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Michael Lewyn

Touro Law Center, mlewyn@tourolaw.edu

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WHEN IS CUMULATIVE VOTING PREFERABLE TO SINGLE-MEMBER DISTRICTING?

MICHAEL E. LEWYN*

I. INTRODUCTION

An election system violates Section 2 of the Voting Rights Act [hereinafter "Section 2"] if it hinders racial groups' right to "elect the representatives of their choice."¹ The purpose of Section 2 is to prohibit electoral arrangements which "dilute" (i.e., diminish)² the voting power of racial minority groups. For example, at-large election systems (which allow every voter to vote for as many candidates as there are legislative seats to be filled in an entire jurisdiction)³ often violate Section 2 by allowing a cohesive racial majority to elect every single legislator, thereby leaving racial minorities unrepresented.⁴ Section 2 also prohibits single-member districting plans⁵ which dilute minority votes.⁶

The traditional remedy for vote dilution has been the creation of "majority minority" single-member districts.⁷ Typically, courts and legislators have tried to create enough majority minority districts to give minorities proportional representation in legislatures.⁸ However, single-

* Attorney, Mullin, Rhyne, Emmons and Topel, P.C., Washington, D.C. Formerly Visiting Assistant Professor, University of Miami School of Law; Law Clerk to Judges Morris Arnold (8th Cir.) and Theodore McMillian (8th Cir.). B.A., Wesleyan University, J.D. University of Pennsylvania Law School.

1. 42 U.S.C. § 1973(b) (Supp. V 1993).

2. Vote dilution has been defined as "a 'process whereby election laws or practices . . . combine with systematic bloc voting among an identifiable [racial or political majority] group to diminish the voting strength of at least one other group.'" Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469, 470 n.3 (1989) (quoting DAVIDSON, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION 1, 4 (C. Davidson ed. 1984).

3. *Id.* at 469.

4. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (citations omitted). For the same reason, multimember districts (which allow each voter within a district to vote for as many candidates as there are seats to be filled) often violate Section 2. *Id.* Specifically, the Court has held that multimember districts and at-large elections violate Section 2 when "a bloc voting majority . . . [is generally] able to defeat candidates supported by a politically cohesive, geographically insular minority voting group." *Id.* at 49 (citations omitted).

5. A single-member districting plan divides a municipality or state into districts, each of which is represented by one legislator. Thus, single-member districting may increase minority representation by allowing the legislature to create districts dominated by minority groups. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 53 (1994).

6. See *Voinovich v. Quilter*, 113 S. Ct. 1149, 1155 (1993). A single-member districting plan can dilute minority strength either by (1) packing a minority group into a small number of districts (thereby depriving it of a majority in other districts) or (2) fragmenting the minority group so it constitutes a majority in no district. *Id.*

7. GUINIER, *supra* note 5, at 50.

8. *Id.* at 53. However, proportional representation is neither necessary nor sufficient to preclude Section 2 liability. See 42 U.S.C. § 1973(b) (proportionality not required); *Johnson v. De Grandy*, 114 S. Ct. 2647, 2661 (1994) (proportionality is "obviously an indication" that Section 2 has been complied with, but is not always dispositive).

member districting has not always increased minority representation, because minority voters are sometimes so geographically dispersed that no majority minority district can be created.⁹ Even where Section 2 has increased minority representation, it has also forced legislatures to create unsightly¹⁰ (and arguably unconstitutional)¹¹ gerrymanders in order to create a large number of majority minority districts.

The defects of single-member districting have caused some commentators (most notably Lani Guinier)¹² to endorse a system known as "cumulative voting" as a remedy for Section 2 violations. Under cumulative voting, as in a traditional at-large election, voters may vote for several candidates. However, voters also have the option of "cumulating" their votes by casting several votes ("plumping") for one or more candidates.¹³ For example, suppose City X has a five-member city council. Under traditional at-large voting, each voter could cast one vote for as many as five candidates, and the five candidates with the most votes would win. By contrast, under cumulative voting, each voter would have five votes but would have the option of casting multiple votes for one or more candidates. Thus, the voter could cast all five votes for his first choice, cast one vote for each of five candidates, or could support an intermediate number of candidates. If enough voters cast multiple votes for a candidate they intensely supported, a candidate without majority support could win.¹⁴ Thus, cumulative voting increases minority representation (like single-member districting) but never requires racial gerrymandering (unlike single-member districting).

Although some local governments have settled voting rights suits by adopting cumulative voting,¹⁵ courts and commentators who have discussed cumulative voting have not explained exactly when cumulative voting is preferable to single-member districting. This article addresses that question and concludes that cumulative voting is most appropriate in small towns, nonpartisan elections, and jurisdictions in which voters know whether they are in the majority. By contrast, single-member districts are preferable to cumulative voting in big cities, state or federal elections, partisan

9. Engstrom et al., *supra* note 2, at 471.

10. GUINIER, *supra* note 5, at 120 (describing unusually shaped districts created in order to comply with Section 2, such as one congressional district shaped like an earmuff in order to connect two noncontiguous Hispanic neighborhoods in Chicago).

11. See *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (finding that race-conscious districting may violate Equal Protection Clause if districting plan lacks nonracial justification).

12. Guinier, a professor at the University of Pennsylvania Law School, was nominated by President Clinton 1994 to head the Justice Department's Civil Rights Division, which enforces the Voting Rights Act. However, Clinton later withdrew the nomination because some of Guinier's ideas were quite controversial. See Stephen L. Carter, *Foreword* to LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY*, vii, vii-xii (1994) (describing conservatives' attacks on Guinier). See also GUINIER, *supra* note 5, at 14-15, 95-101 (endorsing cumulative voting).

13. Engstrom et al., *supra* note 2, at 477.

14. GUINIER, *supra* note 5, at 14-15.

15. See, e.g., *Dillard v. Chilton County Board of Education*, 699 F. Supp. 870 (M.D. Ala. 1988), *aff'd without opinion*, 868 F.2d 1274 (11th Cir. 1989) (approving one such settlement).

elections, and elections in which the racial or partisan balance between factions is either close or is unknown to most voters.

II. BACKGROUND: THE RISE (AND POSSIBLE FALL) OF SINGLE-MEMBER DISTRICTS

A. *The Growth of Majority Minority Districts Under the Voting Rights Act*

Congress enacted the Voting Rights Act¹⁶ in 1965 to restrict literacy tests and other practices used by southern states to prevent blacks from voting.¹⁷ After the act was enacted, Southern states frequently altered election rules in order to reduce black candidates' chances of winning. For example, some localities switched from single-member district elections to at-large elections.¹⁸ At-large elections typically allow a cohesive majority bloc to elect all legislators. For example, suppose 51% of voters in City X are white, 49% are black, and all whites vote for whites. Under an at-large system, all white candidates will get at least 51% of the vote, and 51% of the voters will therefore win 100% of the seats. By contrast, under a system of neighborhood-based districts, some districts will typically be majority black, and the black minority will therefore obtain some representation in the city council.¹⁹ In order to increase minority representation, voting rights activists have generally sought to replace at-large elections with single-member districts.²⁰

Initially, voting rights activists met with some resistance from the Supreme Court, which held that districting plans were illegal only if they were enacted with discriminatory intent.²¹ In 1982, Congress overruled the Supreme Court by enacting Section 2 of the Voting Rights Act, which provided that "dilution claims could be proved based on discriminatory results alone."²² However, the lack of proportional representation alone does not violate Section 2.²³ In 1986, the Supreme Court held that to establish that an at-large or multimember districting plan violates Section 2, plaintiffs must show that (1) a racial minority is sufficiently numerous and compact to constitute a majority of the voters in a single-member district,²⁴ (2) the minority group is politically cohesive,²⁵ and (3) the majority "votes sufficiently as a bloc to enable it . . . usually to defeat

16. 42 U.S.C. § 1973 (Supp. V 1993).

17. GUINIER, *supra* note 5, at 7.

18. *Id.* As at-large voting and multimember districting have the same effects, *see supra* note 4, the term "at-large election" should be read to include multimember districting within a larger jurisdiction throughout this article.

19. *Id.* at 7-8.

20. *Id.* at 150.

21. *City of Mobile v. Bolden*, 446 U.S. 55 (1980).

22. GUINIER, *supra* note 5, at 50.

23. *See* 42 U.S.C. § 1973(b) (Supp. V 1993).

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

25. *Id.* at 51.

the minority's preferred candidate."²⁶ If these factors have been established, courts must also "examine other evidence in the totality of the circumstances" before finding a voting rights violation.²⁷

Over the past decade, Section 2 has revolutionized electoral laws in areas with large minority populations. Many state and local governments have remedied Section 2 violations by abolishing multimember and at-large systems and replacing them with single-member districting, thereby ensuring that minorities could elect at least one municipal legislator.²⁸ Even states which already used single-member districts were forced to redraw them in order to create a larger number of majority minority districts.²⁹ However, the growth of race-conscious single-member districting has created a variety of unintended consequences.

B. Has the Voting Rights Revolution Gone Sour?

Undoubtedly, Section 2 has increased representation of racial minorities. Between 1985 and 1992, the number of black elected officials rose by almost 20%³⁰ and the number of Hispanic elected officials rose by over 50%.³¹ Nevertheless, single-member districting has been criticized on several grounds.

First, despite the aforementioned statistics, single-member districts do not always increase minority representation. Where a minority is segregated into a few neighborhoods, single-member districting usually increases minority representation by allowing the creation of majority minority districts.³² However, single-member districting will not increase minority representation where a racial group is "too geographically dispersed for a districting plan to result in many, if any, 'majority minority' districts."³³

26. *Id.* (citations omitted). The Court later held that the same test applied to suits challenging single-member districting plans. *See* *Grove v. Emison*, 113 S. Ct. 1075, 1084 (1993).

27. *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2657 (1994). Such evidence may include evidence of historical discrimination against a minority group, the exclusion of minority group members from candidate slating processes, the use of voting practices that make discrimination easier (such as unusually large election districts), economic and social inequalities between racial groups, the use of racial appeals in political campaigns, responsiveness of elected officials to the minority's needs, and the policy supporting the government's use of the challenged electoral practice. *Id.* at 2656 n.9. In addition, proportional representation of minority groups (or the absence thereof) is highly relevant. *Id.* at 2660-61 (noting that proportional representation important but not always dispositive).

28. *See* *Engstrom et al.*, *supra* note 2, at 471. *See also* *League of United Latin Citizens v. Midland Indep. School Dist.*, 812 F.2d 1494 (5th Cir. 1987) (requiring switch from at-large elections to single-member districts).

29. *See, e.g.* *Rural West Tennessee African-American Council, Inc. v. McWherter*, 836 F. Supp. 453 (W.D. Tenn. 1993) (rejecting state Senate redistricting plan where only 9.1% of single-member districts majority black, state could have enacted plan in which 12.1% of districts majority black, and 14.4% of voting-age population was black).

30. U.S. DEPARTMENT OF COMMERCE, BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1993 at 280 (113th ed. 1993) [hereinafter ABSTRACT] (noting increase from 6312 black elected officials to 7517).

31. *Id.* at 281 (noting increase from 3147 Hispanic elected officials to 4994).

32. *Engstrom et al.*, *supra* note 2, at 471.

33. *Id.*

Such "dispersed minorities" are no better off under single-member districting than under traditional at-large systems.³⁴

Second, race-conscious districting is constitutionally questionable. Long before the passage of the Voting Rights Act, the Supreme Court held that racially motivated redistricting is unconstitutional if district-drawers intended to "[single] out a readily isolated segment of a racial minority for special discriminatory treatment."³⁵ In *Shaw v. Reno*,³⁶ the Court expanded its prohibition of racial gerrymandering to restrict race-conscious redistricting plans enacted in order to comply with Section 2. In *Shaw*, the plaintiffs challenged North Carolina's congressional redistricting plan, which created numerous "unusually shaped" districts in order to increase the number of majority black districts.³⁷ For example, one district "narrowly track[ed] the path of an interstate, creating a swatch of voters on either side of the highway from one end of the state to the other."³⁸ The district court dismissed plaintiffs' equal protection claim because the plan was enacted to comply with the Voting Rights Act and did not cause underrepresentation of white voters.³⁹ The Supreme Court reversed and remanded for further proceedings, holding that plaintiffs could challenge the state's redistricting plan under the Equal Protection Clause⁴⁰ if the plan was "so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race"⁴¹ and was not "narrowly tailored to further a compelling governmental interest."⁴² Unfortunately, the practical impact of *Shaw* is unclear because the Court did not explain either (1) what constituted a "rational" justification for a districting plan or (2) what constituted a "compelling governmental interest."

Third, racial gerrymandering is arguably objectionable on policy grounds. For example, the *Shaw* Court expressed concern that "[r]acial classifications of any sort pose the risk of lasting harm to our society"⁴³ by reinforcing "the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin."⁴⁴ The Court added that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions . . . [and] carry us further

34. Even if dispersed minorities had a remedy for section 2 violations, they frequently cannot even prove a section 2 violation because the Supreme Court has held that to do so, a minority must be "sufficiently large and *geographically compact* to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (emphasis added).

35. *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960) (invalidating plan redrawing a city's boundaries to exclude blacks). See also *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (applying similar principles to redistricting within state).

36. 113 S. Ct. 2816 (1993).

37. *Id.* at 2820.

38. GUINIER, *supra* note 5, at 120.

39. *Shaw*, 113 S. Ct. at 2820 (citation omitted).

40. U.S. CONST. amend. XIV, § 1 (prohibiting states from denying equal protection of the laws).

41. *Shaw*, 113 S. Ct. at 2832.

42. *Id.* (citations omitted).

43. *Id.*

44. *Id.*

from the goal of a political system in which race no longer matters.”⁴⁵

Fourth, single-member districting, regardless of its racial impact, has two significant disadvantages. Initially, single-member districting “wastes” votes (i.e. renders them insignificant). Single-member districting wastes the votes of losing candidates’ supporters by ensuring that they are not represented by a candidate for whom they voted.⁴⁶ Single-member districting also wastes the votes of winning candidates’ supporters. As the Supreme Court noted in *Shaw*, “[w]hen more people vote for the winning candidate than is necessary to carry the district, their votes are technically wasted because they were unnecessary to provide an electoral margin within the district and because they could have been used to provide the necessary electoral margin for a like-minded partisan in another district.”⁴⁷ Additionally, single-member districting leads to gerrymandering. Gerrymandering is the “distortion of district boundaries and populations for partisan or political purposes.”⁴⁸ Where there are no districts there are no district boundaries, and gerrymandering is therefore impossible. Gerrymandering reduces political competition, because in order to create “safe” seats for their own allies, district-drawers must create a large number of noncompetitive districts. By reducing political competition, gerrymandering may also reduce voter interest and turnout.⁴⁹ In addition, gerrymandering may have the pernicious consequences of (1) allowing politicians to “re-elect” themselves by manipulating district boundaries,⁵⁰ (2) allowing parties to obtain majorities through adroit districting even if they only have a minority of the popular vote,⁵¹ and (3) allowing a majority party to turn a small majority into an overwhelming majority.⁵²

In sum, single-member districts have increased minority representation, but arguably have undesirable side effects. As a result, some commentators have endorsed alternative systems such as cumulative voting.

45. *Id.* The above discussion is not an exhaustive summary of the policy arguments against race-conscious districting. Other arguments against race-conscious districting include contentions that: (1) because the right to vote is individual in nature, redistricting need not consider group interests (GUINIER, *supra* note 5, at 139), (2) minorities can be adequately represented even if there are no majority minority districts, because they can form multiracial coalitions in majority white districts (*see id.* at 35-36), and (3) geography is a more legitimate basis for districting than race, because voters choose where they live (*see id.* at 141). *But see id.* at 36-37, 65-66, 124-42 (rebutting arguments against race-conscious districting).

46. GUINIER, *supra* note 5, at 134-35. For example, single-member districting wastes the votes of Democrats in Republican districts, or blacks in majority white districts.

47. *Id.* at 134.

48. *Kirkpatrick v. Preisler*, 394 U.S. 526, 538 (1969) (Fortas, J., concurring). District-drawers construct gerrymanders in two ways: (1) “packing” political opponents into a small number of districts to diminish their overall influence, and (2) “cracking” the opposition vote by spreading it among a number of districts so that the opposition cannot obtain a majority in any district. *See* Michael E. Lewyn, *How to Limit Gerrymandering*, 45 FLA. L. REV. 403, 406 (1994) (citations omitted).

49. GUINIER, *supra* note 5, at 85.

50. *See id.*

51. Lewyn, *supra* note 48, at 407.

52. *Id.* *But see id.* at 407-09 (addressing and rebutting arguments that gerrymandering is (1) not an unmitigated evil or (2) rarely successful).

III. THE STORY OF CUMULATIVE VOTING

Traditional at-large elections and single-member districting are not the only possible districting systems. A city or state may also use modified at-large systems such as cumulative voting, which include safeguards to increase minority representation (unlike traditional at-large elections) but eliminate gerrymandering (unlike single-member districting).⁵³ The following sections of this article discuss (1) how cumulative voting works and (2) the history of cumulative voting.

A. What Is Cumulative Voting?

Cumulative voting is a type of at-large districting, because (as in any other at-large system) voters vote for multiple candidates to represent a jurisdiction or multimember district. However, in jurisdictions using cumulative voting (unlike those using traditional at-large systems) "voters are not restricted to casting only a single vote for any particular candidate, but may instead cumulate or aggregate their votes behind one or more candidates if they wish."⁵⁴

For example, a voter with three votes to cast may "vote in the traditional fashion, casting one vote each for three different candidates, or may cast two votes for one candidate and one for another, or even cast all three of his votes for a single candidate (a phenomenon called 'plumping')." ⁵⁵ Thus, cumulative voting allows minorities to elect candidates by plumping for them, despite the majority's apathy or hostility. As in at-large voting, the candidates with the most votes win.⁵⁶

The number of votes necessary to elect a candidate under cumulative voting is determined by a concept known as the "threshold of exclusion." The threshold of exclusion is the fraction of the "electorate that a group must exceed in order to elect the candidate of its choice, *regardless of*

53. I note in passing that cumulative voting is not the only modified at-large system in existence. Other such systems include:

1. Pure proportional representation, a system "under which political parties must be represented in a legislature in proportion to their statewide vote totals." Lewyn, *supra* note 48, at 405. Cf. John R. Low-Beer, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984).

2. The single transferable vote allows voters to number all candidates in the order of preference from most favorite to least favorite. Once a voter's first choice has accumulated the minimum number of votes necessary for election, her surplus votes may be transferred to the voter's second choice (or lower choices, if the second choice has also accumulated the minimum number of votes necessary for election). See Lewyn, *supra* note 48, at 484; Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U.P.A. L. REV. 1991 (1993) (endorsing system).

3. Limited voting allows voters to cast fewer votes than there are seats available. Therefore, a majority of the electorate cannot elect every single legislator. See Pamela Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 223-24 (1989); Engstrom, *supra* note 2, at 475 n.32.

The advantages and disadvantages of these systems are beyond the scope of this article; the purpose of this article is merely to discuss cumulative voting in depth, and to compare it to single-member districting.

54. Engstrom et al., *supra* note 2, at 477.

55. *Id.*

56. *Id.*

how the rest of the electorate votes."⁵⁷ In cumulative voting systems the threshold of exclusion is usually one divided by one plus the number of seats at stake.⁵⁸ For example, where three seats are at stake, any candidate with over one-fourth of the vote will win.⁵⁹ This concept can be illustrated by the following hypothetical: suppose the city of Engstromville has 3 council seats, 4 candidates (whites B, C, and D, and black E), and 10 voters (7 whites and 3 blacks, all of whom vote only for candidates of their own race). Under traditional at-large elections, voters can cast only one vote per candidate, so B, C and D will each beat E by a 7-3 margin. By contrast, under cumulative voting, the black voters can "plump" for the black, giving him a total of 9 votes (3 for each black voter). If the white vote is equally divided among the candidates, E finishes first (with 9 votes, as opposed to 7 for each of the whites).

If opposition votes are not evenly divided among candidates, a candidate can win under cumulative voting with less than the threshold of exclusion, because the less successful opposition candidates will also fall below the threshold. For example, suppose that in Guinier County (which also uses cumulative voting), there are 8 whites and 2 blacks, 3 white candidates (A, B and C), 1 black candidate (D), and 3 council seats at stake. Because the threshold of exclusion is 25%, a black candidate will lose if the white vote is evenly split among all white candidates. Nevertheless, if 5 white voters cast all their votes for A, 2 give one vote to each of 3 white candidates (A, B and C), and 1 casts all her votes for B, the black candidate will still finish in the top three. A will have finished first with 17 votes, the black candidate (D) will be in second place with 6 votes (due to plumping by both black voters) and B and C will have only 5 and 2 votes respectively. Indeed, in Illinois (which used cumulative voting for elections in three-seat state House districts) candidates were sometimes elected with as little as 6.4% of the vote,⁶⁰ one-fourth of the threshold of exclusion.

In sum, cumulative voting combines at-large elections with minority representation by allowing minorities to show the intensity of their support for their favorite candidates. Nevertheless, cumulative voting rarely turns minorities into majorities, because by plumping for one candidate, minority groups forego the opportunity to elect others.⁶¹

B. The Checkered Past of Cumulative Voting

1. The First Wave of Support and the Illinois Experiment

As early as 1859, commentators have endorsed cumulative voting on the ground that it "protect[s] minority party representation while dis-

57. *Id.* at 478 (emphasis in original).

58. *Id.* at 479.

59. *Id.* at 478.

60. Charles W. Dunn, *Cumulative Voting Problems in Illinois Legislative Elections*, 9 HARVARD J. ON LEGIS. 627, 651 (1972).

61. *But see infra* text accompanying notes 180-188 (suggesting that where electorate closely divided between races or parties, strategic voting might turn majority into minority and vice versa).

couraging the proliferation of minor parties that might occur under proportional representation.”⁶² During the late 19th century, cumulative voting was proposed in various jurisdictions, although it was rarely adopted.⁶³ America’s only long-term⁶⁴ cumulative voting experiment was Illinois’ use of cumulative voting in state House elections.

In 1870, the Illinois constitutional convention adopted cumulative voting for the Illinois House.⁶⁵ The convention adopted cumulative voting for three reasons. First, the convention wanted to increase minority representation in order to make the House more representative of the electorate.⁶⁶ Second, the convention wanted to allow individual voters to maximize their influence by plumping for their first choice.⁶⁷ Third, the convention intended to eliminate sectional divisions between the parties by ensuring that some Republicans would represent southern Illinois (then dominated by Democrats) while some Democrats would represent northern Illinois (then dominated by Republicans).⁶⁸

Under Illinois’ cumulative voting system, the state had fifty-nine House districts, each of which had three seats,⁶⁹ and voters could distribute their votes between candidates in at least three ways: they could cast one vote for each of three candidates, one and one-half votes for each of two candidates, or three votes for one candidate.⁷⁰ Because nearly

62. Dunn, *supra* note 60, at 629. Ironically, Guinier endorses cumulative voting precisely because single-member districting unduly restricts the growth of third parties. GUINIER, *supra* note 5, at 86. However, the Illinois experience suggests that under cumulative voting, the threshold of exclusion is too high for most minor parties. See Dunn, *supra* note 60, at 633-34 (noting weakness of minor parties under cumulative voting).

63. In 1873, the governor of New York vetoed a New York City charter providing for cumulative voting, and in 1891, South Dakota voters rejected cumulative voting in a referendum. Dunn, *supra* note 60, at 630. Cumulative voting bills were also introduced in the U.S. Congress in 1869, 1870 and 1871, but were not seriously considered. *Id.*

64. In the early 1870s Pennsylvania and Wilmington, North Carolina briefly adopted cumulative voting for municipal elections, but both jurisdictions quickly repealed the system. *Id.* at 629-30. In addition, corporations frequently use cumulative voting to elect directors. See Jeffrey N. Gordon, *Institutions as Institutional Investors: A New Look At Cumulative Voting*, 94 COLUM. L. REV. 124, 145-46 (1994) (noting that six states require cumulative voting, and forty-three others permit it). I doubt that corporate cumulative voting is particularly relevant to politics because the major arguments against corporate cumulative voting are simply inapplicable to any sort of legislative elections. For example, opponents of corporate cumulative voting argue that cumulative voting can turn a corporate board of directors into a “debating forum,” *id.* at 167, in which directors are “partisans of particular interest groups.” *Id.* In contrast, a legislature should be a “debating forum” in which a variety of views are represented. *But cf.* Karlan, *supra* note 53, at 232-33 n.249 (noting that purpose of corporate cumulative voting, like purpose of legislative cumulative voting, is to increase minority representation).

65. Dunn, *supra* note 60, at 630-31.

66. *Id.* at 631-32.

67. *Id.* at 632.

68. *Id.* at 630. Ironically, this rationale for cumulative voting is arguably no longer valid, at least not in Illinois. In recent years, both Northern and Southern Illinois have elected representatives of both parties. See MICHAEL BARONE & GRANT UJIFUSA, *THE ALMANAC OF AMERICAN POLITICS* 1994 at 381, 389-435 (1994) (comparison of state map with legislator profiles show that in recent years downstate Illinois has elected U.S. representatives of both parties, as has the Chicago area) [hereinafter *ALMANAC*].

69. Dunn, *supra* note 60, at 631.

70. *Id.* at 657. However, Illinois law was apparently unclear as to whether voters could cast two votes for one candidate and one for a third. *Id.* at 656.

every district gave one of its three seats to a candidate from the minority party,⁷¹ the Illinois system achieved two of its goals: (1) reducing geographic divisions between the parties⁷² and (2) increasing minority party representation in the House.⁷³

However, cumulative voting arguably failed to increase the individual voter's influence, because "[t]he majority party in a district would often nominate two candidates, and the minority party just one."⁷⁴ Parties failed to run full slates because of (1) "fear that their votes [would] be diluted to the point that they will lose a seat which they [could] easily win [if they ran fewer candidates]"⁷⁵ and (2) collusion between party organizations.⁷⁶ As a result of the parties' strategies, cumulative voting arguably weakened voter power by weakening political competition. To solve this problem, the 1920-22 Illinois constitutional convention proposed a constitution which abolished cumulative voting. In 1922, the proposed constitution (which was submitted to the voters as a whole, so that voters could not separately decide the cumulative voting issue) was defeated.⁷⁷

In 1970, another constitutional convention altered the cumulative voting system by providing that party committees could no longer limit nominations to less than two in each district (thereby eliminating elections in which all major-party nominees were unopposed).⁷⁸ Because a large minority of the convention opposed cumulative voting, a proposal to abolish cumulative voting in favor of single-member districting was submitted to the voters separately from the constitution as a whole, and was narrowly defeated.⁷⁹

In 1980, Illinois finally abolished cumulative voting when "Illinois voters, upset over a substantial pay raise that legislators had granted themselves, voted to reduce the number of seats in [the Illinois House]."⁸⁰ Voters' support of the amendment "was reportedly an expression of disaffection with the sitting legislature and had little or nothing to do with support/opposition to cumulative voting."⁸¹

71. *Id.* at 633. See also Karlan, *supra* note 53, at 233 n.250 (noting that Illinois system achieved similar results in 20th century when Democrats became dominant party in Chicago while Republicans became dominant party downstate).

72. Dunn, *supra* note 60, at 632.

73. *Id.* at 633.

74. *Id.* at 635.

75. Charles W. Wiggins & Janice Petty, *Cumulative Voting and Electoral Competition*, 7 AM. POL. Q. 345, 355 (1979). This fear is by no means irrational. For example, suppose that the 1st House district has 55 Democrats and 45 Republicans, and that every voter splits her votes equally among the candidates of her party. If the Democrats run 3 candidates to the Republicans' 2, each Democrat gets only 55 votes (one per candidate) while each Republican gets 67.5 (1.5 per candidate). Thus, if the Democrats ran "too many" candidates, the Republicans would win 2 of 3 seats despite being the minority party.

76. *Id.*

77. Dunn, *supra* note 60, at 636. I note in passing that in 1910, the legislature altered cumulative voting by applying it to primaries. *Id.* at 636 n.43.

78. *Id.* at 661-62.

79. *Id.* at 637 (noting that proposal for single-member districts carried 76 of 102 counties, but lost due to heavy opposition from Chicago area).

80. Engstrom et. al, *supra* note 2, at 476 n.38.

81. Richard L. Engstrom & Charles J. Barrilleaux, *Native Americans and Cumulative Voting: the Sisseton-Wahpeton Sioux*, 72 Soc. Sci. Q. 388, 388 n.1 (1991) (citation omitted).

2. The Revival of Cumulative Voting

Ironically, shortly after Illinois abolished cumulative voting, it regained its popularity among commentators, albeit for entirely different reasons. In recent years, several commentators have endorsed cumulative voting as a means of increasing the representation of racial (as opposed to partisan) minorities.⁸² Several jurisdictions have adopted cumulative voting plans in order to settle voting rights lawsuits.

For example, in the *Dillard v. Chilton County Board of Education*⁸³ litigation, five jurisdictions—three municipalities, a county commission, and a county school board—voluntarily adopted cumulative voting in order to settle a voting rights lawsuit. In each of these jurisdictions, the black population was either too small or too dispersed for district drawers to create a “majority minority” district.⁸⁴ Nevertheless, in the first election held under cumulative voting, all five jurisdictions elected black candidates.⁸⁵ Moreover, the election results suggest that “black electoral success was due in substantial part to the ability of black voters to concentrate their support behind a few candidates: all four of the successful black candidates . . . received more votes than there were black [voters].”⁸⁶

Moreover, cumulative voting in Alabama helped political as well as racial minorities. Under Chilton County’s traditional at-large system, the county’s school board and commission were monopolized by white Democrats. By contrast, each body now has three white Democrats, three white Republicans, and one black Democrat.⁸⁷

Similarly, Alamogordo, New Mexico, settled a voting rights suit by agreeing to adopt cumulative voting for three at-large city council seats.⁸⁸ Between 1970 and the 1986 settlement, no Hispanic candidate had been elected to the council, although 21% of the city’s voting age population was Hispanic.⁸⁹ In the first election held under cumulative voting, a Hispanic was elected. The minority candidate’s success was apparently due to plumping, because an exit poll showed that fewer voters supported the Hispanic candidate than supported the fourth-place white candidate. Nevertheless, the Hispanic candidate won because 52.9% of her supporters gave her multiple votes (as opposed to 27.4% of the fourth-place candidate’s supporters).⁹⁰

82. See *infra* notes 102-34 and accompanying text (discussing advantages of cumulative voting).

83. 699 F. Supp. 870 (M.D. Ala. 1988) (approving settlement adopting cumulative voting for county board of education and county commission), *aff’d without opinion*, 868 F.2d 1274 (11th Cir. 1989); see also *id.* at 876 n.7 (citing unreported cases approving settlements for three small municipalities) (citations omitted).

84. Karlan, *supra* note 53, at 234. I note in passing that before the settlement all five jurisdictions used at-large systems. *Dillard*, 699 F. Supp. at 872.

85. Karlan, *supra* note 53, at 234.

86. *Id.* at 235.

87. GUINIER, *supra* note 5, at 15-16. Because each body has seven members, the threshold of exclusion is one-eighth, or 12.5%. *Id.* at 15.

88. *Vega v. City of Alamogordo*, No. 86-0051-C (D.N.M. Feb. 10, 1986). Four other council members are elected through at-large districts. Engstrom et. al, *supra* note 2, at 480-81.

89. Engstrom et. al, *supra* note 2, at 481.

90. *Id.* at 491.

Cumulative voting also increased minority representation in elections for the Sisseton-Wahpeton School Board in South Dakota. The school district (which is one-third Native American) is governed by a nine-member school board elected at-large. Each year, three of the nine members are elected to three-year terms.⁹¹ Although Native American candidates had occasionally run for the school board, they usually could not win without substantial white support.⁹² In order to settle a voting rights suit brought by Native American voters, the district enacted cumulative voting.⁹³ In the first election held under cumulative voting, a Native American finished first among seven candidates and therefore won a seat.⁹⁴ The Native American finished fourth among whites,⁹⁵ but was elected because over 90% of Native American voters plumped for him.⁹⁶

IV. WHEN IS CUMULATIVE VOTING APPROPRIATE?

In order to determine when cumulative voting is appropriate, it is necessary to consider a number of factors. These factors include the following: (1) who decides when cumulative voting systems may be created, (2) the advantages of cumulative voting over single-member districting, and how those advantages may be maximized, and (3) the alleged disadvantages of cumulative voting and how these disadvantages may be minimized.

A. *Who Decides and When?*

Nearly every jurisdiction that has adopted cumulative voting in recent years has done so as part of a voluntary settlement of a voting rights suit.⁹⁷ Thus, the pros and cons of cumulative voting are most relevant to legislators and attorneys who are deciding whether to (1) settle voting rights suits by enacting single-member districting plans, (2) settle such suits by enacting cumulative voting plans, or (3) go to trial.

By contrast, judges have a limited role in deciding what remedy is appropriate. Where the parties have reached a voting rights settlement, the court must approve it if it provides minority voters with a "realistic opportunity to elect candidates of their choice"⁹⁸ and "represents a fair

91. Engstrom & Barrilleaux, *supra* note 81, at 389.

92. *Id.* According to plaintiffs, Native Americans had won only when (1) they were "handpicked" by white board members, and therefore were not the minority's choice, or (2) the whites decided to run only two candidates for three seats, thereby guaranteeing election to a Native American candidate. *Id.*

93. *Id.*

94. *Id.* at 390.

95. *Id.*

96. According to an exit poll, 339 of 358 votes cast by 121 Native Americans were for the Native American candidate. *Id.* at 390-91. Thus, at least 113 of the 121 Native American voters voted for their group's candidate, and the average Native American gave the Native American candidate 2.8 votes. *See id.* at 390.

97. *Id.* at 388. Apparently, at least eight jurisdictions have adopted cumulative voting in settlements. *Id.* at 388 n.2 (listing jurisdictions).

98. *Dillard*, 699 F. Supp. at 875.

and equitable solution to this litigation.”⁹⁹ Where the parties have not agreed on an appropriate remedy, the court must adopt the legislature’s proposed remedy unless it is “legally unacceptable because it . . . fails to meet the same standards applicable to an original [voting rights] challenge of a legislative plan in place.”¹⁰⁰ However, where a legislative body fails to present the district court with an acceptable remedy, the district court may “exercise its discretion in fashioning a ‘near optimal’ plan.”¹⁰¹

In sum, parties must consider the advantages and disadvantages of cumulative voting in deciding upon settlement terms, and courts must do so in deciding (1) whether to approve a settlement or (2) what to do if no acceptable remedy has been proposed.

B. The Advantages of Cumulative Voting

Supporters of cumulative voting argue that cumulative voting (1) increases minority representation in situations where single-member districting does not, (2) reduces the number of votes “wasted” on losing candidates, (3) eliminates gerrymandering of all types, (4) encourages voters to build multiracial coalitions, and (5) may increase voter turnout.¹⁰² Each of these arguments will be discussed below.

1. Cumulative Voting and “Dispersed Minorities”

Where a racial minority is geographically concentrated, district-drawers can easily give that minority proportional representation by creating majority-minority districts.¹⁰³ However, single-member districts are far less satisfactory where a politically cohesive minority group is too geographically dispersed for a single-member districting plan to create majority minority districts. For example, suppose that a Hispanic family lives in every other house in Dunntown, and constitutes 40% of that city’s

99. *Id.* at 876 n.6.

100. *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988) (citation omitted). Applying this rule, the court held that a “limited voting” plan could not be imposed where the legislature presented the court with a remedial single-member districting plan “which provides the maximum opportunity for representation possible by that means.” *Id.* at 120. Thus, it appears that a court may not impose cumulative voting upon an unwilling legislature merely because minorities cannot elect a representative under a single-member plan.

101. *Id.* at 115.

102. Pre-Voting Rights Act commentators made two other arguments in favor of cumulative voting, both of which are now questionable. First, it was argued that “the longer legislative tenure resulting from the cumulative voting system makes the Illinois House of Representatives a more experienced legislative body.” Dunn, *supra* note 60, at 639. Today, incumbents are usually reelected even in single-member districts. See, e.g. ABSTRACT *supra* note 30, at 277 (showing that in most recent elections, over 90% of U.S. representatives reelected). As a result, incumbency protection is frequently considered a disadvantage for an electoral system rather than an advantage. See BARONE & UJIFUSA, *supra* note 68, at 214, 292 (describing efforts to limit state and federal legislators’ tenure). Second, pre-Voting Rights Act commentators noted that cumulative voting gives each party representation in the other’s strongest districts. However, it is not altogether clear why a legislature should include legislators who represent minuscule factions merely to give each party representation in all areas. See Dunn, *supra* note 60, at 651 (noting that in Illinois, legislators elected with as little as 6.4% of the vote).

103. See, e.g., *Johnson v. DeGrandy*, 114 S. Ct. 2647, 2658 n.11 (1994).

population. In the absence of unusually creative districting, every possible district in Dunntown would be about 40% Hispanic, and Hispanics would therefore be outvoted everywhere. Thus, single-member districting will frequently underrepresent such "dispersed minorities."¹⁰⁴

By contrast, under cumulative voting, "dispersed minorities" can elect representatives of their choice by plumping for their favorite candidate. For example, if city A has cumulative voting for three at-large council positions, Hispanics can easily elect a council member (because the threshold of exclusion will be only 25%, far below the city's Hispanic percentage).¹⁰⁵

The Chilton County, Alabama, elections support the "dispersed minority" argument. In Chilton County, the black population was only slightly below the threshold of exclusion.¹⁰⁶ Nevertheless, it was not "possible to draw a single-member district plan which would provide black voters with an equal opportunity to elect their preferred candidates."¹⁰⁷ Under cumulative voting, however, blacks managed to elect candidates by plumping for their favorites.¹⁰⁸ Similarly, in Alamogordo, New Mexico, a single-member districting plan would, at best, have given minorities a solid majority in one of seven single-member districts and only a "tenuous"¹⁰⁹ majority in another, even though blacks and Hispanics together constituted 29.3% of the city's population.¹¹⁰ Thus, single-member districting would have given minorities some representation, but might not have given them proportional representation. By contrast, after the first election held under cumulative voting, two of seven council members were members of racial minority groups: a black who had been elected from a majority minority district, and a Hispanic elected through cumulative voting.¹¹¹ It therefore appears that cumulative voting solves the "dispersed minority" problem by allowing minority groups to elect the candidates of their choice even where those groups are not geographically concentrated enough to form a majority in a single-member district.

2. Cumulative Voting and Wasted Votes

Under single-member districting, a minority of voters arguably "waste" their votes by casting them for losing candidates.¹¹² In a single-member

104. I note, however, that single-member districting in city A would not violate the Voting Rights Act. See *Thornburg v. Gingles*, 478 U.S. 30, 50 (districting plan is not illegal if no minority group "geographically compact" enough to constitute majority in single-member district). Thus, the "dispersed minority" argument for cumulative voting is more relevant to settlement negotiations than to judicial proceedings.

105. See *supra* notes 57-60 and accompanying text (explaining threshold of exclusion).

106. In Chilton County, most legislative bodies had seven members. See Karlan, *supra* note 53, at 234 n.253. Thus, the threshold of exclusion was 12.5%. The black population of Chilton County was 11.86%, and was 10-11% in two of the Chilton County cities which adopted cumulative voting. *Id.* at 235 n.255.

107. *Id.* at 234.

108. *Id.* at 234-35.

109. Engstrom et al., *supra* note 2, at 482.

110. *Id.* at 481.

111. *Id.* at 489 (noting that Hispanic elected because Hispanic voters "seiz[ed] the opportunity to cumulate their votes on her behalf.").

112. GUINIER, *supra* note 5, at 134.

district, a candidate may need as much as 50% of the vote (plus one) to be elected. In a close election nearly half the vote is wasted on losing candidates.¹¹³ By lowering the threshold of exclusion, cumulative voting ensures that a candidate who gets a large minority of the vote will be elected, and that his votes will not have been wasted on a loser. Thus, it appears that cumulative voting reduces the number of votes wasted on losing candidates.¹¹⁴

3. The End of Gerrymandering

Another advantage of cumulative voting is that by eliminating redistricting, it eliminates gerrymandering.¹¹⁵ Gerrymandering is constitutionally questionable (and is arguably bad public policy)¹¹⁶ whether it is done for racial¹¹⁷ or partisan¹¹⁸ reasons.

However, cumulative voting will only eliminate redistricting under certain circumstances. In elections for small legislative bodies, such as municipal elections for small cities, cumulative voting will usually eliminate redistricting because where only five or ten seats are at stake, at-large voting is feasible.

By contrast, even some supporters of cumulative voting admit that in big cities or state legislative elections "some multimember subdistricts would be required both to reduce the complexity of the ballot and to promote access for local communities of interest. In New York City, for example, boroughs might be appropriate multimember districts for borough-wide cumulative voting."¹¹⁹ This is so because in elections for large legislative bodies, cumulative voting without any districting might confuse voters. For example, the smallest state House in the United States, that of Alaska, has thirty-eight members.¹²⁰ If Alaska used cumulative voting without creating any districts, voters would be forced to choose among at least seventy-six candidates (one from each major party) for thirty-

113. Of course, even more votes may be wasted in a multicandidate race where a candidate can win with a mere plurality of the vote.

114. On the other hand, by decreasing the number of votes wasted on losers, cumulative voting increases the number of votes wasted on winning candidates. See GUINIER, *supra* note 5, at 134 (noting that "[w]hen more people vote for the winning candidate than is technically necessary to carry the district, their votes are technically wasted because they are unnecessary to provide an electoral margin."). For example, in a South Dakota school board election held under cumulative voting, Native American voters wasted so many votes for Native American candidate that "had [his] vote been split almost equally between [him] and another Native American candidate, both could have been elected." Engstrom & Barrilleaux, *supra* note 81, at 391. However, this kind of vote wasting is far less undesirable, because a voter who casts an unnecessary vote for a winning candidate knows she is represented by someone she has voted for, unlike the voter who wastes her vote on a losing candidate.

115. See GUINIER, *supra* note 5, at 152.

116. See *supra* notes 48-52 and accompanying text.

117. See *Shaw v. Reno*, 113 S. Ct. 2816 (1993) (racial gerrymandering without adequate justification unconstitutional even if purpose is to benefit minorities).

118. See *Davis v. Bandemer*, 478 U.S. 109 (1986) (plurality opinion) (partisan gerrymandering unconstitutional if minority party's strength consistently degraded).

119. See GUINIER, *supra* note 5, at 154-55.

120. ABSTRACT, *supra* note 30, at 279.

eight seats, and would have to decide how to cumulate thirty-eight votes among those candidates—obviously an extremely difficult, if not impossible, task. As numerous cities are more populous than Alaska,¹²¹ cumulative voting would also require redistricting in big-city municipal elections.

If redistricting makes gerrymandering possible, and cumulative voting would not eliminate redistricting in big-city, state, or congressional elections, it follows that cumulative voting would not eliminate gerrymandering in such elections. On the other hand, cumulative voting would eliminate gerrymandering in municipal elections for small and mid-sized cities.

4. Cumulative Voting and Multiracial Coalitions

In single-member districts drawn in order to increase minority representation, voters are often packed into districts dominated by one race. As a result, race-conscious districting systematically wastes both the votes of voters who are not part of the racial majority in their district (e.g., whites in black districts, blacks in white districts), and the votes of voters who are in the minority within their race (e.g., white liberals in white Republican districts, black conservatives in black Democratic districts).¹²² By contrast, cumulative voting allows voters to form “voluntary districts” by joining across district lines and forming multiracial coalitions. For example, black liberal voters whose votes are not needed for the election of a black candidate may ally with sympathetic white liberals in another part of a city (or state) to elect a like-minded candidate.¹²³

Similarly, in Alamogordo, New Mexico, a Hispanic candidate won primarily because a majority of Hispanic individuals voted for her,¹²⁴ but she could not have been elected without significant white “crossover” support.¹²⁵ Thus, it appears that cumulative voting can encourage multiracial coalitions.

5. Cumulative Voting and Voter Turnout

It has also been suggested that cumulative voting might raise voter turnout, for a variety of reasons. First, if cumulative voting reduces the number of “safe districts” by eliminating gerrymandering, elections might become more competitive and voter interest would increase.¹²⁶ Second, cumulative voting, by reducing the threshold of exclusion, would reduce

121. *Id.* at 42-44.

122. See GUINIER, *supra* note 5, at 85.

123. *Id.* at 96.

124. Engstrom et al., *supra* note 2, at 495.

125. *Id.* at 493. The Hispanic candidate received a majority of the Hispanic vote, *id.* at 495, and 21.8% of the white vote. *Id.* at 493. Ironically, the Hispanic candidate ran not as a liberal but as “a conservative candidate who will not vote for higher taxes.” *Id.* at 486 (quoting campaign literature).

126. See GUINIER *supra* note 5, at 85 (noting that “safe seats discourage political competition and thus further diminish turnout.”).

the number of votes wasted on losing candidates. Ostensibly, this would result in increasing a voter's chance of "making a difference" by voting for a successful candidate.¹²⁷ Third, cumulative voting would require groups to vote in large numbers in order to elect a representative.¹²⁸ For example, suppose city X has 120 white voters (all of whom vote only for whites) and 30 Hispanic voters. If the city has five single-member council districts and creates a 90% Hispanic district, a Hispanic candidate could win that district even if only 4 Hispanics voted because only 3 whites would live in the district. By contrast, under cumulative voting the threshold of exclusion would be one-sixth,¹²⁹ so at least 25 Hispanics would have to vote in order to guarantee the election of a Hispanic. In sum, cumulative voting (like single-member districting) increases minority representation but (unlike single-member districting) does not create districts which are so "safe" for a racial group that political organization is unnecessary.

Of course, it could be argued that to the extent cumulative voting requires groups to turn out large numbers of voters to elect representatives, cumulative voting somehow causes underrepresentation of racial groups "with large numbers of non-citizens, age-ineligible citizens or people with other conditions that disable them from voting."¹³⁰ For example, Hispanics might be underrepresented under cumulative voting.¹³¹ However, this argument should not discourage jurisdictions from adopting cumulative voting for three reasons. First, the only experiment with cumulative voting in a heavily Hispanic area, Alamogordo, New Mexico, actually increased Hispanic representation. In Alamogordo, a Hispanic won the first election held under cumulative voting, even though only 13.7% of voters were Hispanic.¹³² Second, if it encourages high voter turnout, cumulative voting may also encourage get-out-the vote efforts and other organizational activity.¹³³ As minors and noncitizens are allowed to engage in such organizational activity, they too may be more likely to participate in a cumulative voting system than in a single-member districting system. Third, single-member districting does little for nonvoters; while a single-member district's "population base extends top-down representational access to nonvoters, these constituents are stuck with whomever the majority of district voters choose."¹³⁴ Thus, nonvoters are no worse off under cumulative voting than under single-member districting.

127. *Cf. id.* at 152.

128. *See id.* at 99 (noting that cumulative voting "depends on high voter turnout").

129. *See* Engstrom et al., *supra* note 2, at 479 (if five council seats are available, threshold of exclusion is one-sixth, or 16.7%).

130. GUINIER, *supra* note 5, at 154.

131. Hispanics are less likely than other groups to be eligible to vote for two reasons. First, Hispanics are more likely than other groups to be under 18. *See* ABSTRACT, *supra* note 30, at 24-25 (containing 1995 projections of age distribution among various groups). Second, Hispanics are more likely than white non-Hispanics or blacks to be noncitizens. GUINIER, *supra* note 5, at 154.

132. *See* Engstrom, *supra* note 2, at 493 (estimate based on exit poll results).

133. *See* GUINIER, *supra* note 5, at 155.

134. *Id.* at 154.

C. *Disadvantages of Cumulative Voting*

Opponents of cumulative voting have advanced a number of arguments against this voting method. These commentators contend that cumulative voting may result in the following: (1) create fragmentation by giving minority groups representation; (2) make legislatures unmanageable by narrowing the gap between the major parties; (3) make legislatures too large; (4) reduce political competition; and (5) distort election results by making a political group's strength depend on its voting strategy, rather than on the size of the group. Each of these arguments will be addressed in turn.

1. Cumulative Voting and Political Fragmentation

One argument against cumulative voting is that by allowing small minority groups to elect legislators, it might create a "proliferation of political interest constituencies [which] might undermine consensus, exacerbate tension, and destabilize the political system."¹³⁵ Where voting rights violations have been alleged, the purpose of any remedy (whether it be cumulative voting, single-member districting, or some other system) is to fragment the electorate—in particular, to fragment a system of "monolithic white rule in substantially [minority] areas."¹³⁶ Furthermore, a single-member districting system can fragment a legislature almost as easily as cumulative voting, because the purpose of both remedies is to increase minority representation by allowing racial minorities to elect their preferred candidates.

Of course, it could be argued that cumulative voting may create other forms of fragmentation, such as the replacement of the two-party system with a multiparty system.¹³⁷ However, Illinois' experience suggests that minority parties are unlikely to benefit from cumulative voting. Although candidates in Illinois occasionally won with as little as 6.4% of the vote,¹³⁸ cumulative voting rarely aided minority parties.¹³⁹

2. Cumulative Voting and Legislative majorities

Cumulative voting might also cause political fragmentation by reducing the majority party's margin of victory, and thereby depriving the majority party of a meaningful working majority. For example, in Illinois the majority party was underrepresented in the House (that is, it received less than a proportional share of seats) in 13 of 18 elections between 1930 and 1970.¹⁴⁰ As a result, "[c]onsistently narrow divisions in rep-

135. *Id.* at 153.

136. Karlan, *supra* note 53, at 231.

137. *Cf.* GUINIER, *supra* note 5, at 100 (suggesting, with approval, that cumulative voting might create "[s]trong minority political parties").

138. Dunn, *supra* note 60, at 651.

139. *Id.* at 633-34. For example, in 1906 the Prohibitionist, Social and Labor parties obtained 15% of the statewide vote for state representatives, but elected only three members of the state House. *Id.*

140. *Id.* at 650.

resentation between the two parties often mean[t] that power in the House of Representatives flow[ed] to small factions and away from party leadership . . . [thus] the power of small factions to thwart the majority and weaken party leadership [was] enhanced.”¹⁴¹ For example, in 1961 Republicans had an 89-88 House majority, but Democrats elected the Speaker of the House because three Republican legislators who were “minority party beneficiaries of cumulative voting and holders of Cook County Democratic organization patronage positions, absented themselves from the opening organizational session.”¹⁴² Where no political party has a working majority, the legislature cannot be held collectively accountable for its actions, and each party can plausibly blame the other for the state’s problems.¹⁴³

This argument assumes that a majority party is more powerful when it has a large majority and less powerful in a narrowly divided legislature. However, a party with a slim legislative margin may sometimes be more unified because legislators may be under more pressure to “vote the party line” and because the majority party’s slim margin might be due to a loss of seats in regions where both parties are ideologically similar.

In order to test both theories, Tables 1 and 2 compare the majority party’s proportion of U.S. House and Senate seats to its proportion of victories on “partisan votes”—that is, votes pitting the majority of one party against the majority of another party. Both tables show the results of this comparison for one of every five years between 1968 and 1993.¹⁴⁴

141. *Id.*

142. *Id.*

143. For example, after the early 1990s recession, Democrats blamed President Bush for the recession, while Republicans blamed the Democratic Congress. See ALMANAC, *supra* note 68, at 558, 790-91 (noting that President Bush suffered politically due to recession, but suggesting that Democratic Senate might be to blame).

144. See 49 Cong. Q. Almanac (Cong. Q., Inc.) 17-C (1993); 44 Cong. Q. Almanac (Cong. Q. Inc.), 37-B (1988); 39 Cong. Q. Almanac (Cong. Q. Inc.) 28-C (1983); 34 Cong. Q. Almanac (Cong. Q., Inc.) 30-C (1978); 29 Cong. Q. Almanac (Cong. Q., Inc.) 958 (1973); 24 Cong. Q. Almanac (Cong. Q., Inc.) 852 (1968). See also ABSTRACT, *supra* note 30 at 275 (giving parties’ congressional seat totals for recent decades). Although the “raw numbers” for Tables 1 and 2 come from the above sources, I have calculated the percentages (i.e. parties’ percentage of seats and of partisan vote victories) myself.

TABLE 1

Majority party's percentage of seats and percentage of victories on partisan votes, U.S. House, 1968-93:¹⁴⁵

Year	Seat %	Victory %
1968	56	53
1973	55	61
1978	67	68
1983	62	77
1988	59	84
1993	59	84

TABLE 2

Majority party's percentage of seats and percentage of victories on partisan votes, U.S. Senate, 1968-93:¹⁴⁶

Year	Seat %	Victory %
1968	64	62
1973	56	70
1978	61	82
1983	54	64
1988	55	73
1993	57	76

Tables 1 and 2 show that the Democrats have consistently become far more united in both houses of Congress (and therefore more successful as a governing party), even though their percentage of House seats has fluctuated, and their percentage of Senate seats has sharply decreased. Thus, it appears that the majority party's seat share only marginally, if at all, affects its political cohesion.

Even if cumulative voting did decrease the majority party's legislative effectiveness, this result may sometimes be desirable. I concede that if the same party controls both the legislative and executive branches of government, or if (as in many local governments) the executive is weak,

145. For all years listed, the Democrats have been the majority party. ABSTRACT, *supra* note 30, at 275.

146. In 1983, the Republicans were the majority party in the Senate; for all other years listed, the Democrats were the majority party. *Id.*

the majority party should have an effective legislative majority, because the majority party would thereby "run the government" and could be held accountable for its failures. However, if one party controls the legislative branch and the other controls the executive branch, a highly partisan legislature may make a state or nation even more ungovernable than it would otherwise be. For example, suppose that the Republicans control Congress and the Democrats control the Presidency. If the Republicans vote in lockstep, the nation will become virtually ungovernable, because the Democratic president cannot get any legislation passed and will veto the Republican legislation. By contrast, if the Republicans are fragmented, a Democratic president can govern effectively (and be plausibly held accountable for the status quo) by forming a "liberal coalition" of Democrats and moderate Republicans.¹⁴⁷

In sum, two conclusions may be divined. First, it appears that even if cumulative voting did reduce the disparity between the legislative seat shares of the two dominant parties, the majority party might be able to assemble a coherent legislative majority. Second, even if the majority party was unable to assemble a coherent legislative majority, the majority party's weakness might make government more coherent if the executive branch was dominated by the opposing party.

3. Is Cumulative Voting Too Complicated?

It might also be argued that cumulative voting is too complex for most voters, especially "members of minority groups, who are often less familiar with the voting process and tend to have less formal education."¹⁴⁸ For example, in Illinois, voters and election officials were often uncertain about how many votes could be cast for a given candidate, and sometimes tried to apply cumulative voting to other offices.¹⁴⁹

However, recent experiments with cumulative voting suggest that cumulative voting is easy for voters to understand. For example, in Alamo-gordo's first election under cumulative voting, the Hispanic candidate won partially because her Hispanic supporters understood the new system well enough to give her an average of 2.6 votes apiece (of a possible 3).¹⁵⁰ Similarly, in Alabama local elections applying cumulative voting, all successful black candidates received more votes than there were black residents,¹⁵¹ and two black candidates received more than twice as many votes as there were black residents.¹⁵² As voting in Chilton County was

147. Cf. Lewyn, *supra* note 48, at 483-84 (using similar argument to criticize pure proportional representation systems, on the ground that such systems usually require all party legislators to be chosen by party bureaucracy, thereby encouraging legislators to vote in lockstep and creating political deadlock where legislative and executive branches controlled by opposing parties).

148. Note, *Alternative Voting Systems As Remedies For Unlawful Vote Dilution*, 92 YALE L.J. 144, 155 (1982).

149. See DAVID KENNEY, BASIC ILLINOIS GOVERNMENT: A SYSTEMATIC EXPLANATION 184 (1st ed. rev. 1974); Dunn, *supra* note 60, at 656-58.

150. Engstrom et al., *supra* note 2, at 495.

151. Karlan, *supra* note 53, at 235.

152. *Id.* at 234-35 n.255.

quite racially polarized,¹⁵³ it appears that the black candidates won due to plumping by black voters (as opposed to "cross-overs" by whites). Finally, in South Dakota school board elections using cumulative voting, an astounding 93.4% of Native American voters plumped for a Native American candidate.¹⁵⁴

Furthermore, an exit poll in the South Dakota election showed that 90.1% of Native American voters and 88.8% of whites understood that they could cast multiple votes for the same candidate.¹⁵⁵ Furthermore, "[i]n response to a question concerning whether the system was more difficult to understand than those used in other elections in which they had voted, 89.4 percent of the Native Americans and 84.9% of the Anglos answered in the negative."¹⁵⁶

The less favorable results of Illinois' cumulative voting experiment are due to Illinois' unique rules. Illinois law allowed voters to cast fractional votes and did not specify all valid ways of casting a ballot. As a result, even constitutional convention delegates who debated cumulative voting disagreed as to the number of ways one could legally mark a cumulative voting ballot.¹⁵⁷ Moreover, Illinois election rules required election clerks to make mathematical calculations. For example, one "tally sheet" given by the Illinois secretary of state to election clerks told clerks that they should "give" a candidate three votes if a voter voted for only one candidate, one and one-half voters if the voter voted for two, and one vote if the voter voted for three.¹⁵⁸ If voters had been told that they could not cast more than one vote for a candidate unless they marked his name more than once, such instructions would have been unnecessary. By contrast, in Alamogordo, "[t]he voting machine ballot was very straightforward. There were three voting levers over every candidate's name, and voters were informed (in both English and Spanish) that they could pull any three of the levers."¹⁵⁹ Thus, in Alamogordo, election clerks were not required to interpret a voter's intent, and voters could not try to cast multiple votes in other elections. It therefore appears that cumulative voting will not confuse voters if fractional votes are outlawed and voters are given clear directions as to how to cast their votes.

4. Does Cumulative Voting Make Legislatures Too Large?

It has been argued that cumulative voting requires either legislatures or districts to be unusually large. For instance, under cumulative voting Illinois' state House included 177 legislators—more than all but four

153. Edward Still, *Cumulative Voting and Limited Voting in Alabama*, in UNITED STATES ELECTORAL SYSTEMS: THEIR IMPACT ON WOMEN AND MINORITIES 183, 193-95 (Wilma Rule & Joseph F. Zimmerman eds. 1992).

154. Engstrom & Barrilleaux, *supra* note 81, at 391.

155. *Id.*

156. *Id.*

157. Dunn, *supra* note 60, at 656.

158. *Id.* at 656-57.

159. Engstrom et al., *supra* note 2, at 483.

other state legislative chambers.¹⁶⁰ As a result, the legislators had no personal staff, unlike legislators in smaller chambers.¹⁶¹ Nevertheless, the House was more than twice as expensive as the State Senate (which was smaller because it was elected through single-member districts).¹⁶²

Illinois could have solved this problem by reducing the number of legislators—but to do so, it would have had to reduce the number of districts, thereby creating unusually populous House districts. For example, in order to reduce its House membership to 105 (as recommended by several citizens' groups),¹⁶³ Illinois would have had to reduce the number of districts to 35, and each district would have contained 317,542 people¹⁶⁴—almost three-quarters as many as the average Illinois congressional district.¹⁶⁵ Moreover, some districts would have encompassed a truly immense geographical area, because even under a 59-district system, one district “consisted of eleven counties and was larger in size than the states of Rhode Island and Delaware combined.”¹⁶⁶ By contrast, if the state had created 105 single-member districts, a 105-member House would include only 105,847 people per district.¹⁶⁷ Thus, cumulative voting forces legislatures to choose between creating gigantic legislative bodies with reasonably sized districts (e.g., the Illinois legislature under cumulative voting) or a small legislative body with gigantic districts.

However, this problem is avoidable in smaller states and cities, where even if there are few or no subdistricts, a legislator represents a fairly small number of people and is therefore easily accessible. For example, in a city with 10,000 people, a city council member represents far fewer voters than an Illinois state legislator, even if all council members are elected citywide. It follows that cumulative voting is most appropriate in small states and cities, as opposed to big states like Illinois and big cities such as New York or Los Angeles.¹⁶⁸

160. Dunn, *supra* note 60, at 644-45.

161. *Id.* at 660.

162. *Id.*

163. *Id.* at 646. I note in passing that since cumulative voting was abolished, the House has included 118 members. ABSTRACT, *supra* note 30, at 279.

164. Dunn, *supra* note 60 at 646.

165. See MICHAEL BARONE ET AL., THE ALMANAC OF AMERICAN POLITICS at 233 (1972 ed.) (noting that a congressional district which was only 1% less populated than state average included 458,872 people).

166. Dunn, *supra* note 60, at 645.

167. *Id.* at 646.

168. Of course, the above analysis begs the question, “How large is too large?” This question in turn depends on the resolution of five other questions:

1. Should a legislature have any districting at all?
2. If so, how many legislators is “too many” for the legislature to function effectively?
3. How many legislators can be elected per district without forcing voters to choose among a abnormally large number of candidates?
4. Conversely, how many legislators per district is “too few” to ensure minority representation?
5. How many people is “too many” for a district?

For example, if we assume that (1) five legislators per district is the largest number appropriate, (2) each district may include as many as 100,000 people, and (3) the maximum appropriate number of council members or state legislators is 50 (so that there will be 10 council districts), a city (or state) with a million or more people can have cumulative voting without having unduly large

5. Does Cumulative Voting Reduce Political Competition?

It has been argued that cumulative voting reduces political competition, at least in partisan elections.¹⁶⁹ However, the consequences of cumulative voting for political competition in partisan elections differ depending on whether parties have absolute power to limit the number of candidates selected, parties are required to run enough candidates to ensure that there are more candidates than seats, or a "full slate rule" is in use, requiring the parties to run full candidate slates (i.e. one candidate per party for every seat). Accordingly, the subsequent sections will address the consequences of each possible rule and cumulative voting in non-partisan elections.

a. Cumulative Voting Without Full Slate Rules

Proponents of cumulative voting suggest that the elimination of gerrymandering increases political competition.¹⁷⁰ However, Illinois' experiment with cumulative voting suggests otherwise. In 1,776 Illinois House elections between 1902 and 1969, only 17 districts ever had as many as five candidates (i.e. three majority party, two minority party) for the three available seats per district.¹⁷¹ Typically, the majority of districts were uncontested—that is, only three candidates ran for the three available seats.¹⁷² Indeed, some supporters of cumulative voting actually treated Illinois' lack of political competition as an advantage, by suggesting that the Illinois House's stability made it more effective than legislatures elected under single-member districting (which increased political competition, and was therefore less favorable to incumbents).¹⁷³

What went wrong in Illinois? In Illinois, the parties could limit the number of candidates nominated.¹⁷⁴ As a result, parties could (and frequently did) prohibit general election competition by limiting the number of nominees per district to two (for the majority party) or one (for the minority party). Parties had a strong incentive to do this, because if a party runs too many candidates it will fragment its vote and win fewer seats than it could otherwise. For example, if the minority party runs only one candidate in a three-seat district, it will nearly always win the seat because its voters will plump for that candidate. By contrast, if the

legislatures or unduly large districts. Under this standard, cumulative voting would be reasonable in all but 10 cities, see ABSTRACT, *supra* note 30, at 42, and in 6 states, *id.* at xii. However, the correct answers to these questions will probably be determined through trial and error.

169. See Dunn, *supra* note 60, at 646-47.

170. See Guinier, *supra* note 5, at 85 (noting that single-member districts may reduce voter turnout by promoting gerrymandering).

171. See Dunn, *supra* note 60, at 646.

172. *Id.* at 647, 662. See also GILBERT Y. STEINER & SAMUEL K. GOVE, LEGISLATIVE POLITICS IN ILLINOIS 6 (1960) (typically, only 40-50% of districts contested).

173. See Charles S. Hyneman & J.D. Morgan, *Cumulative Voting in Illinois*, 32 ILL. L. REV. 12, 12 (1937) (endorsing cumulative voting because of Illinois legislature's "greater stability of personnel"). Such stability is arguably no longer an advantage today, because the growth of split-ticket voting has made incumbents far "safer" than in the early 20th century. See ABSTRACT, *supra* note 30, at 277 (over 90% of U.S. House incumbents usually re-elected).

174. Dunn, *supra* note 60, at 661.

minority party runs two candidates, it risks losing both seats by fragmenting its own vote. Similarly, the majority party has an incentive to run only two candidates for three seats, because if the majority party runs three candidates, the majority party might lose two of them if its vote is too fragmented.¹⁷⁵ Thus, cumulative voting should not be used for partisan elections unless the legislature prohibits the parties from limiting the number of nominees.

It could be argued that even where partisan elections are noncompetitive, cumulative voting encourages competition within the parties by increasing competition in party primaries. For example, in Illinois, primary contests occurred in slightly over half of Illinois House elections between 1966 and 1977, as opposed to 27% of Illinois Senate elections during that period.¹⁷⁶ Cumulative voting encouraged primary competition within the minority party by giving minority party candidates a chance to win general elections in otherwise noncompetitive districts, thereby making minority party nominations more attractive.¹⁷⁷ However, "primary elections are typically for the 'party faithful' and . . . are often held many months before the general election."¹⁷⁸ Thus, competitive primaries are no substitute for competitive general elections.

b. Cumulative Voting With Modified Full Slate Rules

During the last decade of cumulative voting, Illinois tried to increase political competition by adopting a modified full slate rule. In 1970, Illinois amended its state constitution to prohibit parties "from limiting the number of candidates allowed to run in a general election to less than two if two or more aspirants had sought the party's nomination(s) in the primary election."¹⁷⁹ As a result, 172 of 177 House elections between 1972 and 1976 involved four major-party candidates for three seats.¹⁸⁰

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

176. Wiggins & Petty, *supra* note 75, at 349. I note that the Illinois House's high rate of primary competition continued after the state enacted a modified full slate rule in 1970. See *id.* at 350 (primary contests occurred in 47.6% of all districts between 1966 and 1970, and in 53.6% in all districts between 1972 and 1976).

177. *Id.* at 350-51. Similarly, cumulative voting may have increased competition within the majority party by allowing majority party candidates to win seats even when one of the majority party's incumbents was unbeatable.

178. Dunn, *supra* note 60, at 647.

179. Wiggins & Petty, *supra* note 75, at 348. The state apparently did not adopt a pure full slate rule (requiring the parties to run three candidates per district) because of fears that if all voters voted a "straight party ticket," all three majority party candidates would be elected, thereby undermining minority representation. See Dunn, *supra* note 60, at 662-63 (noting that some legislators feared that even modified rule would have this result).

180. Wiggins & Petty, *supra* note 75, at 357. Not one race involved more than four candidates, and some involved only three candidates because only three bothered to run. See *id.* I note in passing that the reason the majority party failed to nominate three candidates for any district may have been that in a close election, the majority would lose two of the three seats if the majority party vote was split among three candidates, while minority party voters plumped for two candidates. See *supra* note 776 and accompanying text; George H. Hallett, Jr., *Proportional Representation with the Single Transferable Vote: A Basic Requirement for Legislative Elections*, in CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 113, 116 (Arend Lijphart & Bernard Grofman eds. 1984).

Although modified full slate rules ensure some degree of interparty competition, they have a variety of undesirable effects. For example, under Illinois' rule, the two majority party candidates were virtually guaranteed election, while the two minority party candidates were required to battle each other for the "minority seat."

Minority party candidates could obtain the minority seat in three ways, all of which might have adverse consequences for the political system as a whole. First, the candidates could try to persuade majority party voters to "cross over" by casting two of their three votes for majority party candidates and a third for a minority party candidate. Such crossover voting could permit the majority to have a great impact on the election results by effectively electing the minority party candidate of their choice.¹⁸¹ This result would subvert the "minority representation" rationale for cumulative voting. Even before the modified full slate rule was adopted in Illinois, such collusion occurred in Illinois House elections. For example, sometimes "the two incumbent majority party candidates and the one incumbent minority candidate [would] 'play down' differences among them in the interest in creating a united front . . . [against] any potential challenger."¹⁸²

Second, minority party incumbents could try to ensure their election by selecting "decoy" candidates. A "decoy" candidate is a weak candidate recruited by a minority party incumbent (or a well-organized non-incumbent) to run for one of the party's two slots. The early entry of the decoy would discourage more qualified minority party candidates from contesting the minority party primary, and if the decoy was nominated, he would not campaign in the general election (thereby causing the minority party incumbent to be effectively unopposed).¹⁸³ Although it is unclear how frequently decoys were used in Illinois,¹⁸⁴ their existence suggests that even laws requiring political competition might fail to ensure such competition.

Third, minority party candidates could try to ensure their election by encouraging minority party voters to plump for them and to ignore the minority party's other candidate. Thus, general elections would essentially be turned into party primaries in which the minority party candidates would ignore the majority party and attack each other.¹⁸⁵

Such intraparty warfare is arguably undesirable because it interferes with the public interest in cohesive, competitive parties. One purpose of political parties is to allow people with "similar views [to] organize to contend for control of the government."¹⁸⁶ Parties do this by "defin[ing]

181. See Dunn, *supra* note 60, at 663 (quoting opponent of full slate rule in Illinois constitutional convention) (citation omitted).

182. *Id.* at 648 (quoting remarks of former House Minority Leader) (citation omitted).

183. Wiggins & Petty, *supra* note 75, at 361.

184. *Id.*

185. See Dunn, *supra* note 60, at 649 (noting that even before Illinois enacted modified full slate rule, such intraparty warfare was frequent where minority party ran two candidates in a district).

186. 17 Encyclopedia Britannica 423 (1966 ed.).

the issues before the electorate in campaigns and elections. They present to the electorate not only a choice among candidates but a choice among governmental programs.”¹⁸⁷ But where a party’s candidates campaign entirely against each other and ignore the opposition, the electorate has no real “choice among governmental programs.” Additionally, under a cumulative voting system minority party legislators may have no incentive to agree on a coherent program or to emphasize their disagreements with the majority party. For example, if two Republican candidates are campaigning for the one “Republican seat” in a heavily Democratic district, they can persuade voters to support them only by emphasizing their disagreements with each other, because the candidates’ disagreements with the Democrats are not particularly relevant to a voter’s choice between Republican candidates.

In sum, even where some political competition exists, cumulative voting in partisan elections may lead to collusion between the parties, efforts to avoid rules requiring general election competition (such as decoy candidacies) and intraparty warfare which makes parties less effective.

c. Cumulative Voting With Full Slate Rules

Finally, a jurisdiction with cumulative voting could try to mandate electoral competition by requiring every political party to run a “full slate”—that is, to run as many candidates as there were seats available. The most obvious advantage of a full slate rule is that it reduces the amount of “cross over” voting by majority party voters, because majority party voters would have to forego voting for a majority party candidate in order to cast one of their votes for a minority party candidate. Furthermore, a full slate rule makes decoy candidacies less likely, because a candidate would need to find two or more decoy candidates, which would be more difficult than finding only one such candidate.

On the other hand, a full slate rule risks shutting out the minority party, thereby frustrating the “minority representation” rationale for cumulative voting.¹⁸⁸ For example, suppose each party nominates four candidates in a four-member legislative district. If each party member votes a “straight party ticket,” the majority party will win all four seats (thereby wasting minority party members’ votes). In order to obtain any seats at all, minority party legislative candidates would be forced to campaign against each other by asking their own party’s voters to plump for one or more minority party candidates and ignore the rest.

For example, in Chilton County, Alabama, where both parties have run full slates in elections held under cumulative voting,¹⁸⁹ the minority party (the Republicans) has been able to elect three members to each of

187. *Id.*

188. See Dunn, *supra* note 60, at 662-63 (expressing similar concerns about modified full slate rule).

189. See Still, *supra* note 153, at 189-90 (tables showing that seven candidates from each party ran in county elections).

the county's major legislative bodies (the board of education and the county commission, each of which have seven members).¹⁹⁰ However, the gap between the leading Republican and the seventh-place Republican is sometimes far larger than the gap between the leading Democrat and the seventh-place Democrat. In 1988, the leading Republican Board of Education candidate received more than six times as many votes as the last-place Republican candidate, while the leading Democrat received less than twice as many votes as the last-place Democrat.¹⁹¹ Thus, it appears that Republicans have been able to elect candidates only by plumping for their favorite Republicans and ignoring the rest¹⁹²—a strategy which, as noted above, risks turning every general election into a battle within the minority party.¹⁹³

Such intraparty division is less problematic in a small local government (such as the Chilton County school board) than in a state or federal government. In national and state government, elections tend to be about ideological differences. Thus, the public has a strong interest in being able to choose between unified, ideologically coherent parties which can be held collectively accountable if their programs fail. By contrast, in small-town governments, ideologically divisive issues such as crime and economic policy will be of little relevance, because such problems are primarily statewide or national in nature. Thus, politics will often focus on personalities, and the public interest in strong parties is less pressing.¹⁹⁴ It follows that the intraparty division caused by cumulative voting is most problematic in state and federal elections, and least problematic in small-town elections.

d. Cumulative Voting in Nonpartisan Elections

As noted above, cumulative voting generally reduces or distorts competition in partisan elections. By contrast, in nonpartisan elections, the parties cannot limit the number of effective candidates through their control over the nomination process. Thus, nonpartisan elections will include a large number of candidates even if major political parties are not involved in the process (or if the parties collude to limit the number of party-sponsored candidates). Indeed, cumulative voting may actually increase competition in nonpartisan elections by giving minorities a chance to elect candidates of their choice.

For example, in Alamogordo's first non-partisan election under cumulative voting,¹⁹⁵ eight candidates ran for three seats.¹⁹⁶ By contrast,

190. *Id.*

191. *Id.* at 189.

192. Of course, it is also possible that Republicans have benefitted from Democratic "cross over votes." As noted above, I believe that crossover voting is probably less frequent where the parties run full slates. See *supra* notes 191-93 and accompanying text.

193. See *supra* notes 186-87 and accompanying text (explaining disadvantages of intraparty division).

194. To quote one of my college professors, "There's no Republican or Democratic way to pick up the garbage."

195. See Engstrom et. al, *supra* note 2, at 484-85 (showing sample ballot which did not list party affiliation).

196. See Karlan, *supra* note 53, at 233.

Illinois' partisan House elections almost never involved more than four candidates for three seats.¹⁹⁷ Moreover, the Alamogordo elections apparently involved a large number of serious candidates, because the gap between the strongest and weakest candidates was no larger than in some partisan elections. In Alamogordo, the first-place candidate had about six and one-half times as many votes as the last-place candidate¹⁹⁸—almost identical to the first place/last place gap in Chilton County's school board election.¹⁹⁹

In sum, it appears that cumulative voting both limits and distorts political competition in partisan elections by giving parties an incentive to run as few candidates as possible, allowing the majority party to select minority party legislators through "cross over" votes, and encouraging minority party candidates to attack each other rather than the opposition. By contrast, cumulative voting may increase competition in nonpartisan elections. Thus, cumulative voting should be disfavored in partisan elections, especially state, federal and big-city elections where parties are ordinarily ideologically distinctive.

6. The Dangers of Strategic Voting

One possible disadvantage of cumulative voting concerns the voters' ability to use their votes prudently. A faction's strength depends not only on how many supporters it has, but on how well they distribute their votes. For instance, suppose Still County has 60 blacks and 50 whites (excluding county commission candidates), 6 county commission candidates of each race, and a six-member commission elected through cumulative voting. If all 60 blacks plump for 1 candidate and all whites cast 1 vote for each of 6 candidates, 1 black candidate will receive 360 votes, each white candidate will receive 50 votes, and the remaining black candidates will receive no votes (except for their own). Thus, the Still County Commission would have a 5-1 white majority, even though the county is two-thirds black. This would hardly be an equitable outcome.²⁰⁰ Similarly, a majority can turn itself into a minority through inadequate plumping.²⁰¹ For example, if Still County's black voters split their votes evenly among all 6 candidates, while white voters concentrated their 6 votes among 4 candidates, 4 of the white candidates could get the

197. See Wiggins & Petty, *supra* note 75, at 357.

198. See Engstrom et al., *supra* note 2, at 488.

199. See Still, *supra* note 153, at 189. The Alamogordo "first place/last place" gap was 6.53, while the Chilton County "first place/last place" gap was 6.47. *But cf. id.* at 190 (gap between candidates far smaller for Chilton County commission).

200. Although my hypothetical is so extreme as to be fanciful, there are real-life examples of groups electing fewer officials than they could have due to incorrect voting strategies. See Engstrom & Barrilleaux, *supra* note 81, at 391 (South Dakota native American voters could have elected two school board members in first election held under cumulative voting, but elected only one because majority plumped for one candidate). *Cf.* Guinier, *supra* note 5, at 96 (noting probability of "strategic voting" under cumulative voting system).

201. Moreover, a minority group could also wholly deprive itself of representation by splitting its vote among numerous candidates. See Dunn, *supra* note 60, at 662-63 (noting possibility that limited full slate rule could deprive minority of representation) (citations omitted).

equivalent of 1.5 votes from each white voter (by receiving 2 votes from half the white voters and 1 from the other half), thus giving the 4 whites 75 votes each (as compared to the blacks' 60). Thus, the white minority would have a 4-2 commission majority.

Such bizarre outcomes (although never totally impossible) are far more likely in some circumstances than in others. For example, if one faction has a stable majority (e.g., in a city 70% white or 70% black) and both majority and minority voters are aware of their status, both groups will probably act rationally; the minority will plump for a small number of candidates in order to ensure their election, while the majority will disperse its votes among a wider number of candidates in order to preserve its majority.

It therefore follows that cumulative voting should be disfavored where most voters are uncertain about whether they are in the majority faction. Such uncertainty can arise in two situations. First, voters may be uncertain about their status where political or racial factions are so closely balanced that there is no clear majority. Second, voters may be unaware of their status where they do not know what the balance of power is in their district. This means that cumulative voting should be especially disfavored in any situation where districting is required, because even the small number of voters who know the identity of all their legislators are not likely to be aware of the political situation in other neighborhoods in their district. Cumulative voting should also be highly disfavored in big-city elections, because even if voters may know the racial or political makeup of their own neighborhood, they may have no idea what the balance of power is in their city as a whole.²⁰² In addition, big-city electorates are so large that voters could probably not be organized to vote rationally.

V. CONCLUSION

The purpose of this article was to answer one narrow question: when should courts, legislators and litigators prefer cumulative voting to single-member districting? I conclude that cumulative voting is often superior to single-member districting because it is more effective in increasing minority representation and eliminates gerrymandering. Specifically, cumulative voting is superior in small cities and states, nonpartisan jurisdictions and jurisdictions with a stable majority faction or party.

202. For example, my home town of Atlanta has some virtually all-white areas within the city limits, and some virtually all-black areas within the city limits. Residents of the first group of neighborhoods may erroneously believe that the city is majority white, while residents of the second group of neighborhoods may be unaware that about one-third of city residents are white. See ABSTRACT, *supra* note 30, at 42. Where a city is large enough to be surrounded by suburbs, erroneous guesses about the balance of power will be especially common, because voters may confuse the city with the metro area or vice versa. See, e.g., *Channel 46 Evening News* (Tribune television broadcast, July 27, 1994) (erroneously describing Atlanta as only 25% black, presumably because newscaster confused city, which is two-thirds black, with metro area, which is majority white). Because of such miscalculations, cumulative voting for Atlanta city council elections could lead to either a white majority council, an all-black council, or any possible result in between.

Small cities and states are well-suited for cumulative voting for three reasons. First, gerrymandering is impossible where a jurisdiction is so small that no districting is necessary. Second, cumulative voting in larger cities and states requires legislatures to either create unusually populous districts or to have an unusually large number of legislators. Third, voters in a small city are more likely to know the area's political or racial balance, and thus would be more aware of how to maximize their group's representation. Additionally, where a municipality is so small that no districting is required, voters are especially likely to be knowledgeable about the "balance of power" throughout the entire community as opposed to their own neighborhood.

Cumulative voting is also appropriate in jurisdictions with nonpartisan elections, because in such jurisdictions parties cannot limit competition by limiting the number of effective candidates. By contrast, in jurisdictions with partisan elections, cumulative voting usually reduces political competition because the parties may collude to limit the number of candidates. The anticompetitive effects of cumulative voting in partisan elections can be limited by a statutory requirement that both parties nominate full slates of candidates—but at a heavy cost. In jurisdictions with both cumulative voting and full slate rules, minority party candidates will not be elected unless minority party voters plump for some candidates and ignore the rest. Thus, cumulative voting in such jurisdictions encourages intraparty warfare, because minority party candidates will fight each other for their partisans' support. As party cohesion is less socially useful in smaller jurisdictions, the use of cumulative voting in such jurisdictions should not result in the same problems as its use in larger jurisdictions with partisan elections.

Finally, the use of cumulative voting is appropriate in jurisdictions with a clear majority race or majority party. Where a jurisdiction is dominated by one group, voters are more likely to know if they are in the majority. Consequently, they are more likely to vote rationally and maximize their group's representation. By contrast, if a city is evenly divided between factions (or if it is so large that most voters do not know whether they are in the majority), cumulative voting can turn a majority into a minority if the majority's voting strategy is inappropriate.

In sum, cumulative voting is appropriate in some situations, and less so in others. Litigators, legislators, and judges should support cumulative voting in small, nonpartisan, local elections, but not in most big-city or statewide elections.

