

May 1978

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Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 Wm. & Mary L. Rev. 621 (1978), <https://scholarship.law.wm.edu/wmlr/vol19/iss4/2>

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William and Mary Law Review

VOLUME 19

SUMMER 1978

NUMBER 4

THE FEDERAL VOTING RIGHTS ACT AND ALTERNATIVE ELECTION SYSTEMS

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Historically, local governments have remained relatively free from direct federal influence. In fact, the federal constitution mandates that electoral systems, voter qualifications, and government structure be determined primarily at the state or local level.¹ The federal government, however, increasingly has intruded into the prerogatives of state governments as part of an intensified effort to end racial discrimination.² Under the aegis of the fourteenth and fifteenth amendments and their implementing statutes, the federal government has precipitated fundamental changes in some local government systems.³ Local governments subject to Section 5 of the Voting Rights Act of 1965,⁴ the most significant statute implementing the fifteenth amendment, may make virtually no changes in their electoral systems without the approval either of the Attorney General or the District Court for the District of Columbia.⁵ These federal authorities will not approve any changes until they are satisfied that the right of racial and foreign language minorities to participate in the electoral process is safeguarded.⁶

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1. In establishing the federal system the Constitution did not restrict the traditional powers of the states to prescribe voter qualifications and electoral systems. The states retained these powers under the tenth amendment. U.S. CONST. amend. X. Indeed, constitutional qualifications for electors of members of the House of Representatives incorporate state standards. U.S. CONST. art. I, § 2, cl. 1.

2. See notes 52-112 *infra* & accompanying text.

3. See note 74 *infra* & accompanying text.

4. 42 U.S.C. § 1973c (1970).

5. *Id.* See notes 83-91 *infra* & accompanying text.

6. See notes 92-112 *infra* & accompanying text.

As a result of the legal standards formulated to preserve the voting rights of these minorities, a trend toward federal imposition of the single-member district, or ward, electoral system is discernable.⁷ These systems are replacing at-large voting systems, thus reversing the previously widespread transformation from ward systems to at-large systems occasioned by the municipal reform movement at the turn of the century.⁸ Although many of the historical reasons for the preference of at-large systems by the municipal reform movement⁹ no longer are applicable,¹⁰ the use of the single-member district system as a tool to promote racial equality has induced many serious social and political inequities.

A prominent example of this deleterious situation is *United Jewish Organizations, Inc. v. Carey (Hasidic Jews)*,¹¹ in which state assembly districts in parts of New York City were reapportioned by the state legislature to comply with the Voting Rights Act. The evidence showed that new districts were drawn with the deliberate purpose of creating a specified non-white racial majority in a certain number of districts so as to ensure the election of non-white representatives in those districts.¹² The particular parameters used to guide this redistricting were chosen primarily because the state planners were made to understand that the Department of Justice would approve no other scheme.¹³ In implementing the controversial technique of "reverse discrimination" to effectuate the new electoral plan, the reapportionment caused a significant diminution in the value of the votes of a cohesive religious minority, the Hasidic Jews of Brooklyn, whose neighborhood was split between two of the new districts.¹⁴ The redistricting not only deprived the Hasidic Jews of an opportunity to select a representative but also was designed to guarantee the futility of participation in the election process by any

7. The Supreme Court's preference for single-member district systems is implicit in many racial discrimination cases. See, e.g., *City of Richmond v. United States*, 422 U.S. 358 (1975); *White v. Regester*, 412 U.S. 755 (1973); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973). This predilection is even more marked in numerical malapportionment cases. See *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Johnson*, 402 U.S. 690 (1971).

8. See text accompanying note 17 *infra*.

9. See text accompanying notes 17-18 *infra*.

10. See note 21 *infra*.

11. 430 U.S. 144 (1977).

12. *Id.* at 152.

13. *Id.*

14. *Id.*

voter whose interests conflicted with those of the non-white majority in the particular district. The United States Supreme Court sanctioned this result as permissible under the Voting Rights Act, holding implicitly that the Act mandated actions necessary to protect racial minorities, even if those safeguards imposed harsh social burdens on non-racial minorities.¹⁵

The single-member district plan in *Hasidic Jews* was validated in large part because the Supreme Court viewed the Voting Rights Act as a remedial measure. When the methods selected to implement this remedial measure ultimately produce undesirable effects, however, a search for less severe alternatives becomes appropriate. Attempts to devise a "fair" and "equal" system of representation have been made since the origin of representative government, leading to a variety of systems designed to reflect the will of the electorate. This Article briefly examines several potential local electoral systems with respect to both their ability to eliminate racial representation problems and their propensity for inducing or ameliorating other undesirable socio-political conditions. Upon comparison of these options, a scheme known as Proportional Representation (PR), which is a permissible electoral system under the Voting Rights Act, will be proposed as a meritorious alternative to the single-member district system. The Article concludes that, except where forbidden by state constitutional provisions,¹⁶ local governments with minority group representation problems should consider carefully the possibility of adopting PR rather than single-member district electoral systems.

THE VOTING RIGHTS ACT AND LOCAL ELECTORAL SYSTEMS

Historical Background

During the nineteenth century many municipalities patterned their government structures after those existing at the national and state levels and adopted bicameral councils elected under the ward system. Near the turn of the century, however, a movement for the reformation of city governments gathered momentum as the problems created by political machines and the increasing complexities of municipal life proved difficult to correct under the existing ward

15. *Id.* at 155.

16. See notes 144-57 *infra* & accompanying text.

systems. The "municipal reform movement" of the early twentieth century strongly attacked the ward system, identifying several major deficiencies. The ward system confined each voter's influence to his particular election district, and ward representatives naturally attempted to win favor with their electorate by persuading the city council to grant benefits to their wards, regardless of the ultimate effect of the council's actions on the city as a whole. Because each voter's interest primarily extended to that portion of the political process with which he had some influence, the politics of any given ward generally interested only its residents. Thus, self-serving political cliques developed in relative obscurity within wards, free from close scrutiny by the press or the public. Another major problem aggravated by the ward system was inequality in representation. As a consequence of either deliberate gerrymandering or gradual population shifts, ward boundaries often favored a particular faction of the population. These factions frequently acquired a disproportionate control of the city council and were able to resist redistricting for long periods. The demise of the ward system in many municipalities has been attributed primarily to these factors.¹⁷

Three major goals of the municipal reform movement were the elimination of municipal corruption, the achievement of increased efficiency and economy in the provision of municipal services, and the attainment of improved representation in municipal government. Convinced that a positive correlation existed between the electoral system and the responsiveness of the governing body to its citizens, the movement's participants sought changes in the electoral system and the size of the city council. The reformers advocated the replacement of partisan elections, the ward system, and a large bicameral city council with a small unicameral council elected at-large by non-partisan ballots.

An at-large electoral system presumably would correct several of the deficiencies perceived in the ward system. Thus, council members would be encouraged to perceive problems in terms of their impact on the city as a whole. Moreover, neither deliberate nor inadvertent inequities in numerical apportionment could arise because elections would be city-wide and each voter would make his selections from an identical slate of candidates. By downgrading the

17. See generally R. CHILDS, *THE FIRST 50 YEARS* 37 (1965).

political cliques' influence in the election of council members, the elimination of wards also would discourage the development of the small-scale organizations so important to the political machines' ability to maintain their power.

Numerous municipalities adopted the at-large system as a result of the municipal reform movement, and many students of local government believe the reform program improved the quality of municipal government. Current conditions, however, have necessitated that the electoral system prescribed by the reformers be reassessed. A major objection to the use of at-large elections is that the system permits the over-representation of a cohesive majority, such as middle class, white voters, denying any direct representation to sizable minority groups. For example, blacks in Albany, Georgia, who constituted forty percent of the city's population, were unable to elect a single black citizen to any elective office in that city for over twenty-five years under an at-large system.¹⁸ Such disproportionate representation may create or aggravate minority group alienation and feelings of political impotence, which eventually may lead to a complete withdrawal by those citizens from participation in the political process. In addition, under an at-large system, a ruling white majority may maintain its overrepresented status and may dilute the voting strength of a growing black minority by annexing a predominately white area. The results of such an annexation actually could transform a black majority within the city's original boundaries to a minority within the new city limits.¹⁹

The problems created by at-large systems have compelled the federal government to direct the restructuring of many local electoral systems to protect the rights of racial minorities. Pursuant to this intervention, numerous existing at-large systems have been replaced by racially balanced single-member district electoral schemes,²⁰ in a reversal of the municipal reform movement's evolution away from that system. Although many of the historical evils associated with the ward system are unlikely to reappear in the modern era,²¹ the use of the single-member district system to help

18. See 19 How. L. J. 177, 182 (1976).

19. See, e.g., *City of Richmond v. United States*, 422 U.S. 358 (1975).

20. See, e.g., *Perry v. City of Opelousas*, 515 F.2d 639 (5th Cir. 1975); *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc).

21. For example, the advent of the civil service system eliminated much of the political

eliminate racial discrimination has introduced some other significant socio-political inequities. An illustrative example involved the Hasidic Jews of Brooklyn.

The Hasidic Jews

Congress specifically designed the Voting Rights Act to end voting discrimination in several southern states, but in 1970 the United States Attorney General determined that three counties in New York²² were subject to the Act as amended that year.²³ After failing to obtain an exemption from the Act's coverage,²⁴ the state called a special session of the legislature in 1974 to redistrict the pertinent areas.²⁵ Although the redistricting did not alter the total number of districts with non-white majorities, it increased the majority percentage of non-white residents in two Senate and two Assembly districts and decreased the non-white majority percentage in one Senate and two Assembly districts.²⁶

patronage, thus reducing the possibility of a political machine's emergence even if a ward system is implemented. *See generally* Note, *Ghetto Voting and At-Large Elections: A Subtle Infringement on Minority Rights*, 58 GEO. L. J. 989, 1003 (1970) [hereinafter cited as *Ghetto Voting*].

22. The counties were Bronx, Kings, and New York Counties.

23. The Voting Rights Act Amendments of 1970 advanced the date to 1968 on which certain prerequisites had to exist to subject a locality to the Act's provisions. 42 U.S.C. § 1973b (1970); *see* note 81 *infra* & accompanying text. One of these prerequisites, that a literacy test exist, is satisfied by the nonavailability of ballots printed in any language except English. *Torres v. Sachs*, 381 F. Supp. 309 (S.D.N.Y.), *aff'd*, 419 U.S. 888 (1974).

24. In 1971 New York sought a declaratory judgment from the District Court for the District of Columbia exempting the three counties from the Act's coverage. With the approval of the Department of Justice, the court granted the judgment. The district court had denied a motion to intervene made by the National Association for the Advancement of Colored People (NAACP), which appealed this ruling, without success, to the Supreme Court. *NAACP v. New York*, 413 U.S. 345 (1973). On remand, however, the NAACP's motion was granted and, after reopening the declaratory judgment, the NAACP obtained an order from the district court holding that the Voting Rights Act as amended applied to the congressional and legislative districts in Manhattan, Brooklyn, and the Bronx. The Supreme Court affirmed this decision, dismissing New York's arguments that the Bureau of the Census population data, used by the Attorney General in his determination that the Act applied to these subdivisions, included 250,000 aliens of voting age who were ineligible to vote and that more than 50% of the electorate had voted. *See New York v. United States*, 419 U.S. 888 (1974).

25. Although New York had redistricted in 1972, the Attorney General rejected that plan, which constituted a change to an electoral system requiring approval under the Voting Rights Act. Rather than seeking a declaratory judgment from the District Court for the District of Columbia validating the 1972 plan, the state attempted to satisfy the Justice Department's objections by making a new plan. *See United Jewish Organs., Inc. v. Carey*, 430 U.S. 144, 150-51 (1977).

26. *Id.* at 151-52.

Objections to some of the new district lines were advanced in federal district court by representatives of Brooklyn's Hasidic Jews, who argued that the new Assembly districts divided the Hasidic community, thus making it the victim of racial gerrymandering and diluting the value of the Hasidic Jews' votes in violation of the fourteenth amendment's equal protection and due process clauses.²⁷ The Hasidic community also challenged the assumption that only black legislators could represent properly the interests of black citizens. In-court testimony by Richard S. Scolaro, executive director of the legislative committee that drew the district boundaries, stated that the Hasidic community was split between two Assembly districts solely because the Department of Justice insisted on a non-white majority in those districts.²⁸ Nevertheless, while the case was pending, the Attorney General approved the new districts, dismissing objections made by Hasidic, Irish, Italian, and Polish groups on the ground that the Act was designed to prevent voting discrimination only on the basis of race or color, not on the basis of ethnic origin or religious belief.²⁹ The Attorney General stressed that his function under the Voting Rights Act was not to dictate to New York a specific redistricting plan but, rather, to determine whether the scheme devised by the state was acceptable.³⁰

The district court similarly dismissed the Hasidic Jews' complaint, concluding that the members of the Hasidic community were not disenfranchised and that a state validly could consider race when redistricting to correct previous racial discrimination.³¹ Affirming the district court's decision, the Court of Appeals for the District of Columbia Circuit reasoned that the redistricting did not cause the underrepresentation of whites, who comprised sixty-five percent of the population, inasmuch as approximately seventy percent of the Assembly and Senate districts in Kings County would contain white majorities.³² The court of appeals was convinced that a legislature would confront an impossible task if "a state must in

27. *Id.* at 152-53.

28. Greenhouse, *Hasidic Jews are Called "Victims of a Racial Gerrymander" at Hearing on Suit*, N.Y. Times, June 21, 1974, at 19, col. 2.

29. See also Tochin, *U.S. Accepts Plan on Districts Here*, N.Y. Times, July 2, 1974, at 24, col. 3.

30. See *United Jewish Organs., Inc. v. Wilson*, 430 U.S. 144, 161 n.19 (1976).

31. *United Jewish Organs., Inc. v. Wilson*, 377 F. Supp. 1164, 1165-66 (D.D.C. 1974).

32. *United Jewish Organizations, Inc. v. Wilson*, 510 F.2d 512, 523 (D.C. Cir. 1975).

a reapportionment draw lines so as to preserve ethnic community unity."³³

In *United Jewish Organizations, Inc. v. Carey (Hasidic Jews)*,³⁴ the Supreme Court affirmed the court of appeals' decision by a seven-to-one margin. Noting that neither the fourteenth nor the fifteenth amendment mandates a *per se* rule against using racial factors in districting and apportionment,³⁵ the Court held that the remedial nature of the Voting Rights Act permitted, and perhaps required, the use of racial considerations in reapportionments subject to the Act.³⁶ Moreover, according to the Court, the Hasidic community was properly represented insofar as race was concerned because the total proportion of districts with white majorities corresponded closely to the total proportion of whites in the municipal population.³⁷ In his partial concurrence, Justice Brennan seemed to reflect the overall attitude of the majority when he indicated that, although the redistricting unfortunately split the Hasidic community, that harm was outweighed by the benefit of ensuring non-white representation.³⁸

The Supreme Court's decision in *Hasidic Jews* is disturbing for several major reasons. The Court strictly limited its 1960 decision in *Gomillion v. Lightfoot*,³⁹ invalidating racial gerrymandering, and ignored the wisdom in Justice Douglas' dissent in *Wright v. Rockefeller*.⁴⁰

When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religious rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.⁴¹

In his well-reasoned dissent in *Hasidic Jews*, Chief Justice Burger

33. *Id.* at 521.

34. 430 U.S. 144 (1977).

35. *Id.* at 161.

36. *Id.* at 156, 159-60.

37. *Id.* at 162.

38. *Id.* at 170-71 (Brennan, J., concurring).

39. 364 U.S. 339 (1960).

40. 376 U.S. 52 (1964).

41. *Id.* at 67.

expressed concerns similar to those troubling Justice Douglas and also noted that the Court's opinion actually could promote segregation by encouraging minorities to move into enclaves from which they could accumulate enough votes to select a particular representative.⁴² The Chief Justice correctly observed that "the assumption that 'whites' and 'non-whites' in the County form homogenous entities for voting purposes is entirely without foundation."⁴³ Thus, the legislators' description of Puerto Ricans as non-whites when calculating the non-white majorities in the legislative districts was made under the erroneous assumption that blacks and Puerto Ricans in New York City have identical interests.⁴⁴

The decision in *Hasidic Jews* also must be criticized for condoning the institutionalized denial of the right to vote to the entire white minority in the sixty-five percent non-white districts. The Court's conclusion that the white minority had not been injured because the total percentage of districts with white majorities corresponded to the total percentage of whites in the county⁴⁵ cannot be credited. As Justice Brennan noted, the Hasidic Jews raised a question concerning their personal rights,⁴⁶ not those of whites in general. The Court's response to that question, that the Hasidic community had no intrinsic right to select its own representative and that individual votes had no constitutional complaint if their candidate failed to win,⁴⁷ is unsatisfactory. Such an argument could be applied as easily to nonwhites who are unable to elect a particular representative because they are dispersed among many districts.⁴⁸ Similarly, the Court's observations could justify a conversion from a single-member district scheme to an at-large system in which a non-white minority could never select their own representatives.

The most disturbing factor noted by Chief Justice Burger in his dissent was that the Hasidic community had been "carved up" for the sole purpose of racial gerrymandering.⁴⁹ In his opinion for the

42. 430 U.S. at 186-87 (Burger, C.J., dissenting).

43. *Id.* at 185.

44. Puerto Rican groups claimed that the 1974 plan discriminated against them. *Id.*

45. *Id.* at 166.

46. *Id.* at 169 (Brennan, J., concurring).

47. *Id.* at 166.

48. Arguably, a minority group could have greater political influence by providing the swing vote in many districts than it would have by possessing a clear majority in a few districts. See *Wright v. Rockefeller*, 376 U.S. 52 (1964) (black petitioner and black intervenor disagreed as to the relative effectiveness of these two approaches).

49. 430 U.S. at 186 (Burger, C.J., dissenting).

Court, Justice White agreed that the purpose of creating a sixty-five percent non-white majority was "to ensure the opportunity for the election of a black representative."⁵⁰ The primary objective of the percentage requirements, therefore, was to render ineffective the white minority's participation in the election process in the event of racial block-voting.

Although this result may be legally permissible as a remedial measure within the scope of the Voting Rights Act, it has imposed an extremely harsh burden on those ethnic and religious minorities who, in effect, are denied their right to vote. The imposition of such a system, even for the purpose of remedying past discrimination, should be avoided if a less severe alternative is available. The most conspicuous deficiency in the Chief Justice's dissent in *Hasidic Jews* is the lack of a proposed alternative to the use of single-member districts that would avoid "unnecessary bias for or against any racial, ethnic, or religious group,"⁵¹ and would comply with the relevant legal standards established by the Constitution and the Voting Rights Act. Indeed, one primary objection to *Hasidic Jews* is the Court's reaffirmation of the single-member district system, despite its harmful social effects, as the electoral scheme that complies with the requirements of the Voting Rights Act. Although the Court failed to consider alternative electoral schemes, an independent review of the various local electoral systems will establish that at least one method, Proportional Representation (PR), provides fair representation for all minority groups without encouraging racial segregation or requiring harmful gerrymandering similar to that approved in *Hasidic Jews*. Moreover, an analysis of the relevant federal law will demonstrate that PR is a legally permissible electoral system in local governments subject to the Voting Rights Act.

Federal Legal Voting Standards of Non-Discrimination

Regardless of an alternative electoral system's advantages over the single-member district scheme, it must satisfy certain constitutional requirements designed to protect against racial discrimination. In addition, some local electoral systems must comply with the requirements established by the Voting Rights Act.

50. *Id.* at 162.

51. *Id.* at 185 (Burger, C.J., dissenting).

Intentional Discrimination and Dilution

Since the adoption of the fifteenth amendment federal courts have enjoined obvious and intentional obstacles to the free exercise of the voting franchise by racial minorities.⁵² Pursuant to the authority provided by that amendment, the Supreme Court has invalidated "grandfather clauses,"⁵³ various procedural obstacles,⁵⁴ and literacy tests,⁵⁵ and it has held that the various techniques designed to exclude black participation in primary elections violate either the fifteenth amendment or the equal protection clause of the fourteenth amendment.⁵⁶ In addition, before the Court formally permitted voters to challenge the apportionment of state legislatures in *Baker v. Carr*,⁵⁷ it invoked the fifteenth amendment, in the historic case of *Gomillion v. Lightfoot*,⁵⁸ to invalidate an Alabama reapportionment plan for Tuskegee that would have denied most of the city's blacks their pre-existing municipal vote by removing them from within the city's limits. Thus, the Court has made clear that state action designed to discriminate against a racial minority in the electoral context violates the Constitution.

A State's discriminatory intent, however, may not always be manifest; the state might have implemented or maintained a facially neutral electoral system that was designed or had the effect of diluting or eliminating altogether the voting strength of a racial minority.⁵⁹ The causes of this dilution include such subtle discriminatory actions as the replacement of a municipality's ward system

52. In 1875, for example, the Supreme Court invoked the fifteenth amendment to require some recalcitrant municipal election officials to count the ballots cast by black voters. *United States v. Reese*, 92 U.S. 214 (1875).

53. *Guinn v. United States*, 238 U.S. 347 (1915).

54. *Lane v. Wilson*, 307 U.S. 268 (1939).

55. See, e.g., *Louisiana v. United States*, 380 U.S. 145 (1965); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949). But see *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (literacy test upheld in absence of proof that test was designed or could easily be used to discriminate).

56. See, e.g., *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

57. 369 U.S. 186 (1962). *Baker v. Carr* decided that malapportionment issues were justiciable and that a voter had standing to challenge an apportionment. It was followed by the leading case of *Reynolds v. Sims*, 377 U.S. 533 (1964), from which the "one man, one vote" doctrine evolved.

58. 364 U.S. 339 (1960).

59. For a thorough discussion of this racial dilution problem, see Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353 (1976).

with at-large elections, a city's annexation of a predominantly white area, or the adoption of a redistricting plan calculated to minimize the political influence of racial minorities. In the absence of proof of a state's discriminatory intent, the applicable law to constitutional challenges against these state actions is uncertain.⁶⁰

The Supreme Court first addressed the problem of racial dilution in the context of at-large electoral systems. Although it declined to state that an at-large system was unconstitutional *per se*, the Court initially indicated in dicta that such an electoral method could be illegal if its effect was to minimize or cancel a racial minority's voting strength.⁶¹ In 1971 the Court confronted directly the issue of the constitutionality of an at-large electoral system in *Whitcomb v. Chavis*,⁶² a case involving an attack on Indiana's multimember districting scheme for Marion County. The plaintiffs argued that the system illegally minimized or cancelled the voting strength of the residents of an identifiable racial ghetto enclosed by a predominantly white district. The district court had found evidence of dilution in that blacks consistently were underrepresented in proportion to their numbers, but the Supreme Court regarded that situation as permissible. According to the Court, no minority group has a constitutional right to be represented in proportion to its voting potential; rather, its members have only a right of effective access to the political process.⁶³ Not only could the ghetto blacks participate in the electoral process on the same basis as other citizens,⁶⁴ their votes were crucial to the election of Democratic Party candidates.⁶⁵ The Court consequently held that the blacks' failure to achieve proportionate representation was caused simply because their candidates lost elections and not because of any intrinsic bias in the system.⁶⁶

Two years after *Whitcomb*, the Supreme Court did hold, in *White v. Regester*,⁶⁷ that the use of an at-large system resulted in an imper-

60. The Fifth Circuit has permitted the retention of historic ward boundaries drawn in 1805, before blacks were permitted to vote, on a rationale that these boundaries could not have been made with an intent to discriminate. See *Taylor v. McKeithen*, 499 F.2d 893 (5th Cir. 1974).

61. See, e.g., *Dusch v. Davis*, 387 U.S. 112 (1967); *Fortson v. Dorsey*, 379 U.S. 433 (1965); *Lucas v. Forty-fourth Gen. Assembly*, 377 U.S. 713 (1974).

62. 403 U.S. 124 (1971).

63. *Id.* at 153-55.

64. *Id.* at 149-50.

65. *Id.* at 150-52.

66. *Id.* at 154-55.

67. 412 U.S. 755 (1973).

missible dilution. In *White* the Court concluded that the maintenance of multimember districts in a state legislative apportionment plan would be illegal if "used invidiously to cancel out or minimize the voting strength of racial groups."⁶⁸ The Court indicated several factors to be considered in determining whether a minority group's members had been denied access to the political process: any history of racial discrimination in the district, a majority vote requirement for a candidate's nomination in the primary election, a rule requiring a candidate to seek a specific position among the group of seats available, an unreasonably low incidence of success among racial minority candidates, and the controlling majority's lack of a good faith interest in the needs of the minority, demonstrating that minority votes were considered unnecessary to win elections.⁶⁹

In cases subsequent to *White*, if an aggregate of the factors enumerated by the Supreme Court were present, lower courts have held at-large electoral schemes unconstitutional on the ground that those systems denied minorities meaningful access to the political process.⁷⁰ This construction of *White* apparently recognized a limit below which a racial minority group's voting strength could not be diluted. Regardless of the cause of dilution, if the requisite factors were established, the minority group became entitled to a beneficial change in the electoral process. This absolute right approach to the dilution problem thus became a racial homologue to the "one man, one vote" doctrine previously developed by the Supreme Court in numerical malapportionment cases.⁷¹

The viability of this broad interpretation of *White*, however, has been weakened by recent decisions in which the Supreme Court has held that proof of discrimination in violation of the fourteenth amendment's equal protection clause requires a showing of subjective intent.⁷² Although the Court has not yet decided whether this

68. *Id.* at 765.

69. *Id.* at 767-70.

70. See, e.g., *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam on other grounds sub nom.* *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976); *Turner v. McKeithen*, 490 F.2d 191 (5th Cir. 1973); *Pitts v. Busbee*, 395 F. Supp. 35 (N.D. Ga. 1975).

71. The one man, one vote doctrine describes the constitutional requirement that an elector in one district have the same potential to control a legislative body through his vote as does an elector in any other voting district. See, e.g., *Mahan v. Howell*, 410 U.S. 315 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964). The concept applies to municipal as well as state governments. See, e.g., *Avery v. Midland County*, 390 U.S. 474 (1968).

72. See, e.g., *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252,

intent requirement is applicable in voting dilution cases, neither has it identified any exception to the rule. Moreover, the Fifth Circuit recently has held in *Nevett v. Sides*⁷³ that discriminatory intent must be proved in voting dilution challenges based on the fifteenth as well as the fourteenth amendment.⁷⁴ According to the court in *Nevett*, proof of dilution within the meaning of *White* raises an inference of intent.⁷⁵ Of course, this narrower construction of *White* places a greater burden on plaintiffs; regardless of the existence of an aggregate of the factors listed in *White*, defendants still may offer proof to overcome the inference of intentional discrimination.⁷⁶

The Fifth Circuit's holding in *Nevett*, thus, significantly reduced the ability of plaintiffs to challenge successfully the constitutionality of voting systems that operate to dilute the voting strength of racial minorities. Despite its constricting effect, however, *Nevett* appears to be an accurate construction of constitutional law. The Supreme Court has held that a valid charge of unconstitutional discrimination requires evidence of intent,⁷⁷ and a claim of racial dilution certainly is based on discrimination. The Court's holding in *Whitcomb*, that a minority group has no constitutional right to be represented in proportion to its voting potential, necessitates an inquiry into whether the state or municipal voting system was adopted or maintained for the discriminatory purpose of preventing the minority group from achieving such representation. Proof of the factors enumerated in *White* may establish the existence of dilution and its discriminatory effect, but such evidence may be insufficient to demonstrate discriminatory intent. The pertinent issue in a dilution case, therefore, is whether the voting system was adopted or maintained "with the purpose of excluding minority input."⁷⁸

265 (1977); *Washington v. Davis*, 426 U.S. 229, 238-39 (1976).

73. 571 F.2d 209 (5th Cir. 1978).

74. *Id.* at 215, 221. In support of its conclusion the Fifth Circuit cited *Wright v. Rockefeller*, 376 U.S. 52 (1964), a case rejecting allegations that New York's congressional apportionment plan was a racial gerrymander in violation of the fourteenth and fifteenth amendments. The Supreme Court relied upon *Wright* in both *Washington v. Davis*, 426 U.S. 229, 240 (1976), and *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977), to support its conclusion that discriminatory intent is necessary to establish a violation of the fourteenth amendment.

75. *Id.* at 222-24.

76. *See id.* at 224.

77. *See* sources cited note 72 *supra*.

78. 571 F.2d at 221-22.

Voting Rights Act

Congress enacted Section 5 of the Voting Rights Act of 1965⁷⁹ to reduce states' incentive to take subtle actions designed to promote racial discrimination.⁸⁰ The presence of two factors, as determined by the United States Attorney General, triggers the application of the Act: the state's maintenance of a test or device to abridge the right to vote on the basis of race or color on November 1, 1964, 1968, or 1972, and a determination by the Director of the Census that less than fifty percent of eligible racial minority members either were registered on that date or voted in the presidential election of that year.⁸¹

Section 5 of the Act provides that the subject local government or state may not change its electoral system as it existed on November 1 of the year during which the prerequisite factors were met without first obtaining either the prior approval of the United States Attorney General or a declaratory judgment from the District Court for the District of Columbia.⁸² Actions implicating the application of Section 5 include changing the location of a polling place,⁸³ changing the existing voting system,⁸⁴ transforming an elective office into an appointive office,⁸⁵ annexation,⁸⁶ or legislative reapportionment,⁸⁷ unless such reapportionment is pursuant to a federal court order to correct an unconstitutional electoral system.⁸⁸ The Act does not apply retroactively,⁸⁹ however, and approval is unnecessary to implement an electoral system ordered by a federal court to correct illegal racial discrimination.⁹⁰

In practice, states or localities subject to the Act first submit

79. 42 U.S.C. § 1973c (1970).

80. For a discussion of the history and constitutionality of § 5, see *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

81. See Voting Rights Act, § 4, 42 U.S.C. § 1973b (1970). In 1970 the Act's coverage was extended to suspend the use of literacy and related tests nationwide. *Id.* §§ 1973b-1973c.

82. *Id.* § 1973c. Section 5 also provides for direct appeals to the Supreme Court. *Id.*

83. *Perkins v. Matthews*, 400 U.S. 379 (1971).

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

85. *Id.*, *rev'g* *Bunton v. Patterson*, 281 F. Supp. 918 (S.D. Miss. 1967).

86. *Perkins v. Matthews*, 400 U.S. 379 (1971).

87. *Georgia v. United States*, 411 U.S. 526 (1973).

88. *Connor v. Johnson*, 402 U.S. 690 (1971).

89. *Beer v. United States*, 425 U.S. 130 (1976). Of course, the constitutionality of a system adopted before the Act's coverage began still may be challenged. See notes 52-78 *supra* & accompanying text.

90. *Connor v. Johnson*, 402 U.S. 690 (1971).

proposed changes to the Attorney General and resort to the courts only if he rejects their plan.⁹¹ In the event of a dispute over the validity of a suggested change, the state or locality has the burden of proving the validity of its proposal.⁹² Unlike the inquiry in a case alleging the unconstitutionality of a voting system, however, which focuses on the issue of discriminatory intent, an evaluation of a proposal's validity under the Voting Rights Act centers on the change's effect on a racial minority's political strength.⁹³ Thus, even if a change has no discriminatory purpose, it will not be approved under Section 5 unless an analysis of the proposal demonstrates that no discrimination would result from its implementation.⁹⁴

In *Beer v. United States*,⁹⁵ a municipal reapportionment case, the Supreme Court announced the basic standard for evaluating a proposed change under the Voting Rights Act, declaring impermissible any changes in apportionment that "lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise."⁹⁶ The Court in *Beer* approved a combined at-large and single-member district plan for New Orleans, under which the blacks, who comprised forty-five percent of the city's population and thirty-five percent of its registered voters, could be expected to elect "at least one and perhaps two" representatives to the seven-member council.⁹⁷ Although the plan did not provide an opportunity for blacks to achieve representation commensurate with their numbers, it was acceptable because it increased the probability that a city council member would be elected by black voters, who had been unable to elect any candidates under the previous apportionment.⁹⁸ In *Hasidic Jews* the Court reaffirmed its holding in *Beer*, concluding that a change increasing the proportion of wards

91. See, e.g., *United Jewish Organs., Inc. v. Carey*, 430 U.S. 144 (1977); *City of Richmond v. United States*, 422 U.S. 358 (1975). In 1978, the City of Dallas, however, decided to ignore the Attorney General and filed directly in the District Court for the District of Columbia.

92. *Georgia v. United States*, 411 U.S. 526 (1973).

93. See, e.g., *Beer v. United States*, 425 U.S. 130 (1976).

94. See, e.g., *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd*, 410 U.S. 962 (1973) (proposed annexation rejected because it unintentionally caused racial dilution).

95. 425 U.S. 130 (1976).

96. *Id.* at 141.

97. *Id.* 139, 141-42. The at-large system was adopted in 1954; consequently, it could not be rejected under the Voting Rights Act, which does not apply retroactively. *Id.* at 138-39.

98. *Id.* at 141-42.

with black majorities satisfied the terms of the Voting Rights Act.⁹⁹

The non-retrogression test announced in *Beer* is important for defining the usual remedial requirements of the Voting Rights Act. *Beer* involved a situation in which the New Orleans' apportionment plan prevented the black minority group from achieving representation in proportion to their numerical voting strength. By preventing further dilution, the non-retrogression test encourages the adoption, in successive reapportionments, of an election plan in which the blacks' aggregate voting power more closely approximates their actual numbers.¹⁰⁰

Occasionally, as when a municipality attempts annexation, the proposed change's validity may be evaluated more effectively under an alternative standard. Annexation of a predominantly white area clearly can reduce the political power of a racial group located within the municipality's previous limits.¹⁰¹ Consequently, in 1971, the Supreme Court held in *Perkins v. Mathews*¹⁰² that an annexation enlarging the city's number of voters constituted a change within the meaning of the Voting Rights Act.¹⁰³ Although the Court's holding in *Perkins* requires a city engaging in annexation to protect the voting interests of its racial minorities, it does not prohibit that mode of municipal expansion. Nevertheless, under *Beer*'s non-retrogression test, virtually every annexation significantly contributing to a city's population could be rejected, regardless of the municipality's precautionary measures, because it could decrease the proportion of a city's voters belonging to a racial minority group. Consequently, at least in those instances when the municipality has proposed measures to protect its racial minority groups' voting strength, the legality of a proposed annexation must be evaluated under a different criterion.

The Supreme Court delineated both this alternative standard and the type of remedial measures necessary to satisfy it in *City of Richmond v. United States*.¹⁰⁴ In 1970, Richmond, Virginia, annexed territory increasing its population by nineteen percent and its real property tax base by twenty-three percent. By adding over 45,000

99. 430 U.S. at 159.

100. See 425 U.S. at 152 n.10 (Marshall, J., dissenting).

101. *Perkins v. Mathews*, 400 U.S. 379, 388-89 (1971).

102. *Id.*

103. *Id.*

104. 422 U.S. 358 (1975).

whites to the city's population, the annexation reduced Richmond's total black population from fifty-two to forty-two percent.¹⁰⁵ After the Court's decision in *Perkins*, the Richmond city government unsuccessfully sought the Department of Justice's approval of the annexation. Denying approval, the Department stressed that, under Richmond's at-large electoral system, the annexation transformed the black population from a majority to a potentially powerless minority.¹⁰⁶

To cure this potential dilution, Richmond attempted to substitute a single-member district plan for its at-large electoral plan.¹⁰⁷ The proposed remedy would have enabled black voters to elect a percentage of the city's council members equivalent to the proportion of blacks in Richmond's total population. Unless the new district lines were designed to permit the overrepresentation of black voters, however, the change could not restore the black population's pre-annexation numerical voting strength. Although the district court rejected Richmond's proposed solution,¹⁰⁸ the Supreme Court reversed, stating:

We cannot accept the position that such a single-member ward system would nevertheless have the effect of denying or abridging the right to vote because Negroes would constitute a lesser proportion of the population after annexation than before and, given racial block voting, would have fewer seats on the city council.¹⁰⁹

The Court stressed that black voters would not be underrepresented on Richmond's city council if its members were elected pursuant to a ward system and concluded that potentially dilutive annexations could be approved if accompanied by the municipality's adoption

105. In 1972 the Fourth Circuit rejected a challenge by black voters who argued that the annexation was discriminatorily motivated. *Holt v. City of Richmond*, 459 F.2d 1093 (4th Cir.) (en banc), cert. denied, 408 U.S. 931 (1972).

106. 422 U.S. at 363-64.

107. As authority for this suggestion, Richmond relied on *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), aff'd, 410 U.S. 962 (1973), in which the District Court for the District of Columbia refused to approve a municipality's proposed annexation. By increasing the white population from a minority to a majority in a city that conducted at-large elections, the annexation impermissibly would dilute the political strength of the black voters. *Id.* at 1028. Nevertheless, the court indicated that the annexation might be acceptable if the city substituted a single-member district plan for its present electoral system. *Id.* at 1031.

108. *City of Richmond v. United States*, 376 F. Supp. 1344, 1352-53 (D.D.C. 1974).

109. 422 U.S. at 371.

of an electoral plan that "fairly reflects the strength of the Negro community as it exists after annexation."¹¹⁰

The holding in *Richmond* is applicable to circumstances other than those involving annexation. For example, if population shifts reduce the proportion of a racial minority in a municipality subject to the Voting Rights Act, the Attorney General legally could approve a reapportionment providing the minority group with representation reflecting its reduced percentage. Otherwise, the Act would be construed as requiring the overrepresentation of that racial minority group in relation to the other elements in the community, a conclusion rejected by the Court in *Richmond*.¹¹¹

A harmonious construction of the holdings in *Beer* and *Richmond* defines the parameters of the Voting Rights Act's restrictions. *Beer*'s non-retrogression test provides the basis for rejecting any proposed change threatening to dilute a racial minority group's voting strength. Dilution occurs when the change prevents the minority group from attaining representation in proportion to its percentage of the city's population. If the current electoral plan prevents minority group members from achieving representation in proportion to their numerical voting strength, however, an impermissible dilution will result only when the change threatens to reduce the percentage of municipal officials that minority voters may elect under the existing system. A change that results in dilution because of a reduction in the percentage of the city's racial minority population may be acceptable under *Richmond* if the municipality implements a plan to prevent any impermissible dilution. Of course, an overriding principle of this analysis is that any electoral change instituted with the intent of discriminating against a racial minority violates both the Constitution and the Voting Rights Act.¹¹² In such situations, an

110. *Id.*

111. *Id.*

112. See notes 52-78 *supra* & accompanying text. In *Richmond* the Court remanded the case, instructing the district court to determine "whether there are now objectively verifiable, legitimate reasons for the annexation. . . ." 422 U.S. at 375. When issuing these instructions, the Court clearly was cognizant of the difficulties *Richmond* could experience in an attempt to de-annex territory possessed for over five years. In most situations, however, the remedy would involve injunctive relief, and the hardships of de-annexation would be irrelevant. Thus, in the majority of cases alleging constitutional violations, courts should ascertain the lawmakers' subjective motivation in proposing the electoral change; the courts should not conduct an independent inquiry to discover the existence of objective, but unconsidered, evidence in support of the proposed change.

elaborate evaluation of the effects of the change, such as those conducted in *Richmond* and *Beer*, is unnecessary.

ALTERNATIVE ELECTORAL SYSTEMS

In practice, the requirements of the Voting Rights Act have prompted the adoption of single-member district electoral systems providing racial minority groups with opportunities for attaining representation in proportion to their numerical voting strength, rather than mere access to the electoral process. Moreover, as demonstrated in *Hasidic Jews*, the Department of Justice's emphasis on the effect of a proposed change required municipalities to abandon almost all criteria except racial percentages in their attempts to adopt acceptable ward plans.¹¹³ Although the Court sanctioned this approach in *Hasidic Jews*,¹¹⁴ other electoral plans, such as Proportional Representation, combined at-large and district elections, at-large elections with residency requirements, limited voting, and cumulative voting,¹¹⁵ may be legally acceptable and socially preferable to the single-member district system.

Proportional Representation

Proportional Representation (PR), developed by Thomas Hare in London in 1857,¹¹⁶ is designed to assure that any group with a common political interest will be represented in proportion to its voting strength with mathematical exactness.¹¹⁷ The principal feature of

113. See text accompanying note 29 *supra*.

114. See text accompanying notes 35-36 *supra*.

115. For a more detailed discussion of these electoral systems, see E. LAKEMAN, *HOW DEMOCRACIES VOTE* (3d ed. 1970); J. ROSS, *ELECTIONS AND ELECTORS* (1955).

116. See T. HARE, *THE ELECTION OF REPRESENTATIVES: PARLIAMENTARY AND MUNICIPAL* (1873); Hare, *Representation in Practice and Theory*, 61 *FRASER'S MAGAZINE* 188 (Feb. 1860).

117. The system has been used in the United States with some success, notably in New York. See note 123 *infra*. PR has been applauded by the English political philosopher John Stuart Mill:

I saw in this great practical and philosophical idea, the greatest improvement of which the system of representative government is susceptible; an improvement which, in the most felicitous manner, exactly meets and cures the grand, and what before seemed the inherent, defect of the representative system; that of giving a numerical majority all power, instead of only a power proportional to its numbers, and enabling the strongest party to exclude all weaker parties from making their opinions heard in the assembly of the nation, except through such opportunity as may be given to them by the accidentally unequal distribution of opinions in different localities. To these great evils nothing more than

the system is the use of transferable preferential votes.

A voter places a "1" on the ballot opposite the candidate he favors most. He places a "2" opposite his second choice and similarly selects according to his preferences among the remaining candidates. He may decide to vote for all or only part of the candidates running for office. Generally, the voter's ballot will count toward the election of his highest preference who has not been elected or defeated already under the system's counting device.

A successful candidate must receive a fixed quota of the votes cast. Quotas may be fixed by one of two methods, depending on whether a fixed or variable number of seats is available. If the number of seats is variable, for example, if each candidate commanding 75,000 votes will be elected, the legislative body implementing the system establishes a fixed numerical quota. If the number of seats is fixed, the minimum required quota is dependent on the number of voters participating in the election and is calculated by using the formula: $Q = (Y/N+1) + 1$, in which Q is the required quota, Y is the total number of votes cast, and N is the number of seats available.

In determining whether a candidate has achieved a sufficient number of votes, ballots are sorted by first choices. Any candidate receiving a total of number "1" ballots equal to or exceeding the quota is declared elected. When a candidate receives more than the quota, his surplus ballots are divided among the other candidates according to the second choices indicated. A new count is conducted, and any candidate accumulating a total of number "1" and transferred ballots equal to or exceeding the quota is declared elected. His surplus ballots, if any, are distributed to the remaining candidates according to the second and third choices indicated.

When this first phase of the ballot counting is completed, the next step is to declare defeated the candidate with the fewest total of number "1" votes and any surplus votes transferred from candidates already elected and to distribute his ballots to the remaining candidates according to the next choices marked on these ballots. If the second choice already has been elected or defeated, the ballots

very imperfect palliations had seemed possible; but Mr. Hare's system affords a radical cure.

J. MILL, AUTOBIOGRAPHY 258 (1873).

The Model City Charter, prepared by the National Municipal League, provided only for PR until 1964, when the sixth edition offered two alternative plans. MODEL CITY CHARTER 15 (6th ed. 1964).

are distributed according to the third choice. Again, a new count is conducted. The process of declaring defeated the lowest candidate and transferring his ballots to the remaining candidates indicated as the next choice on the ballots continues until the full council is elected. Thus, either by first choice or by transfer, most ballots help to elect a candidate.

Two systems may be used to govern the transfer of surplus ballots. Under the first system, after a candidate receives enough number "1" ballots to meet the quota, any subsequent number "1" ballots for this candidate are transferred automatically to the number "2" choice. This surplus distribution system is used in the election of community school boards in New York City. One possible drawback to this method is that the second choices of a particularly large block of votes, perhaps a late reporting precinct, might affect the election disproportionately.

Surplus number "1" votes under the second system are distributed according to a formula. The ballots of a candidate receiving a surplus of number "1" votes are re-examined to determine the distribution of number "2" votes. The surplus ballots then are distributed proportionally according to second choices. For example, if candidate X receives 12,000 number "1" ballots but needs only 10,000, he has a surplus of 2,000. Assuming that candidate Y was the number "2" choice on 6,000 of candidate X's number "1" ballots, candidate Y would be given one-half of candidate X's surplus, or 1,000 ballots.

PR's Legal Sufficiency under Federal Standards

PR does not eliminate entirely the possibility of discrimination. Any minority whose voting strength is less than the required quota cannot elect a candidate independently. For example, assuming that racial block-voting occurs in a nine-seat election, a racial minority commanding less than ten percent of the vote cannot elect a representative. Thus, a legislative body can discriminate against a racial minority by implementing a PR system in which the required quota is larger than the racial minority group's voting strength. As with all electoral systems, PR may be rejected as unconstitutional if it is adopted for a discriminatory purpose. Mere discriminatory potential, however, which is manifest in all electoral systems, is not a disqualifying factor in most situations.

Even if PR is proposed for non-discriminatory reasons, the estab-

lished quotas may prevent a racial minority from independently electing a representative. This result possibly could be rejected under *Beer's* non-retrogression test in a municipality subject to the Voting Rights Act. For example, a racial minority comprising slightly more than five and one-half percent of the total population and concentrated within a single district in a city using a nine-seat single-member district plan could select the representative chosen in that district.¹¹⁸ If the city implemented PR but retained its nine-member city council, however, the racial minority could not elect a representative under the new system unless it comprised slightly more than ten percent of the municipality's total population.¹¹⁹ Consequently, the adoption of PR might prevent the racial minority from electing a representative to which it was entitled before the electoral change.

An initial analysis suggests that this result would be permissible under *Richmond*, for the minority group is entitled to representation only in proportion to its numerical voting strength. Closer scrutiny, however, reveals that the proposed change could cause an impermissible dilution to which the Attorney General and the courts validly might object under *Beer*. In the existing single-member district system, a group constituting approximately five and one-half percent of the city's population is able to select a council member from a ward containing slightly more than eleven percent of the city's population. Rather than correcting this overrepresentation and providing the racial minority with representation in proportion to its actual numbers, the implementation of PR would deprive the minority of the ability independently to select a representative, thus rendering it politically powerless. The non-retrogression test announced in *Beer* could provide a basis for rejecting this dilution.

118. Assuming that the wards are numerically balanced, as required by the "one person, one vote" doctrine, a candidate from any particular district could determine the number of votes necessary to win an election in that district by using the formula: $Q = (Y/2N) + 1$, in which Q is the required number of votes, Y is the total number of votes cast city-wide, and N is the number of single-member districts. In a city with 100,000 voters and nine single-member districts, the candidate would need 5,556 votes, or slightly more than 5.5% of the total votes cast, to win a district election. Consequently, a cohesive group controlling that percentage of the voters within the ward could select that district's representative.

119. As previously noted, the minimum quota required under PR may be calculated by using the formula: $Q = (Y/N + 1) + 1$. In a city with 100,000 voters and a nine-member council, a candidate would need 10,001 votes, or slightly more than 10% of the total votes cast, to win the election.

Clearly, a municipality must be given some flexibility in its attempt to develop an electoral system compatible with the Voting Rights Act. Provided that a plan presents an opportunity for racial minorities to achieve representation in proportion to their numerical voting strength, it should not be rejected merely because the variations between the existing and proposed systems might prevent a minority group from electing as many council members under the new plan as under the old. Thus, under PR, a racial minority group might consist of more members than necessary to elect two city councilmen but less than it needs to select three candidates; the system nevertheless should be found acceptable, although the city either already has implemented or could adopt a ward plan permitting the same group to elect three or more council members. The single exception to this argument, as indicated previously, might exist in a rare situation if the implementation of PR would prevent a racial minority, previously represented, from electing any council members. In that particular instance, the Attorney General or a court might reject the plan as dilutive and require the retention of a pre-existing ward plan.

Despite these possible criticisms, legal objections to PR may be overcome easily. To prevent dilution, either the fixed number of seats on the city council could be increased or the fixed quota could be decreased so that any racial minority that could have elected only one representative under the pre-existing single-member district plan will possess the numerical voting strength to select one candidate under PR.¹²⁰ In practice, however, the circumstances ne-

120. The maximum number of representatives required in a PR system substituted for a ward plan may be calculated by solving the simultaneous equations:

$$Q = (Y/2N) + 1 \text{ (single-member district plan)}$$

$$Q = (Y/X+1) + 1 \text{ (PR)}$$

in which Q is the number of votes required to elect a candidate under either system, Y is the total number of votes cast city-wide, N is the number of districts in the single-member district plan, and X is the number of council seats required under PR to prevent the implementation of that plan from resulting in dilution. In simplified form, $X=2N-1$. Thus, a municipality with nine single-member districts theoretically may need to increase the size of its city council to 17 members if it adopts PR.

Because the size of this increase is based on two assumptions that rarely will exist in practice, however, a much smaller increase in the council's size usually will be satisfactory. The first assumption is that the minority group constitutes only a bare majority in the district from which it presently selects a candidate. The second assumption is that no minority voters

cessitating these remedial measures will seldom, if ever, exist, and the implementation of PR generally will satisfy the requirements of the Voting Rights Act.

PR and the Single-Member District System Compared

The principal advantage of PR over single-member districts, as its name suggests, is that it assures that neither the majority nor the minority will be underrepresented or overrepresented in proportion to their numbers within the entire city. Under a ward system, assuming the existence of N equally populated districts, each representative theoretically represents $1/N$ th of the total population; in reality, however, the council member represents primarily those who voted for him. A geographically concentrated minority controlling only a bare majority of a single district's votes and a $(1+1)/2N$ percentage of the city's total voters conceivably can control a district election. Because this group will select a candidate who represents a percentage of the city's population equivalent to $1/N$, it will be overrepresented under a single-member district plan.

PR not only virtually eliminates the possibility of overrepresentation presented by a ward plan; it also obviates the necessity for a municipality to emphasize racial criteria in its attempt to formulate a voting plan providing minorities with proportional representation. The use of PR city-wide makes districting plans unnecessary, eliminating racial gerrymandering for either benign or discriminatory purposes.¹²¹ Moreover, because PR is an at-large plan, it would not encourage segregation, an effect of single-member districts criticized by Justice Burger in his dissent in *Hasidic Jews*.¹²² Unlike ward plans, PR determines a minority group's voting strength by its

reside outside of that district and that the group therefore comprises only slightly more than 5.5% of the city's total population. See note 118 *supra*. In a more realistic example, the minority group in a municipality of 100,000 voters may control 6,000 votes, or six percent of the city's total voters, in the ward from which it elects a candidate. Moreover, two or three percent of the voters in the remainder of the city may belong to the racial minority. The group, therefore, may comprise as much as nine percent, or 9,000 voters, of the entire city. Nine percent of the voters is less than the ten percent required to elect a candidate under a PR plan in a city with a nine-member city council. See note 119 *supra*. As a result, the fixed quota must be reduced to 9,000 votes or the total number of council seats must be increased to ten so that the minority group may continue to elect a candidate after the adoption of PR.

121. The use of PR in a multimember district system would provide the same benefits as those accompanying the adoption of the plan city-wide but on a smaller scale.

122. See text accompanying note 42 *supra*.

actual size, not by its degree of concentration within a particular part of the city.¹²³

PR provides a minority group with representation commensurate with its voting strength without forcing the group's members to distort their election preferences. Under conventional at-large electoral systems, minority group voters commonly engage in "bullet-voting" or "single shot-voting," a practice by which a voter, hoping to increase his group's prospects of electing a candidate, marks only one choice on the ballot; additional choices might help to defeat his first preference. In a PR election, however, second and subsequent choices are pertinent only if the first choice has been elected or defeated, and the presence of subsequent choices on the ballot, therefore, has no effect on the first choice's election prospects.

In addition to eliminating incentives for segregation, the at-large nature of PR offers several other advantages over a ward plan. Because council members are selected in city-wide elections, they tend to emphasize legislative policies responding to the needs of the entire municipality rather than those fulfilling only a special interest group's desires.¹²⁴ More importantly, the at-large aspect of PR provides automatic and continuous reapportionment, permitting common interest groups to attain representation in exact proportion to their voting strengths in each election.¹²⁵ Finally, PR reduces the possibility of election fraud inasmuch as the number of voters is large and the ballots are centrally counted.

123. The effectiveness of PR in providing minority representation is demonstrated by examining election results in New York City. In the 1970 PR community school board elections, 28% of the elected candidates were black or Puerto Rican. In contrast, no Puerto Ricans and only two blacks were on the 37-member city council though the city's population was more than 20% black and 12% Puerto Rican. In the 1973 community school board election, 38% of those elected were black, Chinese, or Puerto Rican; these groups comprised approximately 36% of the city's total population. Today, no black or Hispanic members serve on the city's Board of Estimates, which determines current and capital budgets and approves contracts.

A comparison of the New York City Council's composition under PR with its composition immediately following PR's abandonment also is instructive. The 1945 PR election produced council members from the following parties: 14 Democrats, three Republicans, two American Labor Party members, two Liberals, and two Communists. In the 1948 election, the Democratic Party captured 24 of the 25 council seats, although the party received only 52.6% of the votes cast.

124. Of course, proponents of single-member district plans regard the responsiveness of elected officials toward their immediate constituents' special interests as a desirable characteristic of those systems.

125. If PR is used in conjunction with a multimember district plan, it provides automatic reapportionment of the seats within each district.

PR increases the probability that candidates will be elected on the basis of merit. The requirement that each voter rank the candidates in his order of preference eliminates the potential for "bandwagon" voting; a popular person cannot carry into office weak or unqualified candidates who happen to be in his party. When selecting their preferences, voters in a PR system probably have more relevant information on which to base their decisions than they would possess in another type of election, for PR motivates the candidates to discuss issues, not personalities. Thus, one commentator has noted:

[I]nstead of trying to beat a particular person, with temptation to belittle his ability and blacken his character, each candidate is trying to win a group of supporters for himself out of the whole field. He knows that he cannot defeat the leaders of the opposition. . . . His best course is to make a vigorous statement of what he himself stands for, without gratuitous attack on anyone else.¹²⁶

PR's transferable-vote methodology removes the need for a primary election. Candidates unable to collect the required quota of votes will be defeated, and the ballots on which they were listed as preferred choices will be transferred to the voters' subsequent choices. Thus, in a single election, all office-seekers without sufficient electoral support can be eliminated, but most of the voters selecting those persons nevertheless will participate in the selection of a successful candidate. A municipality using PR not only saves the cost of conducting primary elections but also lessens the potential that small voting groups may control the electoral process. A characteristic of primary elections is a weak voter participation rate, which often enables a small clique to control the nomination process, particularly if the opposition is divided. A city effectively could combat this situation, however, through the implementation of PR and, thereby, the elimination of primary elections.

Moreover, PR's transferable-vote procedure mitigates the effect of dissension within a group, which, under another electoral system, might prevent it from either nominating or electing a candidate. Under PR, if the internal dispute concerns which of the candidates is most qualified, each member has the opportunity to rank the candidates according to his own preference on his ballot. Conse-

126. G. HALLETT, JR., *PROPORTIONAL REPRESENTATION: THE KEY TO DEMOCRACY* 72-73 (1940).

quently, although none of the office-seekers representing the group obtains sufficient first choices to win a council seat, one or more of them may collect an adequate number of transferred ballots to be elected.

Despite its advantages, PR arguably has some drawbacks, and the single-member district system retains its proponents.¹²⁷ For example, the opponents of PR argue that because it promotes civic disunity and strife by exaggerating the voting strength of splinter groups and encouraging political decisions based on ethnic, racial, or religious considerations, PR is inferior to an electoral system that deemphasizes divisive prejudices.¹²⁸ A system such as an at-large plan that prevents minority groups from attaining representation does not alleviate prejudices; rather, it aggravates minorities' alienation. Moreover, as has been discussed previously, an electoral plan denying representation to racial minorities is suspect legally. No evidence exists suggesting that voting pursuant to ethnic, racial, or religious considerations is more common under PR than under other electoral systems. Unlike most other systems, however, PR permits each minority group, not merely racial minorities, to gain representation in proportion to its numerical voting strength.

Although PR facilitates the election of minority candidates, it does not guarantee that each neighborhood will be represented on the city council. Representation by group, however, probably is more effective than representation by geographic area. Indeed, as demonstrated in *Hasidic Jews*, a particular district's voters may have such antagonistic interests that the neighborhood's representative could not be expected to balance their differing viewpoints. In such circumstances, representation by group may provide the only opportunity for minority voters in any particular neighborhood to participate in the selection of a candidate sharing their opinions. Nevertheless, the residence of a particular candidate retains some relevance under PR; the electoral decisions of a large, cohesive group of voters concentrated in a particular section of the city may be influenced by the various candidates' places of residence.

The counting of paper ballots cast in a PR election may take several days. For example, in the 1939 New York City election, nine

127. See, e.g., *Ghetto Voting*, *supra* note 21.

128. See, e.g., F. HERMENS, *THE REPRESENTATIVE REPUBLIC* (1958); F. HERMENS, *DEMOCRACY OR ANARCHY* (1941).

days were required to determine the results. This objection is not crucial; most winning candidates do not take office until at least two months after their election. Although the cost of counting paper ballots used in a PR election is greater than the cost of counting ballots cast pursuant to another type of electoral system, PR eliminates the expense of a primary election. Of course, the use of voting machines or computer cards can reduce both the time and the cost of counting ballots in a PR election. Additionally, although in the first election under PR in a new locality the ballot tends to be lengthy, the ballot soon becomes relatively short in subsequent elections as potential candidates perceive that they must have substantial voter support to win the election. Nor do the electors under PR need to know or vote for all candidates. In most cases, the transferable ballot will enable a voter who marks his first seven to ten preferences to participate in the election of one of those candidates.

The major argument advanced in opposition to PR is that its fantastically complicated system is understood by relatively few citizens. A voter's effective participation in an election, however, is not dependent upon his understanding of the ballot-counting process. He need only know that the ballot should be marked in the order of his preferences among the candidates and that his ballot will count toward the election of his highest priority candidate not already elected or defeated. The small percentage, 2.5 percent, of invalid votes cast in New York City's Community School Board elections in the spring of 1970 suggests that the vast majority of electors easily understand the voting procedures under PR. Moreover, the number of blank ballots cast in those elections was very small, amounting to less than .4 percent of the total ballots cast in most districts.

An emotional opposition to PR also may exist. The system permitted the election of two Communists and two American Labor Party candidates to the New York City Council in 1945.¹²⁹ Because the two parties accounted for eighteen percent of the first-choice vote and won 17.5 percent of the council seats, they were able to attain representation in proportion to their numerical voting strength. PR provides every large minority group, regardless of its popularity, with an opportunity to achieve representation. The rejection of an electoral system merely for the purpose of stifling the

129. See note 123 *supra*. See generally F. HERMENS, *THE REPRESENTATIVE REPUBLIC* (1958).

political strength of an unpopular minority generally would be unconstitutional, as has been previously demonstrated.

Overall, PR represents a meritorious alternative to the single-member district system that generally will be permissible under the Voting Rights Act. The at-large nature and the transferable-vote methodology of PR make it superior to a ward plan. Although some tenuous criticisms of the system have been identified, these arguments are unpersuasive and should not form the basis for rejecting the implementation of a PR plan.

Combined At-Large and District Elections

To provide geographical representation and to obtain the benefits of an at-large system, some municipalities have adopted electoral plans whereby several council members are elected at-large and the remainder are selected by wards.¹³⁰ This system not only furnishes representation to specialized interests concentrated within particular geographic areas but also ensures the election of some representatives who will direct their priorities toward the needs of the entire city.

Combined at-large and district election plans are subject to some disadvantages common to at-large systems and ward plans generally. As in all single-member district systems, the combined electoral plan requires that any racial minority group obtaining representation be concentrated within one or more of the city's wards. Thus, to safeguard a minority's ability to select a representative, a city would need to create districts with large racial majorities. As in *Hasidic Jews*, such racial gerrymandering places a harsh burden on non-racial minorities who intentionally are deprived of an opportunity to participate effectively in the electoral process.

Even if the wards' boundaries are designed specifically for the purpose of providing representation to racial minority groups, those groups will be unable to control the percentage of the city council that reflects their numerical voting strength. If racial block-voting occurs in the municipality, the majority group always will be overrepresented on the council, for they will elect the at-large candidates.

130. This type of electoral system was approved by the Supreme Court in *Beer*. See notes 95-98 *supra* & accompanying text. In addition, the Metropolitan Government of Nashville and Davidson County, which contains five council members elected at-large and 35 members representing specific districts, holds combined at-large and district elections. METROPOLITAN GOV. OF NASHVILLE & DAVIDSON COUNTY CHARTER art. 3, § 3.01 (1962).

This characteristic of the combined at-large and district system prevents its indiscriminate adoption by municipalities subject to the Voting Rights Act. Under *Beer's* non-retrogression test, any change causing an impermissible dilution will be rejected. Because the combined system has a built-in dilution factor, it is an acceptable replacement only for those electoral plans that have afforded even less representation to minorities than they will receive under the combined plan. Consequently, although the combined system probably could replace an at-large plan, it could not be used as a substitute for an existing single-member district electoral system.

At-Large Elections with Residency Requirements

A municipality having an at-large electoral plan with residency requirements conducts an otherwise straightforward at-large election in which residency requirements are imposed on the candidates.¹³¹ Each seat on the city council is associated with a specified district, and candidates running for a particular seat must be residents of that district. Under this system, although each geographical area of the city is represented, all the council members will have a city-wide orientation and constituency.

The primary criticism of this system is that the majority voting group will control the final results of the election. Although a candidate for a particular district may be nominated by a racial minority group, he will not win an election in which racial block-voting occurs if the majority also has nominated a candidate from that district. Thus, for a racial group to elect a candidate, it must be concentrated sufficiently within a district to enable it to select all the nominees from that ward.¹³² To achieve this result, the percentage

131. Metropolitan Dade County uses this system. METROPOLITAN DADE COUNTY CHARTER art. I, § 1.04 (1957).

132. A municipality may have little difficulty in establishing a district in which almost all of the voters belong to a single minority group because the population of the various districts can be unequal. See *Dusch v. Davis*, 387 U.S. 112 (1967). In *Dusch* the Supreme Court held constitutional an at-large electoral system in which seven of the 11 council members were required to reside in seven different districts the populations of which varied from 733 to 29,048. *Id.* at 117. But see *Reese v. Dallas County*, 505 F.2d 879 (5th Cir. 1974), in which the Fifth Circuit invalidated an electoral plan for Dallas County, Alabama, providing for at-large elections with a requirement that each of the four county commissioners reside in a different district. The court of appeals observed that in *Dusch* the Supreme Court approved a system in which the city council could not be controlled by members who represented districts containing a minority of the total voters. In contrast, in *Reese* the county commissioner

of minority voters within the district would have to be much larger than the sixty-five percent non-white majority approved in *Hasidic Jews*.

Even if the minority group could nominate all the candidates from a particular district, it would be unable to elect that ward's ultimate council member. The majority of voters controlling the at-large election would determine which of the candidates nominated by the minority group would represent the district. The inability of an at-large election with residency requirements to provide a racial minority group with an opportunity to select its own representatives renders that system only a marginal improvement over a standard at-large electoral plan. In a municipality subject to the Voting Rights Act, its dilutive characteristics prevent it from satisfying *Beer's* non-retrogression test in almost all situations except those in which it is offered as a substitute for a standard at-large plan.

Limited Nomination and Voting

An electoral system using limited nomination and voting has a dual purpose: encouragement of the two-party system and provision for the election of minority candidates. By preventing a party from nominating a sufficient number of candidates to fill all of the available seats, this system encourages two-party politics. Similarly, the system provides each voter with fewer votes than the total number of available seats and thereby denies the majority an opportunity it might otherwise have in an at-large election to win election to all of the offices.

Although a limited nomination and voting system generally provides a municipality's largest minority group with representation, the electoral plan has several disadvantages. The system does not ensure the existence of proportional representation, unless the ratio of the limitation placed on nomination and voting over the total number of elective seats available corresponds to the proportion of the city's largest group of voters. Adherence to this ratio requires a city to re-evaluate constantly the numerical strength of its majority voters and to implement corresponding nomination and voting limitations. Moreover, if more than two sizeable groups are present in the municipality, the implementation of this formula guarantees

representing Selma, which contained one-half of Dallas County's population, could be outvoted by the three county commissioners representing the rural districts. *Id.* at 883-85.

proportional representation only to those voters comprising the largest group. For example, in a city with a nine-member council and voting groups A, B, and C constituting fifty-five, twenty-five, and twenty percent of the municipal population respectively, the formula requires a voting and nomination limitation of five. If group block-voting occurs in an election, group A will win five council seats, group B will win four seats, and group C will receive no representation on the council.¹³³

As in a typical at-large election, no preferences attach to the votes cast by electors in a limited nomination and voting system. By using all of his votes, an elector can increase the tally of a candidate he least favors and thereby help to defeat his favorite candidate. Consequently, to maximize his opportunity for electing a representative, a voter is encouraged to vote only for his most preferred candidate, a practice known as "bullet voting."

Limited nomination and voting is a crude and unreliable method for securing minority representation. Moreover, the system is complicated for the elector, who must choose whether to exercise all of the votes to which he is legally entitled. The voter must attempt to predict the circumstances in which his voting for more than one candidate might contribute to the defeat of his favorite candidate. As a method for securing proportional representation, PR clearly is superior to limited nomination and voting. PR provides representation to all minority groups and eliminates the need for recalculating the nomination and voting limitations every few years. PR's transferable-vote methodology, which makes bullet voting unnecessary, also removes the complicating factors present in a limited voting system.

Despite the inadequacies of a limited nomination and voting system, its adoption would be legally acceptable in many municipalities subject to the Voting Rights Act. As with other electoral plans, the principal inquiry into a proposed limited nomination and voting system's validity focuses upon the effect of the plan's implementation. Under *Beer's* non-retrogression test, a system is acceptable whenever it provides racial minorities with a greater opportunity to achieve proportional representation than they possess under the existing electoral plan. Thus, although the system always could

133. Under PR, group A would elect five representatives, group B would elect two, and group C would elect two.

replace an at-large plan, it probably would not be an acceptable substitute for an existing system in which the third largest group was a racial minority already able to elect at least one council member.

Cumulative Voting

In a cumulative voting system, each elector has a number of votes equivalent to the total number of seats available, and he may apportion his votes among the candidates in any manner he chooses.¹³⁴ Thus, if nine seats are available, the voter may give all nine of his votes to one candidate, vote once for nine different candidates, cast six votes for one candidate and three for another, or assign his nine votes in any other combination.

The purpose of cumulative voting is to provide representation for minority groups. As with PR, the minimum number of votes required to elect a candidate is determined by formula: $Q = (Y/N + 1) + 1$, in which Q is the required vote quota, Y is the total number of votes cast, and N is the number of seats available. To be assured of winning an election in a city with a nine-member council, a candidate needs one more than ten percent of the total votes cast, the same proportion of votes required under a PR electoral plan.¹³⁵ By calculating its voting strength, nominating the correct number of candidates, and then successfully instructing its members to apportion their votes among the office-seekers, a cohesive group could attain proportional representation on the city's council. Moreover, as an at-large election system, cumulative voting, like PR, potentially provides proportional representation for all minority groups. The system therefore has at least one advantage over single-member district plans, which, in providing representation only to geographically concentrated minorities, tend to promote segregation.¹³⁶

The adoption of a cumulative voting system by a municipality subject to the Voting Rights Act usually would be legally permissible. In a few rare situations, however, the legislative body enacting this electoral plan may confront some legal objections. Thus, if a cumulative voting plan is accompanied by a manipulative reduction

134. Many corporations are required to use cumulative voting for the election of their directors. See generally W. CAREY, *CORPORATIONS* (1969); Williams, *Cumulative Voting*, 33 HARV. BUS. REV. 108 (1955).

135. See note 119 *supra* & accompanying text.

136. See text accompanying note 42 *supra*.

in the city council's membership intended to prevent a racial minority from electing any representatives, the system's implementation would be unconstitutional. In addition, as with PR,¹³⁷ a cumulative voting plan could be impermissibly dilutive under *Beer's* non-retrogression test if it threatened to deprive a geographically concentrated racial minority group that had achieved representation under an existing single-member district system from electing any council members under the new plan. Of course, a municipality always could overcome this objection to cumulative voting by increasing the city council's membership so that every minority that previously could have elected a candidate will maintain sufficient numerical voting strength to select a representative under the new system.¹³⁸ Finally, an evaluation of a change under the Voting Rights Act focuses primarily on the proposal's actual effect on a racial minority's voting strength;¹³⁹ a cumulative voting plan, which only provides racial minorities with the potential for attaining proportional representation, therefore may be an unacceptable substitute for an electoral system in which those groups have actually achieved such representation. These objections to cumulative voting clearly arise infrequently; the system's capacity for providing racial minorities with the potential for achieving proportional representation generally would compel its approval under the Voting Rights Act.

Despite the legality of cumulative voting, several factors undermine the system's socio-political attractiveness.¹⁴⁰ As previously discussed, such an electoral plan can provide proportional representation only when each group successfully has accomplished a number of complicated tasks. A group that miscalculates its voting strength may nominate either too many or too few candidates. If too many candidates are nominated, the group's membership may divide their votes in a manner preventing two or more of the nominees from receiving a sufficient number of votes to ensure their election. Such

137. See notes 118-19 *supra* & accompanying text.

138. As previously discussed, a municipality also can use this method to overcome any legal objections to its proposed implementation of PR. See note 120 *supra* & accompanying text.

139. See notes 93-94 *supra* & accompanying text.

140. Illinois uses cumulative voting to elect legislators from three-seat districts to that state's House of Representatives. ILL. CONST. art. IV, § 7. For a discussion of the problems cumulative voting has caused in Illinois, see Hyneman and Morgan, *Cumulative Voting in Illinois*, 32 ILL. L. REV. 12 (1937).

vote splitting may enable another group to elect one of its candidates who otherwise would have been defeated. As a consequence of its miscalculation, therefore, the former group will be underrepresented on the council, and the latter group will have representation in excess of its numerical voting strength.¹⁴¹ The same result will occur if a group nominates an insufficient number of candidates. If the membership divides its votes among the group's nominees, it will elect each of those candidates with surplus ballots, and the other council seat will be won by a different group's candidate who will receive fewer votes than the amount usually necessary to secure his election.¹⁴²

If each of a municipality's groups correctly calculates its voting strength and nominates an appropriate number of candidates, the resulting election reveals the foremost political weakness of the cumulative voting system. In their attempts to avoid the potentially dilutive effects resulting from the nomination of too many candidates, each group will limit its nominations according to its proportional voting strength. The groups capable of electing representatives, therefore, will nominate a combined total of candidates equivalent to the number of seats available. This practice deprives the voters of any significant choice in the election and eliminates any need for the candidates to discuss issues.¹⁴³

The transferable-vote methodology of PR avoids all of the inadequacies of a cumulative voting plan. Under PR, a political group never has to calculate its voting strength, and it may nominate any number of candidates without risking a loss in representation. PR consequently encourages groups to provide their memberships with a variety of nominees from which preferences may be listed. Moreover, because the surplus ballots of elected candidates and all the

141. See G. BLAIR, *CUMULATIVE VOTING: AN EFFECTIVE ELECTORAL DEVICE IN ILLINOIS POLITICS* 103-04 (1960).

142. For example, in the 1958 Illinois election, the two majority-party candidates for seats to that state's House of Representatives from one three-seat district were elected with 47.6% and 45.8% of the total votes cast; in contrast, the minority-party candidate was elected after receiving only 6.4% of the total votes.

143. In the 1970 Illinois election, for example, although one state Senate candidate had no opposition, 93 candidates for the state House of Representatives ran unopposed. In contrast to elections for House members, however, Senate elections are not based on cumulative voting. In an attempt to remedy this problem, the Illinois state legislature enacted a law preventing any political party from limiting its nominations for House members in any particular district to less than two candidates. ILL. ANN. STAT. ch. 46, § 8-13 (Smith-Hurd Supp. 1976).

ballots of defeated office-seekers are transferred to the electors' subsequent choices, a group's representation will not be reduced merely because one of its candidates was exceedingly popular or because the membership split its first choices evenly between a large number of nominees. Through the transfer process, the group ultimately will receive proportional representation, and none of the groups will elect a candidate receiving less than the required number of votes.

PR AND STATE CONSTITUTIONS

PR clearly is the most favorable alternative to the single-member district system. Although federal law presents few obstacles to the implementation of PR, some state constitutional provisions may pose a formidable barrier to the adoption of the system. The principal objection to PR concerns the system's limited voting characteristics. Under PR, each voter may list any number of preferences on his ballot, but his vote will contribute toward the election of only one candidate. Consequently, although several representatives will be selected from the geographical area encompassed by the election, each elector effectively may exercise only one vote.

Courts in Michigan and California have held that this limited voting characteristic of PR violated state constitutional provisions entitling each voter to vote "in all elections."¹⁴⁴ Broadly construing this language, these courts determined that the right to vote in all elections entitles an elector to cast a vote for a candidate for each office to be filled.¹⁴⁵ The Supreme Court of Rhode Island reached a similar conclusion in a 1939 advisory opinion to the governor interpreting the state's constitutional provision assuring each elector the right to vote "in the election of all civil officers."¹⁴⁶ Under these holdings, an elector in a municipality with an at-large electoral plan

144. See *People v. Elkus*, 59 Cal. App. 396, 398-99, 211 P. 34, 36-37 (1922); *Wattles v. Upjohn*, 211 Mich. 514, 179 N.W. 335, 341-42 (1920).

145. See, e.g., *People v. Elkus*, 59 Cal. App. 396, 398-99, 211 P. 34, 36-37 (1922). See also Weaver, *Representation of Minorities in At-Large Elections in City and Village Governments under Michigan Law*, 49 J. URB. L. 146 (1971). The decision by the Michigan Supreme Court in *Wattles v. Upjohn*, 211 Mich. 514, 179 N.W. 335 (1920), may have been reversed by a 1963 amendment to that state's constitution transforming an elector's right to vote "in all elections" into a privilege to vote "in any election." MICH. CONST. art. II, § 1. See Weaver, *supra*, at 156.

146. See *Opinion to the Governor*, 62 R.I. 320, 6 A.2d 147 (1939) (advisory opinion). The current Rhode Island constitutional provision similarly entitles each elector to "vote for all officers to be elected." R.I. CONST. amend. art. XXXVIII, § 1.

and a nine-member city council would be entitled to nine votes in the city's election.

In contrast to the decisions in Michigan and California, the Supreme Court of Ohio concluded that its state constitutional provision permitting each elector to vote "at all elections" did not render unconstitutional Cleveland's 1921 adoption of PR.¹⁴⁷ Adopting a literal construction of the constitutional language, the court reasoned that an elector was not denied the right to vote in any election merely because his ballot was "effective in the election of fewer than the full number of candidates."¹⁴⁸ The court based its decision on the state constitutional grant of home rule powers to cities, holding that "charter cities have all powers of local self-government."¹⁴⁹

The Ohio court's decision appropriately harmonizes the home rule powers with the general voting rights provisions contained in most state constitutions. Chartered cities in states with constitutions granting strong home rule powers should have the freedom to adopt the most effective electoral plan for their locality.¹⁵⁰ Nevertheless, this issue is unresolved in other states with constitutions entitling each voter to participate in all elections,¹⁵¹ and implementation of PR in those jurisdictions may require either a favorable court decision or a state constitutional amendment.

In 1937 the New York Court of Appeals determined that PR did not violate a state constitutional provision providing each elector with the right to vote "for all officers."¹⁵² The primary authority for the court's decision, however, which contradicted the advisory opinion issued by the Supreme Court of Rhode Island, was the long-standing and unchallenged use of limited voting in both New York State and City.¹⁵³ Consequently, other states having similar constitutional provisions¹⁵⁴ but shorter limited voting histories may be reluctant to follow the New York decision. In those states, the adoption of PR could require a state constitutional amendment.

The transferable-vote methodology of PR may subject this system

147. *Reutener v. City of Cleveland*, 107 Ohio St. 117, 141 N.E. 27, 32 (1923).

148. *Id.* at ____, 141 N.E. at 33.

149. *Id.* at ____, 141 N.E. at 34.

150. See also Weaver, *supra* note 147, at 56.

151. See, e.g., ALAS. CONST. art. V, § 1; HAWAII CONST. art. II, § 1; PA. CONST. art. VII, § 1.

152. *Johnson v. City of New York*, 274 N.Y. 411, 9 N.E.2d 30 (1937).

153. *Id.* at 421, 9 N.E.2d at 38.

154. See, e.g., N.J. CONST. art. II, ¶ 3.

to other state constitutional objections. For example, challengers opposed the use of PR to elect the Cambridge city council, claiming that the system violated the state's constitution, which provided that in "all elections of civil officers by the people of this Commonwealth, whose election is provided for by the Constitution, the person having the highest number of votes shall be deemed and declared elected."¹⁵⁵ The Massachusetts Supreme Judicial Court rejected the complaint on the ground that the state constitution did not, as expressly required to trigger the clause, provide for the election of the Cambridge city council's members.¹⁵⁶

In addition PR's transferable-vote mechanism may violate Florida's constitution, which states that "all elections by the people shall be by direct and secret vote."¹⁵⁷ Because PR's transfer process will help to elect some candidates indirectly, it could be held unconstitutional. A court probably would interpret "direct" to govern only the voting process, however, and to require merely that an elector personally mark his ballot or operate the voting machine. Under this interpretation, PR would be constitutional in Florida.

CONCLUSION

In *Whitcomb v. Chavis*,¹⁵⁸ the Supreme Court recognized that single-member district plans may not best remedy the problems associated with multi-member districting systems:

It is not at all clear that the remedy is a single member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups with its own capacity for overrepresenting and underrepresenting parties and interests and even for permitting a minority of voters to control the legislature and government of a State.¹⁵⁹

Nevertheless, the trend toward the imposition of single-member district systems with boundaries that are drawn according to racial considerations on localities subject to the Voting Rights Act continues unabated, with virtually no consideration of the use of alternative electoral plans. As demonstrated in *Hasidic Jews*, these

155. MASS. CONST. amend. art. XIV.

156. *Moore v. Election Comm'rs of Cambridge*, 309 Mass. 303, ___, 35 N.E.2d 222, 231 (1941).

157. FLA. CONST. art. VI, § 1.

158. 403 U.S. 124 (1971).

159. *Id.* at 159-60.

“remedial” activities have inflicted extreme socio-political hardships on non-racial minority groups who intentionally may be deprived of their voting strength in racially gerrymandered electoral systems.

Clearly, as this Article indicates, many alternative electoral systems are acceptable under the Voting Rights Act in different circumstances. At least one of these alternatives, Proportional Representation (PR), provides all minority groups with representation in proportion with their numerical voting strengths and avoids the debilitating characteristics of ward plans. Consequently, when given a choice between a racially gerrymandered single-member district system furnishing racial minorities with proportional representation and PR, law enforcement agencies and courts always should select the latter as the most socially beneficial alternative.

The Department of Justice is partly responsible for the hardships created by many recently implemented single-member district plans. Although the Department's authority under the Voting Rights Act merely enables it either to approve or reject proposed electoral changes made by state and local governments, it often confers informally with these jurisdictions in the development of their proposals. The Department provides indications during these conferences of the type of system it would approve. Unfortunately, however, as suggested by the sixty-five percent non-white figure promoted by the Department's officials in *Hasidic Jews*, this advice often is unimaginative and, as observed by Chief Justice Burger, unnecessarily rigid in relation to the state's obligation under the Voting Rights Act.¹⁶⁰ If the Department of Justice continues to provide assistance to covered jurisdictions in their efforts to comply with the Voting Rights Act, it should be aware of the acceptable alternatives to the single-member district system, such as PR, and should educate states and municipalities as to the benefits of these electoral plans.

160. 430 U.S. at 183 (Burger, C.J., dissenting).