the *Gingles* decision.[90]

If a court adopts the STV voting plan as a remedy for vote dilution in this city, it would be able to redress the underrepresentation of both minority populations. The black voters under the STV voting plan would still be able to elect the representatives that they had previously elected from "safe" districts, and they would possess new opportunities for coalition-building.[91] The Hispanic voters would benefit even more. Under single-member districts or at-large voting, Hispanics can exercise influence only by joining coalitions with other groups in single-member districts or at-large elections. Under the STV voting plan, however, Hispanics would be able to elect at least one candidate on the basis of their own electoral power, provided that they are politically cohesive and the governing body is sufficiently large. By adopting the STV voting plan, the court would remove the artificial barrier that district boundaries had placed in the way of both minorities' electoral success.

D. *An Assessment of the STV Voting Plan*

The STV voting plan would provide an effective remedy in both of the hypothetical cases described here because it would allow the court to eliminate electoral districts altogether. Under the STV voting plan, politically cohesive minority voters would be able to consolidate their votes in support of candidates of their choice, regardless of residential configuration. As a result, even if racial bloc voting continues, the adoption of the STV voting system would tend to increase the number of minority representatives who are elected.[92]

In addition to enhancing the electoral power of minority communities, the STV system might also tend to break down patterns of racial bloc voting.[93] Under the STV plan, voters would be able to vote for several candidates in each election. Voters could therefore select a candidate of a different race as

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90. *See supra* notes 8-11 and accompanying text.

91. *See infra* part II.D.

92. The STV voting system, in an environment of racial bloc voting, would allow the transfer of votes from black candidates with more than enough votes to reach the threshold to black candidates below the threshold. The transfer of votes would therefore enable black voters to consolidate their support behind black candidates without having to suffer losing an election because of splitting their votes between the black candidates.

93. *See* LAKEMAN, *supra* note 74, at 140-41.

a second or third choice while still voting for a member of their own race as a first choice. Knowing that voters can support several candidates, candidates of both races will be more likely to cross racial boundaries in search of electoral support. Once candidates cross racial lines to obtain second-choice votes, voters of both races might be more likely to cast their ballots on non-racial grounds.

The erosion of racial bloc voting will enhance all voters' opportunities for political participation by broadening the range of potential political alliances. Rather than confining their political activity to "safe" districts, voters under the STV voting plan will be able to exercise influence in city or county politics as a whole. Voters who had been "trapped" in safe districts will be able to join city- or county-wide coalitions to support candidates of their choice. In addition, voters throughout the city or county will have a wider range of candidates from which to choose.

The STV voting plan might also yield advantages for very small minority communities. In close elections, the small minority could establish itself as a tie-breaker of sorts, and the competing candidates might seek to strike deals among themselves and with the minority in order to form winning coalitions. As a condition for joining a coalition, a small minority might seek to strike an agreement in favor of expanding the number of seats up for election—since the greater the number of seats, the lower the electoral threshold.[94]

Most importantly, the STV plan proposed in this Article would not force the courts or minorities to choose between residential integration and political empowerment. Dispersion and geographical compactness would no longer be determining factors of the minority groups' ability to participate in the political life of their communities.

E. *A Response to Critics of STV Voting Plans*

Although STV voting plans have been frequently discussed, neither commentators nor courts have viewed STV voting plans as viable alternatives to single-member districting. The widespread skepticism regarding STV voting plans rests on a number of common criticisms. First, critics often suggest that the complexity of the STV balloting process would confuse voters. The experience with forms of STV in other countries provides little empirical support for this criticism. In Northern Ireland, for example, STV voting was implemented for all local elections in 1973 following a brief educational advertising campaign. In the first STV election, only 1.5 % of the ballots cast were invalid; after ten years of experience with the STV system, less than one

94. *See supra* note 83.

percent of the ballots cast were invalid.[95] The success of the STV voting system in Northern Ireland indicates that voters do not need to understand all of the complexities of the counting process. Voters can participate successfully simply by ranking the candidates according to their preferences.

The STV voting system has also been criticized on theoretical grounds. Under certain circumstances it is possible for the outcome of an STV election to violate the "reduction principle," which provides that the elimination of a losing candidate ought not to affect the identity of the winners.[96] In addition, the winning candidates in the STV voting system are not always the candidates who received the greatest number of first-choice votes.[97] These theoretical criticisms, while valid, do not provide a sound basis for rejecting STV voting plans altogether. Other voting schemes have also been shown to contain basic theoretical inconsistencies, and nevertheless remain in widespread use.[98]

Critics of proportional representation have also argued that representation of groups is contrary to American traditions.[99] These critics rely heavily on the geographically based system of representation established by the Constitution, but in doing so they overlook the extent to which the founders sought to use geography as a means of ensuring the representation of groups. As one commentator has written,

> [t]here is a solid constitutional pedigree for group representation of members of racial minority groups . . . . [G]roup representation has always been an important feature of American constitutionalism. At the time of the framing, for example, geography was thought to define distinct communities with distinct interests; representation of the states as such only seemed natural. It would not be difficult to argue that racial and ethnic groups . . . are the contemporary analogue to groups that were defined in geographical terms during the founding period.[100]

Today, the representation of politically cohesive groups can not always be achieved through geographically based voting systems. As a result, preservation of the tradition of group representation may require adoption of proportional systems such as STV voting. Furthermore, STV voting can be justified even if it does require certain departures from traditional geographic

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95. BOGDANOR, *supra* note 74, at 88-89.

96. *See* Still, *supra* note 74, at 260 (noting that the same criticism can also be made of plurality elections, limited voting, cumulative voting, and the first stage of two-stage elections); *see also* Gideon Doron, *Is the Hare Voting System Representative?*, 41 J. POL. 918-22 (1979).

97. This result reflects the "Condorcet effect," which occurs when the winner of a multi-candidate election would not have won a series of head-to-head contests with each of the other candidates. For a more detailed explanation of this phenomenon, see Still, *supra* note 74, at 261-62; *see also* Gideon Doron & Richard Kronick, *Single Transferable Vote: An Example of a Perverse Social Choice Function*, 21 AM. J. POL. SCI. 303-11 (1977).

98. *See generally* KENNETH ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES (2nd ed. 1963). For discussions of Arrow's Theorem, see DENNIS C. MUELLER, PUBLIC CHOICE 185-201 (1979); and IAIN MCLEAN, PUBLIC CHOICE 165-68 (1987).

99. *See, e.g.*, ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? (1987).

100. Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1586 (1988) (citations omitted).

voting practices. These departures may be necessary steps toward the rejuvenation of the legitimacy of democratic institutions in communities that exclude racial minority groups from full participation in the political process.[101]

A more compelling criticism of STV voting is that it may tend to provide electoral power to "extreme" or "radical" minorities. Unlike single-member districting, which is designed specifically to enhance the power of disadvantaged groups such as Blacks and Hispanics, the STV voting system could enhance the power of *any* politically cohesive group—including, for example, hate groups that seek to oppress the very groups that the Voting Rights Act seeks to protect. The force of this criticism is blunted if the STV voting system is used only at the local level, where legislative bodies tend to be relatively small and electoral thresholds are therefore relatively high. Furthermore, extreme candidates will find it difficult to accumulate enough second-choice and third-choice votes to reach the electoral threshold. Finally, it should be noted that the flexibility of the STV voting system is also one of its greatest virtues: the single-member districting plans can at best help only a limited set of disadvantaged groups, while the STV voting system can enhance the power of any disadvantaged group capable of voting cohesively. As a result, STV voting could enhance the political power not only of Blacks and Hispanics but also of other ethnic minorities, women, gays and lesbians, and religious minorities.

Finally, critics have suggested that it would be improper for courts to implement STV voting, because such a system would represent a dramatic departure from current voting practices. While it is true that courts have less freedom than legislatures to experiment with innovative electoral systems, the courts do have an obligation to provide effective remedies for violations of the Voting Rights Act. Plainly, the single-member district remedies currently used by courts cannot provide effective remedies for vote dilution in some cases.[102] Where single-member districting cannot provide an effective remedy, courts should be free to approve the use of STV voting as a means of vindicating the voting rights of minority groups.

III. CONCLUSION

Current voting rights jurisprudence fails to achieve the political empowerment goals established by the Voting Rights Act and conflicts with the integration ideal established in *Brown*. Under the *Gingles* interpretation of section 2, only a geographically compact minority community can meet the

101. *Id.* at 1588.
102. *See supra* part I.C.

threshold condition for demonstrating vote dilution. As a result, politically cohesive minorities residing in integrated neighborhoods or small enclaves cannot bring vote dilution claims. By making residential segregation a necessary element of a vote dilution claim, the *Gingles* approach undermines the integration ideal established in *Brown.* The *Gingles* approach, however, may be based on an unnecessarily narrow interpretation of the courts' remedial powers under section 2. By reinterpreting section 2, courts could develop remedial strategies capable of more fully protecting the rights of all racial and ethnic minorities, not just those who live in segregated communities.

The single transferable vote (STV) system would allow courts to provide vote dilution remedies to politically cohesive minority communities without regard to residential distribution. There would be no need to draw electoral districts under the STV system. Rather, all candidates would compete for votes throughout the city or county in which the election is held; to win, candidates would be required to reach a threshold based on the ratio between seats available and ballots cast. The STV system would therefore ensure that politically cohesive minorities would be able to exercise effective political power, even if they are geographically dispersed.

The advantages of the STV voting system will become increasingly apparent as the electorate becomes more pluralistic in its racial and ethnic composition. The 1990 census has revealed that many cities now contain substantial numbers of Hispanics and other ethnic minorities, many of whom do not reside in large geographic concentrations. If these minorities vote cohesively, they will find it difficult to meet the compactness standard required for single-member districting. As a result, the *Gingles* approach may become an even less effective means of achieving the goals of section 2. In addition, continued reliance on the single-member districting will encourage these minority communities to segregate themselves in order to achieve political power. By adopting the STV voting system as a remedy for vote dilution, the courts can ensure that section 2 continues to protect the voting rights of people of every "race or color."