

Harvard BlackLetter Law Journal  
Spring, 1994

**\*61 THE SYSTEMATIC DENIAL OF THE RIGHT TO VOTE TO AMERICA'S MINORITIES**

Marcia Johnson [\[FNa1\]](#)

Copyright © 1994 by the President and Fellows of Harvard College; Marcia

Johnson

## I. INTRODUCTION

The population of the State of Texas is approximately 17 million. [\[FN1\]](#) Of that number, approximately 2 million, or 11.9%, are African American; 4.3 million, or 25.5%, are Hispanic; and 12.8 million, or 75%, are Anglo American. [\[FN2\]](#) Of the 186 county court judges in Texas, however, only three, or 1%, are African American, and twenty-two, or 11%, are Hispanic. [\[FN3\]](#) The number of African American and Hispanic Texas district court judges is equally stark. Of the 386 district court judges, 10, or about 2%, are African American and 37, or about 9%, are Hispanic. [\[FN4\]](#)

To a considerable degree, what accounts for these startling statistics is the fact that Texas county and district court judges are popularly elected under an at-large electoral process. [\[FN5\]](#) This results in the dilution of Black and Hispanic votes. Indeed, notwithstanding that there are several communities in Texas whose electorates are overwhelmingly minority, [\[FN6\]](#) it remains enormously difficult for these communities to elect minority judges to the bench because the majority of electoral bases in Texas are white. [\[FN7\]](#)

Both the Houston Lawyers Association (HLA) and the League of United Latin American Citizens (LULAC) have filed lawsuits against the State of Texas, alleging, inter alia, that the at-large electoral system dilutes the Black and Hispanic vote in violation of the Voting Rights Act of 1965. [\[FN8\]](#) The purpose of this Article is to contextualize this litigation historically, socially, and politically. [\[FN9\]](#) Accordingly, the Article is organized as follows.

\*62 Part II places the present struggle to increase minority representation on the Texas bench in the context of the broader historical struggle for the right to vote. Part III discusses the Voting Rights Act of 1965 and its treatment of vote dilution. Part IV focuses on the specific arguments advanced in the HLA and LULAC cases and the present status of the litigation. Part V highlights the sociological impact vote dilution has on minority communities. Part VI examines the extent to which there are alternatives to an at-large electoral system that could work more effectively and equitably in Texas. Finally, Part VII concludes with several specific suggestions as to how Texas can move towards racial equity in the judicial electoral process.

## II. HISTORICAL FOUNDATION OF THE STRUGGLE FOR THE RIGHT TO VOTE

### A. The Struggle for Constitutional Equality

The preamble to the Declaration of Independence states that "all men are created equal." [\[FN10\]](#) However, the history of the United States, or more specifically, the history of Blacks in America, demonstrates that Blacks were

never considered equal to whites. Indeed, it was precisely the perception that Blacks were inferior to whites that justified their enslavement. [FN11] The statutes and case law of the seventeenth, eighteenth, and nineteenth centuries reveal not only "judicial and legislative sanction of slavery but also an effort on the part of lawmakers and judges to bolster the system's effectiveness by enacting and upholding a regime that rendered Black slaves powerless before the law." [FN12] One of the most striking examples of the extent to which the U.S. judiciary deemed African slaves to be less than persons is provided by the case, *Dred Scott v. John F.A. Sandford*. [FN13]

In *Dred Scott*, the U.S. Supreme Court was called upon to determine, among other things, the legal status of African slaves and their descendants. [FN14] The Court, per Justice Taney, held that Blacks, whether or not \*63 enslaved, were not "persons" within the meaning of the Constitution. According to Justice Taney, "the enslaved African race were [sic] not intended to be included, and formed no part of the people who framed and adopted" the Declaration of Independence. [FN15]

The enactment of the Thirteenth Amendment in 1865 formally abolished slavery. [FN16] It did not, however, end Black subjugation. In fact, as soon as this amendment became law, the confederate states promulgated laws that resulted in the establishment of a de facto slave system. [FN17] These laws, generally referred to as "Black codes," [FN18] systematically eliminated the rights afforded the newly freed slaves by the Thirteenth Amendment.

Partially as a response to the proliferation of "Black codes," Congress passed the Civil Rights Act of 1866. [FN19] Its stated purpose was to ensure that the Thirteenth Amendment's promise to remove "every vestige of African slavery from the American Republic" was kept. [FN20] The Fourteenth Amendment [FN21] was also a response to the "Black codes." Based principally on the Civil Rights Act of 1866, [FN22] its purpose was to ensure that each state complied with the mandates of the federal emancipation laws. [FN23]

#### B. The Right to Vote

The Fifteenth Amendment was enacted expressly to guarantee Blacks the right to vote. [FN24] Subsequent to its enactment, however, state legislatures \*64 began passing legislation that substantially interfered with the right of Blacks to vote. For example, in 1916, the Oklahoma legislature enacted a law that required eligible voters to register to vote within a twelve-day period or be disenfranchised for life. [FN25] Specifically exempted from this requirement were the mostly white voters who had voted in 1914. [FN26] Reasoning that this law placed an onerous burden on African Americans' right to vote, the Supreme Court ruled it unconstitutional. [FN27]

Several states also used literacy requirements to restrict African Americans' right to vote. In the South, it was common practice for voting registrars to strictly apply the literacy tests to Blacks to preclude them from registering to vote, while permitting illiterate whites to register. [FN28] Other states used poll taxes, [FN29] residence and registration requirements, [FN30] and property ownership requirements [FN31] in an effort to bar Blacks from voting. Thus, notwithstanding the various constitutional amendments and the Civil Rights Act of 1866, African Americans continued to be denied the fundamental right to vote. [FN32]

#### C. White Judges--White Justice

While the Supreme Court played an important role in guaranteeing African Americans formal equality, it also played a role in denying African Americans the opportunity to effectively enjoy that equality. The major post-Civil War cases that demonstrate this latter phenomenon were decided between 1873 and 1883. [FN33] The first of these decisions were the *Slaughter-House Cases*. [FN34]

Interestingly enough, the *Slaughter-House* cases involved neither racial discrimination nor African Americans. The plaintiffs in these cases were challenging a Louisiana statute that granted a monopoly on butchering livestock to one slaughterhouse in the New Orleans area. The claim \*65 alleged that the statute violated the Privileges and Immunities, Due Process, and Equal Protection clauses of the Fourteenth Amendment. Upholding the validity of the statute, the U.S. Supreme Court held that the Fourteenth Amendment applied only to those rights incident to national citizenship. The implication of this holding for African Americans was that states could create and enforce legislation that impinged on their civil rights, so long as these states could establish that the rights in question were incident to state, not federal, citizenship. [FN35]

The Civil Rights Cases [\[FN36\]](#) present another example of the Supreme Court's legitimization of Black subjugation. [\[FN37\]](#) The plaintiffs in these cases brought claims against private persons alleging that the latter had denied them access to certain hotels and theaters. [\[FN38\]](#) The Court held that denial of equal accommodations did not constitute the imposition of slavery upon the plaintiffs. Therefore, the Thirteenth Amendment, which expressly and exclusively related to slavery, could not serve as the basis for the plaintiffs' cause of action. The Court reasoned additionally that the Fourteenth Amendment could not be invoked against private citizens. [\[FN39\]](#) Justice Harlan was the sole dissenter. [\[FN40\]](#) He maintained that the majority opinion has taken "constitutional provisions, adopted in the interest of liberty, . . . and construed [them] to defeat the ends the people desired to accomplish." [\[FN41\]](#)

\*66 These court-sanctioned acts of discrimination gave rise to the Jim Crow era, an era in which African Americans sometimes got formal equality but never substantive equality. During the Jim Crow era, southern states amended their constitutions and enacted statutes to deprive African Americans of opportunities for civic and political participation. [\[FN42\]](#) Moreover, they were oftentimes the victims of rampant violence and mob terrorism. [\[FN43\]](#)

By the end of the Jim Crow era, African Americans had been subjected to widespread lynching, [\[FN44\]](#) the Supreme Court had legitimized the separate but "equal" doctrine in *Plessy v. Ferguson*, [\[FN45\]](#) state courts had sanctioned violations of the Thirteenth, Fourteenth and Fifteenth Amendments as well as civil rights legislation, [\[FN46\]](#) and the National Association for the Advancement of Colored People (NAACP) was born. [\[FN47\]](#)

Subsequent to Jim Crow, and as a result of legislative [\[FN48\]](#) and judicial [\[FN49\]](#) "activism," the social and economic position of African Americans improved marginally. However, the general problem of racial inequality remained; Blacks continued to be treated as second-class citizens.

#### D. The Texas Tradition

As stated above, many southern states enacted statutes to circumvent the requirements of the Fifteenth Amendment and the Civil Rights Act of 1866. Texas was one such state. In 1923, for example, the Texas legislature enacted a statute that provided, inter alia, that: "in no event shall a Negro be eligible to participate in a Democratic party primary election in the \*67 State of Texas." [\[FN50\]](#) The Supreme Court declared the statute unconstitutional. [\[FN51\]](#)

In 1925 the Texas legislature again attempted to limit Black participation in the political process. This time it passed a statute empowering the Democratic and Republican political parties to determine voter qualifications. [\[FN52\]](#) The Supreme Court, in *Nixon v. Condon*, invalidated this statute as unconstitutional as well. [\[FN53\]](#)

In an attempt to circumvent the *Condon* holding, the Texas legislature repealed the statute. [\[FN54\]](#) The purpose of the repeal was to "disinvolve" the state in the affairs of the local political parties. Plaintiffs would then be precluded from raising constitutional state action claims. For nine years the repeal achieved its goal. [\[FN55\]](#) However, in 1944, the Supreme Court, in *Smith v. Allwright*, declared the maneuver unconstitutional. [\[FN56\]](#)

Notwithstanding *Allwright*, the Democratic Party continued to deny Blacks political participation and the right to exercise their vote. For example, rather than handling the selection process itself, it delegated this duty to The Jaybird Association, a private "for-whites-only" club. In *Terry v. Adams*, [\[FN57\]](#) however, the Supreme Court held that African Americans could not be barred from voting in the Jaybird elections. [\[FN58\]](#)

It was not until 1965, with the enactment of the Voting Rights Act ("the Act"), [\[FN59\]](#) that Congress specifically addressed the enforcement of the Fifteenth Amendment. [\[FN60\]](#) And although the Supreme Court unanimously held the Act constitutional, [\[FN61\]](#) numerous states, including the State of Texas, continued to circumvent the spirit, if not the letter of the Act, thereby depriving African Americans of their right to vote. [\[FN62\]](#)

#### \*68 III. VOTER DILUTION AND THE VOTING RIGHTS ACT OF 1965

Congress enacted the Voting Rights Act of 1965 to put an end to racial discrimination in voting, which had

infected the electoral process in the United States despite the enactment of the Fifteenth Amendment. [\[FN63\]](#) The Voting Rights Act prohibited the states from promulgating rules or statutes, such as those imposing literacy requirements, which had the effect of denying African Americans the right to vote.

Soon after the Voting Rights Act was passed, the Supreme Court recognized that African Americans and other racial and language minorities [\[FN64\]](#) continued to be prevented from electing the candidates of their choice. [\[FN65\]](#) Vote dilution, a means of veiling discrimination by using nonracial proxies in order to weight black votes less heavily than white votes, was isolated as a "new" measure used to get around the Fourteenth and Fifteenth Amendments and the Voting Rights Act of 1965. [\[FN66\]](#)

In *Gray v. Sanders*, [\[FN67\]](#) the Supreme Court struck down a statewide primary system of election because the process favored ballots cast in rural areas over ballots cast in urban areas. The Court announced that the concept of political equality required by the Fifteenth, Seventeenth, and Nineteenth Amendments mandated one person, one vote. [\[FN68\]](#) In response to *Gray*, some scholars have argued that the one person, one vote principle should apply to all racial discrimination cases despite alternative voting rights, constitutional, or reapportionment claims. [\[FN69\]](#) Nevertheless, it is Section Two of the Voting Rights Act which has emerged as plaintiffs' choice of laws in challenging voter discrimination.

Section Two of the Voting Rights Act was originally designed to prohibit specific measures used to keep African Americans and other minorities out of the voting process. At-large elections effectively serve as a substantial, even insurmountable, political barrier to African Americans' and other minorities' ability to elect their representatives. [\[FN70\]](#) The leading \*69 case in the context of Section Two challenges to multi-member district elections is *Thornburg v. Gingles*. [\[FN71\]](#) *Thornburg* was an action brought by African American voters who objected to multi-member districts established by the North Carolina General Assembly's enactment of a legislative redistricting plan. The plan created six multi-member districts and one single-member district. In order to determine whether the Voting Rights Act had been violated, the Court established a three-prong test. [\[FN72\]](#) To prove that a violation of Section Two has occurred by virtue of a multi-member district voting scheme that dilutes the minority vote, the plaintiff must first show that the minority group challenging the system is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the plaintiff must show that it is a politically cohesive group. Third, the plaintiff must show that the white voters in the district vote as a bloc to defeat the candidate of choice of the minority group. [\[FN73\]](#)

In addition to this *Gingles* test, plaintiffs can support their claims by showing "typical factors" exist that tend to indicate impermissible racial vote dilution. These factors were enumerated in the U.S. Senate Report interpreting Section Two of the Voting Rights Act, as amended. [\[FN74\]](#)

This *Gingles* test was applied in two legal challenges to the multimember district voting scheme used in Texas judicial elections. Examination of these two cases helps to illuminate the application of Section Two to judicial elections.

#### IV. CHALLENGING AT-LARGE JUDICIAL ELECTIONS IN TEXAS

In 1988, ten individual voters and the League of United Latin American Citizens sued in federal district court alleging that the electoral schemes for trial judges in nine Texas counties diluted the voting strength of the minority voters in those counties in violation of the Voting Rights Act. [\[FN75\]](#) In 1989, the district court granted the Houston Lawyers' Association's (HLA) motion to intervene. The respondents in both actions included, among others, the Texas Attorney General.

In *LULAC v. Attorney General of Texas*, [\[FN76\]](#) the petitioners' challenge to the at-large district-wide electoral scheme was based, in part, on the demographics of Harris County. At the time of the litigation, approximately twenty percent of Harris County was African American but only three of the fifty-nine state district judges (about five percent) were African American. \*70 Applying the *Gingles* test, this violated the Voting Rights Act. The two factors that were most heavily weighted by the district court were (1) the existence of racially polarized voting, and (2) the extent to which minorities had been elected a challenged jurisdiction. [\[FN77\]](#)

The district court's finding as to the existence of racially polarized voting was based on the testimony of two experts. In the seventeen elections analyzed by the plaintiffs' expert, Dr. Richard Engstrom, and the twenty-three elections analyzed by the defendants' expert, Dr. Delbert Taebel, the vote of African Americans and the white vote were found to be largely racially motivated. [\[FN78\]](#) In other words, whites mostly voted for whites and Blacks mostly voted for Blacks. [\[FN79\]](#)

Overall, Dr. Engstrom testified that, since 1980, 52% of white Democratic candidates have won contested district judge elections in Harris County, while only 12.5% of African American Democratic judicial candidates have won. [\[FN80\]](#) This testimony was uncontroverted at trial.

In addition, the district court found that of the seventeen African Americans who ran in contested district judge elections in Harris County since 1980, only two had won. No more than three African Americans had ever served simultaneously as district judges in Harris County. [\[FN81\]](#)

\*71 Noting that Harris County used an unusually large election district for district judge elections, the court found that the size of Harris County "further enhance[s] the problems that minority candidates face when they seek office." [\[FN82\]](#)

The requirement that district judge candidates run for a specific numbered judicial seat within the county was found to be equivalent to a numbered post system, which prevents the use of bullet or single-shot voting. [\[FN83\]](#) While the district court did not find that the current at-large system of electing district judges was intentionally discriminatory, it was "not persuaded that the reasons offered for its continuation are compelling."

Considering the "totality of the circumstances," the district court concluded that under the challenged electoral scheme, "plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice in district judge elections." [\[FN84\]](#) While the district court did not state what electoral system would past muster, it did rule that the state legislature should select and approve an alternative judicial election scheme. [\[FN85\]](#)

In 1990, a three-judge panel of the Fifth Circuit of the U.S. Court of Appeals reversed the judgment of the district court holding that Section Two did not apply to judicial elections. [\[FN86\]](#) Upon a majority vote of the active judges sua sponte, a rehearing en banc was ordered. [\[FN87\]](#) The en banc majority held that Section Two of the Voting Rights Act, [\[FN88\]](#) as amended, was inapplicable to judicial elections regardless of how discriminatory the election system is. [\[FN89\]](#) The majority of the concurring judges [\[FN90\]](#) concluded that \*72 Congress' reference to the voters' opportunity to elect "representatives" of their choice evinced a deliberate decision to exclude the election of judges from scrutiny under the newly enacted test. [\[FN91\]](#) After the Fifth Circuit rendered its en banc decision, the petitioners appealed to the U.S. Supreme Court.

In 1991, the Supreme Court heard LULAC along with a companion case, *Chisom v. Roemer*, [\[FN92\]](#) which was also on appeal from a ruling of the Fifth Circuit. The issue in both cases was whether the Voting Rights Act applied to judicial elections. In *Chisom*, the Court held that the Act applied to judicial elections because the word "representatives" describes the winners of popular elections, including elected judges. [\[FN93\]](#) The Court reasoned:

The fundamental tension between the ideal character of the judicial office and the real world of electoral politics cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office . . . it seems both reasonable and realistic to characterize the winners as representatives of that district. [\[FN94\]](#)

Central to the Court's holding was the fact that Section Five of the Voting Rights Act has already been recognized as applying to judicial elections. [\[FN95\]](#) The Court maintained that:

If Section Two did not apply to judicial elections, then a state covered by Section Five would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under Section Two. It is unlikely that Congress intended such a result. [\[FN96\]](#)

Thus, judicial elections are not categorically excluded from coverage.

In *Houston Lawyers' Association v. Attorney General of Texas*, [FN97] the U.S. Supreme Court held that the Act's coverage encompassed the election of executive officers and trial judges whose responsibilities are exercised independently in an area co-extensive with the districts from which they are elected. Therefore, once a state decides to elect its trial judges, those \*73 elections must be conducted in compliance with the Act. [FN98] In addition, the Court noted that an analysis of the "totality of the circumstances" [FN99] must be considered in light of an application of the results test embodied in Section Two to a consideration of possible remedies in the event of a proved violation. [FN100] Hence, the state's interest in maintaining its electoral process would merely be a factor to be considered by the Court in evaluating whether the evidence in a particular case supports a finding of a vote dilution violation in an election for a single-member office. The Court stated that "even if we assume, arguendo, that the state's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts or may even preclude a finding that vote dilution has occurred under the 'totality of the circumstances' in a particular case, that interest does not justify excluding elections for single-member offices from the coverage of the Section Two results tests." [FN101]

In rejecting the "single-member" office theory that Section Two of the Voting Rights Act does not apply to elections for single-member office holders, [FN102] the Court illustrated its rationale by giving two examples of Section Two violations: (1) early poll closing; and (2) disputes concerning the boundaries of the electoral district that results in an abridgement of a racial minority's voting rights. [FN103] The Court stated that "the Act would unquestionably apply to restrict such practices, regardless of whether the election was for a single-member officeholder or not." [FN104] The Supreme Court remanded the case to the Fifth Circuit in order to determine whether a violation occurred under the "totality of the circumstances" analysis.

Upon remand, a majority of a three-judge panel of the Fifth Circuit decided that under a "totality of the circumstances" analysis, a violation of Section Two had occurred in all of the counties except Travis County. [FN105]

At the defendants' request [FN106], the Fifth Circuit panel considered the state's interests. The court concluded that even if the courts were required \*74 to balance state interests against proven vote dilution, the plaintiff would still prevail because Texas' interests in maintaining the electoral system were not compelling or substantial. Accordingly, in any proposed balancing framework, they would be entitled to little weight. [FN107] The court did recognize, however, that there are several potential remedies that could cure the proven vote dilution while simultaneously protecting the asserted state interests. [FN108]

After the three-judge panel of the Fifth Circuit rendered its decision, but prior to remand to the district court to implement a remedy, Judge Higginbotham requested that the Fifth Circuit hear the case en banc. After a settlement agreement was reached with the plaintiffs, a joint motion was filed by the plaintiffs and the state officials in the Fifth Circuit requesting the case be remanded to the district court for a hearing and findings on the proposed settlement. On August 23, 1993, in a 9-4 ruling, the Fifth Circuit, en banc, denied the request to remand, reversed the district court's opinion and held there was no violation of the Voting Rights Act in any of the identified counties. [FN109]

The Fifth Circuit's ruling in *LULAC* ignored the U.S. Supreme Court holdings in *HLA* and *Gingles*, violated public policy, and created legal tests that ensured that only white judges would continue to be elected to office. By rejecting the U.S. Supreme Court's holdings in *HLA* and *Gingles* on the issue of bloc voting based on race, the Fifth Circuit effectively "enacted" a new Voting Rights provision that interpreted Section Two of the Voting Rights Act to say:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the U.S. to vote on account of race or color [so long as race or color is shown to be the only reason for such results] . . . . [FN110]

This interpretation constitutes a legislative act outside the purview of the judiciary. It has the effect of eliminating the ability of any minority plaintiff to show racial bloc voting no matter how egregious the wrong, and is merely another route taken by the Fifth Circuit to circumvent the Voting Rights Act.

In addition, the Fifth Circuit dodged precedent by holding that in considering the totality of the circumstances,

courts should examine the extent to which voting in the elections of the state or political subdivision is racially polarized, excluding situations where polarization could be \*75 attributed to party affiliation rather than the race of the candidate. [FN111] This Fifth Circuit court-imposed limitation on the Voting Rights Act has no legislative or judicial basis. [FN112] In *Gingles*, Justice O'Connor stated that once divergent racial voting patterns are shown, defendants "cannot rebut this showing by offering evidence that divergent racial voting patterns may be explained, in part, by causes other than race." O'Connor concluded:

that evidence that divergent voting patterns are explained in part by partisan affiliation will not preclude a finding of legally significant white bloc voting--a finding which bears directly on the minority group's prospects for electoral success. [FN113]

Furthermore, the Fifth Circuit court ruling ignored long-standing policy favoring settlements of disputes between parties. [FN114] Faced with both a proposed settlement between all parties to the lawsuit and plaintiffs' motion to remand, the Fifth Circuit held the proposed settlement ineffective and denied plaintiffs' motion.

Finally, the Fifth Circuit majority found that the state's interest in maintaining the at-large election system was compelling. The evidence on which it relied necessitates a contrary determination. The uncontroverted evidence shows that district court judges have statewide jurisdiction. [FN115] This means that Texas district court judges are authorized to act in areas where the voters had no opportunity to elect them. Thus, judges elected in single-member districts would be similarly situated in that they would have authority over voters who had no opportunity to elect them.

As to the majority's suggestion that judicial independence is somehow threatened by single-member district elections of judges, Judge King wrote in her dissent, "At best, the argument is about appearances. At worst, it exhibits an unfounded fear of having judges elected from majority-minority districts." [FN116] Perhaps this assessment is too diplomatic. There could only be one explanation for the Fifth Circuit's action especially when viewed in light of the history of LULAC specifically and Texas's history of depriving minorities of their right to vote generally. That explanation is that the majority of the judges of that court believed it compelling to protect the election system that keeps white judges such as themselves in office. The effect of the LULAC ruling cannot be ignored and must not be accepted. Such a holding, which creates an unbearable burden on plaintiffs to defeat every possibility other than race for denial of their right to vote, eviscerates the Voting Rights Act and makes a mockery of the Fifteenth Amendment.

In January 1994, the U.S. Supreme Court denied certiorari, leaving this Fifth Circuit court's ruling undisturbed. Since redress is impossible, these \*76 holdings encourage present discrimination and exacerbate the effects of past discrimination.

## V. SOCIOLOGICAL EFFECTS OF EXCLUSION

Although systematic racial inequality in the electoral process has been acknowledged, the impact of the resulting exclusion of a meaningful voice has far-reaching implications that extend much further than the deprivation of the right to a representative government. Exclusion supports a counter sociology and results in depressed social, economic, and psychological development that negatively affects not only the excluded classes, but society as a whole. Members of lower socioeconomic status groups tend to be disconnected from society. On the other hand, social connectedness increases voter participation. [FN117] The at-large system of voting is often an effective tool for ensuring exclusion [FN118] and therefore conflicts with the essence of suffrage. [FN119]

The effect of the victimization of persons excluded from participation in the political process has been analyzed by various sociologists. [FN120] Sociologist Roderick Martin states that "major elements in any explanation of power relations are actors' goals and the distribution of resources required to achieve them. Although the range of possible goals is almost infinite, certain goals have remained important . . . acquisition of basic necessities of life and competent performance of basic social roles . . . ." [FN121]

Patterns of interdependence link the victim to the oppressor. These patterns result from the oppressor's control over access to the resources necessary to achieve such goals. [FN122] When dependence is imbalanced, possibilities to escape become limited. These limitations create compliance. [FN123] The victim accepts the power of the oppressor

to acquire basic necessities. \*77 The compliance becomes an apparent acceptance of the exclusion itself until the subordinate group adopts a stratification ideology. In voting rights issues, the historical exclusion of groups of people from the process creates a socialization experience that finds growing numbers of persons within these groups adopting this ideology of exclusivity. These growing numbers of people actually exclude themselves from the process and fail to exercise their right to vote even if the opportunity is available. [FN124] Low benefits from the exercise of the right to vote constitute the most potent influence on American non-voting. [FN125]

The U.S. Supreme Court may have best described the importance of guarding the right of minorities to have a meaningful vote when it stated that equal political access for all voters rested on a:

belief in the distinctive values that inclusion in governmental decision-making brings a sense of connectedness to the community and of greater political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable and intelligent governmental decision-making . . . . [Inclusion] accepts the bedrock diversity of modern America and seeks to bring diverse groups into the governing circle because, quite simply, the best way to ensure that all points of view are taken into account is to create decision-making bodies in which all points of view are represented by people who embody them. It is not enough that there are people who can only imagine what minority interests might require. [FN126]

In order to break the pattern of discrimination that is perpetuated by systems that allow minority vote dilution, steps must be taken to ensure that the minority vote has meaning. Having the vote is not enough. It should be a vote that equitably achieves the desired result.

## VI. ALTERNATIVES TO AT-LARGE VOTING SYSTEMS

The at-large system of electing representatives [FN127] is the most common way of diluting minority votes. [FN128] The at-large system is based on a pure majority rule principle. This principle, deeply rooted in the American \*78 political system, is inherently discriminatory. [FN129] The majority rule principle ensures that a homogeneous majority will always dominate, control and rule over a homogenous minority so long as votes are cast along group lines. In effect, if votes are cast along racial lines, the African American vote would always be ineffective because it would be canceled out by the votes of the Anglo majority. Such a voting system would therefore be unconstitutional. [FN130]

A primary question raised is whether it is reasonable to expect or presume that votes will be cast along racial lines. Studies show that not only is such a presumption reasonable, but that race, more than any other factor, determines how a vote is cast. [FN131] This makes it imperative to devise an electoral system that ensures that all Americans will be able to effectively exercise their constitutional right to vote. There are numerous alternative voting systems that could increase the effectiveness of the minority vote.

### A. Limited Voting

The limited voting system is one of the available alternatives to at-large voting. The limited voting system uses multi-member districts in which each voter has fewer votes than there are seats to be filled. [FN132] The limited voting system was created as a method of ensuring inclusion by representatives of the second political party. [FN133] Its principles, however, have permitted a ready transition to the inclusion of racial representation. [FN134] This system of voting has had a significant anti-dilution impact on those areas where it has been employed. [FN135]

\*79 The limited voting system is largely based on a mathematical formula used to determine the threshold of exclusion [FN136] that is defined as the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable conditions. [FN137] This formula takes the result of dividing the number of votes by the sum of the number of votes plus the number of seats multiplied by 100:

$$v \times 100\% \text{ where } v = \text{number of votes}$$

$$v + m \text{ where } m = \text{number of seats. [FN138]}$$

Once the threshold for exclusion is determined, the percent of the vote necessary for a candidate to win is determined. The winning percentage would be less than fifty percent, thus assuring minority representation by preventing the majority to shut out the minority through bloc voting. [FN139] This system could permit minority

representation, even where the number of minorities are small. Since the threshold of exclusion depends on both the number of votes each voter can cast and the number of seats to be filled, the greater the difference between the number of seats to be filled and the number of votes allotted each voter, the lower the threshold of exclusion. [\[FN140\]](#) This lowered threshold could permit the success of a minority candidate with a percentage of the votes significantly less than fifty percent. [\[FN141\]](#) This concept of proportional representation also supports the one-person, one-vote principle. [\[FN142\]](#)

The limited voting system arguably wins supporters because the system is simple and avoids "sweep" tendencies common in at-large elections. [\[FN143\]](#) The limited voting system also avoids the redistricting and gerrymandering required of single-member districts. [\[FN144\]](#) Another advantage of this system is its independence of the geographic compactness of the voter group, which allows minorities to live throughout the jurisdiction and still elect their own representative(s). [\[FN145\]](#) Limited voting is also supportable because it allows for a maturing election system less dependent on race and segregated residential patterns.

#### **\*80 B. Single-Member Districts**

Another alternative voting system is the single-member-district process. [\[FN146\]](#) Although the single-member-district election is a modification of the at-large system, [\[FN147\]](#) it is still a winner-take-all or majority rule election system. [\[FN148\]](#) This system, however, is anti-dilutive in that the electorate is subdivided into smaller geographic districts. These smaller subdistricts are designed to have a minority-majority balance that ensures that the representatives from the subdistrict will be from the minority group. [\[FN149\]](#)

The subdistricting system responds to the inherent unfairness that exists under the majority rule system where the majority will always determine the outcome of an election. Since the majority's determination will be race directed, minority representation will be limited at best or nonexistent at worst. [\[FN150\]](#) The single-member subdistricts rely on residential segregation [\[FN151\]](#) as well as racial bloc voting [\[FN152\]](#) to support the electoral system. Under this single-member-district system, a residentially segregated racial minority community would enjoy the opportunity of having their ideas on political matters represented. [\[FN153\]](#)

One of the principle arguments against single-member districts is that the system disempowers the elected official who becomes the lone vote or powerless minority in the electoral body. [\[FN154\]](#) It is argued that this powerlessness is exacerbated by two factors. First, the minority representative is viewed as representing or answering only to a small group of concentrated voters who impact no other officials. [\[FN155\]](#) Second, because majority rule is generally exercised by the policy body after the election, the representative's vote is almost always a lone, defeated vote. [\[FN156\]](#) Although these arguments pose important considerations for most elected officials, they would not apply to single-member districts for the election of judges. Judges act alone in their decision-making as opposed to other elected officials who must act as part of a policy body.

The single-member-district alternative has also been challenged on the ground that it favors racial protection while discriminating against political party interests, [\[FN157\]](#) favors incumbents through the redistricting process, [\[FN158\]](#) and discriminates against interests of socio-economic classes. [\[FN159\]](#)

**\*81** Notwithstanding these problems associated with single-member districts, the system has one very compelling asset. Single-member districts address the "real world" voting climate. That climate is primarily dictated by racial polarization in society in general, but it specifically results from segregated residential housing patterns. This polarization forms the basis for political and voting alliances. Single-member districts, designed along geographical lines, combine the two phenomena of racial polarization by geography (segregated housing patterns) and racial voting polarity. The result directly impacts minority representation. Arguably, this representation alone, though not creating a "seat" of power, creates a "source" for power and bridges the transition from race-based voting to issue-based coalitions.

There is some evidence of judicial interest in moving toward such issue-based voting systems. In 1993, the U.S. Supreme Court, in a 5-4 decision, held that a reapportionment plan developed solely on the basis of race, without other factors being present, was subject to judicial review even when such reapportionment resulted in the election of racial minorities. [\[FN160\]](#)

Justice O'Connor, writing for the majority, stated that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without compelling justification" is impermissible. The Court did recognize that it had never "held that race-conscious state decision-making is impermissible in all circumstances." However, the Court did recognize that it had established standards for determining the circumstances that would permit race-conscious decision-making. [\[FN161\]](#)

The issue presented in Shaw led to what the Court called an "invocation of the ideal of a 'color-blind' Constitution," presumable where voting blocs are determined by issues and not by race. One proposed vehicle to reaching this "ideal" is the cumulative voting system.

### C. Cumulative Voting

The cumulative voting system is not a new concept in the United States. Cumulative voting has long been used in America's corporations as a way of ensuring that minority interests are heard and represented. [\[FN162\]](#) \*82 Cumulative voting is a means by which a voter can aggregate votes for one or more but less than all seats available. [\[FN163\]](#) Theorists argue that this system provides less dilution of minority voting strength, less wasted votes and increased opportunity for issue-based coalition building in lieu of race-based coalition building. [\[FN164\]](#) University of Pennsylvania Professor Lani Guinier opines that it would be impossible to establish impermissible vote dilution if voluntary constituencies are recognized to the extent they conceptually organize and attract sufficient numbers of like-minded voters. [\[FN165\]](#) Professor Guinier further states that if the interests of most Blacks are fungible with those of most whites, an integrated interest constituency would naturally result with a goal of having voting patterns based on issue and interest rather than race. Current data actually indicates, however, that minority voters, especially Black voters, will overwhelmingly support Black candidates. [\[FN166\]](#) Statistics further show that Anglo voters vote for Anglo candidates over a minority or Black candidate. [\[FN167\]](#) In effect, employing the cumulative voting system might not alter the current approach at building coalitions around the issue of race, at least for the short term. Nonetheless, the focal difference in using the cumulative system is that it allows for development of a less racially dependent voting system without imposition of geographical boundaries and vote wasting. Such a system would not encourage segregated residential patterns that isolate racial coalitions but would encourage a more expanded base for coalitions based on issues.

Cumulative voting may also prevent any representative from excluding racial or ethnic concerns from her policy-making since the origin of her support would be indeterminable. The representative would therefore be more responsive to the entire jurisdiction because the constituency is comprised of multi-racial/ethnic coalitions. That in mind, perhaps the real question is whether the American voter is ready for such a voting system.

The power of race over interest based voting may also minimize general use of other corporate voting measures. These options include the supermajority vote and vote pooling. [\[FN168\]](#) By the same token, it might support the corporation borrowed system of class voting.

### \*83 D. Supermajority Votes

The supermajority rule, which requires greater than a simple majority vote to win, has had a long history in America both in the corporate and public sectors. [\[FN169\]](#) The basis of the supermajority rule in the corporate sector is to give minority shareholders some power to prevent majority oppression. [\[FN170\]](#) Using supermajority rules in general elections may not be as appropriate as in using them in the policy making and legislative bodies once the officials have been elected. Requiring supermajority elections of the candidates themselves may empower the majority and wholly disempower the minority. However, the supermajority system among legislators, for example, coupled with an effective nondilutive election system would encourage inter-racial and inter-ethnic deliberations and coalition building. Supermajority rules further provide minority legislators a true representative capacity since their interests could not be summarily dismissed by a simple majority. [\[FN171\]](#)

### E. Class Voting

Class voting is another method that corporations employ to assure minority shareholders are not oppressed by majority shareholders. [\[FN172\]](#) Under the class voting structure, holders of the various classes of issued shares of a corporation must vote within their class. [\[FN173\]](#) The vote of a majority or greater number of shares in each class becomes the vote of the class. In those instances where class voting is required, each class vote must favor the proposed corporate action. Applying this process to general public elections would require defining "class" for purposes of such an election. Since American political history shows that the overriding "class" distinction is based on race, then each racial class would vote to elect their candidate. This system could easily limit the political efficacy of the elected official who would be seen as representing only one racial group.

#### F. Appointive Systems

Appointment systems provide for representatives to be selected by a separate body from the general electorate. This body, which may be a committee or an elected official, would be the sole determinant of who would represent the community, for example. Studies show that the appointive system does not increase the level of minority representation. [\[FN174\]](#) \*84 Legally, appointment systems are generally recognized as a vote dilution device. [\[FN175\]](#) Commonly referred to as slating groups, judicial appointment committees themselves are usually overwhelmingly white and male and tend to select representatives from a minority community whom that community would not have selected for itself. [\[FN176\]](#)

#### VII. CONCLUSION

Some political scientists have acknowledged the basic inequity of the current electoral process. [\[FN177\]](#) The most important factors underlying the racial fissure in American politics revolve around the competitive positions of Black and white voters:

When Black voters pose no perceived threat to white hegemony, politics is not structured in terms of race, and racial polarization within the electorate becomes less likely. Conversely, when white dominance is threatened, political appeals are much more likely to take on either covert or overt racial significance, and the electorate becomes, particularly the lower-class electorate, fractured by race . . . . Under what circumstances is white dominance likely to be threatened? Most obviously, white dominance is threatened when the numerical position of Black voters is relatively enhanced. Recognizing this simple fact was the evil genius behind the solid Democratic white South: even in the face of numerically superior Black populations, white dominance could be preserved so long as Blacks were disenfranchised. [\[FN178\]](#)

Whatever it is called, poll tax, residency requirements, all white primaries or at-large voting systems, the intent and effect is the same: the effective denial of the right to vote to minorities. This denial has far reaching effects, not just on the minority communities but on the entire country. These systems encourage racial polarization in our nation and perpetually disenfranchise minority racial groups. There is probably no one best remedy because each remedy should be selected based on factors that would be most effective for the affected jurisdiction. However, the single-member district enjoys the flexibility, acceptance, success and relative simplicity to make it the best short term choice for the current political climate. It is flexible because districts can be redrawn as population mobility dictates. It is "acceptable" because this voting system comports with the majority rule principle. Though such a system may be a transitional one for elections where the elected official is part of a policy body, it need not be transitional in the election of judges who act alone. A reasonable solution is to employ single-member-district election systems for judges at the electorate level and some form of supermajority system at the policy-making level. This should assure that currently disenfranchised minorities would have an opportunity to cast an effective vote.

[\[FN179\]](#). Associate Professor, Thurgood Marshall School of Law, Texas Southern University.

Special thanks to Joel Mallory, who assisted in the writing of part IV of this Article, and to Allecia Coleman for her research assistance and support. Many thanks to Carol Lewis and Ingrid Hancock for enduring the several drafts and redrafts.

[\[FN180\]](#). BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1993, at 28 (1993).

[FN2]. *Id.* at 30-31. Numbers and percentages are not exact because all races are combined in Hispanic numbers.

[FN3]. Office of Court Administration for the State of Texas, Austin, Texas.

[FN4]. *Id.*

[FN5]. [Tex. Const. art. V, § 7.](#)

[FN6]. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES, at 41.

[FN7]. See *infra* note 7, at 38-40.

[FN8]. [42 U.S.C.S. § 1973.](#)

[FN9]. See *infra* part IV.

[FN10]. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

[FN11]. A. Leon Higginbotham, Jr. & Anne F. Jacobs, The "[Law Only as an Enemy": The Legitimization of Racial Powerlessness Through the Colonial and Antebellum Criminal Laws of Virginia](#)," 70 N.C. L. REV. 969 (1992). Slavery abolitionist William Goodell wrote that the slave "can know law only as an enemy, and not as a friend." Explaining his statement Goodell said:

[t]he slave, who is but "a chattel" on all other occasions, with not one solitary attribute of personality accorded to him becomes "a person" whenever he is to be punished! He is the only being in the universe to whom is denied all self-direction and free agency, but who is, nevertheless, held responsible for his conduct, and amenable to law . . . . He is under the control of law, though unprotected by law.  
*Id.* at 971.

[FN12]. *Id.* at 969.

[FN13]. [60 U.S. \(19 How.\) 393 \(1856\).](#)

[FN14]. *Id.* at 403. The court stated,

The question is simply this: Can a Negro, whose ancestors who were imported into this country, and sold as slaves, become a member of the political community formed and brought into existence by the Constitution of the United States, and as such become entitled to all the rights, and privileges, and immunities, guaranteed [sic] by that instrument to the citizen? One of which rights is the privilege of suing in a Court of the United States in the cases specified in the Constitution.

[FN15]. *Id.* at 411.

[FN16]. [U.S. Const. amend. XIII.](#) Pursuant to this amendment, Congress authorized legislation to effectuate the mandate of the Thirteenth Amendment.

[FN17]. Broderick, [Why the Peremptory Challenge Should Be Abolished](#), 65 TEMP. L. REV. 369 (1992).

[FN18]. *Id.* at 376.

[FN19]. Civil Rights Act of 1866, ch. 31, 14 Stat 27 (1866) (current version at [18 U.S.C. § 242](#) & [42 U.S.C. §§ 1981-1983, 1988 \(1988\)](#)); Cong. Globe, 39th Cong., 1st Sess. 474 (1866) (statement of Rep. Davis); see also [Jones v. Alfred H. Mayer Co.](#), 393 U.S. 409, 440-41 (1968) (stating that the Thirteenth Amendment was intended to remove badges and incidents of slavery).

[FN20]. *Id.* (citing CONG. GLOBE, 38th Cong., 2d Session 155 (1865) at note 52 (statement of Rep. Davis)). See

also [Pa. v. Local Union No. 542, Intern. Union of Operating Engineers, 347 F. Supp. 268 \(D.C. Pa. 1972\)](#); [Holt v. Sarver, 309 F. Supp. 362 \(D.C. Ark. 1970\)](#) [Sethy v. Alameda County Water Dist., 545 F.2d 1157 \(C.A. Cal. 1970\)](#).

[FN21]. [U.S. Const. amend. XIV.](#)

[FN22]. Schnapper, [Perpetuation of Past Discrimination, 96 HARV. L. REV. 828 \(1983\)](#).

[FN23]. The [Civil Rights Cases, 109 U.S. 3, 21-22 \(1883\)](#); The [Slaughter-House Cases, 83 U.S. \(16 Wall.\) 36 \(1872\)](#) (quoting the 14th Amendment: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside" and finding that "[the 14th Amendment] overturns the Dred Scott decision by making all persons born within the United States and subject to its jurisdiction citizens of the United States"). [Id. at 73.](#)

[FN24]. [U.S. Const. amend XV](#) ("the right of a citizen of the United States to vote shall not be denied or abridged by any state on account of race, color, or previous condition of servitude"). It became increasingly apparent to Congress and the Supreme Court that: "lying at the foundation [of the Thirteenth and Fourteenth Amendments] is the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over him." The Slaughter House Cases, *supra* note 23, at 72.

[FN25]. See Schnapper, *supra* note 22 (citing Act of February 26, 1916, ch. 24 § 4, 1916 Okla. Sess. Laws).

[FN26]. *Id.*

[FN27]. [Lane v. Wilson, 307 U.S. 268, 275 \(1939\)](#).

[FN28]. See Civil Rights Cases *supra* note 23, at 841 nn.59-60 (citing H.R. Rep. No. 439, 89th Cong., 1st Sess. 11-13 (1965); S. Rep. No. 162, 89th Cong., 1st Sess. pt. 3, at 4-5, 9-12 (1965); [South Carolina v. Katzenbach, 383 U.S. 301, 312 \(1966\)](#); [Louisiana v. United States, 380 U.S. 145, 154-55 \(1965\)](#)). White voters were excused from such regulations pursuant to grandfather clauses, which were enacted for the purpose of protecting whites from severely onerous voter registration requirements. In 1915, these laws were struck down by the United States Supreme Court in [Guinn v. United States, 238 U.S. 347 \(1915\)](#).

[FN29]. The Twenty-fourth Amendment to the United States Constitution prohibits poll taxes. It was passed in 1964.

[FN30]. CIVIL RIGHTS AND AFRICAN AMERICANS, A DOCUMENTARY HISTORY 244 (Albert Blaustein & Robert L. Zangrando eds., 1991).

[FN31]. See [Myers v. Anderson, 238 U.S. 368, 377 \(1915\)](#) (state law requiring that voters own \$500 worth of property but exempting from this requirement citizens who were allowed to vote before the Fifteenth Amendment or citizens with ancestors who were allowed to vote before adoption of Fifteenth Amendment).

[FN32]. Frederick Wertheim, [Slavery and the Fellow Servant Rule: An Antebellum Dilemma, Note, 61 N.Y. U. L. REV. 1112 \(1986\)](#).

[FN33]. See CIVIL RIGHTS AND AFRICAN AMERICANS, *supra* note 30, at 246.

[FN34]. [83 U.S. \(16 Wall.\) 36 \(1872\)](#).

[FN35]. *Id.*

[FN36]. [109 U.S. 3 \(1883\)](#).

[FN37]. The Civil Rights Cases were based on the Civil Rights Act of 1875. See CIVIL RIGHTS AND AFRICAN

AMERICANS, supra note 30, at 269. See also [U.S. v. Cruikshank, 92 U.S. 542 \(1875\)](#). In Cruikshank, three white men were convicted under the Civil Rights Act for being a part of a mob that had broken up an African American local elections meeting. The Court held that the conviction could not be sustained because a private person violates the Civil Rights Act only when the crime alleged interferes with a right derived from national citizenship. Since the right to assembly can reasonably be interpreted to be a right associated with national citizenship, the Supreme Court expressly held that the Constitution did not grant the right of assembly; it merely forbade the Congress to infringe on such rights. Id. at 551-52.

[FN38]. The five cases comprising the [Civil Rights Cases were United States v. Stanley, United States v. Ryan, United States v. Nichols, United States v. Singleton, Robinson and Wife v. Memphis & Charleston R. Co., 109 U.S. 3, 3 S. Ct. 18 \(1883\)](#)

[FN39]. See [109 U.S. at 19](#).

[FN40]. [Id. at 26](#).

[FN41]. Id. Justice Harlan maintained additionally that:

At every step, in this direction, the nation has been confronted with class tyranny, which a contemporary English historian says is, of all tyrannies, the most intolerable, "for it is ubiquitous in its operation, and weight, perhaps, most heavily on those whose obscurity or distance would withdraw them from the notice of a single despot." Today, it is the colored race which is denied, by corporations and individuals wielding public authority, rights fundamental in their freedom and citizenship. At some future time, it may be that some other race will fall under the ban of race discrimination. If the constitutional amendments be enforced, according to the intent with which, as I conceive, they were adopted, there cannot be, in this republic, any class of human beings in practical subjection to another class, with power in the latter to dole out to the former just such privileges as they may choose to grant. The supreme law of the land has decreed that no authority shall be exercised in this country upon the basis of discrimination, in respect of civil rights, against freemen and citizens because of their race, color, or previous condition of servitude. To that decree--for the due enforcement of which, by appropriate legislation, Congress has been invested with express power--every one must bow, whatever may have been, or whatever now are, his individual views as to the wisdom or policy, either of the recent changes in the fundamental law, or of the legislation which has been enacted to give them effect.

Id. at 62.

[FN42]. See CIVIL RIGHTS AND AFRICAN AMERICANS, supra note 30, at 244.

[FN43]. Id.

[FN44]. During the 1890s, the reported number of African Americans lynched exceeded 100 in each year except two.

[FN45]. [163 U.S. 537 \(1896\)](#).

[FN46]. See discussion of the Civil Rights Cases at notes 37-39; see also Ex Parte [Yarbrough, 110 U.S. 651 \(1884\)](#) (upholding the conviction of nine men who had beaten an African-American because he had voted in a Congressional election).

[FN47]. The National Association for the Advancement of Colored People was established in 1909 by W.E.B. DuBois and others as a National Negro protest movement.

[FN48]. The Gavagan anti-lynching bill was enacted in 1937. In 1941, [President Franklin D. Roosevelt issued Executive Order 8802 establishing a Committee on Fair Employment Practice, 6 Fed. Reg. 3109 \(1941\)](#). Additionally, in 1948, President Harry S. Truman issued [Executive Order 9981](#) mandating equal treatment of all people, regardless of race in the U.S. [Armed Services, 13 Fed. Reg. 4313 \(1948\)](#).

[FN49]. See [Moore v. Dempsey, 261 U.S. 86 \(1923\)](#). In Dempsey, five black defendants appealed their conviction

for killing a white man during racial uprisings. Although there was significant evidence that the defendant's had been denied their constitutional right to due process, the district court dismissed their writ of habeas corpus. The Supreme court reversed the district court's decision. *Id.* at 92. See also [Shelley v. Kraemer, 334 U.S. 1 \(1948\)](#) (the Supreme Court invalidated racially discriminatory covenants); [Brown v. Board of Education of Topeka, 347 U.S. 483 \(1954\)](#) (rendering the "separate but equal" doctrine unconstitutional); [Gayle v. Browder, 352 U.S. 903 \(1956\)](#) (invalidating racial segregation on public transportation).

[FN50]. Rev. St. Tex. 1911; art. 3093a (1923).

[FN51]. See [Nixon v. Herndon, 273 U.S. 536 \(1927\)](#).

[FN52]. Art. 3093a, Rev. St. Tex. 1911 as revised by Art. 3107, Vernon's Ann. Civ. St. 1925.

[FN53]. [286 U.S. 73 \(1932\)](#).

[FN54]. [Vernon's Ann. St. Const. art. 1 § § 2, 27](#); Vernon's Ann. Civ. St. Arts. 2939, 2955, 2956, 2978, 2980, 2981, 2984, 2986, 2987, 2990, 3002-25, 3028, 3041, 3104, 3107, 3108, 3109, 3119, 3123-25, 3127, 3136, 3139.

[FN55]. See [Grovey v. Townsend, 295 U.S. 45 \(1935\)](#) (upholding the validity of a resolution of the Texas democratic convention that restricted primary voting exclusively to whites by reasoning that the restriction did not constitute state action).

[FN56]. [321 U.S. 649 \(1944\)](#). The Court reasoned that the privilege of membership in a party may be no concern of a state. But when, as here, that privilege is also the essential qualification for voting in a primary to select nominees for a general election, the state makes the action of the party the action of the state. *Id.* at 663-64.

[FN57]. [345 U.S. 461 \(1953\)](#).

[FN58]. *Id.* at 470.

[FN59]. The Act is entitled "An Act to enforce the Fifteenth Amendment to the Constitution of the United States and for other purposes." 79 Stat. 437 (1965). Among other things, the Act suspended literacy tests. [42 U.S.C. § 1973](#).

[FN60]. The struggle for the enactment of this legislation resulted in several deaths, including the deaths of Reverend James Reeb and Mrs. Viola Liuzzo during the Civil Rights march from Selma to Montgomery, Alabama in March of 1965. On March 15, 1965, President L. Johnson requested that Congress enact a new voting law.

[FN61]. [South Carolina v. Katzenbach, 383 U.S. 301 \(1966\)](#).

[FN62]. [LULAC v. Attorney General of Texas, 999 F.2d 831 \(5th Cir. 1993\)](#); [Meek v. Metropolitan Dade County, 985 F.2d 1471 \(11th Cir. 1993\)](#); [Chisom v. Edwards, 970 F.2d 1408 \(5th Cir. 1992\)](#); [Southern Christian Leadership Conf. of Ala. v. Evans, 785 F. Supp. 1469 \(M.D. Ala. 1992\)](#); [Nipper v. Chiles, 795 F. Supp. 1525 \(M.D. Fla. 1992\)](#).

[FN63]. [383 U.S. at 308](#).

[FN64]. [42 U.S.C. § 1973\(c\)\(3\) \(1988\)](#) (defining language minority as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish Heritage").

[FN65]. April D. Dulaney, [A Judicial Exception for Judicial Elections: "A Burning Scar on the Flesh Of the Voting Rights Act"](#), 65 TULANE L. REV. 1223, 1224 (1991).

[FN66]. See [Allen v. State Board of Elections, 393 U.S. 544, 569 \(1969\)](#).

[FN67]. [372 U.S. 368 \(1963\)](#).

[\[FN68\]. Id. at 381.](#)

[\[FN69\].](#) See, for example, Andrew S. Marovitz, [Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination](#), 98 YALE L.J. 1193 (1989) where author discusses the trend of courts to rely on Section Two of the Voting Rights Act when the basis of the plaintiff's claim is racial discrimination and not the one-man, one-vote principle. The author suggests that the decision in [Wells v. Edwards](#), 347 F. Supp. 453 (M.D. La. 1972), aff'd, 409 U.S. 1095 (1973), has been used for a more general purpose than the decision actually stands for. In Wells, the district court held that the one-man, one-vote concept did not apply to judicial elections. Although the U.S. Supreme Court affirmed this decision, the case itself was not based on racial discrimination but on apportionment. The author states that the reliance by subsequent courts on Wells for the principle that the one-person, one-vote principle cannot be applied in judicial elections is therefore error. Id. at 1194-95.

[\[FN70\].](#) See [Dillard v. Baldwin County Board of Education](#), 686 F.Supp. 1459, 1467 (M.D. Ala. 1988). In Dillard, the court states that it

is convinced that the at-large election system, including in particular its majority-vote and numbered-post features, has interacted with the extensive racial polarization to render the ability of the black voters to elect their representative substantially inferior to that of whites. The court is also convinced that this dilution of the black vote--or more appropriately annihilation of it--is not only exacerbated by the depressed social and economic conditions for most blacks in the county, it is perpetuating these conditions.

[\[FN71\]. 478 U.S. 30 \(1986\).](#)

[\[FN72\]. Id. at 48-51.](#)

[\[FN73\]. Id.](#)

[\[FN74\].](#) S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 205-07. See infra note 77 for the list of factors.

[\[FN75\].](#) These counties are Harris, Dallas, Travis, Bexar, Jefferson, Lubbock, Midland, Tarrant, and Ector.

[\[FN76\].](#) League of United Latin American Citizens (LULAC) v. Attorney General of Texas, transcript vol. III, No. 88-154 (decided Nov. 14, 1989).

[\[FN77\].](#) Other factors that are probative of whether or not the Voting Rights Act has been violated include:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, vote, or otherwise participate in the democratic process;
  2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
  3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
  4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
  5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
  6. Whether political campaigns have been characterized by overt or subtle racial appeals;
  7. The extent to which members of the minority group have been elected to public office in the jurisdiction; and
  8. The extent to which elected officials are unresponsive to the particular needs of minority communities.
- See Gingles, supra note 71, at 36-37.

[\[FN78\].](#) See LULAC, transcript vol. III, No. 88-154, at 140.

[\[FN79\]. Id.](#)

[FN80]. See generally *id.*

[FN81]. Evidence additionally showed that no African American had ever been elected to a civil district court bench.

With regard to the remaining Senate factors, the district court made additional findings that supported the petitioners' claims. The court noted the "well chronicled" and "undisputed" history of discrimination in Texas, that touched upon the right of minorities to vote and participate "in the democratic system governing [the] State." The court's findings were supported by the testimony of lay witnesses who attested to the historical and continued presence of racial discrimination in Texas. LULAC, transcript vol. III, No. 88-154, at 140.

[FN82]. This conclusion was supported by defendant Thomas Phillips, Chief Justice of the Supreme Court of Texas, who testified that it is more difficult for minority lawyers to raise the funds necessary to mount a successful campaign for district judge in large urban areas such as Harris County. *Id.*

[FN83]. See [Westwego Citizens for Better Government v. City of Westwego, 946 F.2d 1109, 1113 n.3 \(5th Cir., 1991\)](#) (defining "single shot" voting as a practice in which all voters are allowed to cast fewer than all of their votes).

[FN84]. LULAC, transcript vol. III, No. 88-154, at 85.

[FN85]. Subsequently, the District Court granted interim relief (to be used solely for the 1990 election of Texas state district judges) that included the creation of electoral subdistricts and a prohibition against the use of partisan elections for state district judges. *Id.*

[FN86]. [LULAC v. Clements, 902 F.2d 293 \(5th Cir. 1990\)](#).

[FN87]. *Id.* at 322.

[FN88]. [42 U.S.C. § 1973 \(1994\)](#).

[FN89]. [LULAC v. Clements, 914 F.2d 620, 622 \(5th Cir. 1990\)](#).

[FN90]. In a separate concurring opinion, portions of which were joined by five other judges, Judge Higginbotham disagreed with the majority that judges are not "representatives" within the meaning of the Act, even though he concurred in the judgment of reversal. He reasoned that the Act is inapplicable to the electoral scheme at issue because Texas district court judgeships are exempt from voter dilution challenges (as distinguished from elections for membership in a collegial or multi-member body). Significant to Justice Higginbotham's claim was the state's compelling interest in linking jurisdictions and the elective base for judges acting alone. Judge Higginbotham further noted that any attempts to break this link, by making only a few district judges principally accountable to the minority electorate rather than making all the district judges partly accountable to the minority electorate, may well lessen minority influence instead of increasing it. *Id.*

Chief Judge Clark, while agreeing with the judgment of reversal, disagreed with the majority and the concurring opinion of Judge Higginbotham. *Id.* at 633. He stated that whenever an officeholder's jurisdiction and the area of residence of his or her electorate coincide, no voter dilution claims may be brought against the at-large scheme for electing the officeholder, regardless of whether the "function" of the officeholder is to act alone or as a member of a collegial body. *Id.*

In dissent, Judge Johnson argued that the Act applies to all judicial elections because the statute had heretofore opened the electoral process to people of all colors, and the statute was intended to prohibit racial discrimination in all voting. *Id.* at 652.

[FN91]. *Id.* at 622-23. Section Two of the Civil Rights Act of 1965 was expanded to include a "results test" that applied to voting in elections of representatives only. This excluded elected judges. *Id.*

[FN92]. [111 S.Ct. 2354 \(1991\)](#).

[\[FN93\]. Id. at 2365.](#)

[\[FN94\]. Id. at 2367.](#)

[\[FN95\]. See \*Clark v. Roemer\*, 500 U.S. 646 \(1991\).](#) Section Five condones the implementation of new voting procedures having discriminatory effects. It also uses language similar to that of Section Two in defining prohibited practices.

[\[FN96\]. See \*Chisom\*, 111 S.Ct. at 2367.](#)

[\[FN97\]. 111 S.Ct. 2376 \(1991\).](#)

[\[FN98\]. \*Houston Lawyers' Association v. Attorney General of Texas\*, 111 S.Ct. at 2380.](#)

[\[FN99\].](#) The "totality of the circumstances" test requires violations of a particular statute to be determined on a case-by-case basis. Under the "totality of the circumstances" inquiry, a court will consider the history of discrimination touching the rights of minorities to participate in the system, use of voting practices that enhance the opportunity for discrimination, minority access to the slating process, lingering socioeconomic effects of discrimination, the extent to which minority candidates have been elected to office, responsiveness of elected officials to particular needs of the minority group, and the tenuousness of the state interest or policy underlying the challenged practices. *LULAC v. Clements*, 986 F.2d 7281 (5th Cir. 1993); see [White v. Regester](#), 412 U.S. 755 (1973).

[\[FN100\]. \*Chisom\*, 111 S. Ct. at 2367.](#)

[\[FN101\]. Id.](#)

[\[FN102\]. Id.](#)

[\[FN103\]. Id.](#)

[\[FN104\]. Id.](#)

[\[FN105\]. \*LULAC v. Clements\*, 986 F.2d 7281 \(5th Cir. 1993\).](#)

[\[FN106\].](#) With respect to the asserted state interest, the defendants essentially proposed that the state's interest in an underlying election scheme would have to be weighed against proven vote dilution before a Section Two violation could be found because the Gingles inquiry, the totality of the circumstances inquiry, and the ultimate vote dilution inquiry fail to take into account adequately Texas' interest in maintaining its current method of electing district court judges. This proposed evidentiary standard would be in lieu of the "totality of the circumstances" that would consider the asserted Texas interest only as a factor to be considered to determine whether a violation occurred.

[\[FN107\]. \*Chisom\*, 111 S.Ct. at 2367.](#)

[\[FN108\].](#) The state interests the court took into consideration included Texas' interest in preserving the administrative advantages of the current at-large system, Texas' interest in allowing judges to specialize, Texas' interest in linking the elective base of district judges to the area in which they exercise primary jurisdiction, and Texas' interest in preserving the function of district court judges. See supra note 99.

[\[FN109\]. \*LULAC v. Clements\*, 999 F.2d 831 \(5th Cir. 1993\).](#)

[\[FN110\]. \*Gingles\*, 478 U.S. at 36.](#)

[\[FN111\]. \*LULAC\*, 999 F.2d at 879.](#)

[FN112]. The Senate Report specifically states that the results test assumes that race is the predominant determinant of political preference. The report also recognizes that white crossover votes will likely occur without impacting the effect of the white bloc in defeating the minority preferred candidate. Senate Report 1982 U.S.C.C.A.N. at 206, modifying, [Zimmer v. McKeithen, 485 F.2d 1297 \(5th Cir. 1973\)](#).

[FN113]. [Gingles, 478 U.S. at 51](#).

[FN114]. [LULAC, 999 F.2d at 840](#).

[FN115]. [Id. at 918](#) (dissenting opinion). See also [Tex. Const. art. V, § 8](#).

[FN116]. [Id. at 920](#) (dissenting opinion).

[FN117]. Ruy A. Teixeira, The Disappearing American Voter, in BROOKINGS INSTITUTION 36-37 (1992).

[FN118]. ANDREW HACKER, TWO NATIONS--BLACK AND WHITE, SEPARATE, HOSTILE, UNEQUAL 210-11 (1992). The author states,

A complaint of many black voters is that even now, they are overwhelmingly governed by white people. Not only has every President of the United States been white, but so is every current senator [in 1993, Carol Braun became the first black Senator since Edward Brooke] and all but one of the governors [ [Gov. Wilder no longer holds that office]; in addition, almost three quarters of all black citizens live in districts that have white representatives in Congress. It is the view of many black citizens that they lack "representatives of their choice", since it is not their choice to have laws made in their name by white officeholders.

[This statement is borne out by statistics that show that blacks overwhelmingly vote for black candidates when opposed by a white candidate.] This effectively means that current voting systems deny African Americans and other minorities the opportunity to cast ballots which will give them "representatives of their choice."

[FN119]. [Id.](#)

[FN120]. See generally THEODORE CROSS, THE BLACK POWER IMPERATIVE AND RACIAL INEQUALITY (1987); MANNING MARABLE, HOW CAPITALISM UNDERDEVELOPED BLACK AMERICA (1983); TERRY EASTLAND & WILLIAM J. BENNETT, COUNTING BY RACE: EQUALITY FROM THE FOUNDING FATHERS TO BAKKE AND WEBER (1979); DANIEL FLANIGAN, THE CRIMINAL LAW OF SLAVERY, 1800-1868 (1987).

[FN121]. RODERICK MARTIN, THE SOCIOLOGY OF POWER (1977).

[FN122]. [Id. at 50](#).

[FN123]. [Id.](#)

[FN124]. [Id.](#)

[FN125]. See Teixeira, *supra* note 117 at 28-29. The author considers both costs of voting and benefits from voting in determining the reason Americans fail to vote. He reasons that the costs of voting have been all but eliminated thereby supporting the conclusion that the significant decline in voting is due primarily to low benefits. Consider the kinds of costs that have been eliminated: (1) poll taxes, (2) literacy tests, (3) increased availability of bilingual registration materials, (4) large increase in laws permitting registration by mail, (5) decline in length of state residency requirements, (6) increased media exposure of candidate and elections. If high costs were discouraging voter turnout, then the elimination of such barriers would increase voter turnout instead of the significant decline in American voting.

[FN126]. [Reynolds v. Sims, 377 U.S. 533 \(1964\)](#).

[FN127]. Representatives include judges in conformance with U.S. Supreme Court decisions earlier referred to in

this Article.

[FN128]. Shawn Fremstad, Note, [State Judicial Elections and the Voting Rights Act: Defining the Proper Remedial Scheme](#), 76 MINN. L. REV. 101, 109 (1991).

[FN129]. Id.

[FN130]. Id.; see also part IV.

[FN131]. See Fremstad, supra note 128 (citing HAROLD W. STANLEY, VOTER MOBILIZATION AND THE POLITICS OF RACE 41-42 (1987) and citing CHANDLER DAVIDSON, INTRODUCTION TO MINORITY VOTE DILUTION 1, 3 (Chandler Davidson ed., 1984)); see also Robert Huckfeldt & Carol Weitzel Kohfeld, Race and the Decline of Class in American Politics 1 (1989) (stating, "Race continues to be the most important line of conflict in American electoral politics . . . . Levels of racial polarization were [especially] high in the South . . . . [[Election] figures indicate a level of polarization between racial groups unequaled by any other social boundaries . . . . The politics of race has emerged as the most meaningful boundary in American politics during the last third of the twentieth century"). See also Guinier, [No Two Seats: The Elusive Quest for Political Equality](#), 77 Va. L. Rev. 1413, 1428 (1991) (referring to a recent Joint Center for Political Studies/Gallup survey that found that 55% of white respondents admitted that in a contest between a black and white candidate for mayor they would vote for the white candidates based on considerations of race regardless of qualifications).

[FN132]. Pamela Karlan, [Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation](#), 24 HARV. C.R.-C.L. L. REV. 173, 223 (1989).

[FN133]. Id. at 224.

[FN134]. Id. at 224-25.

[FN135]. [Dillard v. Baldwin County Board of Education](#), 686 F.Supp. 1459 (M.D. Ala. 1988). This litigation involved over 200 local jurisdictions. In a settlement of that case, a number of the municipalities adopted limited voting systems. The results show a marked increase in the numbers of successful African American candidates. In fact, African American candidates won in 13 of the 14 jurisdictions. In jurisdictions where an African American candidate won a seat, the black populations ranged from 14.5% to 38.5%. In one jurisdiction where no African American candidate was unsuccessful, the African American population was 41%.

Limited voting systems were similarly successful when enacted in the Granville County, North Carolina Board of Commissioners election. Granville County had a 39.5% African American register voter population. Under an at-large system of elections, no African American had been elected to the Board in modern history. Voters voted in racial blocs that ensured to the continuity of the election of all-Anglo representatives. After instituting a limited voting system, eight Anglo and four African American candidates completed for five seats. Two of the winning candidates were Anglo while three were African American.

[FN136]. Mona Hymel, [Judicial Electoral Systems: Foreign Democracies Provide Solutions](#), 27 TEX. INT'L. L.J. 447, 464 (1992).

[FN137]. Id.

[FN138]. Id.

[FN139]. Karlan, supra note 132, at 224.

[FN140]. Id.

[FN141]. Id.

[FN142]. This analysis is based on the single-nontransferable-vote system. Single-transferablevote systems are not

discussed in this Article because both enjoy the same results and are based on the same underlying principles. For a discussion of both systems, see Hymel, *supra* note 136.

[FN143]. Hymel, *supra* note 136, at 462.

[FN144]. *Id.*

[FN145]. Karlan, *supra* note 132.

[FN146]. Edward Still, Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections, 9 YALE L. & POLICY REV. 354 (1991).

[FN147]. *Id.*

[FN148]. *Id.* at 359.

[FN149]. *Id.* at 360.

[FN150]. Guinier, *supra* note 131.

[FN151]. Still, *supra* note 146; see also Guinier, *supra* note 131, at 1430.

[FN152]. Still, *supra* note 146.

[FN153]. *Id.*

[FN154]. Guinier, *supra* note 131, at 1447-58.

[FN155]. *Id.*

[FN156]. *Id.*

[FN157]. See [Badham v. Eu](#), 694 F. Supp. 664 (N.D. Cal. 1988).

[FN158]. See [Karcher v. Daggett](#), 462 U.S. 725 (1983); See [White v. Weiser](#), 412 U.S. 783 (1978); [Burns v. Richardson](#), 384 U.S. 73 (1966).

[FN159]. See [Carstens v. Lamb](#), 543 F. Supp. 68 (D. Colo. 1982); [Shayer v. Kirkpatrick](#), 541 F. Supp. 922 (W.D. Mo. 1982); [Lacomb v. Growe](#), 541 F. Supp. 145 (D. Minn. 1982).

[FN160]. [Shaw v. Reno](#), 113 S.Ct. 2816, 2824 (1993).

[FN161]. *Id.*

[FN162]. See Lani Guinier, [The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success](#), 89 MICH. L. REV. 1077, 1139 n.298 (1991); Sell & Frige, Impact of Classified Corporate Directorates on the Constitutional Right of Cumulative Voting, 17 U. PITT. L. REV. 151, 157-58 (1956). Sell and Frige write,

First, the two party system is an essential part of the American Method of legislation. If that system tends to promote sound legislation, it is logical to expect it to produce similar results in the field of corporate management. Second, the right to cumulate votes and insure the minority a right to listen and be heard on questions of management should be granted as a matter of fairness and equity. Third, in its own interest, management should keep the board of directors an open forum for the discussion of problems. Fourth, the extension of cumulative voting principle to the corporate field provides a means for curbing overreaching managers or majorities without injuring the corporate form of organization. Fifth, it provides an analogous right to that existing in the partnership form. Sixth, cumulative voting serves to strip the veil of secrecy, thus making corporate proceedings public and hence,

presumably is for the good of the corporation. Seventh, cumulative voting would give the minority a representation in the counsels of the board who presumably would be able to exert some measure of influence on the board where the minority's interests seem to conflict with the majority's.

[FN163]. Guinier, *supra* note 162, at 1139.

[FN164]. *Id.*

[FN165]. See generally Guinier, *supra* note 16 (discussing the merits of the cumulative voting system).

[FN166]. *Id.*

[FN167]. *Id.*

[FN168]. The vote pooling agreement is an approach by which some or all of the shareholders of a close corporation sign an agreement with each other to vote their shares in a certain way in a particular election.

[FN169]. *Id.* (citing [U.S. Const. art. I § 3, cl. 6](#), supermajority required for impeachment); [U.S. Const. art. I § 7, cl. 2](#) (supermajority required to override a presidential veto); [U.S. Const. art. II § 2, cl. 2](#) (supermajority required to amend treaties).

[FN170]. See [CTS Corp. v. Dynamics Corp.](#), 481 U.S. 69, 90 (1987).

[FN171]. See Karlan, *supra* note 132, at 246.

[FN172]. See Civil Statutes, Title 32, Art. 4.03, Texas Business Corporation Act, which provides for votes by shares when the subject of the vote would significantly impact the rights or obligations of the class.

[FN173]. This requirement depends on the applicable state statute and usually is restricted to certain types of votes as identified in the state statute or the corporate articles.

[FN174]. See Fremstad, *supra* note 128 (citing Nicholas O. Alozie, *Distribution of Women and Minority Judges: The Effects of Judicial Selection Methods*, 71 *SOC. SCI. Q.* 315, 321 (1990)). But see American Judicature Society, *The Black Judge in America: A Statistical Profile*, 57 *JUDICATURE* 18, (1973) (showing that an overwhelming majority of black judges attained their judgeships through some type of appointive process).

[FN175]. Judicial selection committees are compared to slating groups, which are groups that control the nomination process. These groups tend to be composed of predominantly white males.

[FN176]. See Fremstad, *supra* note 128, at 128.

[FN177]. HUCKFELDT & KOHFELD, *supra* note 131.

[FN178]. *Id.*