
January 1995

Judicial Roulette: Alternative to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to at-Large Judicial Elections

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Recommended Citation

Ronald W. Chapman, Comment, *Judicial Roulette: Alternative to Single-Member Districts as a Legal and Political Solution to Voting-Rights Challenges to at-Large Judicial Elections*, 48 SMU L. REV. 457 (1995)
<https://scholar.smu.edu/smulr/vol48/iss2/7>

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JUDICIAL ROULETTE: ALTERNATIVES TO SINGLE-MEMBER DISTRICTS AS A LEGAL AND POLITICAL SOLUTION TO VOTING-RIGHTS CHALLENGES TO AT-LARGE JUDICIAL ELECTIONS

Ronald W. Chapman

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MINORITY voters across the country are pressing for increased political representation. In no area is this phenomenon more true than in state judicial elections. After years of debate and development, the United States Supreme Court has finally determined that the Voting Rights Act does apply to judicial elections. Consequently, minority voters have begun to challenge existing state electoral systems as violative of the Voting Rights Act. Even if plaintiffs in these cases can establish a violation of the Voting Rights Act, the question of the appropriate remedy still remains. In this manner, the game of judicial roulette - how to best select our judges - has already begun.

The most commonly suggested remedy is the implementation of single-member districts. However, for a variety of reasons, such a plan may not be the most beneficial relief, even for the minority plaintiffs. Cumulative voting, merit selection, and non-partisan elections each may have advantages over single-member districts as a solution to voting-rights challenges to judicial elections.

Part I of this Comment will explore the current status of the minority underrepresentation problem. Part II will address the development of

the Voting Rights Act in response to this quandary. Part III will examine the potential impact of implementing a single-member-district remedy. Finally, Part IV will analyze potential solutions to these voting-rights challenges, excluding single-member districts.

I. THE CURRENT STATUS OF THE UNDERREPRESENTATION PROBLEM

Most states today use a version of an at-large voting system.¹ An at-large election is one in which voters elect more than one candidate for the same type of office in a multimember government body.² An at-large judicial election is one in which voters elect all the judges that serve on the bench in a given jurisdiction.³ "Such at-large systems create a possibility that the votes of a racial minority will be cancelled out by a white majority that votes as a bloc."⁴ The United States Supreme Court has recognized that "[a]t-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district."⁵

The statistics support such a conclusion. According to a 1985 study, 7,544 judges were elected to serve on major state courts.⁶ Of these, only 238 were African-American.⁷ That figure represents barely over three percent of all elected judges. A 1986 study indicated that of the fifteen states that elected judges to positions on their highest courts, ten had no

1. See Mary T. Wickham, Note, *Mapping the Morass: Application of Section 2 of the Voting Rights Act to Judicial Elections*, 33 WM. & MARY L. REV. 1251, 1252 (1992) (citing Dixie K. Knoebel, *The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?*, 13 STATE CT. J., Summer 1989, at 27). Thirty-eight states elect either appellate or general jurisdiction trial court judges. Knoebel, *supra* at 24, 26. The following states elect at least some of their judges in multijudge, at-large elections: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 27.

2. Richard Saks, Note, *Redemption or Exemption?: Racial Discrimination in Judicial Elections Under the Voting Rights Act*, 66 CHI.-KENT L. REV. 245, 246 (1990).

3. *Id.*

4. *Id.* The existence of a bias against African-American candidates on the part of white voters has been the subject of much research. "[T]he social science literature indicates that race impacts most white decisionmaking most of the time, and . . . unconscious discrimination may be even more prevalent than the studies acknowledge." Barbara J. Flag, *Was Blind, But Now I See: White Race Consciousness and the Requirement of Discriminatory Intent*, 91 MICH. L. REV. 953, 985 (1993).

5. *Rogers v. Lodge*, 458 U.S. 613, 616 (1982). Challenges to at-large systems for various local governing bodies have eliminated at-large elections and produced a dramatic increase in the number of minority elected officials on local school boards, city councils, and county commissions. Saks, *supra* note 2, at 246. Between 1977 and 1987, the number of local African-American elected officials increased from approximately 3,500 to 5,500. *Id.*

6. Wickham, *supra* note 1, at 1276 (citing FUND FOR MODERN COURTS, INC., *THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS* 18-19 (1985)).

7. *Id.*

African-Americans sitting on the high bench.⁸ In Texas, less than two percent of elected judges are African-American.⁹ In Louisiana, less than three percent of elected judges are African-American.¹⁰ A 1990 study in Florida found that only five minority judges, of 630 elected judges, attained their positions on the circuit or county courts in at-large elections.¹¹ “[A]rguably the most prevalent electoral procedure that capitalizes on racial prejudices, and perpetuates the historical legacy of racial discrimination in voting, is the at-large electoral district.”¹²

II. THE DEVELOPMENT OF THE VOTING RIGHTS ACT

The Fifteenth Amendment to the United States Constitution prohibits the denial or abridgement of a citizen's right to vote based on race or color by the United States or by any state.¹³ Historically, however, this Amendment was never enforced. Instead, states were given great deference with regard to their electoral methods because of the Tenth Amendment, which allows each state to determine its own electoral systems, voter qualifications, and government structure.¹⁴

The Voting Rights Act of 1965 was intended to enforce the Fifteenth Amendment.¹⁵ “The failure of prior civil rights legislation and case-by-case litigation during the 1950's and early 1960's convinced Congress that the stringent measures proposed in the Act were essential to dismantle racial barriers in the American political system, particularly those existing in the Southern states.”¹⁶

“Underscoring the comprehensive intent of Congress is section 14(c)(1) of the Act, which defines vote and voting for purposes of the Act and outlines the types of practices and elections that are embraced by the Act's regulatory provisions.”¹⁷ Section 14(c)(1) states:

The terms “vote” and “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this sub-

8. Barbara L. Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28, 30 (1990). In 1986, no blacks were on the highest state courts in 30 states, including ten that elect their judges: Arkansas, Georgia, Indiana, Kentucky, Louisiana, Nevada, New Mexico, Tennessee, Texas, and West Virginia. *Id.* The following states each had one black justice on their highest bench: Alabama, California, Florida, Maryland, Michigan, Mississippi, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. *Id.*

9. *Id.*

10. *Id.*

11. Brenda Wright, *The Bench and The Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections*, 19 FLA. ST. U. L. REV. 669, 672 (1991) (citing CENTER FOR GOVERNMENTAL RESPONSIBILITY, UNIVERSITY OF FLORIDA, RACIAL AND ETHNIC DIVERSITY OF THE FLORIDA JUSTICE SYSTEM pt. 2, at 21-22 (1990) (study commissioned by the Fla. Sup. Ct. Racial and Ethnic Bias Study Comm'n)).

12. Saks, *supra* note 2, at 252.

13. U.S. CONST. amend. XV.

14. U.S. CONST. amend. X.

15. See *Chisom v. Roemer*, 501 U.S. 380, 383 (1991).

16. Saks, *supra* note 2, at 251.

17. *Id.* at 273.

chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.¹⁸

However, as originally enacted, the Voting Rights Act did not affect existing electoral systems that diluted minority voting strength unless the plaintiffs could show that they were adopted with discriminatory intent.¹⁹ The Supreme Court eased this burden by reading the Equal Protection Clause of the Fourteenth Amendment to prohibit minority vote dilution.²⁰ Instead of the intent requirement, the *White* Court adopted a totality of the circumstances approach to plaintiffs' burden.²¹ The Court held that:

[P]laintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.²²

The Fifth Circuit refined this standard in *Zimmer v. McKeithen*.²³ Taking *White* with *Zimmer*, plaintiffs were merely required to present evidence that the challenged electoral system had a discriminatory effect on minority voting strength.²⁴ However, this "effects" test lasted only seven years. The Supreme Court in *Mobile v. Bolden* held that *White* requires proof of discriminatory intent.²⁵ The *Mobile* decision prompted Congress to amend the Voting Rights Act in 1982²⁶ to reinstate the pre-*Mobile* effects test.

The Senate report which accompanied the amendments outlined three principal reasons why the intent test was repudiated. First, the intent test was "unnecessarily divisive" because it forced minority groups to prove that local or state officials were purposefully racist. Second, plaintiffs had to bear an "inordinately difficult" burden of proof that the defendant jurisdiction acted in a purposefully racist manner. Third, it "ask[ed] the wrong question."²⁷

In other words, the intent test focused on the defendant jurisdiction, rather than the rights of the minority voter.²⁸ Specifically, the Senate

18. Voting Right Act of 1965, § 14(c)(1), codified at 42 U.S.C. § 1973(c)(1) (1994).

19. See Pub. L. No. 89-110, 79 Stat. 437 (1965).

20. *White v. Regester*, 412 U.S. 755, 765-67 (1973).

21. *Id.* at 766. Thus, minority voters had to show that, in the totality of the circumstances, they had less opportunity than others to participate in the political processes. *Id.*

22. *Id.* (citing *Whitcomb v. Chavis*, 403 U.S. 124, 149-50 (1971)).

23. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

24. See Philip P. Frickey, *Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of MINORITY VOTE DILUTION*, 3 LAW & INEQ. J. 209, 213 (1985).

25. *Mobile v. Bolden*, 446 U.S. 55, 65-74 (1980).

26. *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986).

27. Saks, *supra* note 2, at 257.

28. *Id.*

report stated that the correct inquiry, considering the purpose of the Act and the doctrine of minority vote dilution, is whether "as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the electoral process and to elect candidates of their choice."²⁹

Section 2 of the Voting Rights Act now prohibits existing electoral laws that, when combined with racial bloc voting,³⁰ tend to dilute minority votes.³¹ Specifically, subsection 2(a) follows the language of the Fifteenth Amendment in prohibiting voting laws that result in the "abridgement of the right to vote on account of race or color."³² Subsection 2(b) defines a violation of subsection 2(a) to include circumstances in which "members [of a minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."³³

"The importance of the 1982 amendments to the development of the concept of minority vote dilution cannot be overstated."³⁴

The effect of the amendments in lightening plaintiffs' burden of proof was often decisive in making a minority vote dilution case viable. Flagrant abuses of the right-to-vote such as literacy tests, registration requirements, and poll taxes in the Southern states of the old

29. *Id.* at 270 (citing S. Rep. No. 417, 97th Cong., 2d Sess. 28, *reprinted in* 1982 U.S.C.C.A.N. 417).

30. The *Thornburg* opinion defines racial bloc voting: "Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg*, 478 U.S. at 48-49.

31. *Id.* at 45-46.

32. Subsection 2(a) provides that:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

42 U.S.C. § 1973(a) (1994) (emphasis added).

33. Subsection 2(b) provides that:

A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973(b) (1994) (emphasis added).

34. Saks, *supra* note 2, at 259.

The impact of the 1982 amendments is revealed by the following statistics. In the three years prior to the passage of the 1982 amendments of Section 2, less than six hundred jurisdictions altered their electoral procedures. However, in the three years after the amendments were passed, the number dramatically increased to 1,354.

Id. at 260 n.75.

Confederacy were the principal targets of the Act in 1965. The Act did abolish such abuses and secure the formal right-to-vote for African-Americans in the South. However, minority vote dilution - resulting mainly from multi-member districts - remained as a subtle, but effective, barrier to minority political participation at the municipal, county, and state levels of government in every region of the country.³⁵

Thus, as it now stands, the Voting Rights Act has two major branches. Section 2 prohibits states from maintaining *existing* electoral systems that dilute minority voting strength.³⁶ Section 5 prohibits dilutive or discriminatory *changes* in a state's electoral system.³⁷ Under this provision, "covered" jurisdictions must inform the Attorney General or the United States District Court for the District of Columbia of changes they plan in their electoral system.³⁸ If the court or the Attorney General finds that the changes have a discriminatory purpose or effect, they may prevent the implementation of the plans.³⁹

Following the 1982 Amendments to the Voting Rights Act, federal circuits were split on whether Section 2 of the Voting Rights Act applies to judicial elections as well as to legislative and executive elections.⁴⁰ Important to this debate was a difference between the language of the *White* opinion and amended subsection 2(b). Congress changed the phrase "opportunity to elect legislators" to "opportunity to elect representatives." The Supreme Court noted the new term and held that Section 2 does apply to judicial elections.⁴¹ Similarly, the Supreme Court has held that Section 5 also applies to judicial elections.⁴²

In spite of this recognition of the applicability of Section 2 protections to judicial elections, the Supreme Court did not discuss the problem of available remedies. This question regarding the proper remedy remains

35. *Id.* at 259.

36. In addition to vote dilution, Section 2 "prohibits all forms of voting discrimination." *Thornburg*, 478 U.S. at 45 n.10 (1986) (citing S. Rep. No. 417, 97th Cong., 2d Sess. 30 (1982), reprinted in 1982 U.S.C.A.N. 177, 207).

37. 42 U.S.C. § 1973c (1994).

38. Covered jurisdictions are those districts that (1) maintained any test or device on November 1, 1964, November 1, 1968, or November 1, 1972, or (2) had less than 50% of voting age residents either vote or register to vote in the 1964, 1968, or 1972 presidential elections. In practice, almost all covered jurisdictions seek preclearance from the Attorney General rather than from the district court. See Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 191 (1983) (describing the "expense and delay" of declaratory judgment actions which usually lead covered jurisdictions to obtain preclearance from the Attorney General for changes affecting voting).

39. 28 C.F.R. §§ 51.1, 51.10 (1990). The burden is on the covered jurisdiction to prove the nondiscriminatory nature of any changes. See Motomura, *supra* note 38, at 245.

40. *Compare* League of United Latin Am. Citizens v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc) (holding that § 2 does not apply to judicial elections), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 501 U.S. 419 (1991) with Mallory v. Eyrich, 839 F.2d 275 (6th Cir. 1988) (holding that § 2 does apply to judicial elections).

41. *Chisom v. Roemer*, 501 U.S. 380, 404 (1991).

42. *Haith v. Martin*, 618 F. Supp. 410, 412-413 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986).

as minority voters have begun to use Section 2 of the Voting Rights Act to challenge judicial elections.⁴³

III. PROBLEMS WITH SINGLE-MEMBER DISTRICTS

Assuming that plaintiffs do establish a violation of the Voting Rights Act, what remedy should the court order? The electoral plan most commonly suggested is that of subdistricting, or single-member districts. Subdistricting is the splitting of at-large electoral districts into smaller subdistricts.⁴⁴ The process works by dividing an at-large electoral district into several single-member subdistricts.⁴⁵ Some of the subdistricts are drawn to ensure that the population of racial or ethnic minority groups in these districts is large enough to permit minority voters to elect their preferred candidates. These subdistricts are called "safe" districts.⁴⁶

However, in spite of the apparent preference given to this system by courts and politicians, single-member districts have many faults. Moreover, single-member districts may not be in the best interests of minority voters, even though these are the people whom such new electoral plans were intended to benefit the most. First, single-member-district plans have failed to mobilize sustained voter participation. Typically, voter turnout increases "in response to initial election opportunities for candidates of the minority community's choice";⁴⁷ however, mobilization efforts for these first-time elections are generally not repeated. Consequently, turnout tends to decline "in subsequent elections after the first black pioneer becomes the incumbent."⁴⁸

Additionally, because these districts are drawn by incumbent politicians seeking to protect their own self-interests, there is a sense that voter preference has been pre-determined by the legislature.⁴⁹ Consequently, minority voters may lose interest in these elections.⁵⁰

43. See *League of United Latin American Citizens v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen. of Texas*, 501 U.S. 419, (1991); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. 955 (1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), *vacated and remanded*, 501 U.S. 1246 (1990); *Brooks v. Georgia State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1989), *aff'd*, 498 U.S. 916, (1990); *Southern Christian Leadership Conference of Alabama v. Siegelman*, 714 F. Supp. 511 (M.D. Ala. 1989); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988); *Williams v. State Bd. of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1986). "Minority voters attribute the exclusion of minority judges to the discriminatory impact of at-large judicial elections." Saks, *supra* note 2, at 246. "In at least eight states, minority voters have challenged the legality of at-large judicial elections, contending that such electoral schemes violate the [Voting Rights] Act." *Id.*

44. CHANDLER DAVIDSON, *Introduction to MINORITY VOTE DILUTION* 1, 3 (Chandler Davidson ed., 1984).

45. *Id.*

46. *Id.*

47. Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1156 (1993).

48. *Id.* at 1157.

49. *Id.* at 1157-58.

50. *Id.* at 1158. ("Incumbents usually enjoy tremendous power over the districting process, through which they frequently attempt to create safe districts to make their reelection margins even more comfortable. Within the legislature, redistricting battles are often

Another problem with single-member districts is that they rely on substantial residential segregation to be effective. For example, if the Hispanic population of a given city is dispersed throughout the jurisdiction, districting does not accurately reflect either the real or potential power of that Hispanic community.⁵¹ Furthermore, in a jurisdiction with a complex mix of racial, ethnic, and linguistic characteristics, the redistricting struggle may result in conflict between African Americans and other minority voters.⁵² "These groups may compete over how many minority districts should be created, and who should control them. Each group is encouraged to assert its superior moral, historic, and pragmatic claim. In the lottery of competing oppression, no one wins."⁵³

Additionally, single-member districts underrepresent minority voters, even when race-conscious, "safe" districts are created.⁵⁴ Minority voters will not enjoy truly proportional representation in a single-member district system unless their residences are concentrated in the correct manner, perfectly within the confines of the safe district created for those minority voters.⁵⁵ This lack of proportional representation is evidenced by the fact that African-Americans "are not proportionately represented in any of the southern legislatures, even after a decade of race-conscious districting."⁵⁶

Single-member districts have also been criticized for denying minority voters meaningful participation in the electoral process.⁵⁷ Because the districts are drawn by the legislature, voters are not directly involved in the districting process. Instead, "voters' interests are presumed to be represented by their indirect, preexisting choice of residence."⁵⁸

Furthermore, single-member-district systems assume that even where voters' true interests are not directly represented by the victorious candidate in their district, the winner will indirectly represent those interests.⁵⁹ This concept is known as virtual representation. Virtual representation presumes that the electoral "winners will represent the [interests of the losers] or that losers may experience defeat in one district," but winners

pitched without regard to issues of community interests or voter representation To maximize their chance of re-election, those in control of districting may promote noncompetitive election contests which further reduce voter participation and interest."). This problem is closely associated with the flaws of virtual representation, discussed *infra*.

51. Guinier, *supra* note 47, at 1159.

52. *Id.*

53. *Id.* (citing Larry Rohter, *A Black-Hispanic Struggle Over Florida Redistricting*, N.Y. TIMES, May 30, 1992, at A6 (stating that a large Hispanic population and other fast-growing minority groups are laying claim "to the same rights provided to blacks under the Voting Rights Act.")).

54. Guinier, *supra* note 47, at 1159.

55. *Id.*

56. *Id.* at 1159-60 (citing REIN TAGEPERA & MATTHEW SOBERG SHUGART, SEATS AND VOTES: THE EFFECTS AND DETERMINANTS OF ELECTORAL SYSTEMS (1989) and Edward R. Tufte, *The Relationship Between Seats and Votes in Two-Party Systems*, 67 AM. POL. SCI. REV. 540 (1973)).

57. Guinier, *supra* note 47, at 1160.

58. *Id.*

59. *Id.*

in another district will still represent them.⁶⁰ "The Supreme Court in *Davis v. Bandemer*, *Gaffney v. Cummings*, and *UJO v. Carey* endorsed this concept."⁶¹

However, commentators believe that virtual representation conflicts with the concept of empowerment.⁶²

The process of physically confecting districts, which may be accompanied by extensive but perfunctory public hearings, is one dominated by incumbent self-interest and court-appointed experts with no particular ties to grass roots concerns. By removing the issue from the voter, the districting process is antithetical to empowerment strategies based on voter participation and voter choice.⁶³

Single-member districts have also been attacked as promoting disharmony amongst various racial groups. For example, during the 1981 congressional reapportionment in Georgia, a plan introduced by Senator Julian Bond creating a sixty-nine percent African-American fifth congressional district was criticized because it "would disrupt the 'harmonious working relationship between the races' and would cause polarization and 'white flight.'"⁶⁴

However, some empirical evidence contradicts this criticism.

The available evidence, while not extensive, supports the conclusion that effective minority voting districts do not create racial isolation or disserve the interests of racial minorities. Existing social science data confirm what common sense and the anecdotal evidence indicate — that the increased minority office holding associated with single member districts has also been associated with a substantial shift in responsiveness to minority interests and the inclusion of minorities in decisionmaking.⁶⁵

Furthermore, studies in California and Alabama have found causal relationships between increased minority representation achieved through single-member districts and tangible policy changes.⁶⁶ Indeed, this increased minority political representation directly furthered congressional support for the 1982 amendments to the Voting Rights Act.⁶⁷ Furthermore, commentators argue that "increased minority office holding enhances ethnic pride and dignity, underscores the legitimacy of elected

60. *Id.*

61. *Id.*

62. Guinier, *supra* note 47, at 1160.

63. *Id.* at 1161.

64. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1250, 1274 (1989) (quoting *Busbee v. Smith*, 549 F. Supp. 494, 507 (D.D.C. 1982)).

65. McDonald, *supra* note 64, at 1276-77 (citing Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in *THE RIGHT TO VOTE* 164, 180 (Rockefeller Found. 1981)).

66. McDonald, *supra* note 64, at 1277 (citing R. BROWNING, D. MARSHALL, & D. TABB, *PROTEST IS NOT ENOUGH* 168 (1984) and Hamilton, *Political Access, Minority Participation, and the New Normalcy*, in *MINORITY REPORT* 12 (L. Dunbar ed., 1984)).

67. McDonald, *supra* note 64, at 1278.

government, and is a visible sign that public office is not reserved for whites only."⁶⁸

Some critics of single-member districts, however, would not deny the many benefits of increased minority representation in the political process. They would simply take issue with the stance that single-member districts are the best way to provide that representation.

Other criticisms of single-member districts are common. For example, single-member districts have also been criticized for having "failed to foster genuine, accountable debate about political issues."⁶⁹ Specifically, in the winner-take-all system, whereby the candidate who surpasses fifty percent of the votes gains all of the political power, candidates rush to the center of the political spectrum where most of the votes are located.⁷⁰ Since the "focus [is] on developing consensus *prior to the election* . . . issues are frequently not fully articulated or debated." Conversely, positions on controversial topics are often avoided and replaced by watered-down, meaningless statements "designed to offend no one."⁷¹

Furthermore, by promoting only two real choices between one candidate or another, winner-take-all, single-member-district plans create a negative campaigning environment.⁷² Negative campaign strategies, in turn, contribute to voter apathy and alienation.⁷³ Such negative campaign tactics, which help create an unfavorable opinion of all politicians, have been linked to the suggestion of term limits.⁷⁴ "Term limits represent voter discontent with the class of professional politicians who will do anything just to get reelected but, apart from election day, have essentially lost touch with their constituency."⁷⁵

68. *Id.* at 1277 n.159 (citing A. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 239-40 (1987)).

69. Guinier, *supra* note 47, at 1161.

70. *Id.*

71. *Id.* Guinier goes on to explain how:

[S]ome candidates avoid discussing issues at all, relying on advertising agencies to sell their candidacies the way they sell products. For example, the largest winner-take-all single member district is the one for the United States Presidency. In 1992, President Bush had planned to mirror the Republican advertising strategy for the 1984 race. In that race, his media group associated Ronald Reagan with "a swell of violins and a cloud of sentimental pictures," completely shunning issue-oriented advertising for "its morning in America" theme.

Id. at 1161 n.90 (quoting Michael Wines, *Bush's Campaign Tries Madison Ave.*, N.Y. TIMES, May 27, 1992, at A18).

72. Guinier, *supra* note 47, at 1161 (explaining that in a two-way race, one candidate can use negative campaigning to discredit the other candidate without any fear that affected voters will turn to an untarnished third candidate).

73. Guinier, *supra* note 47, at 1161-62 (citing Elizabeth Kolbert, *Senate Races Marked by Vivid Images*, N.Y. TIMES, May 27, 1992, at A18 (stating that "candidates in a California primary were searching for strong insults to lodge against opponents in order to make their campaign commercials stand out; this practice met the usual stereotypes of candidates that they will do anything for votes without saying anything of substance.")).

74. Guinier, *supra* note 47, at 1162.

75. *Id.* (citing Elizabeth Kolbert, *Campaign in California: Little But Commercials*, N.Y. TIMES, May 22, 1992, at A1 (describing new campaign tactics in which candidates sell themselves exclusively as a product via television commercials)).

Perhaps the most significant criticism of single-member districts, however, is that such a system promotes only tokenism, not true political power.⁷⁶ A natural consequence of concentrating politically-cohesive minority voters in a single district is that nonminority voters will also be concentrated in the remaining districts.⁷⁷ Each district is intentionally drawn so as to maximize racial differences between voters in those districts;⁷⁸ consequently, racial segregation will create political segregation.⁷⁹ "White candidates will have no political incentive to respond to minority needs, because they will not be responsible in any way to minority voters at the polls."⁸⁰

Race-conscious districting creates other problems. For instance, it isolates African-Americans from potential political allies, such as white women, who are not geographically concentrated.⁸¹ Furthermore, single-member-districting systems in effect waste the votes of white liberals who may be placed in white, conservative districts.⁸² In this manner, single-member districts may suppress the potential development of issue-based campaigns and cross-racial political coalitions.⁸³ Thus, this political segregation may actually hinder minorities' efforts to effect substantive policy changes.⁸⁴ While in all likelihood, single-member districts would increase the number of minority members on state courts,⁸⁵ the purpose

76. See Guinier, *supra* note 47, at 1162 (arguing that while "symbolic representation is important even where it does not insure accountability and influence," having the real political power necessary to actually influence substantive policy changes should be the goal of minority voters).

77. James S. McClain, Note, *The Voting Rights Act and Local School Boards: An Argument for Deference to Educational Policy in Remedies for Vote Dilution*, 67 TEX. L. REV. 139, 150 (1988).

78. This alludes to yet another byproduct of a single-member-districting plan: the resulting fierce political battles over the actual drawing of the district lines. These political wars can rage on for years, throwing jurisdictions into a state of political confusion and uncertainty.

79. McClain, *supra* note 77, at 150-51.

80. *Id.* at 151; see also Guinier, *supra* note 47, at 1162-63:

Because majority black districts free black candidates from electoral competition from whites, white legislators may enjoy electoral success in white districts that are not dependent on black votes. For this reason, some conservative critics of race-conscious districting argue that majority minority districts quarantine poor blacks in inner-city ghettos. For example, critics of newly drawn black districts claim that the districts ultimately benefit white Republicans. . . . The direct consequence of majority black districts is that fewer white legislators are directly accountable to black interests.

81. Guinier, *supra* note 47, at 1163.

82. *Id.*

83. *Id.*

84. See also Guinier, *supra* note 47, at 1163 ("In these ways, race-conscious districting may not ensure that blacks enjoy proportional legislative influence. Because majority black districts are necessarily accompanied by majority white districts, black representatives may become isolated in the governing body."). However, as stated previously, some studies come to the opposite conclusion. See *supra* notes 65-68 and accompanying text.

85. Wickham, *supra* note 1, at 1282 (citing Marcia Coyle, *The Justices Rule on Judges*, NAT'L L.J., July 1, 1991, at 1).

of the Voting Rights Act is to protect minority voters, not minority candidates.⁸⁶

Another possible impact of instituting a single-member-district electoral system is that judges may become dependent on special interests.

In subdivided judicial districts, the risks of overpoliticization are clear. The smaller the group a judge serves, the greater the likelihood that constituents will expect a judge to be responsive to their special needs. Danger exists that the focus may move away from qualifications, integrity, and experience⁸⁷ and toward an attitude of "what can this judge do for me." When voters hold such an attitude, even the most conscientious judges may be tempted to bow to constituent pressures. Multimember judicial districts can provide a buffer that mitigates the accountability of each judge to a particular constituent group. In single-member districting, however, that buffer is destroyed.⁸⁸

However, in spite of this theoretical concern, judicial observers in Mississippi, the first state where single-member districts were ordered as a legal remedy, have not noted any threats to the independence of the state judiciary or other detrimental consequences from the use of single-member districts.⁸⁹

Nevertheless, because of all of these concerns regarding the impact of instituting a single-member-district system, race-conscious districting may not be the best available remedy to victims of the Voting Rights Act violations. At the very least, such a plan will be politically unpopular and thus difficult to implement.⁹⁰ Furthermore, as shown above, even though single-member districts would probably increase the number of minority judges, it is not at all clear that such symbolic representation is in the best interests of minority voters. If a single-member-district system is not the best remedy, however, the question as to what is still remains open for debate.

Any proposed alternative must ideally meet two requirements. First, it must increase the representation provided to minority voters. In this regard, true, substantive representation, providing the ability to influence actual policy decisions, would best serve minority voters.

86. *Id.*

87. The validity of the assumption contained in this argument (*i.e.*, that the current focus of judicial elections is on qualifications, integrity, and experience) is not at all clear. Rather, extensive evidence supports the argument that the focus of judicial elections is not on the qualifications, integrity, and experience of the candidates but their political party affiliation. See discussion of non-partisan elections, *infra* part IV.C.

88. Wickham, *supra* note 1, at 1281-82 (citing Katherine I. Butler, *The Bench and the Ballot Box*, FULTON CO. DAILY REP., Nov. 4, 1991, at 6-7).

89. See *Clark v. Roemer*, 777 F. Supp. 471, 477 (M.D. La. 1991) (citing testimony of a judge elected in 1990 from a black majority subdistrict in Hinds County, Mississippi and of a white trial lawyer in a large firm in Jackson, Mississippi).

90. The plan would be unpopular to white majority voters who often react negatively to any threat of changing the status quo. While such caution is insufficient to justify impeding progress, it nevertheless remains a realistic political obstacle.

Second, if possible, any proposed alternative should be politically acceptable. Changing a state's electoral system will at the very least require state legislative action, if not a state constitutional amendment. Therefore, taking into account political realities and finding a remedy that is politically acceptable would increase the potential effectiveness of any proposed alternative to single-member districts as a solution to voting-rights challenges. The remainder of this Comment will discuss several possible alternative remedies with these two suggested conditions in mind.

IV. POTENTIAL SOLUTIONS TO VOTING-RIGHTS CHALLENGES OTHER THAN SINGLE-MEMBER DISTRICTS

A. CUMULATIVE VOTING

A cumulative voting system is one possible alternative to single-member districts as a solution to voting-rights challenges to at-large judicial elections. Voters in such a system have a predetermined number⁹¹ of votes to distribute among the available candidates.⁹² Voters are free to distribute their votes however they like, and the candidates receiving the most votes win.⁹³ Thus, by casting more than one vote for a single candidate, voters in a given election are able to express the relative strength of their preferences among the candidates.⁹⁴

The advantages to a cumulative voting system are numerous. First, each voter in such a system has the ability to influence the electoral success or failure of every representative.⁹⁵ In contrast, in a single-member-district system, voters have the ability to influence only the representative chosen in their particular district.

Cumulative voting . . . allows interest groups to plan strategically to maximize their representation. Each group can estimate its strength, determine the number of candidates it can elect, and instruct its members how best to vote in order to elect the group's candidates. If all groups follow this course, representation will approximate each group's share of the electorate.⁹⁶

91. Usually, the number of votes given to each voter in a cumulative voting system is equal to the number of candidates to be elected. For example, if twelve judges were to be elected, each voter would receive twelve votes. Each individual voter could then distribute those votes however he or she wished. See Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 153 (1982) [hereinafter *Alternative Voting Systems*].

92. *Id.*

93. *Id.* The number of votes required for a candidate to win an election held under a cumulative voting system if all remaining votes are cast in the way most unfavorable to her is given by the formula: $NV/(S+1)+1$, where N is the number of voters; V is the number of available votes given to each voter to cast; and S is the number of seats to be filled in the election. *Id.* at 153 n.41.

94. *Alternative Voting Systems*, *supra* note 91, at 153.

95. *Id.*

96. *Id.*

Obviously, one possible drawback with such a system is the potential danger of miscalculation on the part of these interest groups:

For representation to be roughly proportional, each group must correctly estimate its strength, run the number of candidates that its strength can support, and instruct its members how best to distribute their votes over the group's candidates. If the group fails in any of these steps or its members fail to follow their directions, underrepresentation of that group can follow. For example, if a group overestimates its strength or for other reasons runs too many candidates, it may spread its votes too thinly to elect any of its candidates. If, on the other hand, it underestimates its strength or for other reasons runs too few candidates, it will elect less than its proportionate share of representatives.⁹⁷

In spite of this potential drawback, the advantages of cumulative voting are provocative. Specifically, a cumulative voting system would tangibly benefit minority voters. "Since voters can cast all their votes for a single candidate, success depends not only on the breadth but also on the depth of a candidate's support."⁹⁸ This characteristic would aid highly cohesive groups, such as racial minorities, that are underrepresented in traditional voting systems that have strong majoritarian biases, such as at-large elections.⁹⁹

Most importantly in terms of comparison, cumulative voting avoids some of the potential disadvantages of single-member districts. First, representatives from a multimember district, such as the winners elected under a cumulative voting system, are less susceptible to being controlled by special interests.¹⁰⁰ Because each candidate for office must campaign in the entire district, not just some carved-up portion therein, there is less political advantage to becoming identified with one particular special-interest group.¹⁰¹

Furthermore, cumulative voting would leave intact the basic structure of the existing form of government.¹⁰² In other words, the district would remain the same; only the method of election would change. On the other hand, in a single-member-district system, the existing district would be discarded in favor of smaller sub-districts. In this manner, cumulative voting may be a "less drastic remedy for discriminatory at-large systems."¹⁰³

Cumulative voting also increases the chances of minority voters achieving actual, substantive representation, as opposed to the virtual representation discussed previously in the context of single-member districts.¹⁰⁴ This achievement of actual representation "increases individuals' percep-

97. *Id.* at 153 n.44.

98. *Alternative Voting Systems*, *supra* note 91, at 154.

99. *Id.*

100. *Id.* at 155.

101. *Id.*

102. *Id.*

103. *Alternative Voting Systems*, *supra* note 91, at 155.

104. *Id.*

tion of participation in the political process and reduces feelings of alienation and powerlessness."¹⁰⁵

Further advantages to cumulative voting, as compared to single-member districts, are associated with residential segregation and race relations. For example, cumulative voting reduces the pressure toward residential segregation that might occur as a result of voter preference for actual representation. Under this system individual voters need not move to a safe district to obtain actual representation.¹⁰⁶ Last, cumulative voting may not exacerbate racial tensions since no group receives special treatment¹⁰⁷ at the expense of other voter groups.¹⁰⁸

However, as with the implementation of almost any political change, cumulative voting produces several potential disadvantages. First and foremost, as a relatively unknown system¹⁰⁹ that is more complex than most electoral systems currently in use, cumulative voting may face an initial reluctance on the part of potential voters, as well as the politicians needed to pass such a plan.¹¹⁰ In this manner, cumulative voting may not meet the goal of political viability.

Furthermore, some commentators argue that the relative complexity of cumulative voting might "present special problems to members of minority groups, who are often less familiar with the voting process and tend to have a less formal education."¹¹¹ Actual experience, however, indicates that most voters can understand cumulative voting.¹¹²

Another objection to cumulative voting is that campaigns for office in a multimember district are much more expensive than those for office in a single-member district.¹¹³ "Increasing the size of the electorate increases the campaign expenses."¹¹⁴ Since minority candidates often have less money than do their white opponents,¹¹⁵ cumulative voting may produce

105. *Id.* (citing *inter alia* United Jewish Orgs. v. Carey, 430 U.S. 144, 178 (1977) (Brennan, J., concurring in part) (noting dissatisfaction of white community with virtual representation) and C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 43 (1970) (arguing that participation leads one to feel part of the community and accept collective decisions)).

106. *Id.* at 155.

107. Special treatment occurs in a single-member-district system in the sense that districts are intentionally drawn for the purpose of ensuring that residents of that district will be able to elect their favored candidate to office.

108. *Alternative Voting Systems*, *supra* note 91, at 155.

109. Before 1980, various jurisdictions in Illinois utilized cumulative voting. McDonald, *supra* note 64, at 1284 n.195.

110. Self-interested politicians would be reluctant to implement a cumulative voting system because they could not then "carve out" their own safe district, as they could under a single-member-districting plan. Again, the interests of the voters far outweigh those of the politicians. Nevertheless, the political reality is that the politicians may be reluctant to adopt a cumulative voting system.

111. *Alternative Voting Systems*, *supra* note 91, at 155.

112. EDITH LAKEMAN, HOW DEMOCRACIES VOTE: A STUDY OF MAJORITY AND PROPORTIONAL ELECTORAL SYSTEMS 155 (3d ed. 1970).

113. *Alternative Voting Systems*, *supra* note 91, at 156.

114. *Id.* (citing LAKEMAN, *supra* note 112, at 155).

115. *Alternative Voting Systems*, *supra* note 91, at 156.

a disadvantage to minority candidates and thus inhibit the ability of minority voters to elect their preferred representatives.¹¹⁶

Minorities and other cohesive groups, however, may not require as much money as other groups to plan and run a successful campaign for office under a cumulative voting system.¹¹⁷ "[M]embers of cohesive groups will likely identify more directly and more immediately with their group's candidates."¹¹⁸

Thus, cumulative voting is one possible alternative to single-member districts as a solution to voting rights challenges to at-large elections. Cumulative voting presents several advantages over single-member districts, yet, as with any system, drawbacks still exist.

B. MERIT SELECTION

Merit selection, usually entailing gubernatorial appointment of judges from nominees submitted by a judicial nominating commission, emerged in 1940 in Missouri as the reform alternative to judicial election.¹¹⁹ In the last twenty-five years, many states have changed to a merit-selection system for selection of judges.¹²⁰ "This shift to [merit-selection plans] has resulted largely from the efforts of reform-minded people in the legal community who view election as a highly flawed method for selecting judges."¹²¹ A merit selection plan is one in which judges are appointed rather than elected. Specifics of the merit selection plans vary. Some have the governor make the appointment; others propose an independent, bi-partisan committee to be the decision-making body.

Even today, states are adopting the merit system, with recent changes occurring in New Mexico and Connecticut.¹²² Merit selection exists in thirty-three states and the District of Columbia, although the states use it in differing amounts in these jurisdictions.¹²³ "For example, thirteen states and the District of Columbia choose all judges by merit plans; nine states use the process for selecting some judges; and eleven employ it for interim appointments only."¹²⁴

The Supreme Court itself has suggested merit selection as a possible remedy for voting-rights violations: "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a

116. "[C]ourts have considered this problem in at-large elections and have found that the higher costs of running in a multimember district do not place an unconstitutional burden on minority candidates." *Id.* at 156 n.55.

117. *Alternative Voting Systems*, *supra* note 91, at 156.

118. *Id.*

119. William M. Pearson & David S. Castle, *Alternative Judicial Selection Devices: An Analysis of Texas Judges' Attitudes*, 73 JUDICATURE 34 (1989).

120. Lawrence Baum, *Voters' Information in Judicial Elections: The 1986 Contests for the Ohio Supreme Court*, 77 KY. L.J. 645 (1989).

121. *Id.* at 646.

122. Pearson & Castle, *supra* note 119, at 34.

123. *Id.*

124. *Id.* at 35.

system in which judges are appointed.”¹²⁵ Texas Supreme Court Chief Justice Tom Phillips, in his 1989 “State of the Judiciary” address, “recommended merit selection as a method of improving the judiciary and avoiding a federal court order to draw judicial district lines in a manner so they do not dilute minority voting strength.”¹²⁶

There are three primary potential benefits to a merit-selection plan for judges. First, such a plan could increase minority representation on the bench. The appointing body, whether it be the governor or an independent committee, cognizant of the need for a judiciary representative of all citizens, could ensure that qualified minorities are selected to serve as judges.

The second potential benefit of a merit-selection plan is that it could, in fact, produce better-qualified judges. Instead of electing judges based primarily on name recognition and party affiliation, judges would be appointed based on their credentials as a prospective jurist. The decision of how best to select judges is dependent on how we view our judges. “[I]f judges themselves are viewed as having a special expertise in probing the source’s mind, elections would not be the preferred mode of selection;” instead, expert executive appraisal would seem to be a better method for evaluating the expertise of judicial aspirants.¹²⁷

The third potential benefit of a merit-selection system for choosing judges is that it could de-politicize the judiciary. In other words, judges would not have to act as politicians, constantly attempting to raise money for their next campaign effort, often from the same attorneys appearing before them in court on a daily basis. By appointing judges instead of electing them, this appearance of impropriety is nullified.

This appearance of impropriety is well documented, especially in Texas. “For example, in 1987, the [Texas] Commission on Judicial Conduct ‘reprimanded’ Supreme Court Justice C.L. Ray and ‘admonished’ Supreme Court Justice William Kilgarlin for ethics violations.”¹²⁸ “The Commission found Ray to have, among other things, improperly requested the transfer of two intermediate appellate cases involving Pat Maloney, who had contributed \$20,000 to Ray’s most recent campaign.”¹²⁹ The Commission’s discovery made Governor Bill Clements ask the two justices to resign, but the resignations were not tendered.¹³⁰ The result was “a number of vigorous editorials in the Texas press calling for reform of Texas’ method of selecting its judges.”¹³¹

125. *Chisom v. Roemer*, 501 U.S. 380, 401 (1991).

126. Pearson & Castle, *supra* note 119, at 35.

127. Michael H. Shapiro, *Introduction, Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1566 (1988).

128. Pearson & Castle, *supra* note 119, at 36.

129. Stuart Banner, *Disqualifying Elected Judges from Cases Involving Campaign Contributors*, 40 STAN. L. REV. 449, 451 (1988).

130. *Id.*

131. *Id.* In late August, Chief Justice John Hill resigned from office effective January 1, 1988, stating that he would lobby to adopt a non-partisan method of judicial selection for Texas. Banner, *supra* note 129, at 490.

"In 1988, CBS's show *60 Minutes* aired a segment on the Texas judiciary, revealing campaign contributions to supreme court justices by lawyers with cases pending before the court. The program's implication [was] that judicial elections encourage a conflict of interest and affect negatively the quality of judges."¹³² Another example occurred in 1985 and involved the Pennzoil-Texaco litigation.¹³³ After learning that the case had been "assigned to Texas District Court Judge Anthony J.P. Farris, Pennzoil attorney Joseph D. Jamail promptly contributed \$10,000 to Farris's re-election campaign."¹³⁴ No research has been conducted on whether these contributions actually influence the outcomes of cases.¹³⁵ The Chief Justice of the Nebraska Supreme Court, Norman Krivosha, has commented on the appearance of impropriety: "How does a judge collect campaign funds without creating the appearance of impropriety? One may be the most ethical individual in the world and, yet, if one must seek funds as the other two branches of government do when running for office, one inevitably creates the appearance of impropriety."¹³⁶

Nevertheless, in spite of this appearance of impropriety, "[s]tate judges, particularly those on the supreme courts, are usually isolated from lobbying efforts by a tradition of insulation and nominally principled decisionmaking."¹³⁷ But supreme court judges cannot be fully insulated from interest group pressure, and the judges may subconsciously favor the interests of a particular group. "In the funding of judicial election campaigns and other ways, interest groups can indirectly affect the direction of substantive law and choice of law."¹³⁸ Thus, the interest group influence is really a matter of degree. "[W]hile surely not as great as that exercised in the legislative or executive arena, interest groups can affect the judicial process as well."¹³⁹ A former justice on the California Supreme Court, Otto M. Kaus, has said, "There's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them at election time. That would be like ignoring a crocodile in your bathtub."¹⁴⁰ Furthermore, this potential for bias may be "both for and against the campaign contributor, as judges may bend over backwards to avoid the appearance of bias."¹⁴¹ When contributors are lawyers appearing before the receiving judge, special problems arise. "It seems unlikely that a litigant who has contributed to

132. Pearson & Castle, *supra* note 119, at 36.

133. Banner, *supra* note 129, at 451.

134. *Id.*

135. Banner, *supra* note 129, at 463.

136. *Id.* (quoting Norman Krivosha, *Acquiring Judges by the Merit Selection Method: The Case for Adopting Such a Method*, 40 Sw. L.J. 15, 19 (1986)).

137. Michael E. Solimine, *An Economic and Empirical Analysis of Choice of Law*, 24 GA. L. REV. 49, 72 (1989).

138. *Id.* at 73.

139. *Id.* at 74.

140. Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007, 2057 (1988).

141. Banner, *supra* note 129, at 452.

the judge before whom he is appearing would ever have done so unless he wanted to influence the way his case would be decided.”¹⁴²

A merit-selection plan, however, may very well increase the political activity of those persons who wish to become judges. Especially if the governor is the appointing body, there is a high risk that appointments will turn into political favors. The potential is that judicial appointments will merely be the prize for the person donating the most money to the victorious gubernatorial candidate's campaign fund.

There are other potential drawbacks to a merit-selection system. First, such a change in a state's election procedures, like all changes to election procedures, would be subject to the preclearance requirements of Section 5 of the Voting Rights Act.¹⁴³ “[T]he House Judiciary Committee Report that accompanies the 1982 amendment of Section 2 [of the Voting Rights Act] specifically mentions ‘shifts from elective to appointive office’ as an example of ‘practices and procedures in the electoral process’ that [might] violate Section 2.”¹⁴⁴

Thus, jurisdictions that switch from an election system to a merit-selection plan would have to get approval from the United States Department of Justice before eliminating their election system for judges.¹⁴⁵ Additionally, if a merit-selection system were instituted in response to litigation under Section 2 of the Voting Rights Act, the jurisdiction would have to “[explain] why such a change was made just when the election system was about to be opened to meaningful participation by minority voters.”¹⁴⁶

Furthermore, most merit-selection proposals include a retention election component.¹⁴⁷ Under this plan, judges would be appointed by the governor or an independent board but would then face an unopposed, yes-or-no vote from the voters. The purpose of the retention election is to preserve the democratic right of citizens to vote for their judges. “[J]udges tell us what to do, making moral decisions in the process, and this puts autonomy and democracy at risk;”¹⁴⁸ however, to say that the

142. Banner, *supra* note 129, at 462-63.

This could happen by coincidence; a nonlawyer who contributes to the re-election campaign of a local judge because he is ‘tough on crime’ could appear soon afterwards before the judge in a wholly unrelated matter The chances of such a coincidence, however, appear slim in comparison to the odds that he contributed to the judge's campaign because he expected to be in court soon.

Id. at 463.

143. Wright, *supra* note 11, at 689.

144. *Id.* at 689-90 (citing H.R. REP. NO. 227, 97th Cong., 1st Sess. 18 (1981)).

145. *Id.* at 689 (citing *Bunton v. Patterson*, 393 U.S. 544 (1969) (holding that “a change from an elective system to an appointive system requires preclearance under Section 5”)).

146. *Id.* at 689.

147. Supporters of merit selection view retention elections as a compromise with those who feel that voters should play some role in choosing judges. The great majority of judges win retention in routine fashion. See Susan B. Carbon, *Judicial Retention Elections: Are They Serving Their Intended Purpose?*, 64 JUDICATURE 210 (1980).

148. Shapiro, *supra* note 127, at 1568. But see Thompson, *supra* note 140, at 2009 (stating that “the existence of life tenured article III judges available to protect fundamental

value of possibly having a more politically independent judiciary capable of making "proper" legal decisions "outweighs democracy doesn't suggest that the latter's value is zero If we believe in both ideas and are loathe to administer knockout blows to either, appointing judges and subjecting them to retention elections makes some sense. Neither value loses, or neither loses badly; both are reinforced."¹⁴⁹

However, if a retention election component is included in the merit-selection proposal, the possibility exists that minority candidates would lose their retention election.¹⁵⁰ Thus, some merit-selection plans may not even achieve the stated goal of increased minority representation. Furthermore, because of this potential for a lack of minority representation, merit-selection plans which include a retention election would be subject to suits under Section 2 of the Voting Rights Act.¹⁵¹

Another potential downside to merit-selection plans, alluded to previously, is that voters lose their right to vote for their judges. If indeed judges are representatives,¹⁵² which they have to be interpreted as to be subject to the Voting Rights Act, then a merit-selection plan in essence chooses citizens' representatives for them. Such a system seems anti-democratic and overly paternalistic.¹⁵³

On the other hand, "[t]o say that judges should be elected or subject to retention elections after appointment suggests that what they do is similar in many respects to what legislators and executives do, and that they may be chosen on the same bases."¹⁵⁴ Furthermore,

values and minority interests diminishes the necessary freedom from electoral accountability of state court judges.").

149. Shapiro, *supra* note 127, at 1561.

150. *Id.* at 1569.

151. *Id.* Given the broad interpretation of the Voting Rights Act's coverage in *Chisom* and *Houston Lawyers' Ass'n*, judicial selection systems with an election component are unlikely to be exempted from scrutiny under Section 2. *Id.*

152. "A realist perspective recognizes the dual characteristics of the judiciary: the public wants judges to be independent and impartial, but also seeks judges that are accountable to citizens and sensitive to the impact of judicial decisions on society. Although tension exists in judicial performance of these twin roles, they are not inherently contradictory. Both functions emanate from a concern to safeguard the integrity and authority of the democratic political process." Saks, *supra* note 2, at 276. On the other hand, "[former] Governor Buddy Roemer of Louisiana argued that representatives 'have a constituency which numbers in the hundreds of thousands, to each of whom they owe fidelity Judges have but one constituency, the blindfolded lady with the scales and sword.'" *Id.* at 277. "[T]hose who now contend that judges cannot be considered 'representatives' remain wedded to a dated formalist philosophy of jurisprudence." *Id.* at 278. The notion that judges do more than apply existing rules and base their decisions on the existing problems and concerns of citizens "precludes a judicial role totally independent of 'representative' concerns. In this sense, judges are similar to legislators and other representative officials who act in the interests of their constituents." *Id.* at 279.

153. See Pearson & Castle, *supra* note 119, at 34 ("The practice of electing judges originated in the Jacksonian era and is considered a part of the period's populist democratic tradition.").

154. Shapiro, *supra* note 127, at 1562. But see Thompson, *supra* note 140, at 2043.

Given the wide rejection of the notion that appellate judges merely find "law" that is somewhere out there to be found, it is inescapable that these judges are political actors; they are lawmakers in conjunction with adjudication, whatever jurisprudential theory is accepted. Inevitably, there is the

[T]he very idea of judges mirroring preferences defies coherent explanation. What exactly are judges mirroring? An untutored set of preferences concerning adjudicatory results? The preferences of informed, reflective members of the community, acting as proxies for the electorate? The preferences of an ideal community? How could accurate mirroring be verified? If the community is substantially fractured, what then? Should courts construct outcomes and design clumsy opinions so as to "mirror" the variations and shadings in public opinion — a kind of proportional representation for community preferences?¹⁵⁵

In other words, "[i]f judges are to be directly responsible to the public, then the judicial system ought to be abolished and every time an issue comes up just have a vote on whether X should be convicted or whether this decision should be made."¹⁵⁶

Additionally, there is not much indication that the majority of voters truly have a desire to vote for down-ballot judicial positions. In general, there is a lack of knowledge of the judicial system and judicial campaigns among the public.¹⁵⁷ Far fewer votes are cast in these races, and many of those are straight-ticket votes,¹⁵⁸ possibly indicating a lack of knowledge concerning individual candidates and their qualifications for office. Most studies of voters in judicial elections indicate that a high proportion of voters know little about the candidates for whom they vote.¹⁵⁹

Finally, merit-selection plans may be politically unpopular, thus failing one of the stated goals for any proposed alternative to single-member districts as a remedy for voting-rights challenges. Specifically, without elections, trial lawyers would have no judicial campaigns to support financially. Trial lawyers value these campaign donations as an attempt to in-

question of why this group of political actors . . . [should be] exposed to less popular electoral accountability than other actors in the political process.

Id.

155. Shapiro, *supra* note 127, at 1565.

156. Hon. Robert F. Stephens, *Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges*, 77 KY. L.J. 741 (1989).

157. *Id.* at 742. As an example, a Kentucky newspaper conducted a poll in the 1980's in which five hundred people in seven counties in the central Kentucky area were polled. Thirty-three percent of the people in this fairly well-educated, fairly high economic level area believed that accused criminals are presumed guilty and have to prove themselves innocent. *Id.* at 743. Twenty-five percent of the people polled believed that the governor of the state had the right to review opinions and decisions of the supreme court. *Id.*

158. See Solimine, *supra* note 137, at 72. But see Pearson & Castle, *supra* note 119, at 35-36 (stating that in "a 1988 Texas Primary referendum . . . eighty-six percent of the voters indicated a preference for partisan election of judges over 'an appointment process created by the Legislature.'").

159. Baum, *supra* note 120, at 647. Baum goes on to argue, however, that improvements in the availability of information to voters could substantially increase their knowledge about candidates for judgeships. Accordingly, one who is dissatisfied with the quality of judgments made by voters might advocate efforts to provide more information to voters rather than an abolition of judicial elections. Further, one's conclusions about the desirability of abolishing elections may depend on perceptions of the likelihood that such improvements could be achieved.

Id. at 649.

fluence potential judges and would thus likely oppose any proposed change to the system which included eliminating elections for judges.¹⁶⁰

C. NON-PARTISAN ELECTIONS

Another possible alternative to single-member districts as a solution to voting rights violations is the implementation of non-partisan elections. States first enacted non-partisan election laws during the Progressive Era in response to the perception that political party bosses and their organizational machines were corrupting city governments.¹⁶¹ Twenty states have non-partisan elections.¹⁶² Such systems require candidates to obtain a certain number of signatures in order to be listed on the ballot.¹⁶³ After acquiring the signatures, candidates run without party affiliation.¹⁶⁴

Typical nonpartisan election laws permit only the names of candidates, without any party affiliation, to appear on the ballot. Generally, political parties may still, and often do, endorse and run the campaigns of nonpartisan candidates. California voters, believing that such participation by parties defeats many of the goals of non-partisan systems, recently amended their state constitution to institute an "absolute" nonpartisan system: one that prohibits political parties from endorsing, supporting or opposing candidates for non-partisan office. This absolute nonpartisan scheme is an attempt to make not just the form of elections, but the campaigns themselves, nonpartisan. Since such a provision directly limits political speech and association, it is susceptible to the challenge that it unconstitutionally burdens the first amendment rights of political parties and their members.¹⁶⁵

The Supreme Court has nonetheless recognized that states have a compelling interest in regulating elections to ensure that the democratic pro-

160. Again, such opposition is insufficient to justify impeding progress. Nevertheless, it remains a realistic political obstacle.

161. Nancy Northup, *Local Nonpartisan Elections, Political Parties and the First Amendment*, 87 COLUM. L. REV. 1677 (1987) ("Nonpartisan schemes, by limiting political party participation in local elections, are seen as a means to a more efficient and responsive local government."); see PHILIP L. DUBOIS, *FROM BALLOT TO BENCH* 4 (1980) ("concern over the adverse effects of partisan politics on the quality and operation of the judiciary led many states to replace partisan elections with . . . nonpartisan nomination and elections. . .").

162. Banner, *supra* note 129, at 452.

163. *Id.*

164. *Id.*

165. Northup, *supra* note 161, at 1677-78.

The First Amendment states: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievance." U.S. Const. amend. I. "It has long been established that these First Amendment freedoms are protected by the Fourteenth Amendment from invasion by the States." Northup, *supra* note 161, at 1677-78 (citing *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963)).

Although the Constitution does not expressly grant a right of association, the Supreme Court has derived it through the First Amendment rights to speech, petition, and assembly. The Supreme Court acknowledged this right in *NAACP v. Alabama ex. rel. Patterson*, 357 U.S. 449 (1958).

cess is open and fair.¹⁶⁶ Not only does the Constitution explicitly grant states the power to regulate the time, manner, and place of elections, but "as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes."¹⁶⁷ Ordered, open, and fair elections are essential to achieve the purpose of the democratic process: the legitimate expression of the will of the electorate in the election's outcome.¹⁶⁸

Some commentators have suggested that political party affiliation, not race, is the deciding factor in judicial elections.¹⁶⁹ Indeed, the statistics in this area are shocking. Texas is an example of the role party politics can play in judicial elections. In 1984, Ronald Reagan won 64 percent of the vote in Texas, and every incumbent Democratic district judge running that year in Dallas and Houston lost.¹⁷⁰ Republicans also won four open district court seats in those two cities.¹⁷¹

Reagan's coattails were not limited to the district courts. Four incumbent Democrats lost their seats on Texas' courts of appeals in 1984.¹⁷² Overall, of the thirty-five contested races statewide for appellate or district benches in 1984, Republican candidates won thirty of them.¹⁷³ Both Republican and Democratic judges agree that 1984 was a clear example of how the top of the ticket can influence down-ballot judicial races.¹⁷⁴ Another example of the potential detrimental effects of partisan politics on judicial elections is the 1994 election in Texas. In a Republican land-

166. *Storer v. Brown*, 415 U.S. 724, 730, *reh'g denied*, 417 U.S. 926 (1974).

167. *Id.*

168. *See id.* at 732-33.

169. *E.g.*, William Murchison, *Why Morales Deserved to Lose*, TEXAS LAWYER, Sept. 6, 1993, at 8:

The Democratic-inspired idea behind judicial reapportionment is to unhorse Republican judges, replacing them with black or brown Democrats grateful to the party establishment. The Democrats brand at-large elections as racist, when in fact party affiliation determines the winners in these races. In counties that go Republican, Higginbotham noted, it's hardly strange that Republican judges get swept into office with the tide. It's equally unsurprising, one might add, when Republican judges got swept backward in Democratic counties.

Id. (commenting on the recent opinion by Justice Higginbotham in *League of United Latin American Citizens v. Clements*, 999 F.2d 831 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994)).

170. Richard Connelly, *GOP's Class of 1984 Leaves Mixed Legacy*, TEXAS LAWYER, Nov. 1, 1993, at 1.

171. *Id.*

172. *Id.*

173. *Id.*

174. Connelly, *supra* note 170, at 36.

Judge David West of Harris County's 269th District has felt the influence both ways: He was ousted in the 1982 Democratic sweep led by Gov. Mark White but returned to office two years later on the Reagan landslide "I got beat good in 1982, and in 1984 I got the second-highest vote for a district judge in the history of Texas," West said. "Two years after a scorching defeat, I went from being this goat to the great brilliant intellectual jurist I apparently am if you believe the vote. So you can see why I'm just a bit cynical [about partisan judicial elections]."

slide, Harris county lost eight of its ten minority judges.¹⁷⁵ Both Democrats and Republican officials attributed the losses to straight-ticket GOP voting.¹⁷⁶ Thus, the lack of minority judges might be the result of partisan voting, not white-block voting.¹⁷⁷ Therefore, non-partisan elections might increase the number of minority judges.

The potential dangers of having a judiciary selected primarily on the basis of party affiliation are considerable. The first danger is the risk of electing unqualified candidates.¹⁷⁸ In the 1984 Reagan landslide, Dallas County, for example, lost five experienced Democratic judges, including a 21-year incumbent, a 16-year incumbent, and a 12-year incumbent.¹⁷⁹ Thirty percent of the votes cast in Dallas County in 1984 were straight-ticket Republican.¹⁸⁰ The Democratic judge who came closest to winning still lost by 22,000 votes.¹⁸¹

Non-partisan elections are instituted to prevent straight ticket voting based on national issues unrelated to the administration of local government.¹⁸² In other words, supporters of non-partisan elections argue, for example, that Ronald Reagan's national campaign rhetoric had little to do with an individual candidate's qualifications to be a judge. Consequently, non-partisan elections, by separating the label of a national political party from the judicial aspirant, serve to promote electoral decisions made on the basis of candidate qualifications, rather than the superficial aspect of an irrelevant political classification. "Partisanship has no place in judicial elections. If we as citizens of this country want judges to do what the constitution requires, we need judges who are objective, talented, fair, and nonpolitical in the long run."¹⁸³

There is little indication that party affiliation is indicative of the decisions a judge will make, especially at the trial-court level. "[E]vidence indicates 'the weakness of party as an ideological predictor.'"¹⁸⁴

[N]umerous empirical studies demonstrate that over time, political affiliation does not offer a "complete explanation" for the voting behavior of most state court judges. That is, judges elected as . . . Democrats do not always, or even consistently, vote for a "liberal" result;

175. Bruce Nichols, "Harris County Voters Oust 8 of 10 Minority Judges," DALLAS MORNING NEWS, Nov. 12, 1994, at A1.

176. *Id.*

177. Some commentators observe that racist voting and straight-ticket voting may not be mutually exclusive. See Nichols, *supra* note 175, at A16.

178. See *id.* (quoting Anthony Champagne, a professor at the University of Texas at Dallas and an expert on the state's judicial politics: "The effect on judicial races is that you can get people in office who are very questionable . . . and people who are not real career judges;" and Judge David West: "When you have a straight-ticket sweep, you're going to elect people who don't deserve to be elected We won at least three seats that year that we shouldn't have won.").

179. Connelly, *supra* note 170, at 36.

180. *Id.*

181. *Id.*

182. Northup, *supra* note 161, at 1679.

183. Stephens, *supra* note 156, at 745.

184. Connelly, *supra* note 170, at 37 (quoting Anthony Champagne, professor at the University of Texas at Dallas).

similarly, elected . . . Republican judges are not guaranteed to vote "conservatively." Many issues, or potential results, do not neatly fall into one or the other category. Moreover, powerful institutional constraints, such as the force of precedent, the expectation of reasonably principled written decisions, and the need to reach collegial decisions (on the appellate level), limit the imposition of a judge's purely personal or political values on a case.¹⁸⁵

Non-partisan elections would de-politicize the process.¹⁸⁶ Because party affiliation is a poor indicator of judicial ideology, there seems little reason to force judges to choose a party label. Non-partisan elections would de-emphasize party affiliation and shift the focus of judicial elections to the qualifications of the candidates.

Finally, unlike merit-selection systems, non-partisan elections would preserve the voters' right to elect their judges. "When judges make common law rules, construe statutes, or interpret constitutions, they are making policies" and in our political system based on democratic principles, it is natural to expect that policy-makers should have some sort of mandate from the electorate to do so, or at least in some way be held accountable to the voters.¹⁸⁷ For this reason, removing political labels from judicial candidates, as opposed to removing judges from elections altogether,¹⁸⁸ might be more politically appealing and thus easier to institute.

However, there are also numerous downsides to non-partisan elections. First, its political appeal is called into question when one considers that the political party benefitting from the coattails effect is unlikely to support changing the status quo, at least until the political pendulum swings back. Thus, for example, Republicans in Texas who have benefitted from

185. Michael E. Solimine, Book Review, 57 U. CIN. L. REV. 987, 991 (1989) (reviewing G. ALAN TARR AND MARY CORNELIA ALDIS PORTER, *ACTIVISM AND POLITICS ON STATE SUPREME COURTS: STATE SUPREME COURTS IN STATE AND NATION* (1988)).

186. See Northup, *supra* note 161, at 1679.

Nonpartisanship is an alternative way to structure local government that rejects both the one-party and two-party systems. Supporters of nonpartisanship envision direct representation of citizens rather than indirect representation through parties as intermediaries. They seek to make local government more businesslike and less political. The ultimate goal is to create a more responsive and effective local government system.

Id.

187. Bradley C. Canon, *Judicial Election and Appointment at the State Level: Commentary on State Selection of Judges*, 77 KY. L.J. 747 (1989). Canon provides an excellent summary of the existing tension:

In short, we do not want judges who are spineless politicians following the whims of every transient majority or helping to whip up the passions of the day. But neither do we want judges whose devotion to logic or principles is so great that they are quite disdainful of the actual consequences their decisions have on society.

Id. Canon concludes that "[t]he Grail of perpetually balanced judicial accountability and independence will never be found, but we should not abandon the search." *Id.* at 757.

188. A merit-selection plan with a retention-election component would, however, preserve some measure of electoral accountability. Unfortunately, voters are likely to be less informed in retention elections, where information may be scarce, than in contested races. Baum, *supra* note 120, at 647.

partisan voting have no incentive to advocate changing the system which has brought them so much success.

Furthermore, it is uncertain that non-partisan elections would increase the number of minority judges; the only thing that is clear is that minority voters tend to support Democratic candidates. Over ninety percent of African Americans and sixty to seventy percent of Hispanics vote Democratic.¹⁸⁹

Thus, the lack of minority representation on the bench may simply be a product of too few African-American Republican candidates and minority voters supporting the side that tends to lose. Arguably, such a situation does not violate the Voting Rights Act. Furthermore, since there is no tangible indication of how changing to non-partisan elections would increase the number of minorities on the bench, such a plan offered as a solution to voting rights violations may not pass constitutional challenges.

Given that the down-ballot judicial races are heavily influenced by the political affiliation at the top of the ticket, if the political party label of judges is stripped, voters will have even less on which to base their votes. Even the most conscientious of voters is not always knowledgeable when it comes to the judicial races at the bottom of the ballot. If voters have even less information on which to base their vote, then the result might actually be an increase in arbitrariness and unqualified judges.

V. CONCLUSION

From the many deficiencies associated with single-member districts, it is clear that districting may create more problems than it solves. Furthermore, single-member districts may not be in the best interest of minority voters. It is these voters that a remedy is intended to benefit the most.

As a theoretical proposal, cumulative voting solves many of the problems associated with single-member districts as a potential remedy. However, because of political practicalities, it will probably never be implemented.

Similarly, non-partisan elections may be a good idea in their own right, since the evidence indicates that partisan politics has a strong influence on judicial races, even though party affiliation is a poor predictor of judicial decisions. However, again for political reasons, such a plan is unlikely to be implemented. It is also unclear how such a plan would increase the number of minority judges.

Finally, merit selection seems to be the best method of ensuring increased minority representation on the bench. Statistics show an increase in the number of minority judges in states where merit selection has been implemented. Also, the political costs of such a plan are less of an impediment than those for the other two proposed alternatives.

Any changes in the process are going to produce political downsides. However, assuming that the status quo is not the desired situation, a

189. Murchison, *supra* note 169, at 8.

merit-selection plan seems to be the best available solution, legally and politically, to voting rights challenges to at-large judicial elections. While voters would lose their right to directly elect their judges, that right should be sacrificed for the benefits such a plan would bring.

APPENDIX

The selection plans discussed above are merely sketches. Many different forms and combinations of such plans can and have been implemented. The following are examples of the selection systems being used by the fifty states, indicating the complex nature such systems can contain:

CALIFORNIA: Supreme court and courts of appeal justices are appointed by the governor and confirmed by a Commission on Judicial Appointments. Judges run unopposed on non-partisan retention ballots at the next general election after appointment. Superior court judges are elected on a non-partisan ballot or are selected by the method described above; judges are elected to a full term at the next general election on a non-partisan ballot. Municipal court and justice court justices are initially appointed by the governor and county board of supervisors, respectively, and retain office by election on a non-partisan ballot.

FLORIDA: Supreme court and district court of appeals justices are appointed by the governor from nominees submitted by the appropriate Judicial Nominating Commission. Judges run for retention at the next general election preceding expiration of the term. Circuit and county court judges are elected on non-partisan ballots.

NEW YORK: All are elected on partisan ballots, except court of appeals judges who are appointed by the governor with advice and consent of the senate. The governor also appoints court of claims judges and designates members of the appellate division of the supreme court. The mayor of New York City appoints judges of criminal and family courts in the city from a list submitted by a Judicial Nominating Commission, established by the mayor's executive order.

TEXAS: All are elected on partisan ballots, however, the method of selection for municipal judges is determined by city charter or local ordinance.¹⁹⁰

190. Taken from WEST'S APPOINTMENT BOOK FOR JUDGES AND LAWYERS, 1994 93-96 (West Publishing 1993).

Articles

