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MAJORITY–MINORITY VOTING RIGHTS: IS CUMULATIVE VOTING A VALID REMEDY FOR VIOLATIONS OF THE VOTING RIGHTS ACT OR AN IMPERMISSIBLE TACTIC TO ADVANCE RACIAL POLITICS?

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The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can only mean one thing—one person, one vote.
Justice William O. Douglas,
Gray v. Sanders, 372 U.S. 368, 381 (1963).

I. Introduction

One person, one vote. To most Americans, this phrase is more than a simple slogan. It has become a long-standing principle of democracy and is the basis for nearly universal suffrage in the United States. The principle that all citizens are entitled to equal legislative representation was enunciated by the Supreme Court in *Reynolds v. Sims*.[1] In *Reynolds*, the

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1. 377 U.S. 533, 566 (1964). In this legislative apportionment case, voters alleged that despite the vast amount of population growth that had occurred in Alabama from 1900 to 1960, there had been no reapportionment since 1900. *Id.* at 540. Voters asserted that many counties had become the victims of arduous discrimination because the legislature had not followed the Alabama Constitution which prescribed decennial reapportionment of the

Court found that the state must apportion seats on a population basis for both houses of the Alabama legislature.[2] Apportioning representation ensures the voting power of each voter is equal.[3] In *Reynolds*' majority decision, Chief Justice Earl Warren said: "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[4] The Court went on to explain that "[w]eighting the votes of citizens differently, by any method or means," is far from justifiable.[5] *Reynolds* was decided one year before the Voting Rights Act was passed in 1965. The purpose of the Act is to outlaw discriminatory voting practices and to extend *Reynolds*' "one person, one vote" principle to all Americans regardless of their race.[6] Today, this democratic principle has evolved into "one person, six votes" for residents of the Village of Port Chester, New York when choosing their city council.[7] A new cumulative voting scheme was ordered by a federal judge as a remedy for a Voting Rights Act violation.[8] The effect of cumulative voting in this small com-

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legislature. *Id.* The Supreme Court explained that the right to direct representation was "a bedrock of our political system" and found that both houses of bicameral legislatures had to be apportioned on a population basis. *Id.* at 562.

2. Reynolds v. Sims, 377 U.S. 533, 568 (1964).

3. *See id.* at 577 (highlighting excerpts from the Supreme Court's decision in *Wesberry v. Sanders*, 376 U.S. 1 (1964), a congressional districting case that was decided just four months before *Reynolds*). The Court explained that although it is impossible to have completely identical legislative districts, states are required to make "an honest and good faith effort" to create districts that are of equal population. *Id. See also* Wesberry v. Sanders, 376 U.S. 1, 7–8, 18 (1964) (explaining that "equal representation for equal numbers of people" was the primary objective of the Constitution in regard to the House of Representatives). In *Wesberry*, the Court held that population equality among districts is the constitutional test to determine if a districting scheme is valid. *Id.* at 18. The Court also established that equal representation for all people is a fundamental principle of government. *Id.* at 40.

4. *Reynolds*, 377 U.S. at 562.

5. *Id.* at 563.

6. Voting Rights Act of 1965, 42 U.S.C. § 1973 (2006) (codifying the guarantee of the Fifteenth Amendment which prohibits "denial or abridgement of the right of any citizen . . . to vote on account of race or color"). The Act was adopted in response to continued discrimination against African-Americans in the South who were trying to exercise their right to vote. *Introduction to Federal Voting Rights Laws,* U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., www.justice.gov/crt/about/vot/intro/intro.php (last visited Sept. 3, 2011). The Act applied measures to get rid of state-imposed restrictions, such as literacy tests, that impaired the right to vote. *Id.* Amended in 1970, 1975, and 1982, the Act is seen by many as the "most successful piece of civil rights legislation ever adopted by the United States Congress." *Id.*

7. *Fox News Distorts Facts to Attack Election of First Latino to NY Village's Legislature*, MEDIA MATTERS FOR AM. (June 16, 2010), http://mediamatters.org/research/201006160053. Jarrett asserted that allowing individual voters to vote six times for one candidate is in violation of the Equal Protection Clause of the Constitution. *Id.*

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

munity means each voter has six votes to cast in the election that can be apportioned in any manner including casting all six of one's votes for only one candidate.[9]

As opposed to the current straight voting system where candidates, like city council members, are elected from specific voting districts, voters are limited to voting for candidates in their district, and the candidate with the highest number of votes wins, cumulative voting allows voters to vote for candidates running outside of a voter's district.[10] Although proponents argue that the movement away from limiting voters to their own districts dispels gerrymandering—or the practice of purposely drawing districts along racial lines—the implementation of vote plumping—or casting all of your votes for one candidate[11] has left many citizens wondering if cumulative voting is the best way to ensure an equitable government system.[12]

Cumulative voting was mandated in Port Chester after the U.S. Justice Department filed a lawsuit charging that Port Chester's voting system illegally diminished Hispanic influence by denying equal opportunities in the election process.[13] The Justice Department alleged that the voting process denied the Hispanic population an adequate opportunity to participate in the election process despite the fact that Port Chester's population of 28,000 is almost half Hispanic.[14] Judge Robinson of the Southern District of New York accepted the village's cumulative voting proposal after concluding the village had met all three preconditions established by the Supreme Court in *Thornburg v. Gingles*[15] as guidelines for determin-

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9. *Id.* at 447.

10. *See* Michael McCann, *A Vote Cast; A Vote Counted: Quantifying Voting Rights Through Proportional Representation in Congressional Elections*, 12 KAN. J.L. & PUB. POL'Y, 191, 191–93 (2002) (providing an assessment of proportional representation). McCann argues that proportional voting systems provide an attractive alternative to straight voting because they offer a greater incentive for minority groups to vote and allow minorities increased access to legislative positions. *Id.* at 212. *See also* LANI GUINIER, *Groups, Representation, and Race Conscious Districting: A Case of the Emperor's Clothes*, *in* THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 151–52 (1994) (arguing that legislative representatives should be elected using cumulative voting from multi-member districts instead of using plurality voting from single-member districts).

11. Vote plumping is the main strategy employed by minorities to elect candidates of their choice under a system of cumulative voting. *Vill. of Port Chester,* 704 F. Supp. 2d at 447.

12. *See* McCann, *supra* note 10, at 194 (arguing that "proportional representation offers several enhancements over the winner-take-all-system, particularly in relation to improving the political voice of minority groups").

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

14. *Id.* at 416, 419.

15. 478 U.S. 30 (1986).

ing claims concerning Voting Rights Act violations.[16] Once all three of the *Gingles* threshold factors have been proven by a preponderance of the evidence, the court must then conclude that based on "'the totality of the circumstances, the challenged practice impairs the ability of the minority voters to participate equally in the political process.'"[17] If the two-step inquiry is satisfied, a court is required to accept the defendant's remedy for a Voting Rights Act violation if it is legally acceptable.[18]

This is not the first time a system of cumulative voting has been implemented in lieu of a traditional straight voting scheme.[19] However, it is the first time cumulative voting has been imposed and maintained at the federal level. Cumulative voting originated in the corporate board room as a way of protecting minority owners' interests and has since been used in many local elections for city and county governments and school boards.[20] In Texas, over fifty-seven jurisdictions adopted cumulative vot-

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16. *Vill. of Port Chester*, 704 F. Supp. 2d at 418 (listing three necessary preconditions used to determine if the Voting Rights Act had been violated); *see also* Thornburg v. Gingles, 478 U.S. 30, 46, 50 (1986) (holding that in order to succeed on a vote dilution claim under the Voting Rights Act, plaintiffs must first establish that the minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district").

17. *Vill. of Port Chester*, 704 F. Supp. 2d at 418 (explaining that the satisfaction of the *Gingles* preconditions is only the first step in a two-step inquiry) (citation omitted); Johnson v. De Grandy, 512 U.S. 997, 1002 (1994) (focusing on the "totality of circumstances" as articulated in *Gingles*); *Gingles*, 478 U.S. at 36 (noting that an examination of certain factors are necessary to determine if a Voting Rights Act violation has occurred). These factors are based on a Senate Judiciary Committee Report that supplemented the 1973 amendment to Section 2 of the Voting Rights Act. *Vill. of Port Chester*, 704 F. Supp. 2d at 418; *Gingles,* 478 U.S. at 36–37. While this report contained numerous relevant factors, the *Gingles* Court stated that they were "neither comprehensive nor exclusive." *Gingles,* 478 U.S. at 45.

18. *Vill. of Port Chester*, 704 F. Supp. 2d at 447–48 (explaining that the defendant jurisdiction is given the first chance to correct a Voting Rights Act violation by proposing their own remedy).

19. *See, e.g.*, United States v. Euclid City Sch. Bd., 632 F. Supp. 2d 740, 771 (N.D. Ohio 2009) (implementing a system of limited voting for the school board election); Cousin v. McWherter, 904 F. Supp. 686, 714 (E.D. Tenn. 1995) (finding a system of cumulative voting to be a possible remedy for impermissible vote dilution); Cane v. Worcester Cnty., Md., 847 F. Supp. 369, 374 (D. Md. 1994) (imposing a system of cumulative voting for the county commissioner election).

20. Jeffrey N. Gordon, *Institutions as Relational Investors: A New Look at Cumulative Voting*, 94 COLUM L. REV. 124, 127 (1994). Cumulative voting became an option for cities such as Amarillo in 1995 when then-governor George W. Bush signed legislation that allowed school districts in Texas to adopt proportional systems such as cumulative voting and limited voting in their local elections. *The History of Cumulative Voting in Amarillo*, FAIRVOTE, http://archive.fairvote.org/?page=247 (last visited Sept. 6, 2011). Since then, Amarillo has become the largest jurisdiction in the United States to implement cumulative voting after initially adopting the system for its school board elections in 2000. *Id.* In the

ing as a remedy to Voting Rights Act suits between 1991 and 2000.[21] In Illinois, cumulative voting was used in lower house elections from 1870 to 1980; however, voters abolished the system in reaction to the slogan, "[f]ire [fifty-nine] lousy politicians with one shot," and majority voting remains in place today.[22]

Cumulative voting is controversial because it changes the basic principle underlying universal suffrage in America. In this Comment, I will examine cumulative voting in the context of the Voting Rights Act, and make a comparison to the current at-large, district-based elections used in the majority of states today. I will focus on the history and effect of cumulative voting on all citizens to determine to what extent this process fosters minority representation, if at all, whether there are unintended consequences, and how any such consequences weigh for or against cumulative voting as a remedy for Voting Rights Act violations.

II. SUFFRAGE AND THE VOTING RIGHTS ACT

There is no individual right to vote in the United States Constitution. When the United States was founded, only White men over the age of twenty-one who owned property were typically allowed to vote.[23] By not addressing the suffrage issue more specifically, the authors of the Constitution set the stage for an interminable struggle over voting rights.[24] Although most economic impediments to voting had disappeared by the mid-1850s,[25] the road to nearly universal suffrage has been a long one. Passed by Congress in 1869 and ratified in 1870, the Fifteenth Amend-

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2000 elections, an African-American candidate was elected for the very first time and a Hispanic candidate was elected for the first time since the seventies. *Id.*

21. *The History of Cumulative Voting in Amarillo*, *supra* note 20.

22. *Cumulative Voting—Illinois*, NEW RULES PROJECT, http://www.newrules.org/governance/rules/proportional-representation/cumulative-voting-illinois (last visited Sept. 6, 2011). In 2005, the Midwest Democracy Center campaigned to reestablish a system of cumulative voting for the Illinois House of Representatives by introducing a bill to amend the Illinois Constitution. *Id.* The goal of the bill was to have cumulative voting in place by the 2008 election. *Id.* This campaign was unsuccessful.

23. Ed Crews, *Voting in Early America*, CW J., Spring 2007, *available at* http://www.history.org/Foundation/journal/Spring07/elections.cfm. In this article, Crews describes the first election and the establishment of voting rights in early America. *Id.* When the United States was founded, most of the nation was excluded from voting, including Native Americans, women, most African-Americans, men who were under the age of twenty-one, and White males without property. *Id.* These voting restrictions stemmed from eighteenth-century England where the male-only electorate held strong beliefs about the incompetency of both women and minorities. *Id.*

24. *Id.*

25. *Id.*

ment guaranteed the right to vote to African-American men.[26] However, this guarantee was short-lived for most former slaves, as many states responded to this new amendment by passing laws to restrict the newfound freedom of African-American voters.[27] Known as the Black Codes, these laws advocated the use of literacy tests and poll taxes to suppress the African-American vote.[28] Although women's suffrage was proposed in 1848, it wasn't until the passage of the Nineteenth Amendment in 1920 that women finally won the right to vote.[29]

It has been over a century since the Supreme Court described the right to universal suffrage as fundamental because it is '"preservative of all rights.'"[30] This principle has remained strong throughout history.[31] As the Court stated in *Wesberry v. Sanders*[32] in 1964: "Other rights, even the most basic, are illusory if the right to vote is undermined."[33] There has been a lot of progress since voting rights were first described as fundamental and obstacles that restrict a citizen's right to vote have been prohibited by law at the federal, state, and local level.[34] However, although

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26. "The right of citizens of the United States shall not be denied or abridged by the United States or by any state on account of race, color or previous condition of servitude." U.S. CONST. amend. XV, § 1. The Fifteenth Amendment was the last of three Reconstruction Amendments implemented to protect the rights of African-Americans. *See* MICHAEL BURGAN, THE RECONSTRUCTION AMENDMENTS 6 (Julie Gassman ed., 2006). These amendments were passed as part of Reconstruction, a program created by Northern lawmakers to help rebuild the South after the Civil War. *Id.* at 6–7. The abolition of slavery by the Thirteenth Amendment and the Fourteenth Amendment (which included a redefinition of citizenship, and the Privileges or Immunities, Due Process, and Equal Protection Clauses) faced much opposition. *Id.* at 18; *see also* U.S. CONST. amend. XIII, XIV (for the full text of the amendments). However, in the end they were successful in restructuring the United States to extend all constitutionally guaranteed rights to the entire male population. BURGAN, *supra* at 18.

27. BURGAN, *supra* note 26, at 13.

28. *Id.* at 13–14. The Black Codes were similar to the Slave Codes which existed before the abolition of slavery and were used to keep newly freed slaves dependent on their former masters. *Id.*

29. U.S. CONST. amend. XIX (prohibiting each state and the federal government from denying the right to vote based on sex); Kris Kobach, *Rethinking Article V: Term Limits and the Seventeenth and Nineteenth Amendments*, 103 YALE L.J. 1971, 1980 (1994).

30. NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010 at 51 (2009) (citing Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886)).

31. *Id.*

32. 376 U.S. 1 (1964).

33. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

34. U.S. CONST. amend. XXIV (prohibiting both Congress and the states from conditioning the right to vote in federal elections on payment of a poll tax or other types of tax). The Twenty-Fourth Amendment was proposed by Congress in 1962 and ratified in 1964. *The Constitution of the United States: Amendments 11-27*, THE CHARTERS OF FREEDOM, http://www.archives.gov/exhibits/charters/constitution_amendments_11-27.html (last visited Sept. 6, 2011).

all citizens earned this fundamental right, the right to vote continued to be illusory for many Americans because Southern legislators resisted voting rights legislation long after the passage of the Fifteenth Amendment.[35] As a result, Congress passed the Voting Rights Act in 1965 which has been regarded by many as "the most successful piece of civil rights legislation ever adopted by the United States Congress."[36]

The Voting Rights Act was created to protect the right to vote as guaranteed by the Fifteenth Amendment and to enforce the Fourteenth Amendment by giving minority voters an opportunity to engage in the electoral process free from discrimination.[37] Section 2[38] and Section 5[39] of the Act are of particular importance for the analysis of this Comment. Section 2 of the Act consists of a broad ban on discriminatory voting practices across the nation by focusing not only on voting systems that are intended to be racially discriminatory, but also on those that have proven to have a racially discriminatory impact.[40] It prohibits all jurisdictions from establishing a "voting qualification or prerequisite to voting or standard, practice or procedure . . . in a manner which results in the denial or abridgement of the right . . . to vote on account of race or color."[41] Section 5 of the Act aims to prevent voting rights violations before they start by requiring certain states to clear any changes to their election procedures with the U.S. Attorney General to ensure that they do not have a discriminatory purpose or effect before allowing them to become law.[42] In 1982 Congress amended Section 2 to provide that a plaintiff did not have to prove discriminatory purpose to establish a violation of the section.[43] The 1982 amendments also codified a "totality of circumstances" standard to determine if a challenged procedure effectively limited the right to vote.[44]

While the Voting Rights Act eliminated formal exclusions and gave members of minority groups a legally recognized right to vote, the issue

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35. *Introduction to Federal Voting Rights Laws, supra* note 6.

36. *Id.*; *see* Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437 (codified at 42 U.S.C. § 1973) ("An Act to enforce the [F]ifteenth [A]mendment to the Constitution of the United States and for other purposes.").

37. *Introduction to Federal Voting Rights Laws, supra* note 6.

38. Voting Rights Act of 1965, § 2, 79 Stat. at 437 (codified at 42 U.S.C. § 1973(a)).

39. *Id.*

40. *Introduction to Federal Voting Rights Laws, supra* note 6.

41. § 2, 79 Stat. at 437

42. § 5, 79 Stat. at 439 (codified at 42 U.S.C. § 1973c); *Introduction to Federal Voting Rights Laws, supra* note 6.

43. Voting Rights Act Amendments of 1982, Pub. L. 97-205, Sec. 3, § 2(a), 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973(b)); NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 30, at 53.

44. Sec. 3, § 2(b), 96 Stat. at 134.

has now become whether this right is an effective tool to ensure that minority groups have a fair chance to have their interests represented.[45] The focus shifted from universal suffrage to equitable voting systems when racial gerrymandering became commonplace in the 1990s in response to the Voting Rights Act.[46] In an attempt to prevent violations of the Act, the Department of Justice began encouraging states subject to Section 5 preclearance to draw redistricting plans to create "majority–minority" districts in an attempt to prevent violations of the Voting Rights Act.[47] The current design and the one used most often to elect our local, state, and federal legislatures requires the winning candidate to garner either a plurality or a majority of the votes in a district to ensure representation is apportioned according to local geographic areas.[48] The basis for this process is the concept of "one person, one vote" with new district boundary lines being drawn every ten years based on the census as required by the Constitution.[49] When states began to draw redistricting plans to create new districts in which members of a racial or language minority group consisted of a majority of the population (majority–minority districts) some of the districts obtained "bizarre shapes that caused them to be labeled 'racial gerrymanders.'"[50]

Racial gerrymandering is defined as "'the deliberate and arbitrary distortion of district boundaries . . . for [racial] purposes.'"[51] It exists when

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45. *See* Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 424–25 (1995) (reviewing LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY (1994)) (describing issues to which Guinier takes objection in the electoral process created by the Voting Rights Act and its subsequent amendments).

46. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 30, at 71. The National Conference of State Legislatures (NCSL) is a bipartisan organization that accommodates legislators throughout the United States with up-to-date research and analysis on a vast array of legal issues. *Id.* For more information about the organization itself, see the NCSL website. *About Us: National Conference of State Legislatures*, NAT'L CONFERENCE OF STATE LEGISLATURES, http://www.ncsl.org/AboutUs/tabid/305/Default.aspx (last visited Sept. 6 2011).

47. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 30, at 71.

48. Briffault, *supra* note 45, at 428.

49. Michael D. Robbins, *Gerrymander and the Need for Redistricting Reform*, FRAUD FACTOR, http://www.fraudfactor.com/ffgerrymander.html#article (last revised Jan. 2, 2007) (discussing redistricting under the subheading "Gerrymander Violates the Fairness Principle").

50. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 30, at 53.

51. *Id.* at 71 (quoting Shaw v. Reno (Shaw I), 509 U.S. 630, 640 (1993)); *see also* Robbins, *supra* note 49 (defining gerrymandering as "an abuse of the redistricting process to draw election district boundaries that give a significant unfair and undeserved vote count advantage in future elections to the majority political party, which controls the redistricting process, and to incumbent politicians of all political parties"). Gerrymandering is not a recent phenomenon. *Id.* The word itself was created in 1812 in response to a bizarre

race is a legislature's dominant rationale for drawing district lines and was first used in the South to instigate racial discrimination in response to the passage of the Fifteenth Amendment.[52] The boundary of Tuskegee, Alabama in 1960 is a prime example of this type of districting. In an attempt to limit African-American representation in Congress, the boundary was redrawn "'from a square to an uncouth twenty-eight-sided figure'" to expel African-Americans from the city.[53] The redistricting that followed the 1990 decennial census was used in the opposite way in an effort to *increase* minority representation instead of limiting it.[54] Many suits were filed in federal district court arguing that these redistricting plans violated the Equal Protection Clause of the Fourteenth Amendment.[55] The first case to reach the Supreme Court was *Shaw v. Reno*,[56] challenging North Carolina's congressional redistricting plan.[57] Numerous North Carolina residents objected to the new district created in the plan, asserting that it concentrated a majority of Black voters in an arbitrary manner.[58] The Court explained that the racial gerrymandering claims must be examined against the backdrop of this country's long history of racial discrimination in voting and commented on the peculiar shape of the minority district stating that "reapportionment is one area in which appearances do matter."[59] The Court found that if a redistricting map is "so bizarre on its face that it is 'unexplainable on grounds other than race,'" it must be held to the standard of strict scrutiny.[60] In similar cases that followed *Shaw*, the Supreme Court established procedures to follow in evaluating racial gerrymandering challenges to majority–minority redistricting plans.[61]

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election district formulated by Elbridge Gerry, an American political leader. *Id.* The created district resembled a salamander and the word "gerrymander" was coined after Gerry expressed his support for the redistricting bill. *Id.*

52. *Id.*

53. *Id.* (citing Shaw v. Reno, 509 U.S. 630, 640, 113 (1993)).

54. *Id.*

55. *See* Lawyer v. Dep't of Justice, 521 U.S. 567, 576 (1997) (asserting that a reapportioned district violated the Equal Protection Clause); *see also* Bush v. Vera, 517 U.S. 952, 958 (1996) (alleging that the majority of newly created congressional districts in Texas violated the Fourteenth Amendment by racial gerrymandering).

56. 509 U.S. 630 (1993).

57. NAT'L CONFERENCE OF STATE LEGISLATURES, *supra* note 30, at 71.

58. Shaw v. Reno, 509 U.S. 630, 637 (1993).

59. *Id.* The Court explained that the district "winds in snake like fashion through tobacco country, financial centers, and manufacturing areas 'until it gobbles in enough enclaves of black neighborhoods.'" *Id.* at 635–36.

60. *Id.* at 644 (1993) (quoting Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1996)).

61. The Supreme Court curtailed race-based districting and other forms of racial gerrymandering while establishing procedures to follow when assessing such claims in many decisions at this time. *See, e.g.*, Bush v. Vera, 517 U.S. 952, 959 (1996) (applying strict

This procedure puts the burden of proving that a redistricting plan was racially gerrymandered on the plaintiff who is challenging the constitutionality of the plan.[62] Once the plaintiff proves this, the court must apply strict scrutiny to determine whether the state had a compelling governmental interest in creating the majority–minority district.[63] It is important to note that although the Supreme Court has held several majority–minority redistricting plans unconstitutional using this procedure, the Court has made it clear that race-conscious redistricting is not always unconstitutional.[64]

Section 2 cases have primarily addressed claims that certain political procedures such as the placement of minority groups into multi-member districts, packing minorities into a single district, and fracturing minorities into multiple districts have made the political process unequal for minorities.[65] Each one of these methods of districting may have a negative effect on minority voting strength.[66] Minority voting strength is easily diluted in multimember district systems by placing the minority group in a larger multi-member district that has a greater population of majority voters.[67] As a result, minority voters will be unable to elect their preferred candidate because of the overwhelming population of majority voters. The validity of multi-member districts has been challenged in many vote dilution cases both before and after the 1982 amendments.[68] However, courts continue to hold that these districts are not per se unconstitutional, but may violate Section 2 if the districting results in a denial of equal opportunity to take part in the electoral process.[69] Packing

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scrutiny and explaining that "for strict scrutiny to apply, the plaintiffs must prove that other, legitimate districting principles were 'subordinated' to race" (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995))); *Miller*, 515 U.S. at 916, 927 (explaining that the excessive use of race in districting causes societal harm by turning electorates into racial blocs which makes it necessary to make a distinction between "being aware of radical considerations and being motivated by them"); United States v. Hays, 515 U.S. 737, 739 (1995) (finding that in order to state a racial gerrymander claim a plaintiff must have been personally subjected to the racial classification).

62. *Shaw*, 509 U.S. 659–60; *see also Hays*, 515 U.S. at 744 (explaining that any citizen that has been harmed by a racial classification will have standing if they can prove they have been personally injured by the classification).

63. *Shaw*, 509 U.S. at 643.

64. *Id.* at 642.

65. LYDIA QUARLES, THE JOHN C. STENNIS INST. OF GOV'T, POLICY MATTERS: CONSIDERING SECTION 2 OF THE VOTING RIGHTS ACT OF 1965 at 4 (Jan. 18, 2010), *available at* http://www.msgovt.org/modules/cms/images/thumb/274.pdf.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*; *see, e.g.*, Ketchum v. Byrne, 740 F.2d 1398, 1409–10 (7th Cir. 1984) ("There appears to be no difference in the practical result or in the available remedy regardless of

districts is another method that is often challenged as a violation of the Voting Rights Act. Packing can be easily established by drawing district lines along racially segregated housing patterns in order to concentrate as many minority voters into a single electoral district to reduce their influence in other districts.[70] This strategy can also minimize the ability of minorities to elect candidates of their choice.

The first time the Supreme Court applied the amended Voting Rights Act to a Section 2 claim was in *Thornburg v. Gingles*, in which the Court addressed a third type of impermissible vote dilution known as fracturing.[71] Fracturing occurs by splitting minority voters from another concentration of minority voters and adding them to a large majority district; this often creates a voting polarity which minimizes the ability of the fractured group to elect a candidate of its choice.[72] In *Gingles*, the Court held that in order to succeed on a vote dilution claim under Section 2, plaintiffs must: (1) establish that a minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) that the minority group is politically cohesive, and (3) without special circumstances, bloc voting by the White majority usually defeats the minority's preferred candidate.[73] Justice Brennan, writing for the majority, rejected the previous test of intent to discriminate and affirmed that to decide whether a violation of Section 2 has occurred, a court must determine if "'as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice.'"[74] Justice Brennan also indicated that the proper way to determine this is to assess the impact of the contested practice in regard to the "totality of circumstances" based on seven objective factors developed by the Senate Judiciary Committee.[75]

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how the resulting discrimination is characterized."); United States v. Marengo Cnty. Comm'n, 731 F.2d 1546, 1550 (11th Cir. 1984) (explaining that at-large elections are not directly prohibited; however, any practice that denies an individual the right to vote based on race violates the Voting Rights Act); Jones v. City of Lubbock, 727 F.2d 364, 385 (5th Cir. 1984) (finding that bloc voting is not in itself unconstitutional).

70. *See* Rybicki v. State Bd. of Elections, 574 F. Supp. 1082, 1093 (N.D. Ill. 1982) ("Packing occurs when a minority group is concentrated into one or more districts so that it constitutes an overwhelming majority in those districts (and part of its vote is 'wasted').").

71. Thornburg v. Gingles, 478 U.S. 30, 46 (1986).

72. *See Rybicki*, 574 F. Supp. at 1093 (describing fracturing as occurring "when a geographically unified minority group is unnecessarily split between a number of districts").

73. *Gingles,* 478 U.S. at 50–51.

74. *Id.* at 44 (quoting S. REP. NO. 97-417, at 36 (1982)).

75. *Id.* at 36–37 (explaining the procedure for determining violations of the Voting Rights Act). The totality of circumstances factors were determined by the Senate Judiciary

In numerous cases since, the Supreme Court has attempted to clarify the *Gingles* factors. For example, in *Growe v. Emison*,[76] the Court determined that the *Gingles* vote dilution claim preconditions apply not only to single-member districts, but also to multi-member or at-large districts.[77] The Court's opinion in *Growe* is also significant because it determined that voting age population is the best measurement to use when examining a Section 2 claim.[78] One year after the *Growe* decision, the Court in *Johnson v. De Grandy*[79] rejected an absolute rule that would bar Section 2 claims if the number of majority–minority districts is proportionate to the minority group's share of the relevant voting age population.[80] To reach this conclusion, the Court ignored the first prong of the *Gingles* test and instead focused on the totality of circumstances.[81] Since

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Committee as a supplement to the 1973 amendment to Section 2 of the Voting Rights Act and include:

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

S. REP. NO. 97-417, at 28–29; *Gingles*, 478 U.S. at 36–37.

76. 507 U.S. 25 (1993).

77. Growe v. Emison, 507 U.S. 25, 40 (1993). Although the Court determined that the *Gingles* preconditions did apply to both single- and multi-member districts, the Court discovered that the district court had completely ignored the threshold factors and instead jumped directly to the totality of circumstances analysis. *Id.* at 37–38. Because a Section 2 violation requires a plaintiff to prove that racial bloc voting exists and there was no evidence of such voting cohesion in these districts, the Court found that there was no Voting Rights Act violation in the first place. *Id.* at 42.

78. *Id.* at 39 n.4 (noting that a district's minority *voting age* population is the appropriate standard to use when assessing the validity of a Section 2 claim); *see also* Romero v. City of Pomona, 883 F.2d 1418, 1425–26 (9th Cir. 1989) (explaining that only minority voters possess the requisite potential to have their vote diluted).

79. 512 U.S. 997 (1994).

80. Johnson v. De Grandy, 512 U.S. 997, 1000 (1994).

81. *Id.* at 1008–10.

the Court's decision to implement strict scrutiny as enunciated in *Shaw*, the Court has determined that a district that is not reasonably compact cannot remedy a perceived Section 2 violation because it fails to satisfy the first threshold requirement of the *Gingles* standard.[82]

Although the *Gingles* preconditions have been interpreted in a variety of ways, the three-part test, combined with an objective evaluation of the totality of circumstances, continues to be the proper method to determine a Voting Rights Act violation.[83] Because the Act gives the district court the broad discretionary authority to implement an adequate remedy that fully alleviates the underlying violation, it becomes necessary to determine what constitutes a proper remedy for a Section 2 violation.[84] After discovering a Section 2 violation, districts courts must give the defendant jurisdiction the first chance to create an acceptable remedial plan; if the proffered plan is legally acceptable, the court is required to accept and enforce the remedy.[85] Therefore, after a determination of illegal vote dilution,[86] a district court's remedial authority seems to be open-ended, as any legal remedy that aids in correcting the vote dilution becomes a feasible option.[87] This broad authority was exemplified most recently in *United States v. Village of Port Chester,*[88] when Judge Robinson ordered an alternative electoral system known as cumulative voting as a remedy to a Voting Rights Act violation. Mandatory cumulative voting originated in 1870 when the Illinois Constitution was revised to require cumulative voting for both the election of the Illinois House of Representatives and the election of directors for corporations throughout the

82. *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, 356 (1998) (explaining that the *Shaw* restrictions also apply to the implementation of alternative voting systems because "no court has done so in circumstances where it was impossible to draw a reasonably compact single-member district").

83. *Id.*

84. *Id.* at 357.

85. *Id.*

86. *The Role of Section 2—Redistricting & Vote Dilution*, REDRAWINGTHELINES.ORG, http://www.redrawingthelines.org/redistrictingvotedilution (explaining that "[p]ractices that have the effect of depriving minority voters of an equal opportunity to elect a candidate of choice constitute minority vote dilution"); *see also* Robert Farley, Comment, *Preventing Unconstitutional Gerrymandering: Escaping the Intent/Effects Quagmire*, 38 SETON HALL L. REV. 397, 397–98 (2008) (explaining that there are permissible and impermissible forms of vote dilution, which can be either direct or indirect). Gerrymandering can cut both ways, both for and against minorities, depending on if the employed mechanism is normal, non-partisan redistricting or unconstitutional gerrymandering. *Id*. at 398.

87. Mulroy, *supra* note 82, at 358.

88. 704 F. Supp 2d 411 (S.D.N.Y. 2010).

state.[89] The goal was to protect minority interests from abuse of power by the majority, especially in situations when being a member of the board gave the minority the information needed to police against fraud.[90] The late 1940s marked the height of this type of voting when twenty-two states adopted mandatory cumulative voting procedures for private corporations.[91] However, by 1992 mandatory cumulative voting was maintained in only six states; forty-four states chose to adopt the permissive form; and one state (Massachusetts) completely banned cumulative voting.[92] In fact, no significant corporate law jurisdiction has continued to implement a system of mandatory cumulative voting as they found that elimination of such a system served shareholders' interests and protected minority interests in a more equitable manner.[93] Mandatory cumulative voting was also rejected in the electoral context when voters in Illinois abolished the system in 1980 in order to save money and increase competition for state house seats.[94]

Cumulative voting has primarily been used in local elections for city and county governments and school boards. Under this proportional system, voters get multiple votes to cast and can spread them among candidates or concentrate them on one or more candidates. If there are five seats to fill, voters will get five votes and will be allowed to give all of those votes to one candidate or distribute them among several candidates.[95] Proponents of this method argue that this system preserves the benefits of at-large elections while addressing the problem of minority exclusion.[96] Also, some courts have expressed support for the use of cumulative voting as a valid alternative to single-member districts.[97] How-

89. Gordon, *supra* note 20, at 142 (explaining that cumulative voting has "fallen into great disfavor" in the corporate world).

90. *Id.*

91. *Id.* at 145.

92. *Id.* at 145–46 (illustrating the rise and fall of cumulative voting in the corporate setting throughout the United States). Gordon explains that cumulative voting is rarely used in large public corporations. *Id.* at 165–66. In fact, even the states that chose to maintain the permissive form of cumulative voting rarely, if ever, employ it. *Id.*

93. *Id.* at 158, 165.

94. *See Cumulative Voting—Illinois*, *supra* note 22 (explaining that in a typical election using cumulative voting, each district would only have one candidate running from the minority party and two from the majority party).

95. *The History of Cumulative Voting in Amarillo*, *supra* note 20 (explaining the various ways in which a voter can cast their votes under a system of cumulative voting); *see also* Mulroy, *supra* note 82, at 341 (providing the mathematical formula to determine the ability of minority voters to elect the candidate of their choice using cumulative voting).

96. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1463 (1991).

97. Mulroy, *supra* note 82, at 358.

ever, in *McGhee v. Granville County*,[98] the Fourth Circuit cast doubt on using a system of cumulative voting as a remedial course, explaining that *Gingles* implies that the universe of Section 2 remedies is limited to single-member districts.[99] Nonetheless, because using districting as a remedy allows those who draw the boundaries to have an inordinate amount of control over electoral outcomes, it is easy to see why many citizens are deeply concerned about how to obtain effective and non-discriminatory voting practices as remedies for Voting Rights Act violations.

III. Cumulative Voting as a Remedy

The implementation of cumulative voting in the Village of Port Chester marks the first time this remedy has been ordered and approved in the electoral context at the federal level.[100] Although this is not the first time a federal court has chosen to implement a nontraditional voting method as a remedy for a Voting Rights Act violation, more often than not, these systems are discarded by the courts.[101] For example, in 2009 the Northern District of Ohio in *United States v. Euclid City School Board*[102] chose to impose a similar proportional voting system known as limited voting in lieu of a districting plan.[103] Limited voting is used in multi-seat electoral districts where each voter is only allowed to vote for one candidate despite the fact that there is more than one seat available.[104] The court

98. 860 F.2d 110 (4th Cir. 1988).

99. McGhee v. Granville Cnty., 860 F.2d 110, 117–18 (4th Cir. 1988) (reiterating that the first *Gingles* precondition requires a plaintiff to show they are numerous and compact enough to draw a single-member district as a threshold matter in order to find liability, which supports this implication).

100. *See* Cousin v. Sundquist, 145 F.3d 818, 822 (6th Cir. 1998) (explaining that at the time *Cousin v. McWherter*, 904 F. Supp. 686 (E.D. Tenn. 1995) was decided, it was the first time cumulative voting had been imposed as a remedy by a federal judge in the electoral context). However, because the decision was subsequently reversed, there continued to be "no example in federal case law in which cumulative voting ha[d] been ordered and approved for elections to any office." *Id.* This all changed with Judge Robinson's decision in *Port Chester*.

101. *See* Dillard v. Baldwin Cnty. Comm'r, 376 F.3d 1260, 1268 (11th Cir. 2004) (explaining that cumulative voting is not accepted as a remedy in Alabama); *see also Sundquist*, 145 F.3d at 829 (indicating that cumulative voting "is an inappropriate remedy for a Section 2 claim"); White v. Alabama, 74 F.3d 1058, 1071–73 (11th Cir. 1996) (finding that the Voting Rights Act cannot be used as a method to achieve proportional representation); Nipper v. Smith, 39 F.3d 1494, 1546 (11th Cir. 1994) (refusing to accept cumulative voting as a valid remedy after determining that the system encourages racial bloc voting).

102. 632 F. Supp. 2d 740 (N.D. Ohio 2009).

103. *See* United States v. Euclid City Sch. Bd., 632 F. Supp. 2d 740 (N.D. Ohio 2009) (addressing a claim that the at-large system of electing members of the school board was a form of illegal vote dilution that polarized voting strength of African-Americans in the city).

104. *Id.* at 755.

discarded cumulative voting as a remedial option after determining that the system is difficult both for a city to implement and for voters to understand.[105] In this instance, the court used the "threshold of exclusion"—or "the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances"—to determine whether minorities would have the opportunity to elect the candidate of their choice under the system of limited voting proposed by the Euclid City School Board.[106] The court found that the straightforward limited voting proposal would remedy the vote dilution violation and provide an opportunity for African-Americans to take part in the political process in a manner that re-districting and cumulative voting could not.[107]

The first time a district court imposed cumulative voting in the electoral setting was over fifteen years ago in *Cane v. Worcester County*,[108] and its decision was quickly reversed by the Fourth Circuit.[109] In *Cane*, the court selected a cumulative voting plan as a remedy for vote dilution after determining that the straight voting system the county used to elect members of the Board of Commissioners violated Section 2 of the Voting Rights Act.[110] The court concluded that cumulative voting would compel candidates to appeal to all voters in the county with the hope that each elected commissioner would therefore serve the interests of the entire community.[111] The court also indicated that a cumulative voting plan would negate the necessity to fashion the type of districts that created the vote dilution in the first place.[112] However, the Fourth Circuit found that by ordering the county to implement the cumulative voting system, the district court abused its discretion by "fail[ing] to give due deference to another legislative judgment set forth on the record."[113] The legislative findings introduced earlier in the case clearly expressed that the retention of commissioner resident districts would be the best method to address the needs and serve the interests of the county's citizens.[114] Because a cumulative voting system would abolish the county's preferred method of electing commissioners, the Fourth Circuit remanded the case to the district court to allow the county to determine an appropriate legally acceptable remedy.[115]

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105. *Id.* at 756.
106. *Id.* at 761 (quoting Dillard v. Cuba, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988)).
107. *Id.* at 770.
108. 847 F. Supp. 369 (D. Md. 1994).
109. Cane v. Worcester Cnty., Md., 35 F.3d 921, 929 (4th Cir. 1994).
110. Cane v. Worcester Cnty., Md., 847 F. Supp. 369, 374 (D. Md. 1994).
111. *Id.* at 373.
112. *Id.*
113. *Cane*, 35 F.3d at 928.
114. *Id.*
115. *Id.* at 929.

In *Port Chester*, Judge Robinson explained that although cumulative voting has been consistently rejected, it has never been disregarded as a concept that may be legally acceptable in certain situations.[116] Judge Robinson reiterated that the usual case (similar to the situation in *Cane*) was one in which the district court did not follow the proper procedure to determine a legally acceptable remedy.[117] Because nothing in the Voting Rights Act suggests that the federal judiciary may simply impose any remedy they see fit, all remedies must come from "the confines of the state's" system of government.[118] Therefore, it is important for a court to focus on the meaning of legally acceptable to determine the proper remedy for a Voting Rights Act violation. The definition of legally acceptable requires an individualized consideration of the facts of each case.

The Eighth Circuit demonstrated the appropriate legal standard for choosing a proposed remedial plan and the proper way to determine whether that plan is legally acceptable in *Bone Shirt v. Hazeltine*.[119] When a Voting Rights Act violation has been established the district court is required to develop a constitutional remedy.[120] While this responsibility ultimately lies with the court, the defendants must always be

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116. United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010).

117. *Id.*

118. Nipper v. Smith, 39 F.3d 1494, 1531 (11th Cir. 1994) (indicating that federal courts do not have a plethora of legal standards to employ when determining the appropriate remedy for a Voting Rights Act violation).

119. Bone Shirt v. Hazeltine, 461 F.3d 1011, 1022 (8th Cir. 2006) (concluding that a South Dakota legislative redistricting plan diluted the Native American vote in violation of Section 2 of the Voting Rights Act). In *Bone Shirt*, the court found that the legislative plan illegally "packed" Native Americans into one district, making it nearly impossible for an Indian-preferred candidate to be elected. *Id.* at 1017. Defendants argued that Native Americans had little to no interest in politics due to the reservation system in South Dakota. *Id.* at 1022. The court dismissed this argument, stating that "[t]he presumption that South Dakota is relieved of liability for discriminatory voting practices because the reservation system makes Native Americans less involved in state politics and more involved in tribal matters is untenable." *Id.* There is a long history of discrimination against Native Americans in South Dakota. *See generally* Laughlin McDonald, *The Voting Rights Act in Indian Country: South Dakota, A Case Study*, 29 AM. INDIAN L. REV. 43 (2004) (detailing the difficulty Native Americans in South Dakota have experienced in securing an equal voice in the political process). Although the 1975 amendments to the Voting Rights Act extended its protection to "language minorities" including Native Americans, Alaskan Natives, Asian-Americans, and individuals of Spanish Heritage, there was a significant lack of enforcement of the Act in South Dakota until fairly recently. *Id.* at 44, 45. In fact, the failure to comply with Section 5 of the Act was more deliberate and prolonged in South Dakota than in many jurisdictions in the South. *Id.* at 65. This lack of enforcement was due to a variety of factors, including lack of resources, past discrimination, language and cultural barriers, and the depressed socioeconomic status of most Native Americans in the state. *Id.* at 70.

120. *Bone Shirt*, 461 F.3d at 1022.

given the first opportunity to propose a legally acceptable remedial plan.[121] If the defendants refuse or fail to submit an acceptable plan, the district court may either adopt the plaintiff's remedial plan or create its own remedy.[122] However, the court must defer to the plan submitted by the governing legislative body if the plan is consistent with federal laws and the Constitution.[123]

Determining if a plan is legally acceptable is a fact-specific inquiry that requires the court to examine whether it will provide a meaningful "opportunity to exercise an electoral power that is commensurate with its population."[124] The most important and obvious obligation is the correction of the specific Voting Rights Act violation.[125] Secondly, the plan must be narrowly tailored to attain population equality without using multi-member districts; the third factor requires that the plan does not violate the Voting Rights Act, particularly Sections 2 and 5.[126] The last requirement is that the plan does not "'intrude upon state policy any more than is necessary'" to comply with the Constitution.[127] The plan being challenged is seen as the benchmark from which the effect of voting modifications are measured, thus it is necessary to compare the proposed plan with the existing plan to ensure the proposed solution is a legally acceptable alternative.[128]

In *Port Chester*, Judge Robinson focused on a court's obligation to impose a remedy that gives effect to the legislative policy judgments underlying the current electoral scheme in the jurisdiction. He explained that the degree of deference required by a district court is extremely strong, emphasizing that "a district court may not substitute its own remedial plan for a defendant's legally acceptable one, even if it believes another plan would be better."[129] After an initial determination that the Village of Port Chester's at-large system for electing its Board of Trustees prevented Hispanic voters from participating equally in the political process, Judge Robinson was faced with the task of implementing a remedial plan.[130] He used the aforementioned legal standards to evaluate whether the Village of Port Chester's at-large cumulative voting proposal or the

121. *Id.*

122. *Id.*

123. United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 447–48 (S.D.N.Y. 2010).

124. *Id.* at 449.

125. *Bone Shirt*, 461 F.3d at 1022.

126. *Id.* at 1022–23.

127. Upham v. Seamon, 456 U.S. 37, 41–42 (1982) (quoting White v. Weiser, 412 U.S. 783, 794–95 (1973)).

128. *Bone Shirt*, 461 F.3d at 1023.

129. *Vill. of Port Chester*, 704 F. Supp. 2d at 448.

130. *Id.* at 447.

plaintiff's single-member districting plan would be the most appropriate remedy for the vote dilution claim and based his decision on the four objective factors illustrated in *Bone Shirt*.[131]

First, Judge Robinson found that Port Chester's cumulative voting system would "cleanse the Section 2 violation" by giving Hispanics an equal chance to partake in the political process and elect their preferred candidates in the next election.[132] He based his conclusion on a number of factors, including the application of the threshold of exclusion. When a threshold of exclusion analysis is used to determine what the impact of cumulative voting will be, there is always an assumption that the minority population will plump their votes by distributing all of their votes to their preferred candidate.[133] This assumption is factored into the following "'worst case scenario': (1) the majority runs the same number of candidates as there are positions to be filled . . . ; and (2) the majority spreads its votes evenly among its candidates, with no support for the minority-preferred candidate."[134] According to the *Report on Cumulative Voting*, prepared for the lawsuit, if a minority population can exceed their threshold of exclusion, vote as a bloc and plump all of their votes for one candidate using cumulative voting, they are virtually guaranteed to elect the candidate of their choice, even under the worst case scenario.[135] According to the court, because the Hispanic population in Port Chester voted cohesively in previous elections, it was reasonable to expect that they would continue to vote as a bloc.[136] As a result, Judge Robinson concluded that it is likely that Hispanics would overcome the threshold of exclusion using a system of cumulative voting and that the village's proposal was narrowly tailored to afford an equal opportunity for Hispanics to participate meaningfully in the next election.[137]

The court also found that the cumulative voting plan met the third requirement to be considered legally acceptable because it did not generate a new Section 2 violation.[138] However, it is important to note that the court determined that this objective could only be accomplished with the implementation of a corresponding voter education program because Port Chester's plan will only provide Hispanics an equal opportunity to

131. *Id.* at 447–52.

132. *Id.* at 449.

133. *Id*. at 450.

134. United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 450 (S.D.N.Y. 2010).

135. RICHARD ENGSTROM, REPORT ON CUMULATIVE VOTING FOR *United States v. Village of Port Chester* ¶¶ 12–14 (2008), *available at* http://archive.fairvote.org/media/engstrom.pdf.

136. *Vill. of Port Chester*, 704 F. Supp. 2d at 450.

137. *Id.*

138. *Id.* at 451.

take advantage of their electoral power if they understand how cumulative voting works.[139] Judge Robinson explained that cumulative voting is a complex concept that is not a common method of voting in the United States.[140] Therefore, using the system as a remedy is counterproductive to a Section 2 violation unless it contains an extensive educational program that is tailored to the minority group.[141] More specifically, the minority group needs to understand the concept of vote plumping in order to elect their preferred candidate.[142] In addition to a comprehensive educational program, the court explained that Port Chester must also address the historical socioeconomic and education discrimination that helped to create the vote dilution in the first place.[143] As a condition of accepting Port Chester's cumulative voting plan, the court ordered the village to address the barriers that might keep Hispanics from partaking in the new system and determine what conditions are necessary for a non-discriminatory implementation of cumulative voting.[144]

The final requirement for formulating a legally acceptable remedial plan is that the plan upholds the Constitution without going against the preferences of the legislative body.[145] According a high level of deference to the defendant jurisdiction, Judge Robinson found that an examination of the plaintiff's remedial plan was unnecessary because the only criterion for judging the adequacy of Port Chester's plan was "statutory and constitutional acceptableness."[146] Once this determination has been made, it is no longer necessary to evaluate whether or not the other remedial plans would pass constitutional scrutiny. Judge Robinson emphasized that cumulative voting was more than appropriate in this situation and met the final requirement because it had been developed and proposed by the village itself.[147]

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139. *Id.* (finding that Port Chester had a history of failing to employ the resources necessary to provide Hispanics with an equal opportunity to vote). The court found that there was a language barrier to voting because Port Chester did not provide Spanish-speaking poll workers or print election materials in Spanish. *Id.* In order to implement cumulative voting in an effective manner Port Chester was required to focus on the education program and provide election day support for Spanish speakers. *Id.* at 451–52.

140. *Id.*

141. United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 451 (S.D.N.Y. 2010).

142. *Id.* at 451 (citing ENGSTROM, *supra* note 135, at ¶¶ 37–38).

143. *Id.*

144. *Id.* at 451–52.

145. Bone Shirt v. Hazeltine, 461 F.3d 1011, 1023 (8th Cir. 2006); *see also* Upham v. Seamon, 456 U.S. 37, 41–42 (1982) (finding that a district court may not interfere with state policy when choosing a reapportionment plan); Cane v. Worcester County, Md., 35 F.3d 921, 928 (4th Cir. 1994) (recognizing the district court's obligation to give deference to the legislative body).

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

147. *Id.*

Judge Robinson ultimately concluded that cumulative voting is legally acceptable as a remedy under both the Voting Rights Act and New York law.[148] He also asserted that there is no case law rejecting cumulative voting as a legally acceptable remedy and explained that the only reason cumulative voting has been discarded in the past is because other judges had been careless about following the appropriate standard of review for Voting Rights Act violations by either ignoring the preferences of the jurisdiction or hastily imposing the remedy without a valid determination of its acceptableness.[149]

In contrast to Judge Robinson's assertion however, the last time cumulative voting was ordered and subsequently reversed was not in response to a district court's failure to follow the appropriate standard of review, but because it failed to meet the third *Gingles* precondition.[150] In *Cousin v. Sundquist*,[151] decided only four years after the district court's decision to implement cumulative voting was invalidated in *Cane*, the Sixth Circuit rejected cumulative voting after determining that the plaintiffs had failed to show that minority-preferred candidates had been unsuccessful in winning elections.[152] *Gingles* has provided courts with a solid test to determine whether or not a Voting Rights Act violation has occurred. As the Seventh Circuit explained in *Milwaukee Branch of the NAACP v. Thompson*[153]: "The possibility of increasing minority representation does not compel a jurisdiction to achieve that outcome, unless the three [*Gingles*] conditions have been met and the judge is satisfied that minority voters have lacked an equal opportunity to participate in the political process."[154] Although the main reason for the reversal in *Cousin* was due to the failure to satisfy the *Gingles* conditions, the court made a point to explain that they would have reversed even if the plaintiffs would have met the conditions because cumulative voting is an inappropriate remedy

148. *Id.*

149. *Id.* at 448–49.

150. Cousin v. Sundquist, 145 F.3d 818, 826 (6th Cir. 1998).

151. 145 F.3d 818 (6th Cir. 1998) (reversing the district court's finding that plaintiffs met the third *Gingles* precondition and had a successful Voting Rights Act claim). In *Cousin*, African-American voters alleged that the at-large method for electing judges in Hamilton County violated the Voting Rights Act. *Id*. at 820. Although the district court found that they had a successful Section 2 claim, the Sixth Circuit found that the plaintiffs did not have a valid claim because they did not show that the minority-preferred candidate was unsuccessful in previous elections. *Id.* at 826. Although an African-American candidate had never been elected in the county, the winning White candidates were the minority-preferred candidates in previous elections. *Id.* at 825–26.

152. *Id.* at 825.

153. 116 F.3d 1194 (7th Cir. 1997) (challenging the election of judges pursuant to a county-wide election, and contending that it should be replaced with smaller districts).

154. Milwaukee Branch of the NAACP v. Thompson, 116 F.3d 1194, 1196 (7th Cir. 1997).

for a Section 2 claim.[155] According to the court, "Section 2 of the Voting Rights Act specifically precludes its use to achieve proportional representation."[156] The court then quoted the Act itself, which states: "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."[157] Because cumulative voting results in proportional representation and also, proponents would argue, the advantage of implementing cumulative voting as a remedy, it cannot possibly be regarded as a legally acceptable remedy for violations of the Voting Rights Act.[158] An examination of the first *Gingles* precondition that requires plaintiffs to show they are numerous and compact enough to draw a single-member district as a threshold matter to find liability also indicates that the universe of Section 2 remedies is limited to single-member districts.[159] According to the court in *Cousin*, altering the current electoral scheme does little but proclaim that race does in fact matter in an election.[160] A review of the Eleventh Circuit's opinion in *Nipper v. Smith*[161] echoes this assertion.[162]

The effect of the implementation of such a complex and controversial system as that of cumulative voting in the Village of Port Chester remains to be seen. Despite the controversial nature of cumulative voting, the prescription of the system by Judge Robinson has not been challenged and the Supreme Court has yet to decide whether such proportional voting systems are legally acceptable remedies under the Voting Rights Act.

IV. The Effect of Proportional Representation

The implementation of an alternative voting system in any form alters the meaning of the right to vote. The geographic representation that underlies the United States' "consent-based republican form of government" has endured because of the stability that has been created by the

155. *Cousin*, 145 F.3d at 829.

156. *Id.*

157. *Id.* (citing 42 U.S.C. § 1973(b)).

158. *Id.*

159. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 n.17 (1986) (noting that the single-member district is the appropriate standard to use when evaluating Voting Rights Act claims). The Court explained that a minority group is required to prove that it can make up a majority in a single-member district. *Id.* at 51.

160. *Cousin*, 145 F.3d at 830.

161. 39 F.3d 1494 (11th Cir. 1994) (criticizing cumulative voting as a remedy in judicial election cases).

162. Nipper v. Smith, 39 F.3d 1494, 1546 (11th Cir. 1994). The court explains that cumulative voting is a race-conscious remedy that would encourage racial-bloc voting and encroach on the same practices the Equal Protection Clause is designed to prevent. *Id.*

"winner-take-all" aspect of majority rule.[163] For most elected offices, districting is the method of representation that is the most consistent with the traditional voting conception that "rests on the republican principle that the actions of government must be based upon the consent of the governed."[164] However, it is necessary to determine whether majority rule actually reflects the will of most people and to ensure that minority voters have meaningful access to the ballot.[165] The Voting Rights Act requires that race be taken into account when drawing districts; however, race-conscious districting has often been found to be unconstitutional.[166] Because of this, the restrictions placed on the creation of majority–minority districts in *Shaw v. Reno* seemingly conflict with the race-conscious agenda of the Voting Rights Act.[167] Proponents of alternative systems argue that the implementation of cumulative voting is a way to resolve this conflict.[168]

Cumulative voting advocates assert that the system excludes racial considerations altogether and enhances opportunities for cohesive minority groups to elect candidates of their choice.[169] This system was the first to be adopted in direct response to allegations of minority vote dilution and is now used to elect the governing bodies of fifty local governments in four states.[170] The first cumulative voting elections were held in response to Voting Rights Act settlements at the end of the 1980s and the beginning of the 1990s.[171] These elections have an impressive record of in-

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163. James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 365 (2002).

164. *Id.* at 364 (quoting James Thomas Tucker, *Tyranny of the Judiciary: Judicial Dilution of Consent Under Section 2 of the Voting Rights Act*, 7 WM. & MARY BILL RTS. J. 443, 458 (1999)).

165. *See id.* at 380 (explaining that geographic representation has often been used to hinder the consent-based form of government by excluding minority groups).

166. *See* Michael E. Lewyn, *When Is Cumulative Voting Preferable to Single-Member Districting?*, 25 N.M. L. REV. 197, 201 (1995) (arguing that "race-conscious districting is constitutionally questionable").

167. Mulroy, *supra* note 82, at 335.

168. *Id*.

169. *Id.* at 350 (arguing that alternative voting systems are effective tools to strengthen minority representation); *see also* Briffault, *supra* note 45, at 422 (summarizing cumulative voting advocate Lani Guinier's attack on the Voting Rights Act and districting).

170. ENGSTROM, *supra* note 135; *see also* SHAUN BOWLER, ET AL., ELECTORAL REFORM AND MINORITY REPRESENTATION—LOCAL EXPERIMENTS WITH ALTERNATIVE ELECTIONS 1, 5 (2003), *available at* http://www.ohiostatepress.org/Books/Book%20PDFs/Bowler%20Electoral.pdf (arguing that cumulative voting results in greater minority representation).

171. Mulroy, *supra* note 82, at 349.

creased racial minority representation.[172] Minority candidates from different minority groups across the country won elections for the first time in decades, and in some cases for the very first time, under a system of cumulative voting.[173] The results include the election of a Native American candidate in Sisseton, South Dakota, a Hispanic candidate in Alamogordo, New Mexico, and African-American candidates in Peoria, Illinois.[174] Most recently, the Village of Port Chester used cumulative voting to elect its first Latino candidate to public office.[175] With just over ten percent of the vote, Luis Marino, a Peruvian-born custodial worker earned a seat on the Village's six-member Board of Trustees.[176] According to the *Cumulative Voting Educational Program Exit Poll Report*, more than ninety-five percent of all voters took full advantage of cumulative voting by casting all six of their votes for one candidate.[177] However, the degree of vote plumping varied based on factors such as race and education. It was estimated that thirty-four percent of voters plumped all six of their votes on one candidate, and minority voters, including voters whose primary language was not English and voters who did not complete high school, were the most likely to report vote plumping.[178] Race and ethnicity were also strongly related to the way that voters cast their ballots. It was reported that 51% percent of Latino voters and 41% percent of African-American voters cast all of their votes for one candidate, while only 27% percent of White voters gave all of their votes to one candidate.[179] Also, because a large amount of Latino voters indicated that they knew how to plump their votes in order to elect the candidate of their choice, it is apparent that the extensive voter education system employed by Port Chester at the order of Judge Robinson was successful.[180] According to the report, the election of Mr. Marino supports the conclusion that at least some voters plumped their votes because he received more votes than total voters in five different districts on election day.[181]

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172. *Id.*

173. *Id.*

174. *Id.*

175. Kirk Semple, *First Latino Board Member Is Elected in Port Chester*, N.Y. TIMES, June 16, 2010, http://www.nytimes.com/2010/06/17/nyregion/17chester.html?_r=1.

176. *Id.* Mr. Marino was not the only minority candidate elected at this time. *Id*. Republican Joseph Kenner was also elected, becoming the first African-American board member in Port Chester. *Id*.

177. DAVID C. KIMBALL & MARTHA KROPF, CUMULATIVE VOTING EDUCATIONAL PROGRAM EXIT POLL REPORT, PORT CHESTER, N.Y. 31 (2011), *available at* http://www.umsl.edu/~kimballd/PCExitPollFinalReport.pdf.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.*

Although cumulative voting may provide minority groups with a better chance to elect their preferred candidates, it does so by sacrificing many important aspects of our consent-based, representative government.[182] Despite the fact that racial bloc voting in the form of majority–minority districts has been regarded as constitutionally questionable since the decision in *Shaw*, racial bloc voting in the form of cumulative voting has been implemented as a remedy for a Voting Rights Act violation.[183] Therefore, although cumulative voting may eliminate some types of gerrymandering, it is far from race-neutral.[184] In *Shaw*, the Court stated that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions . . . [and] threatens to carry us further from the goal of a political system in which race no longer matters . . . ."[185] Interestingly enough, by encouraging minority groups to cast all their votes for one minority candidate when they might have initially supported a White majority candidate, cumulative voting assists in the creation of multiple competing racial groups, thereby creating the exact result the Court feared.[186]

Even though cumulative voting may have been successful when it was adopted as a judicial remedy for a specific Voting Rights Act violation, it is generally a very poor system for achieving a proportional result.[187] This is true because it takes a large amount of resources, party control, and coordination of voting to ensure minority success.[188] This coordination may be easy to achieve in simple situations, but is nearly impossible in situations where a minority group may elect multiple candidates or when the minority group must make specific strategic choices in order to elect the candidate of their choice.[189] Cumulative voting failed to achieve a proportional result in Great Britain when various forms were used in multiple elections at the end of the nineteenth century.[190] Strategic er-

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182. Tucker, *supra* note 163, at 437–38 (explaining that any change in the way an election is conducted changes the meaning of consent, representation, and the right to vote).

183. *See* Mulroy, *supra* note 82, at 348–49 (discussing the conflict between the Voting Rights Act and *Shaw*, and advocating the adoption of alternative voting systems).

184. *Id.*

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

186. *But see* Mulroy, *supra* note 82, at 352 (maintaining that although it is troubling, the balkanization argument is unpersuasive).

187. Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1151 (1998).

188. *Id.* at 1151–52.

189. *Id.* at 1152.

190. *Id.* For an in-depth analysis of the British political system, see VERNON BOGDANOR, THE PEOPLE AND THE PARTY SYSTEM: THE REFERENDUM AND ELECTORAL REFORM IN BRITISH POLITICS 111–18 (1981) (discussing the varying forms of proportional representation and the negative consequences of adopting such systems in Great Britain). In his

rors frustrated the proportional effect and cast doubt on all schemes that sought to achieve a proportional result.[191]

If cumulative voting was widely adopted in the United States, it is likely that this experience would repeat.[192] There has been only one long-term cumulative voting experiment in the United States—Illinois used cumulative voting from 1870 to 1980 in state house elections to fill three-member districts in the lower house.[193] The Illinois constitutional convention adopted cumulative voting for three main reasons. First, the convention aimed to make the house more representative of the electorate by increasing minority representation across the state.[194] Second, the convention wanted to give voters the option to maximize their influence by plumping votes for their first-choice candidate.[195] Third, the convention hoped to eliminate sectional divisions between the parties by ensuring that some Republicans would represent northern Illinois (then dominated by Republicans) while some would represent southern Illinois (then dominated by Democrats).[196] Because nearly every district gave one of its three seats to a candidate from the minority party, the Illinois system was effective in fulfilling the first two objectives of reducing geographic divisions and increasing minority representation.[197] However, cumulative voting failed to meet the third objective of enhancing individual voting decisions by increasing a voter's influence because "[t]he majority party in a district would often nominate two candidates, and the minority party, just one."[198] There was tight control over the nominating process and parties failed to run full slates for fear of vote dilution and

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book, Bogdanor explained that although proportional voting systems were created to protect minorities, when implemented in Britain, they had the opposite effect and "encouraged the development of a party machine whose purpose it was to ensure that only majorities were represented." *Id*. at 104. According to Bogdanor, in order for a political system to be successful, the government must act in a manner that is consistent with the dominant social views of that time. *Id*. at 3–4.

191. BOGDANOR, *supra* note 190, at 104.

192. McKaskle, *supra* note 187, at 1153.

193. *See* Tucker, *supra* note 163, at 434. *S*ee also FairVote Illinois, *Documentary on Cumulative Voting*, YOUTUBE (June 9, 008), http://www.youtube.com/watch?v=oavixTnQ 4eA.

194. Charles W. Dunn, *Cumulative Voting Problems in Illinois Legislative Elections*, 9 HARV. J. ON LEGIS. 627, 631–32 (1972) (exploring the history of cumulative voting in Illinois and concluding that a system of single-member districting is preferable).

195. *Id.* at 632.

196. *Id.*

197. *Id.* at 633.

198. *Id.* at 635 (describing one of the problems associated with using cumulative voting in the electoral context); *see also* Tucker, *supra* note 163, at 435 (explaining that during these primary elections in Illinois, the major parties would collude and nominate two candidates and have the minority party nominate only one).

party collusion.[199] Therefore, cumulative voting diminished the newfound voting power by reducing the amount of political competition and in most elections third parties failed to elect any representatives at all.[200]

Although proving that cumulative voting can co-exist with a two-party system of government, Illinois' experience with cumulative voting demonstrates that by limiting voting choices to maintain a stable two-party system, cumulative voting often replicates the same defects it is said to correct.[201] Illinois abolished cumulative voting in 1980 when citizens voted to reduce the number of seats in the Illinois House of Representatives.[202] According to Judge Abner Mikva,[203] the main reason the system was repealed by constitutional referendum was because most people never understood how to cast their votes in an effective manner.[204] He also argues that the repeal of cumulative voting had little to do with cumulative voting itself and was the result of the negative public perception of the Illinois legislature after it voted to give its members a pay raise.[205] The reasons for the repeal of cumulative voting are not as significant as the fact that the system has not been reinstated as a voting mechanism for the state legislature.[206]

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199. Dunn, *supra* note 194, at 634 (noting that cumulative voting weakened voter power by reducing political competition). The necessity of increased party control under a system of cumulative voting was recognized by an early cumulative voting analyst, Blaine F. Moore, in 1909. BLAINE F. MOORE, THE UNIVERSITY STUDIES—THE HISTORY OF CUMULATIVE VOTING AND MINORITY REPRESENTATION IN ILLINOIS, 1870–1908 at 33 (1909), *available at* https://www.ideals.illinois.edu/bitstream/handle/2142/9015/historyofcumulat03moor.pdf?sequence=1 (supporting cumulative voting as an alternative system but recognizing that it did not have an exact proportional result). Moore explained that it is impossible to have a small amount of party control when using cumulative voting because "several thousand voters coming to the polls each with three votes to distribute as he sees fit, without a certain amount of party supervision can lead to nothing but confusion, injustice and misrepresentation." *Id*. at 32.

200. Dunn, *supra* note 194, at 635; *s*ee also David Kenney, *No Cumulative Voting*, ILLINOIS ISSUES, Nov. 1976, *available at* http://www.lib.niu.edu/1976/ii761112.html (explaining the history of cumulative voting, and arguing that it is a faulty system since it results in meaningless contests).

201. Tucker, *supra* note 163, at 434, 437.

202. *See Cumulative Voting—Illinois*, *supra* note 22 (illustrating that when cumulative voting was replaced with simple majority voting, the house was reduced by fifty-nine seats).

203. Mikva, a visiting professor of law at the University of Chicago, served as chief judge on the U.S. Court of Appeals for the District of Columbia Circuit from 1979–1994.

204. Abner J. Mikva, *The Case for Cumulative Voting*, ILL. COUNTRY LIVING, Feb. 2001, at 4, *available at* http://www.lib.niu.edu/2001/ic010204.html.

205. *Id.* at 6.

206. *See id.* (indicating that returning to a system of cumulative voting would be difficult).

Except for the lower house in Illinois, all alternative voting systems utilized in the United States have been in the corporate context or at the local level.[207] Cumulative voting is appropriate in the corporate setting because voting is administered through proxies allowing shareholders to delegate their votes in advance to advocates of opposing positions.[208] This allows each side to know exactly how many proxies it has acquired before the actual vote and to determine the best manner to allocate the votes in order to attain the desired electoral goal.[209] Because elections for public officials are conducted by secret ballot and in person, the only way to implement an efficient system of vote targeting would be for the public to take an extreme step away from these traditional voting concepts.[210] It is quite unlikely that the public will agree to abolish the secret ballot and adopt a proxy system—the two characteristics that make corporate cumulative voting effective.[211] Also, in a corporate situation, shareholder voters are more likely to be sophisticated and have a better understanding of cumulative voting as compared to the average electoral voter.[212] Because of this, except for in the simplest situation, it will be extremely difficult to knowingly allocate votes in an efficient manner under a system of cumulative voting. Casting votes ineffectively will result in a large amount of wasted votes, diminish the influence of minority voters, and thereby defeat the purpose of cumulative voting as a viable alternative voting scheme.[213]

Local governments in small towns have less interest in maintaining geographic representation and are the strongest candidates for proportional voting systems.[214] More specifically, school boards are the most appropriate arenas for cumulative voting because they often conduct at-large elections which make it easier to adopt the modified election rules of cumulative voting.[215] They will have less difficulty in administering elections and can better facilitate relational representation because of the small size of the voting population.[216] However, even if the goal of cumulative voting is met and minority groups are able to elect the candidates of their choice, there is no guarantee that they will have a

207. McKaskle, *supra* note 187, at 1151–54.
208. *Id.* at 1153–54.
209. *Id.* at 1154.
210. *Id.*
211. *Id.*
212. *Cf.* Kenney, *supra* note 200 (emphasizing that cumulative voting created serious confusion among voters when it was used for lower house elections in Illinois because it is extremely difficult to understand).
213. McKaskle, *supra* note 187, at 1154.
214. Lewyn, *supra* note 166, at 227; Tucker, *supra* note 163, at 397–98 (2002).
215. Tucker, *supra* note 163, at 398–99.
216. *Id.* at 438.

significant amount of policy making power in the legislature.[217] As legal scholars, such as Dr. James Thomas Tucker,[218] have explained, "fair allocation of seats" is not always commensurate with "fairness in the allocation of power or a more responsive, accountable, and representative government" as cumulative voting often makes it easier for disruptive, fringe, and single-issue candidates to be elected.[219] Cumulative voting may create political fragmentation and deny the majority party of an effective working majority.[220] There is also the possibility that if a specific group has a majority in the legislature, they may have little to no incentive to represent minority groups that have obtained proportional representation.[221] Additionally, it may be necessary for minority groups that have a plurality of seats to bargain with other groups that have enough seats to establish a coalition with the majority.[222] In this sense, cumulative voting has the possibility of creating "token representation" which is, according to cumulative voting advocates, one of the fundamental problems of districting that proportional representation is supposed to correct.[223] Therefore, except in very specialized circumstances, cumulative voting as an electoral system does not guarantee proportional representation. More importantly, it would not consistently provide a satisfactory alternative to single-member districts.

Although judges have the power to implement a proposed remedy, they have a limited role in deciding what remedy is appropriate. Despite the fact that Judge Robinson determined that cumulative voting was the proper remedy for Port Chester, the involvement of the federal government in the village's Voting Rights Act case raises concerns about the proper role of the federal and state governments.

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217. *Id.* at 420.

218. Dr. James Thomas Tucker served as a senior trial attorney with the U.S. Department of Justice, Civil Rights Division-Voting Section. James Thomas Tucker Biography, AMAZON.COM, http://www.amazon.com/James-Thomas-Tucker/e/B002T3VWOE (last visited July 17, 2011). He works with the Native American Rights Fund (NARF) as a voting rights consultant, and has published over a dozen books and journal articles discussing minority voting rights. *Id.*

219. Tucker, *supra* note 163, at 420 (citation omitted) (internal quotation marks omitted).

220. Lewyn, *supra* note 166, at 214.

221. Tucker, *supra* note 163, at 420.

222. *Id.*

223. *Id.* (explaining the election of minority candidates may or may not increase the power of minority groups); *see also* Lewyn, *supra* note 166 (contending that the election of minority candidates with cumulative voting may result in intraparty warfare and collusion between political parties, making parties less effective).

V. Conclusion

Implementing cumulative voting in an attempt to deliberately reduce the White majority means that the Voting Rights Act is now being used to regulate not only the process by which voting is carried out, but the results of voting. The issue in Port Chester was not that Hispanics were not allowed to vote or that their right to vote was being hindered in any way, but that no Hispanic had won an election. The purpose of the Voting Rights Act was to outlaw discriminatory voting practices, not to provide minority voters with a guaranteed way to get their preferred candidate into office. Because the success of cumulative voting is based on the strategy of a specific voting group, it is likely to have adverse consequences on the political system as a whole.

While the implementation of cumulative voting at the electoral level may be a worthwhile experiment for state and local governments, it should not be widely adopted in the United States. If properly implemented in specific situations, cumulative voting may provide voters with a greater chance to elect their preferred candidate, but not without forfeiting many important aspects of our government.[224] If cumulative voting is truly proportional, there will be a better chance that elections will reflect the will of the people; however, there will be no guarantee that minority interests will not be subsequently suppressed in the legislature unless there is a complete departure from majority rule.[225]

For cumulative voting to be successful, voters must know if they are a part of the majority and the community must provide an extensive voter education program for all citizens. Therefore, cumulative voting is only appropriate in small communities that hold nonpartisan elections and have a smaller population of citizens to educate. Where a community is dominated by a specific group, voters will have a better chance of increasing their representation through vote plumping because they will know if they are a part of the majority and will be able to vote accordingly.[226] In contrast, if voters do not know whether they are a part of the majority or the minority because their city is so large, it will be difficult to employ an appropriate voting strategy, which could result in the majority becoming the minority.[227]

This is not to say that Judge Robinson's decision to implement cumulative voting in Port Chester is without merit. Although there are many valid reasons cumulative voting has been discarded by most courts, if it is applied to the right community for the right reasons, it has proven to be a

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224. *Id.* at 437–38.
225. *Id.* at 437.
226. Lewyn, *supra* note 166, at 227.
227. *Id.*

successful tool for increased minority representation. In elections for small legislative bodies, such as the Board of Trustees in Port Chester, cumulative voting will normally do away with redistricting because at-large voting is only possible when five or ten seats are at stake.[228] However, in large cities, cumulative voting will still require the use of multi-member districts in order to reduce the complexity of an already complex ballot.[229] Therefore, because cumulative voting does not eliminate the need for redistricting in "big-city, state, or congressional elections" and redistricting creates gerrymandering, it follows that cumulative voting does not dispel the practice of gerrymandering and should not be used as a remedy for Voting Rights Act violations.[230]

It would certainly be rash to forgo considering an option that may help to obtain America's promise of universal suffrage, but a broad solution that creates the same problem it is meant to remedy is not the answer. Courts may be headed in the right direction by moving slowly and testing alternative voting systems in small jurisdictions, but that is where these alternative systems should stay. Cumulative voting is, in general, a clumsy and defective system for obtaining a proportional result. The amount of coordination required to obtain a proportional result indicates that in most situations the system will work poorly. This does not mean that cumulative voting should be rejected completely.

Although we live in a very racially diverse democracy, we are nowhere near post-racial. Alternative systems may resolve certain defects of our current electoral system, while creating some new ones of their own. It may be time to consider alternatives other than race-conscious districting, but the substitution of race-conscious voting is not the answer for most jurisdictions. It is also important to recognize that any model for obtaining the consent of the governed will be imperfect in today's racially charged society. If we are ready to change the meaning of our representative government by abolishing majority rule to implement a proportional system, then some alternative voting systems may be appropriate.

228. *Id.* at 211.
229. *Id.*
230. *Id.* at 212.