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One Man, Six Votes, and Many Unanswered Questions

CUMULATIVE VOTING AS A REMEDIAL MEASURE FOR SECTION 2 VIOLATIONS IN PORT CHESTER AND BEYOND

The nation looked on as voters cast up to six ballots for their favorite candidates in the June 2010 local government election in Port Chester, New York (the Village).¹ For the first time in the Village, voters exercised an ability to stack votes for their preferred candidates—and a court-imposed remedial plan made this electoral system possible. Four years before, the Department of Justice (DOJ) filed a claim seeking to remedy what it perceived to be impermissible voting practices that led to the dilution of Hispanic votes within the Village.² After litigation in the United States District Court for the Southern District of New York, the DOJ prevailed in its claim against the Village.³ The court ordered that a new plan be employed to rectify past voting wrongs in Port Chester.⁴ Specifically, the court ruled that Port Chester’s proposed plan for an alternative system of voting, called cumulative voting, would be used.⁵

This type of DOJ enforcement action is certainly not unique. The DOJ has filed a host of suits against jurisdictions it perceives to be in violation of section 2 of the Voting Rights

¹ Kirk Semple, *First Latino Board Member Is Elected in Port Chester*, N.Y. TIMES, June 16, 2010, at A27, available at <http://www.nytimes.com/2010/06/17/nyregion/17chester.html> [hereinafter Semple, *First Latino Board Member*]; Kirk Semple, *Trying to Make History, With 6 Votes Per Person*, N.Y. TIMES, June 11, 2010, at A15, available at <http://www.nytimes.com/2010/06/12/nyregion/12chester.html> [hereinafter Semple, *Trying to Make History*] (“federal officials, civil rights scholars and the village’s political leadership” all watched the polls closely).

² *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 416 (S.D.N.Y. 2010); see also Semple, *First Latino Board Member*, *supra* note 1 (“A federal lawsuit filed in 2006 by the Justice Department, charged that the village’s method of electing its trustees diluted the voting strength of Latino citizens. A federal court judge agreed, and in 2009 ordered the imposition of a rarely used process known as cumulative voting.”).

³ *Port Chester*, 704 F. Supp. 2d at 447.

⁴ *Id.*

⁵ *Id.* at 453.

Act of 1965,⁶ with an aim of earning minority voters in targeted jurisdictions fair representation.⁷ Section 2 is the crucial provision under which the DOJ brings claims against political subdivisions for vote-diluting practices. The section authorizes the courts or the litigating parties to develop remedial measures so that minority populations have the potential to elect their preferred candidate.⁸ Although the DOJ objected to the Village's plan, it ultimately signed the consent decree after a court order, which established the new cumulative voting system.⁹

The DOJ's position regarding the implementation of cumulative voting—or other alternative voting systems¹⁰—is not new. Cumulative voting, a proportional system of representative voting that is more commonly used in corporate governance,¹¹ has been implemented in dozens of jurisdictions nationwide in recent years, often as a remedial measure in settlement agreements for violations of the Voting Rights Act.¹²

⁶ 42 U.S.C. § 1973 (2006).

⁷ See *Section 2 of the Voting Rights Act*, U.S. DEPT OF JUSTICE: CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last visited Mar. 12, 2011).

⁸ See *id.*

⁹ *Port Chester*, 704 F. Supp. 2d at 453.

¹⁰ Other alternative voting systems include “preference” or “choice” voting, and “limited voting.” Choice voting is a “proportional voting system used in at-large or multi-member district elections where voters rank candidates in order of preference.” Limited voting is a “plurality-majority system used in multi-member districts; electors have more than one vote but fewer votes than there are candidates to be elected. . . . [T]he candidates with the highest vote totals win[] the seats.” See *Glossary*, FAIRVOTE: THE CENTER FOR VOTING AND DEMOCRACY, <http://www.fairvote.org/fvo-glossary> (last visited Mar. 12, 2011). This note focuses on cumulative voting, but the DOJ has not readily approved these other alternative systems as remedial measures for section 2 violations either.

¹¹ See Robert Brischetto, *Cumulative Voting at Work in Texas: A 1995 Exit Survey of Sixteen Communities*, FAIRVOTE: PROGRAM FOR REPRESENTATIVE GOVERNMENT, <http://archive.fairvote.org/index.php?page=529> (last visited Mar. 12, 2011).

¹² See Richard Briffault, *Electing Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 RUTGERS L.J. 1125, 1147 (2005) (discussing different settlement agreements adopting cumulative voting in section 2 lawsuits); Alec Slatky, *Debunking the Myths about Port Chester*, FAIRVOTE: THE CENTER FOR VOTING AND DEMOCRACY (June 25, 2010), <http://www.fairvote.org/debunking-the-myths-about-port-chester> (last visited Mar. 12, 2011). Cumulative voting garnered interest and attention after the Supreme Court's decision in *Shaw v. Reno*, 509 U.S. 630 (1993), and a subsequent line of cases, which instructed that racial gerrymandering was a violation of the Equal Protection Clause. Districts were left befuddled at how best to earn minority populations a fair vote in elections without drawing territorial lines that were impermissibly associated with race. See Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 348-49 (1998) [hereinafter Mulroy, *The Way Out*] (explaining that the *Shaw* cases allowed for “less and less discretion for drawers of redistricting plans to draw districts that provide minorities fair electoral opportunities without running afoul of the Constitution”). The *Shaw* line of cases is discussed in more detail *infra* Part I.B.

Cumulative voting allows voters within a system to cast more than one vote for a favored candidate. Each voter is typically allotted as many ballots as the number of seats open in a given election.¹³ However, while the DOJ has been a signatory on consent decrees that effectually implement the system, it has never specifically advocated for cumulative voting as a cure for violations of the Act.¹⁴ Rather, the DOJ continues to push for single-member districts that comprise majority-minority populations as cures for defective, vote-dilutive procedures. The DOJ's failure to readily sanction cumulative voting as a remedy for section 2 violations is problematic; it has led to public misconception and confusion within political subdivisions about how best to approach implementation of alternative voting systems like cumulative voting. And, in the wake of a recent Supreme Court decision,¹⁵ the DOJ's refusal to identify cumulative voting as a cure narrows still the availability of potential remedies for section 2 violations.

This note seeks to understand why the DOJ is wary of using cumulative voting to remedy violations of section 2 of the Voting Rights Act, and advocates that the DOJ provide clear guidelines regarding the circumstances under which the system should be used. While cumulative voting received attention nearly fifteen years ago when single-member districts¹⁶ were challenged on equal-protection grounds, the public's understanding of the system—and the DOJ's stance on using the system—has not become any clearer. But in the wake of recent Supreme Court precedent, the fate of single-member districts is again unclear at best.¹⁷ As such, it is necessary to

¹³ See *Glossary*, *supra* note 10.

¹⁴ See Steven J. Mulroy, *When the U.S. Government Endorses Full Representation: Justice Department Positions on Alternative Electoral Schemes*, FAIRVOTE: PROGRAM FOR REPRESENTATIVE GOVERNMENT, <http://archive.fairvote.org/?page=542> (last visited Mar. 6, 2011) [hereinafter Mulroy, *Full Representation*] (noting that the DOJ has never “explicitly stated a policy regarding the appropriateness of these electoral schemes, except to say that they may be appropriate in certain circumstances to correct the problem of under-representation of minorities”).

¹⁵ See *Bartlett v. Strickland*, 129 S. Ct. 1231, 1249 (2009) (plurality opinion) (holding that crossover districts will not satisfy a prima facie vote-dilution cause of action under the first *Gingles* precondition and Section 2 and that the law does not mandate that crossover districts be drawn).

¹⁶ A single-member district is “[a] district from which only one member is elected.” See *Glossary*, *supra* note 10.

¹⁷ See *Bartlett*, 129 S. Ct. at 1254, 1258 (Souter, J., dissenting) (noting that the preclusion of crossover districts as embodying an “opportunity to elect” will require political subdivisions to draw districts in accordance with race); see also Luis Fuentes-Rohwer, *The Future of Section 2 of the Voting Rights Act in the Hands of a Conservative Court*, 5 DUKE J. CONST. L. & POL'Y 125, 126 (2010) (noting that “race-conscious

revisit the possibility of implementing reasonable alternative systems, and it is necessary for the DOJ to be more flexible in its view of acceptable remedies for section 2 violations and embrace alternative systems where appropriate. Neither the DOJ nor the courts have provided sufficient guidance about when these systems might be appropriate as remedial measures. Indeed, scholars such as Steven J. Mulroy wrote about the DOJ's unclear stance regarding cumulative voting in the 1990s, seeking to divine the circumstances under which the DOJ would support alternative systems of voting.

Part I of this note provides an overview of the relevant Voting Rights Act provisions and the system of cumulative voting. Part II discusses a recent case, *United States v. Village of Port Chester*,¹⁸ as a relevant example of contemporary litigation and a model of the current implementation of cumulative voting. Part III seeks to glean an understanding of the DOJ's position regarding cumulative voting. Part III also compares section 2 and section 5 of the Voting Rights Act, providing a snapshot of cumulative voting in the history of the DOJ's preclearance system.¹⁹ Next, this part discusses potentially preclusive precedent, along with a recent decision that, from a policy perspective, should engender, but from a legal standpoint, might jeopardize, the existence of cumulative voting as a section 2 remedy.²⁰ Finally, Part IV proposes that the DOJ provide more detailed information about the availability of alternative voting schemes like cumulative voting for section 2 violations and advocates that the DOJ pronounce the circumstances under which the system may—or may not—be used.

redistricting and the creation of effective minority districts' . . . might soon become quaint relics of an old and racist past," and discussing the views of Justices Kennedy, Thomas, Scalia, and Alito); Richard Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140 (2007) ("Far from a ringing endorsement of the law of minority vote dilution, [*League of United Latin American Citizens (LULAC) v. Perry*, 548 U.S. 399 (2006)] reveals a Court increasingly troubled by—indeed, more and more resistant to—the very concept of minority vote dilution and the accompanying legal requirement of 'safe minority districting.'").

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

¹⁹ Under section 5, "covered jurisdictions" seek approval from the Attorney General to change their voting systems to ensure they do not implement procedures that would likely have retrogressive effects. See *Section 5 of the Voting Rights Act*, U.S. DEPT OF JUSTICE: CIVIL RIGHTS DIV., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Mar. 17, 2011).

²⁰ *E.g.*, *Bartlett*, 129 S. Ct. 1231; *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Cottier v. City of Martin*, 604 F.3d 553 (8th Cir. 2010).

I. RELEVANT VOTING RIGHTS ACT LEGAL HISTORY

Minority vote dilution litigation has a complex past. Since the enactment of the Voting Rights Act in 1965, vote dilution claims have generated difficult analyses for the courts. As Justice O'Connor noted at the outset of one vote-dilution case, the Court was faced with "two . . . most complex and sensitive issues . . . : the meaning of the constitutional 'right' to vote, and the propriety of race-based state legislation designed to benefit members of historically disadvantaged racial minority groups."²¹ The issues facing the courts today are similar, but the difficulty lies in a legislature's ability to ensure proper ballot access to the electorate under the framework of the law.

A. *Section 2 of the Voting Rights Act of 1965: A Brief Summary*

On August 6, 1965, President Lyndon Johnson signed the Voting Rights Act into law.²² The Act's passage "was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise the most fundamental rights of our citizens: the right to vote."²³ When it was passed, the Voting Rights Act was controversial.²⁴ Section 2 of the Act, however, was not criticized, since it was largely identical to the Fifteenth Amendment of the United States Constitution.²⁵ In relevant part, section 2 of the Voting Rights Act provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"²⁶

²¹ *Shaw v. Reno*, 509 U.S. 630, 633 (1993).

²² CHARLES V. HAMILTON, *THE BENCH AND THE BALLOT* 235 (1973).

²³ *Bartlett*, 129 S. Ct. at 1240.

²⁴ *Id.*

²⁵ The Fifteenth Amendment to the United States Constitution reads, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude. The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV; *see also* *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (noting that section 2 was "intended to have an effect no different from that of the Fifteenth Amendment itself").

²⁶ 42 U.S.C. § 1973(a) (2006). Section 2 originally prohibited practices "imposed or applied by any state or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973 (1970). When the Act was amended in 1982, the section dispensed with any kind of

In 1986, in *Thornburg v. Gingles*,²⁷ the Supreme Court construed section 2 as amended for the first time, providing a set of conditions to aid courts and potential plaintiffs in determining the boundaries of a section 2 violation.²⁸ The preconditions set by *Gingles* still dictate the test that courts apply today.²⁹ It is now well settled that minority vote dilution, in addition to simply denied access or abridgment, violates the Act.³⁰

The Supreme Court pronounced three “pre-conditions” in *Gingles*, which act as a gateway for all section 2 claims: (1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the minority group must be politically cohesive; and (3) the white majority must vote sufficiently as a bloc to enable it to usually defeat the minority’s preferred candidate.³¹ Only when these three conditions have been met does a court move on to determine whether there has been a violation.³² This analysis is based on the “totality of circumstances,” which includes factors envisioned by Congress when it passed the 1982 Amendments:³³ (a) a history of official discrimination; (b) the extent of racially polarized voting; (c) the electoral practices that enhance opportunities for discrimination; (d) access to the candidate-slating process; (e) discrimination in other areas that hinders the ability of the minority group to participate effectively in the political process; (f) racial appeals

“intent” requirement, and thus only attacked the “*manner which results in a denial or abridgement of the right to vote,*” with a focus on the discriminatory effects. 42 U.S.C. § 1973(a) (2006) (emphasis added). The 1982 Amendments rejected the plurality view of *City of Mobile*, 446 U.S. at 74, which required a plaintiff to show discriminatory intent. *See, e.g., Thornburg v. Gingles*, 478 U.S. 30, 71 (1986). The 1982 Amendments also outlined a test for determining whether a violation of section 2 had occurred. *See* 42 U.S.C. § 1973(b) (2006); *see also Bartlett*, 129 S. Ct. at 1241.

²⁷ 478 U.S. 30 (1986).

²⁸ *See Gingles*, 478 U.S. at 43-44, 50-51.

²⁹ *Gingles*, 478 U.S. at 50-51; *see also Bartlett*, 129 S. Ct. at 1241 (discussing and evaluating the necessary *Gingles* preconditions to establish a section 2 violation).

³⁰ Vote dilution has long been considered violative of the Act, although certain Supreme Court Justices prefer a purely textual reading of section 2, which would preclude vote dilution claims altogether. Justices Thomas and Scalia have endorsed such a textual reading of section 2, whereby vote dilution does not establish a “standard, practice, or procedure” and thus should not be challenged under the Act. *See, e.g., Bartlett*, 129 S. Ct. at 1250 (Thomas, J., concurring); *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).

³¹ *Gingles*, 478 U.S. at 50-51.

³² *See, e.g., Bartlett*, 129 S. Ct. at 1241 (“In a [section] 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances.”).

³³ *Gingles*, 478 U.S. at 36-37; *see also Johnson v. De Grandy*, 512 U.S. 997, 1010-11 (1994).

in political campaigns; and (g) election of members of the minority group to public office in the jurisdiction.³⁴ When a plaintiff proves a prima facie case of vote dilution under the *Gingles* preconditions, and the court further determines that the “totality of circumstances” is also met, the defendant political subdivision must implement a cure for the violation.

B. The Traditional Cure for a Section 2 Violation: Single-Member Districts

Since the Court’s decision in *Gingles*, the traditional remedy employed for section 2 violations is the drawing of single-member districts. Single-member districts within a political subdivision are typically implemented as a cure for the at-large, “winner-take-all” election practices that are challenged under section 2.³⁵ In an at-large election, each voter may cast one vote for the number of empty seats, and the candidates who receive the most votes fill the positions.³⁶ This was the system that existed in Port Chester prior to the implementation of cumulative voting, and it is often the system challenged in section 2 actions.³⁷ At-large voting systems do require heightened review by the DOJ and are usually the subjects of section 2 claims because they tend to squash the minority vote.³⁸ Essentially, the minority vote’s strength is diluted because the majority votes as a bloc to fill vacancies.³⁹ If a section 2 violation is found after litigation, the courts usually

³⁴ See, e.g., *De Grandy*, 512 U.S. at 1010 & n.9 (summarizing factors from the Senate Report regarding the 1982 Amendments for a section 2 claim).

³⁵ See Mulroy, *The Way Out*, *supra* note 12, at 338, 362 (“An oft-repeated principle in voting rights cases is that single-member districts are ‘strongly preferred’ to at-large plans for court-ordered . . . remedies.”).

³⁶ See *id.* at 336.

³⁷ See *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 420 (S.D.N.Y. 2010); Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 708-09 (2006).

³⁸ See Heather K. Gerken, *A Third Way*, in *THE FUTURE OF THE VOTING RIGHTS ACT* 277, 302 n.13 (David L. Epstein et al., eds. 2006); see also Peyton McCrary, Christopher Seaman & Richard Valelly, *The Law of Preclearance: Enforcing Section 5*, in *THE FUTURE OF THE VOTING RIGHTS ACT*, *supra*, at 20, 24 (noting that in the context of section 5 preclearance submissions, changes from single districts to at-large elections could be retrogressive in effect).

³⁹ See Mulroy, *The Way Out*, *supra* note 12, at 337-38 (“Voting rights jurisprudence has long acknowledged . . . that wherever minority and majority groups have differing voting patterns, the winner-take-all at-large method tends to dilute minority voting strength, because the majority group tends to vote as a bloc to fill all the available seats. This phenomenon is known as ‘vote dilution.’ Courts have also recognized that such features as numbered posts, staggered terms, and majority vote requirements can exacerbate the at-large method’s dilutive effect.”).

mandate that single-member districts be drawn to encompass a group that is geographically compact enough to elect its candidate of choice and thus eradicate the harm of the “winner-take-all” system—the very requirement that exists in the first *Gingles* precondition.⁴⁰

The courts and the DOJ have certainly articulated their preference for single-member districts, especially in early Voting Rights Act jurisprudence.⁴¹ Supreme Court decisions also evidence districting as a means to give minorities more voting influence, as does the Supreme Court’s use of single-member districts as a benchmarking tool to determine liability.

While they are the popular and presumptive remedy for a section 2 violation, single-member districts that create geographic compactness of minorities—as required, too, by the first *Gingles* precondition—became hypersensitive to constitutional attack in the 1990s, and continue to be scrutinized today.⁴² In the seminal case *Shaw v. Reno*,⁴³ the Supreme Court held that districts drawn according to race are subject to strict scrutiny. The Supreme Court later determined that strict constitutional scrutiny is applied whenever “race was the predominant factor motivating the legislature’s decision to place a significant number of voters within or without a particular district.”⁴⁴ Thus, while single-member districts redress the problems of at-large, winner-take-all systems by giving a minority group potential power in

⁴⁰ See *id.* at 363 (“By requiring plaintiffs to show they are numerous and compact enough to draw a single-member district as a threshold matter in order to find liability, *Gingles* arguably implies that the universe of [s]ection 2 remedies is limited to single-member districts. Indeed, the Court notes that single-member district systems are generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected.”) (internal quotation marks omitted).

⁴¹ See, e.g., *Chapman v. Meier*, 420 U.S. 1, 17-18 (1975) (discussing the Court’s preference for single-member districts).

⁴² See, e.g., Richard H. Pildes & Kristen A. Donoghue, *Voting Rights and Elections: Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 249 (1995); see also *Bartlett v. Strickland*, 129 S. Ct. 1231, 1258 (2009) (Souter, J., dissenting) (noting that to meet a threshold large enough to constitute a minority’s opportunity to elect, a state will be forced to use race-conscious measures, which will leave it vulnerable to equal-protection challenges).

⁴³ 509 U.S. 630, 658 (1993) (finding that where a district is drawn that is so oddly shaped as to be “irrational on its face . . . it can be understood only as an effort to segregate voters into separate voting districts,” and is subject to strict scrutiny). *Miller v. Johnson*, 515 U.S. 900 (1995), foreclosed the notion that a mapped district would have to look irrational on its face to be violative of the Equal Protection Clause. *Id.* at 912.

⁴⁴ *Miller*, 515 U.S. at 916, 920 (explaining that a “congressional redistricting plan cannot be upheld unless it satisfies strict scrutiny, [the] most rigorous and exacting standard of constitutional review”); see also Pildes & Donoghue, *supra* note 42, at 241.

geographic compactness, racial districting as a practice is subject to strict scrutiny as a kind of “reverse” discrimination.⁴⁵

Indeed, the decision in *Shaw* along with its progeny has curtailed the ability of a political subdivision to draw majority-minority districts, leaving those subdivisions that do implement these districts vulnerable to equal-protection challenges.⁴⁶ The *Shaw* line of cases, as an extension of the equal-protection doctrine, asserts that district-drawing to obtain a certain number of minorities of voting age within a given district does nothing more than “reinforce the ideas that the racial group thinks alike, shares the same political interests, and will prefer the same candidates at the polls.”⁴⁷ As a result, race cannot be the predominant factor in configuring a district, which obviously creates tension between the cause of and cure for dilution.⁴⁸

After *Shaw*, political subdivisions and scholars struggled to develop solutions to cure vote dilution without running afoul of *Shaw* and the Equal Protection Clause. Many in the legal academy explored the benefits of coalitional, or “crossover,” districts as remedies for section 2 violations.⁴⁹ A

⁴⁵ See Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, 116 HARV. L. REV. 2208, 2208-09 (2003). The Court’s reluctance to readily sanction majority-minority districts in light of *Shaw* and its progeny has sparked debate within the academic community regarding remedial measures. Influence and coalitional or crossover districts were viewed initially as viable alternatives. *LULAC v. Perry*, 548 U.S. 399, 412 (2006), and *Bartlett*, 129 S. Ct. at 1247-49, held, however, that influence and crossover districts, respectively, cannot be used to prove vote dilution (and thus, by implication, cannot be used as a legally imposed remedy for section 2).

⁴⁶ See Mulroy, *The Way Out*, *supra* note 12, at 346 (discussing racial gerrymandering and equal-protection violations).

⁴⁷ *Shaw v. Reno*, 509 U.S. 630, 658 (1993); see also Mulroy, *The Way Out*, *supra* note 12, at 347.

⁴⁸ See *Miller*, 515 U.S. at 915-17. As Steven J. Mulroy notes, the “*Shaw/Miller* cases and their progeny . . . create a dilemma for anyone interested in drawing fair electoral districts. The Voting Rights Act requires that race be taken into account when drawing districts, but the *Shaw* cause of action requires that race not be used ‘too much.’” Mulroy, *The Way Out*, *supra* note 12, at 348.

⁴⁹ See Yishaiya Absoch, Matt A. Barreto & Nathan D. Woods, *An Assessment of Racially Polarized Voting for and Against Latino Candidates in California*, in VOTING RIGHTS ACT: REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 107, 108 (Ana Henderson ed., 2007); Note, *The Future of Majority-Minority Districts in Light of Declining Racially Polarized Voting*, *supra* note 45, at 2228; see generally Luke P. McLoughlin, Note, *Gingles in Limbo: Coalitional Districts, Party Primaries and Manageable Vote Dilution Claims*, 80 N.Y.U. L. REV. 312 (2005). Scholars found support for the coalitional district as a remedy to section 2 violations in Supreme Court precedent. See *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (“[S]tudies have suggested that the most effective way to maximize minority voting strength may be to create more influence or coalitional districts.”); *Thornburg v. Gingles*, 478 U.S. 30, 90 n.1 (1986) (O’Connor, J., concurring) (“[W]hen the candidates

crossover district is a district in which the group of minority voters makes up less than a majority of the voting-age population, but in which the minority population is big enough to elect its candidate of choice with help from voters who are members of the majority that “cross over” to support the minority group’s candidate of choice.⁵⁰ Crossover districts were thought to be “superior to majority-minority districts because the smaller the number of minority voters required per district, the smaller the need to disregard traditional districting principles and the less likely that a court will invalidate a newly drawn district on equal-protection grounds.”⁵¹

While crossover districts seem to embody the spirit of the Voting Rights Act and breed coalitional unity between minority and majority voters in order to elect a minority group’s preferred candidate, the Supreme Court ruled in *Bartlett v. Strickland* that the Voting Rights Act did not provide a cause of action for those minority voters who could elect a candidate of choice with even a small crossover vote from the white majority.⁵² *Bartlett* thus established that, for the purposes of the first *Gingles* precondition, single-member benchmark districts drawn for establishing liability must comprise more than a fifty percent minority voting age population (VAP) or citizen voting age population (CVAP).⁵³ Crossover districts would have enlarged the scope of section 2 claims—and available court-ordered remedies. But *Bartlett* foreclosed this ability. The DOJ and other individuals with

preferred by a minority group are elected in a multimember district, the minority group has *elected* those candidates, even if white support was indispensable to these victories.”).

⁵⁰ See, e.g., *Bartlett v. Strickland*, 129 S. Ct. 1231, 1242 (2009) (describing crossover districts).

⁵¹ Absoch et al., *supra* note 49, at 108.

⁵² *Bartlett*, 129 S. Ct. at 1246 (plurality opinion) (holding that the first *Gingles* precondition requires a showing that the minority population in a majority-minority district makes up more than fifty percent VAP/CVAP, and that majority-minority districts are only required by law if all three *Gingles* factors are met).

⁵³ See *id.* at 1246-47. Before *Bartlett*, some courts had applied a fifty percent numerical threshold for the sake of ease; the precise number of majority voters within a district was a question left open in *Thornburg v. Gingles*, 478 U.S. 30 (1986). See, e.g., McLoughlin, *supra* note 49, at 319. The *Bartlett* Court did not address specifically whether the numerical applied to VAP or CVAP. Pre-*Bartlett*, many circuit courts used CVAP as the appropriate metric. See Nathaniel Persily, *The Law of the Census: How to Count, What to Count, Whom to Count, and Where to Count Them*, 32 CARDOZO L. REV. 755, 779 (2011). In a Fifth Circuit Court of Appeals case post-*Bartlett*, the court recognized CVAP as the appropriate measure, and also asserted that while *Bartlett* did not address the question head-on, the opinion’s language indicates that CVAP is the applicable population nonetheless. See *Reyes v. City of Farmers Branch*, 586 F.3d 1019, 1023-24 (5th Cir. 2009); see also Persily, *supra*, at 779.

standing cannot now challenge perceived vote-dilutive practices under section 2 based on the minority population's potential to elect in a crossover district, nor can the court order what might have been this more race-neutral remedy.⁵⁴ *Bartlett* therefore resurrects the concerns of *Shaw* to some extent, as single-member districts must be drawn to encompass an exact majority percentage of minorities in order to satisfy *Gingles*—a practice that seems Voting-Rights-Act-retrogressive in itself.⁵⁵ But the *Bartlett* Court noted that requiring crossover districts for section 2 violations would breed even more race-conscious district drawing.⁵⁶ Without crossover districts as a viable challenge-worthy scheme or court-mandated remedy for vote dilution after *Bartlett*, it is time again to explore alternative forms of democratic representation that can cure section 2 violations. Cumulative voting can be used as such a remedy.

C. *Cumulative Voting: An Alternative Electoral Process*

Cumulative voting is a method of at-large election voting where every voter gets as many votes as there are seats for the open posts in a given election, and voters can distribute their ballots as they please.⁵⁷ That is, “under cumulative voting, a voter may distribute votes among candidates in any

⁵⁴ See, e.g., Ellen D. Katz, *Engineering the Endgame*, 109 MICH. L. REV. 349, 370-71 (2010).

⁵⁵ See *id.* at 370 (“*Bartlett* highlights how scaling back a remedy may produce perverse effects. . . . [T]he Justices cut off an application of the statute that promised to encourage the type of political participation the Court has long claimed it wants to promote—namely, the type that yields cross-racial coalitions. At the same time, the Justices restricted the statute’s reach to protect the type of participation they most dislike—namely, that secured by the majority-minority district.”). It should be noted that the Court did not admonish the drawing of such districts—it encouraged them in so far as coalition voting would foster communication of races. Political subdivisions could draw such districts on their own, of course, but such a coalition district could not be used to draw a remedial plan to prove voter dilution pursuant to the first *Gingles* precondition. See *Bartlett*, 129 S. Ct. at 1248.

⁵⁶ *Bartlett*, 129 S. Ct. at 1249.

It would be an irony, however, if [section] 2 were interpreted to entrench racial differences by expanding a statute meant to hasten the waning of racism in American politics. Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate. The Voting Rights Act was passed to foster this cooperation. We decline now to expand the reaches of [section] 2 to require, by force of law, the voluntary cooperation our society has achieved.

Id. (internal citations and quotations omitted).

⁵⁷ See Joseph F. Zimmerman, *The Federal Voting Rights Act and Alternative Election Systems*, 19 WM. & MARY L. REV. 621, 654-57 (1978).

combination, even distributing all votes to one candidate.”⁵⁸ Cumulative voting embodies a type of proportional representation.⁵⁹ In predicting the election outcome for a minority group under cumulative voting, a simple calculation of the “threshold of exclusion” is used. The threshold of exclusion is calculated as “one” divided by “one more” than the number of seats to be filled. Therefore, in a cumulative voting system, in order for a minority population to have a realistic opportunity to elect its preferred candidate, that minority population must make up greater than “1 / n+1” of the population, where “n” is equal to the number of seats up for election.⁶⁰ The resultant number of this formula is the “threshold of exclusion.”⁶¹ This number is equal to the percentage of votes that any group of voters must exceed in order to elect a candidate of its choice, regardless of how the rest of the voters cast their ballots. The system allows “a numerical minority to concentrate its voting power behind a given candidate *without* requiring that the minority voters themselves be concentrated into a single district.”⁶² The Equal Protection Clause is thus not implicated by cumulative voting.

In practice, cumulative voting is more commonly associated with corporate governance and has been used to elect members to corporate boards.⁶³ But cumulative voting has also been used in the political arena. From 1870 to 1980, Illinois used cumulative voting to elect members of its general assembly.⁶⁴ The cumulative voting scheme has also been used to elect minority-preferred candidates in communities in Illinois, Alabama, North Carolina, South Dakota, and more than two

⁵⁸ Brischetto, *supra* note 11; *see also* Zimmerman, *supra* note 57, at 654.

⁵⁹ *See* Jeffrey C. O’Neill, *Everything That Can Be Counted Does Not Necessarily Count: The Right to Vote and the Choice of a Voting System*, 2006 MICH. ST. L. REV. 327, 375 (2006).

⁶⁰ *See, e.g.*, Mulroy, *The Way Out*, *supra* note 12, at 341 (outlining calculation for the threshold of exclusion).

⁶¹ *See id.*

⁶² *Holder v. Hall*, 512 U.S. 874, 910 n.15 (Thomas, J., concurring) (emphasis added).

⁶³ *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 232-33 (1989) (“Surprisingly, although cumulative voting is quite widespread in elections for corporate boards of directors, it has been used rarely in elections for political office.”); *see also* Brischetto, *supra* note 11 (“Cumulative voting has . . . been used for decades to elect members of many corporate boards of directors.”).

⁶⁴ Brischetto, *supra* note 11.

dozen local political subdivisions in Texas.⁶⁵ While cumulative voting has been effective in these places,⁶⁶ it should be noted that cumulative voting is often considered more advanced than voting in single-member districts; it requires that “voters understand how to navigate the system and turn out to cast their ballots in sufficient number to elect a candidate preferred by the minority but not the majority of voters,” and studies have shown that this does not always happen.⁶⁷ Voters need to be educated in how best to “plump” their votes, and vote cohesively for their candidate of choice. And while it has been called controversial, no court has found cumulative voting unconstitutional.

D. Cumulative Voting Has Never Been Ruled Illegal by Federal Courts—But Dicta Has Sent Mixed Messages

While cumulative voting schemes have typically been implemented as settlement agreements between litigating parties in section 2 actions,⁶⁸ no case has held that cumulative voting is an illegal or unconstitutional remedial measure for violations of the Voting Rights Act of 1965.⁶⁹ Although, as the *Port Chester* Court noted, the DOJ would have liked the court to “believe that cumulative voting has been consistently rejected as a remedy to a section 2 violation,”⁷⁰ this is not entirely true.

⁶⁵ See *Communities in America Currently Using Proportional Voting*, FAIRVOTE: PROGRAM FOR REPRESENTATIVE GOVERNMENT, <http://archive.fairvote.org/index.php?page=2101> (last visited Mar. 14, 2011).

⁶⁶ See, e.g., Pildes & Donoghue, *supra* note 42, at 301 (discussing cumulative voting in Chilton County, Alabama, and noting that “[c]umulative voting has been quite effective, even in the face of racially polarized voting, at bringing about minority representation—not just for racial minorities, but for women and political minorities as well”); see also Mulroy, *The Way Out*, *supra* note 12, at 349 (discussing cumulative voting successes in different political subdivisions).

⁶⁷ Katz, *supra* note 54, at 384.

⁶⁸ See Mulroy, *The Way Out*, *supra* note 12, at 346 (noting that alternative electoral systems started to come about as settlement agreements in the 1980s).

⁶⁹ *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 448 (S.D.N.Y. 2010) (“There is no case law that rejects cumulative voting as a lawful remedy under the Voting Rights Act. Recently, a district court in the Northern District of Ohio did exactly what Port Chester is asking of the Court in this case: it accepted the defendant’s proposal for limited voting instead of the plaintiffs’ districting plan to remedy a [s]ection 2 violation.”). As a note, the DOJ also submitted arguments to oppose the Ohio jurisdiction’s proposed remedy of cumulative voting. See generally *United States Memorandum in Opposition to Euclid City School Board’s Proposed Remedies*, *United States v. Euclid City Sch. Dist.*, 632 F. Supp. 2d 740 (N.D. Ohio 2009) (No. 08-cv-2832) [hereinafter *U.S. Memorandum in Opposition to Euclid City Sch. Dist.*].

⁷⁰ *Port Chester*, 704 F. Supp. 2d at 449.

1. Cases That Note the Permissibility of Cumulative Voting as a Cure

Importantly, a few cases have noted the possibility that cumulative voting could serve as a potential cure for vote imbalances. For example, in *Holder v. Hall*,⁷¹ Justice Thomas noted in his concurring opinion that the implementation of alternative voting systems

may seem [like] radical departures from the electoral systems with which we are most familiar. Indeed, they may be unwanted by the people in the several States who purposely have adopted districting systems in their electoral laws. But nothing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under [section] 2⁷²

Similarly, in *Branch v. Smith*,⁷³ Justice O'Connor stated that "a court could design an at-large election plan that awards seats on a cumulative basis, or some other method that would result in a plan that satisfies the Voting Rights Act."⁷⁴ One court mandated a cumulative voting system for County Commissioner elections. It ruled that "primary elections would be conducted using the electoral districts submitted in the County's second proposed remedial plan and that the general election would be conducted on a countywide basis using cumulative voting."⁷⁵ On appeal, this scheme was found to be impermissible, but only because the lower court did not consider the preference of the defendant and give deference as required.⁷⁶

⁷¹ 512 U.S. 874 (1994).

⁷² *Id.* at 910 (Thomas, J., concurring). Justice Thomas also noted that:

districting is merely another political choice made by the citizenry in the drafting of their state constitutions. Like other political choices concerning electoral systems and models of representation, it too is presumably subject to a judicial override if it comes into conflict with the theories of representation and effective voting that we may develop under the Voting Rights Act.

Id. at 911.

⁷³ 538 U.S. 254, 309-10 (2003).

⁷⁴ *Id.* at 309-10 (O'Connor, J., concurring) (discussing the fact that at-large elections can be remedial for violations of section 2 or section 5, so long as they provide appropriate representation with respect to population).

⁷⁵ *Cane v. Worcester Cnty.*, Nos. 95-1122, 95-1688, 1995 WL 371008, at *2-3 (4th Cir. June 16, 1995).

⁷⁶ *Cane v. Worcester Cnty.*, 35 F.3d 921, 923 (4th Cir. 1994) (noting that the court abused its discretion in imposing the preferred voting system of the plaintiff—cumulative voting).

The *Port Chester* Court also ordered that the system be used as a cure. The new voting system in Port Chester is currently the only court-imposed (as opposed to simply court-ratified), still-viable remedial cumulative voting scheme in existence.

These decisions show that federal courts—and even the Supreme Court—are willing to sanction alternative electoral schemes.

2. Cases That Cast Doubt on Cumulative Voting as a Cure

Other courts have been reluctant to support cumulative voting as a remedial measure. Indeed, in certain contexts, while not striking cumulative voting down as illegal, circuit courts of appeals have determined that cumulative voting is, at times, an inappropriate remedy for section 2 violations.

For example, in *Cousin v. Sundquist*,⁷⁷ at issue was the alleged dilution of the African American vote in the election of judges in Hamilton County, Tennessee. After cumulative voting was ordered by the district court, the Court of Appeals for the Sixth Circuit remanded to the district court because it was not convinced that a violation had even occurred.⁷⁸ But this did not stop the court from discussing its views about cumulative voting: “[W]e feel that cumulative voting, the remedy ordered by the district court in this case, is an inappropriate remedy for a section 2 claim, and especially so when imposed on the election of state court judges.”⁷⁹ The court also asserted that cumulative voting “would encourage racial bloc voting,” and warned the system had the potential to entrench factions in the judiciary.⁸⁰ The court concluded that the system would increase competitiveness to obtain as many votes as possible, vitiating collegiality among judges on the bench, and would be a movement towards proportional representation—something the court admonished.⁸¹

In *Dillard v. Baldwin County Commissioners*,⁸² the Eleventh Circuit Court of Appeals concluded that the cumulative voting system that Dillard sought was not an

⁷⁷ 145 F.3d 818 (6th Cir. 1998).

⁷⁸ *Id.* at 821-22.

⁷⁹ *Id.* at 829.

⁸⁰ *Id.* at 830-31.

⁸¹ *Id.*

⁸² 376 F.3d 1260 (11th Cir. 2004).

appropriate section 2 remedy. The district court had recognized that “there [was] no objective and workable standard for choosing [it as a] reasonable benchmark[] over the many forms of government.”⁸³ The court also noted that the first *Gingles* precondition is not without limitations: the federal courts could not concoct any remedy they so chose if the remedy had never been contemplated before by the state.⁸⁴ Thus, while circuit courts have discussed an apprehension about implementing cumulative voting as a remedial cure based on case-specific facts—like the nature of judicial elections—no court has determined that cumulative voting by its nature is *illegal* as a cure.⁸⁵ These mixed messages on cumulative voting as a remedial measure offer little aid in trying to assess the potential of implementing cumulative voting for section 2 violations.

⁸³ *Id.* at 1264 (internal quotations omitted).

⁸⁴ *Id.* at 1268. Indeed, the question of a reasonable benchmark has been a trying consideration for the judiciary. *See* *Holder v. Hall*, 512 U.S. 874, 880-81 (1994) (“In certain cases, the benchmark for comparison in a [section] 2 dilution suit is obvious. The effect of an anti-single-shot voting rule . . . can be evaluated by comparing the system *with* that rule to the system *without* that rule. But where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under [section] 2.”) (emphasis added).

⁸⁵ Two recent cases might have provided further insight into the dilemma of whether cumulative voting should be used as a remedial measure for section 2 violations. Unfortunately, neither case reached the merits. In another of the “Dillard” cases, *Dillard v. Chilton County Commission*, 495 F.3d 1324, 1327-28 (11th Cir. 2007) (per curiam), the Eleventh Circuit faced a challenge by two litigants who sought to eradicate the consent decree that mandated cumulative voting as a section 2 remedy on the ground that Alabama law precluded the system. While the district court had upheld the challenge and determined that cumulative voting was not an appropriate remedial measure, the Eleventh Circuit vacated the district court’s judgment because the challengers lacked standing. *Id.* at 1339-40. The Eleventh Circuit’s decision disposed of a litigation that had been pending in one form or another before the court for nearly 20 years—the decision was pending because of individuals’ refusal to accept the cumulative voting system. *Id.* at 1327-28. And even more recently, in *Cottier v. City of Martin*, 604 F.3d 553, 555 (8th Cir. 2010), Native Americans brought suit under section 2, claiming that districts had been drawn in such a way that their votes were diluted. In *Cottier*, the district court ruled that a violation had occurred, and imposed the defendants’ third proposed remedial plan: cumulative voting. *Id.* at 555-56. The Court of Appeals affirmed. *Id.* at 556. However, on appeal and after a rehearing, the Court of Appeals for the Eighth Circuit, sitting en banc, determined that a violation of the Act had not been proved to begin with, and so never reached the question of whether cumulative voting was an appropriately imposed remedy by the Court. *Id.* at 561; *see also* *Cane v. Worcester Cnty.*, 35 F.3d 921, 928 (4th Cir. 1994) (court “not called upon to outline whether facts and circumstances might justify the imposition of a cumulative voting plan on a political subdivision,” and review was limited to the specific facts and circumstances where the district court abused its discretion in adopting the cumulative voting scheme).

II. THE SECTION 2 ENFORCEMENT ACTION IN PORT CHESTER

Courts have not provided clear guidance about whether cumulative voting is an appropriate remedial measure for section 2 violations, but the section 2 enforcement action in Port Chester provides more insight into the DOJ's position regarding implementation of the system. Until 2006, the Village of Port Chester, New York, had an electoral system that used at-large voting to elect six members of a Board of Trustees (the Board). Every year, the Village's voters elected two of the Board's members for three-year terms.⁸⁶ Under this system, each voter was permitted two votes for each calendar year.⁸⁷ He or she could cast one vote for two separate candidates or, alternatively, he or she could cast one vote for a single candidate and withhold the other vote.⁸⁸ Port Chester, with a population of 27,867, has a plurality of Hispanics who comprise 46.2% of the Village's total population; non-Hispanic whites make up 42.8% of the total population.⁸⁹

In December 2006, the United States sued the Village of Port Chester in the U.S. District Court for the Southern District of New York, alleging violations under section 2 of the Voting Rights Act in that the large Hispanic population had been denied fair representation in local government.⁹⁰ The DOJ requested a preliminary injunction under the Act to prevent the Village from holding its spring election for Board members.⁹¹ The injunction was granted.⁹² After a six-day bench trial, the court concluded that the Village's current practice of electing Board members was in violation of section 2 of the Voting Rights Act because it diluted the Hispanic vote in accordance with *Gingles*.⁹³ Each party was permitted to submit briefs thereafter, outlining prospective remedial plans for how to solve the lack of fair representation in the new elections.⁹⁴

⁸⁶ United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 420 (S.D.N.Y. 2010).

⁸⁷ *Id.*

⁸⁸ *Id.* This practice is known as "bullet" or "single shot" voting. *Id.*

⁸⁹ *Id.* at 419. All population percentages are as of the 2000 Census. *Id.*

⁹⁰ *Id.* at 416.

⁹¹ *Id.* Cesar Ruiz intervened as a plaintiff in this action. *Id.* at 417. Ruiz had received nearly all the Hispanic votes in 2006 for a seat on the Board of Trustees, but still did not garner enough support to win a spot. *Id.* at 431.

⁹² *Id.* at 416.

⁹³ *Id.* at 417, 453. The court determined this through its analysis of the preconditions and factors set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986). *Id.* at 420-47.

⁹⁴ *Id.* at 417. FairVote also submitted an amicus brief in which it advocated for cumulative voting. *Id.* FairVote is an advocacy group for election reform that strives

The DOJ set forth a plan that would have established six districts within the Village, one for each Trustee on the Board.⁹⁵ Once the districts were drawn, voters would cast their ballots for a single Board member from their district.⁹⁶ All seats would be voted for simultaneously in the first new election, with staggered terms thereafter.⁹⁷ The Village proposed an alternative plan: members of the six-person Board would still be elected through an at-large, multimember system, but the system would use cumulative voting to elect all six members of the Board concurrently.⁹⁸ The DOJ opposed the plan, but the court adopted Port Chester's proposed remedy, giving required deference to the jurisdiction and local legislature.⁹⁹

A. *Understanding the Department of Justice's Position on Cumulative Voting: The DOJ's Rejection of the Port Chester Plan*

In its opposition brief to the Village's proposed cumulative voting remedy, the DOJ cryptically noted that, while it objected to cumulative voting, "[t]his is not to say that cumulative voting would never be an appropriate remedy in a [section] 2 case."¹⁰⁰ Here, however, the DOJ rejected Port Chester's proposal as an inappropriate remedy.¹⁰¹ In fact, the DOJ's opposition to cumulative voting in *Port Chester* seems more vociferous than the DOJ's opposition to cumulative voting in other cases; in the past, the DOJ seemed more ready to

to "respect every vote and every voice through bold approaches to increase voter turnout, meaningful ballot choices and fair representation." See *Who We Are*, FAIRVOTE: THE CENTER FOR VOTING AND DEMOCRACY, <http://www.fairvote.org/who-we-are> (last visited Mar. 11, 2011).

⁹⁵ See *Port Chester*, 704 F. Supp. 2d at 420, 447; Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan at 6, *Port Chester*, 704 F. Supp. 2d 411 (No. 06-cv-15173).

⁹⁶ See *Port Chester*, 704 F. Supp. 2d at 447.

⁹⁷ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 21-22.

⁹⁸ See Defendant's Pre-Hearing Remedy Brief at 1, 17, *Port Chester*, 704 F. Supp. 2d 411 (No. 06-cv-15173).

⁹⁹ *Port Chester*, 704 F. Supp. 2d at 453; see also *White v. Weiser*, 412 U.S. 783, 794-95 (1973); *Cane v. Worcester Cnty.*, 35 F.3d 921, 927 (4th Cir. 1994) ("Once a violation of [section] 2 of the Voting Rights Act has been established, a district court should give the appropriate legislative body the first opportunity to devise a remedial plan.").

¹⁰⁰ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 20.

¹⁰¹ See *id.*

embrace the system.¹⁰² Regardless, the DOJ argued that Port Chester's plan was deficient for several reasons.

First, the DOJ noted that courts may not order multimember districts "absent insurmountable difficulties" in using single member districts.¹⁰³ It argued that "cumulative voting [was] plainly not a viable alternative for Port Chester compared to the presumptive remedy of single-member districts"—especially because the Hispanic population was not so geographically dispersed.¹⁰⁴ Next, addressing what FairVote—a voting advocacy group that submitted an amicus brief endorsing cumulative voting—perceived to be a prevalence of jurisdictions nationwide that have adopted cumulative voting as a remedy for section 2 violations, the DOJ noted summarily that the approximately sixty jurisdictions where cumulative voting had been implemented as a cure were mostly located in Texas and other areas in the South, and applied mostly to school boards.¹⁰⁵ The significance of this geographic concentration was not detailed. The DOJ also argued that, upon appellate review, cumulative voting plans had been rejected wholesale by circuit courts.¹⁰⁶ In each of these situations, it claimed, the courts had described cumulative voting as too "unconventional," or as impermissibly preserving at-large systems.¹⁰⁷ And while noting that the DOJ had never discussed cumulative voting as an "outright improper . . . remedy to a section 2 violation," the DOJ

¹⁰² See, e.g., Defendant's Pre-Hearing Remedy Brief, *supra* note 98, at 9 (discussing four cases where the DOJ, either as amicus or litigating party, indicated that cumulative voting could be a viable remedy option for section 2 violations). Steven J. Mulroy speculates that the heightened opposition to cumulative voting in this case might be related to the fact that the U.S. Attorney's Office in the Southern District of New York, not the central DOJ in Washington, D.C., took the lead in the *Port Chester* case. Telephone Interview with Steven J. Mulroy, Professor, Cecil C. Humphreys Sch. of Law (Apr. 3, 2011).

¹⁰³ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 16 (quoting *Chapman v. Meier*, 410 U.S. 1, 18 (1975)).

¹⁰⁴ *Id.* at 20.

¹⁰⁵ *Id.* at 17. For a current list of political subdivisions where cumulative voting is in effect, see *Communities in America Currently Using Proportional Voting*, *supra* note 65.

¹⁰⁶ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 17-18. Here, the DOJ cited several cases for this proposition, including *Dillard v. Baldwin County Commissioners*, 376 F.3d 1260 (11th Cir. 2004), *Harper v. City of Chicago Heights*, 223 F.3d 593 (7th Cir. 2000), *Cousin v. Sundquist*, 145 F.3d 818 (6th Cir. 1998), *Cane v. Worcester County Commission*, 35 F.3d 921 (4th Cir. 1994), and *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993). *Id.*

¹⁰⁷ *Id.*

contended that the Village and FairVote¹⁰⁸ falsely characterized the DOJ's positive stance on cumulative voting.¹⁰⁹ For example, the Village and FairVote each noted that the DOJ had almost always allowed for new cumulative voting process changes under the section 5 preclearance procedure.¹¹⁰ The DOJ argued that the preclearance procedure is not the same as a remedy under section 2.¹¹¹

Finally, the DOJ expressed its concern with the practical application of cumulative voting in Port Chester. Specifically, the DOJ noted that, with the exponential growth of the Hispanic population in Port Chester, the "Hispanic community could come to dominate the political landscape in Port Chester even under the current at-large system."¹¹² The DOJ asserted that cumulative voting tends to produce "one, but only one, heavily supported minority candidate," and "[i]n the context of a steadily increasing Hispanic population in Port Chester, cumulative voting could restrain the ability of Hispanics to elect more than one Hispanic-preferred Trustee."¹¹³ This argument, however, seems to be at odds with the DOJ's vote-dilution claim.

The court rejected the DOJ's arguments, addressing some more directly than others. The court did not attack the DOJ's assertion that single-member districts are highly presumptive remedies, nor did it address the relevance of the fact that cumulative voting has been used almost exclusively in the South. The court did, however, distinguish the facts of courts of appeals cases that the DOJ cited.¹¹⁴ In the instances where cumulative

¹⁰⁸ FairVote submitted an amicus brief in support of alternative voting schemes, and advocated for Port Chester's chosen scheme of cumulative voting as well as choice voting. *See generally* Brief of Amicus Curiae, *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010) (06-civ-15173).

¹⁰⁹ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 20.

¹¹⁰ Defendant's Pre-Hearing Remedy Brief, *supra* note 98, at 8; Brief of Amicus Curiae, *supra* note 108, at 15.

¹¹¹ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 21. For a more detailed discussion of the interplay between section 2 and section 5, see *infra* Part III.A.

¹¹² Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 21.

¹¹³ *Id.*

¹¹⁴ *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010) (noting that in cases where a district court's order of cumulative voting was stuck down, "the circuit courts found either that the district court improperly imposed its own remedy without first finding that defendant's plan was not legally acceptable . . . or the district court's plan did not adequately take into account the

voting was rejected, the district courts either did not defer to the political subdivision's preferred remedies as required by law or impermissibly mandated a voting scheme on their own.¹¹⁵

The court also found that, specific to the Village, the proposed remedy was legal under the Voting Rights Act and New York law, and would cleanse the section 2 violation.¹¹⁶ Notably, it would not require Hispanics to see ultimate success in the election; it would simply “provide a genuine opportunity to exercise an electoral power that is commensurate with its population.”¹¹⁷ The court noted that an expert had applied the “threshold of exclusion”¹¹⁸ test to determine that Hispanic voters would enjoy an actual opportunity to elect their candidate of choice.¹¹⁹ Further, the court found that, in the specific context of the Village of Port Chester, the implementation of cumulative voting would not create a *new* section 2 violation so long as the implementation process included a robust educational program and staggered terms were eliminated.¹²⁰ Finally, benefits of the plan were clear: it did not violate the “one-person, one vote” requirement of the Fourteenth Amendment, and would not require racial districting.¹²¹ Because the Village's Plan was legally and factually defensible, the court gave due deference to the Village's legislative policy judgments.¹²² On December 22, 2009, the parties signed a consent decree, which the court

preferences of the defendant . . . [or] was deemed inappropriate in judicial elections for reasons unique to the judiciary”) (internal citations omitted).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 447-51.

¹¹⁷ *Id.* at 449 (quoting *LULAC v. Perry*, 548 U.S. 399, 428 (2006)) (internal quotation marks omitted).

¹¹⁸ The court took into account the possibility that the white majority would not support the minority-preferred candidate at all. *Id.* at 450 (explaining that the threshold of exclusion takes the “worst case scenario” into account). The “threshold of exclusion” is “the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances.” *Cottier v. City of Martin*, 475 F. Supp. 2d 932, 937 (D.S.D. 2007), *aff'd* 551 F.3d 733 (8th Cir. 2008), *rev'd en banc* 604 F.3d 553 (8th Cir. 2010) (quoting *Dillard v. Chilton Cnty. Bd. of Educ.*, 699 F. Supp. 870, 874 (M.D. Ala. 1988)); *see also* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. REV. 1867, 1880 (1999) [hereinafter *Mulroy, Alternative Ways Out*] (explaining the threshold of exclusion is calculated by “1” divided by the numbers of seats available plus “1”).

¹¹⁹ *Port Chester*, 704 F. Supp. 2d at 450.

¹²⁰ *Id.* at 451-52.

¹²¹ *Id.* at 452-53.

¹²² *Id.* at 453; *see also* *Cane v. Worcester Cnty.*, 35 F.3d 921, 927 (4th Cir. 1994) (“Once a violation of [section] 2 of the Voting Rights Act has been established, a district court should give the appropriate legislative body the first opportunity to devise a remedial plan.”).

entered, directing the Village to implement cumulative voting with a number of provisions.¹²³

Importantly, in a four-to-two vote of the Board, the Village determined that it would appeal the section 2 liability ruling of the district court.¹²⁴ But for now, the cumulative voting scheme still stands.

¹²³ See generally Consent Decree, *Port Chester*, 704 F. Supp. 2d 411 (No. 06-Civ-15173). The decree “remain[s] in effect through June 22, 2016 or three election cycles, whichever is longer.” *Id.* ¶ 10.

¹²⁴ See Kirk Semple, *Port Chester to Appeal U.S. Voting-Rights Ruling Aimed at Helping Latinos*, N.Y. TIMES, Feb. 24, 2011, at A25, available at <http://www.nytimes.com/2011/02/24/nyregion/24chester.html>; see also *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411 (S.D.N.Y. 2010), appeal docketed, No. 11-1831 (2d Cir. May 5, 2011). The Village has only indicated that a recent Supreme Court case lends support to the argument there was no impermissible vote dilution practice employed in Port Chester’s election process when the DOJ brought suit. See *Port Chester Appeals Federal Voting Rights Ruling*, CBS N.Y., Feb. 24, 2011, <http://newyork.cbslocal.com/2011/02/24/port-chester-appeals-federal-voting-rights-ruling>. Assumedly, the Village intends to base its appeal on *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009). In its motion for reconsideration in the U.S. District Court for the Southern District of New York, the Village argued several points that it considered grounds for reconsideration. Among them, the two upon which the Village will likely base its appeal are (1) the election of what the Village deems to be minority-preferred candidates, aside from those elected through cumulative voting in the June 2010 election, and (2) dicta in *Bartlett v. Strickland*, 129 S. Ct. 1231, which contemplated that if a crossover district were allowed to satisfy the first *Gingles* prong, the third *Gingles* prong would come under greater scrutiny. Memorandum of Law in Support of Defendant’s Motion to Reconsider 5-14, *Port Chester*, 704 F. Supp. 2d 411 (No. 06-Civ-15173). Port Chester will likely contend that Mayor Dennis Pilla, who was previously found to be a Hispanic-preferred candidate, has been elected as mayor twice since the court determined the Village’s section 2 liability. See *id.* at 5; see also Nathan Mayberg & Jananne Abel, *Pilla Wins Re-election by a Landslide*, PORT CHESTER WESTMORE NEWS, MAR. 18, 2011, http://pc.westmorenews.com/atf.php?sid=16216¤t_edition=2011-03-18. This will naturally require the Village to proffer evidence in support of its theory. The Village will also likely contend that, in previous elections, crossover districts were a factor, and did, in fact, aid the Hispanic population in electing its candidate of choice. See Memorandum of Law in Support of Defendant’s Motion to Reconsider, *supra*, at 8-14. Because *Bartlett* dicta seemed to say that a district that used a crossover majority vote to prove an opportunity to elect would have difficulty proving the third *Gingles* precondition—that the white majority votes in a sufficient bloc to preclude the effectiveness of the minority vote—the Village will likely argue that such was the case in Port Chester, and that, therefore, the DOJ should not have been able to make out a prima facie case of vote dilution. In opposition to Port Chester’s motion for reconsideration, the DOJ argued that it had not based its enforcement action on a crossover district theory at all. See Memorandum of Law of the United States of America in Opposition to Port Chester’s Motion to Reconsider 11, *Port Chester*, 704 F. Supp. 2d 411 (No. 06-Civ-15173). Rather, the DOJ had shown that Hispanic voters in Port Chester comprised more than fifty percent CVAP in the relevant district—what was ultimately required by *Bartlett*—and had shown that the Hispanic vote was, in fact, diluted. *Id.* at 11-12. The DOJ’s motion to dismiss the appeal is pending as this note goes to press. See Motion of the United States to Dismiss the Appeal, *United States v. Vill. of Port Chester*, No. 11-1831 (2d Cir. June 7, 2011).

B. *Cumulative Voting Carries the Election Day in Port Chester*

In June 2010, the Village of Port Chester was once again able to hold elections for the Board of Trustees—but this time, it had a new system to use.¹²⁵ It was the first time that cumulative voting would be used in the state of New York.¹²⁶ In addition to Election Day, the polls were open for five days of early voting.¹²⁷ Many voted as often as they were allowed, with individuals casting up to six votes for one candidate, or distributing their votes as they pleased.¹²⁸ An exit poll showed that “[t]urnout was at least 10% higher than in recent Port Chester municipal elections.”¹²⁹

The consent decree set forth a number of provisions that were to be followed in accordance with the implementation of the cumulative voting system. The “Voter Education Program” of the decree mandated that the Village implement a number of new educational elements.¹³⁰ First, a Program Coordinator, fluent in both English and Spanish, would be hired and trained to assist the Village in carrying out the decree.¹³¹ The consent decree required the Village to hold a total of twelve general public forums—six each in both English in Spanish—prior to the June 2010 election.¹³² The forums would provide practice rounds of voting and training, and would be advertised in local newspapers and on local radio and television stations.¹³³ After the initial election, bilingual forums are required each year

¹²⁵ United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 453 (S.D.N.Y. 2010).

¹²⁶ Jim Fitzgerald, *Port Chester Election: New York Villagers Get Six Votes Each*, HUFFINGTON POST (June 15, 2010, 4:08 PM), http://www.huffingtonpost.com/2010/06/15/portchester-election-new_n_612365.html. Accordingly, Judge Robinson embarked on an analysis in his opinion that demonstrated the legality of the system with respect to the New York Constitution. *Port Chester*, 704 F. Supp. 2d at 448-49.

¹²⁷ Fitzgerald, *supra* note 126; see also *Early Voting Information*, PORT CHESTER VOTES, <http://portchestervotes.org/earlyvoting> (last visited Mar. 25, 2011).

¹²⁸ Fitzgerald, *supra* note 126.

¹²⁹ DAVID C. KIMBALL & MARTHA KROFF, CUMULATIVE VOTING EDUCATIONAL PROGRAM EXIT POLL REPORT, PORT CHESTER, N.Y. ii (Aug. 20, 2010), available at <http://www.umsl.edu/~kimballd/PCFinalReportAug20.pdf>.

¹³⁰ Consent Decree, *supra* note 123, ¶ 6.

¹³¹ *Id.* app. ¶ 1. “Defendants shall assign one employee to act as Program Coordinator . . . to assist in carrying out the Defendants’ obligations under this Decree. The Coordinator shall be able to understand, speak, write, and read fluently both English and Spanish.” *Id.*

¹³² *Id.* app. ¶¶ 5-6. Among other things, each forum was required to allow the public to practice cumulative voting. *Id.*

¹³³ *Id.*

until 2016.¹³⁴ The Village sent voters detailed bilingual sample ballots and instructions before the election, and letters regarding the new system were also requested to be sent home with public school students.¹³⁵ In addition, a number of civic posts, like libraries, would carry bilingual samples and brochures for voter information.¹³⁶ Finally, for the benefit of voters, public forums educated the community about the candidate-qualifying process.¹³⁷ Voters mobilized with t-shirts, signs, and tote bags that read, “Your voice, your vote, your village.”¹³⁸

Importantly, the consent decree included a number of provisions regarding Spanish language assistance. The decree stressed the necessity of the Village to comply with section 203 of the Voting Rights Act to ensure that both English and Spanish language election information and materials were equally available.¹³⁹ Translators and bilingual election personnel were to be hired and present at all election-related events conducted in Port Chester.¹⁴⁰ The number of Spanish-speaking poll officials was to be commensurate with the Hispanic population surrounding each polling place.¹⁴¹ Poll officials would also receive more training about the requirements of section 203.¹⁴² The Voting Education Plan Coordinator would keep a log of all of these events, and would send the log to the DOJ to show the Village’s compliance; the Village would also prepare a postelection report including exit

¹³⁴ *Id.*

¹³⁵ *Id.* app. ¶¶ 7-8.

¹³⁶ *Id.* app. ¶ 13. Additionally, the decree required “Defendant . . . [to] make bilingual persons who are knowledgeable about the cumulative voting process available to meet with different Hispanic organizations to meet with such organizations and explain the cumulative voting process,” *id.* app. ¶ 12, as well as “post a bilingual sample ballot with detailed instructions concerning the cumulative voting process in libraries, public assistance agencies, village offices, senior centers, civic centers and other public places . . .” *Id.* app. ¶ 13.

¹³⁷ *Id.* app. ¶ 16.

¹³⁸ Fitzgerald, *supra* note 126.

¹³⁹ Consent Decree, *supra* note 123, app. ¶ 18. Section 203, in relevant part, requires that “Whenever [a district] . . . provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable minority group as well as in the English language.” 42 U.S.C. § 1973aa-1a(c) (2006). Although, as one scholar notes, “[T]he salad days for [section] 203 and the other minority language provisions may be coming to an end.” Michael J. Pitts, *The Voting Rights Act and the Era of Maintenance*, 59 ALA. L. REV. 903, 965 (2008). While section 203 is existing law, it was perhaps reiterated in the consent decree to ensure its application regardless of the section’s actual status.

¹⁴⁰ Consent Decree, *supra* note 123, app. ¶¶ 19, 22.

¹⁴¹ *Id.* app. ¶ 24.

¹⁴² *Id.* app. ¶ 26(b).

polling for the United States after each election.¹⁴³ The decree expires in 2016 (or, the equivalent of three election cycles); up until that time, the Village is also subject to the preclearance requirements of section 3(c) of the Voting Rights Act,¹⁴⁴ and must notify the Attorney General of any changes in its voting practices and receive permission from the Attorney General before implementing those changes.¹⁴⁵

1. Praise for the New System

On June 15, 2010, the Village's voters elected the first Hispanic member to the Board.¹⁴⁶ Mr. Luis Marino, the newly elected Board member, said that he felt the new system benefited him.¹⁴⁷ The Mayor of Port Chester, Dennis G. Pilla, spoke positively of the system, boasting "the results are clear—that the new system worked."¹⁴⁸ In fact, the system worked not only to elect the Hispanic-preferred candidate, but it also created a diverse Board: the villagers elected two democrats, two republicans, one independent, and one conservative.¹⁴⁹ It was also the first time an African-American was elected to the Board.¹⁵⁰ The Board now comprises a mix of newcomers, like Marino, and those who have played a part in Port Chester politics for years: the villagers elected a former mayor to sit on the Board, as well.¹⁵¹

One of the reasons why the system "worked" was the education program for which the DOJ advocated in the consent decree. The exit poll report from the first Port Chester cumulative voting election shows that "the vast majority of Port Chester voters showed that they took full advantage of cumulative voting."¹⁵² In fact, "[m]ore than 95% of voters in all

¹⁴³ *Id.* app. ¶¶ 30-31.

¹⁴⁴ 42 U.S.C. § 1973a(c) (2006).

¹⁴⁵ Consent Decree, *supra* note 123, ¶¶ 9, 11.

¹⁴⁶ KIMBALL & KROPF, *supra* note 129, at 39; Semple, *First Latino Board Member*, *supra* note 1.

¹⁴⁷ Semple, *First Latino Board Member*, *supra* note 1.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ John Branca, elected to the board in June 2010, was a "trustee from 1983-93 and mayor from 1993-95." Jananne Abel, *Thirteen trustee candidates to choose from on June 15*, PORT CHESTER WESTMORE NEWS, June 11, 2010, http://pc.westmorenews.com/atf.php?sid=13375¤t_edition=2010-06-; *Board of Trustees*, VILL. OF PORT CHESTER, N.Y., http://www.portchesterny.com/Pages/PortChesterNY_BTrust/index (last visited Apr. 11, 2011).

¹⁵² KIMBALL & KROPF, *supra* note 129, at 39.

demographic groups reported that they used all six of their votes in the election, which comports with the number of votes cast in the official election results. In addition, voters demonstrated that they knew how to plump their votes.”¹⁵³ Importantly, “Latino voters, African American voters, voters whose first language was Spanish, and voters who did not finish high school were more likely to give all of their votes to one candidate. These are the same demographic groups who reported being more familiar with cumulative voting.”¹⁵⁴ Polled voters spoke highly of the educational offerings, handouts, and community presentations, which accounted in large part for their understanding of the new system.¹⁵⁵ The television and radio advertisements also contributed to their notice and edification.¹⁵⁶

This result is not an uncommon one with the implementation of cumulative voting: “The track record of the first cumulative voting elections held (pursuant to settlements) in the late 1980s and early 1990s is . . . impressive . . . from the standpoint of racial and ethnic minority empowerment.”¹⁵⁷ In fact, “[w]henver racial or ethnic minority candidates ran, cumulative voting resulted in the election of racial or ethnic minority candidates for the first time in decades (or ever).”¹⁵⁸

For his part, Mayor Pilla is pleased with the new system.¹⁵⁹ He notes that the Village was extremely proactive in ensuring that the Voter Education Program was implemented in the most effective way possible.¹⁶⁰ And because the system was so new, elements that might have seemed simple initially underwent careful scrutiny: the ballot design, for example, required several draft iterations and the vetting of different Spanish dialects.¹⁶¹ Two of the most effective tools for voters, according to the mayor, were the sample ballot and a cumulative voting “How-To” guide, which were also two of the least expensive measures the Village employed.¹⁶² Mayor Pilla also

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at iv-v, 16.

¹⁵⁶ *Id.* at 16.

¹⁵⁷ See Mulroy, *Alternative Ways Out*, *supra* note 118, at 1891.

¹⁵⁸ See *id.* at 1891-92 (discussing the effectiveness of settlement agreement implementation of limited, cumulative, and preference voting in different political subdivisions across the county).

¹⁵⁹ Interview with Dennis Pilla, Mayor, Vill. of Port Chester, in Port Chester, N.Y. (Mar. 27, 2011).

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

explains that the Village's civic educational component was crucial—it conveyed to citizens why voting in local government is so significant.¹⁶³ As Mayor Pilla notes, “It really affects your day-to-day life more than other forms of government.”¹⁶⁴

Mayor Pilla, who is against the appeal, believes that cumulative voting is a progressive step for the Village, and that, if the new system unraveled, it would be a step backwards.¹⁶⁵ And with the practical knowledge gained from the first election, he thinks that the system will only become more streamlined so that the Village's costs can kept as low as possible.¹⁶⁶ He also accredits the higher voter turnout rate during the June 2010 election in part to “early voting.”¹⁶⁷ While early voting within the Village required more security and staff, it was an effective tool, and one he believes could be implemented elsewhere to boost voter turnout.¹⁶⁸ Going forward, Mayor Pilla also believes that cumulative voting with staggered terms should be an option for the Village, provided that the number of seats up for election at any given time allows for the Hispanic population to surpass the threshold of exclusion.¹⁶⁹

Professor Steven J. Mulroy is also a proponent of cumulative voting within the Village—in fact, he consulted with the Village as it formed its remedial plan.¹⁷⁰ Mulroy notes that the community embodies qualities that are most fitting for a political subdivision that establishes cumulative voting: the Hispanic population, while compact in one area, was relatively dispersed throughout the Village; and the Village's size, geographically, is too small to make districting practicable.¹⁷¹

2. Media Backlash

One problem with the DOJ's refusal to openly sanction the cumulative voting system—which was evidenced after the *Port Chester* case—is the backlash and criticism that resulted within the public. Implementation of the Port Chester plan was not

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Telephone Interview with Steven J. Mulroy, Professor, Cecil C. Humphreys Sch. of Law (Apr. 3, 2011).

¹⁷¹ *Id.*

without critics. One major complaint of commentators was the fact that the DOJ had not supported the remedy. As one individual noted, “Judge Robinson . . . overstepped his bounds to impose a solution that not even Barack Obama’s Justice Department wanted. . . . [Judge Robinson] should be impeached.”¹⁷²

Activists who oppose illegal immigration also condemned the move, noting that the court that implemented the plan discussed the fact that “there were many more Hispanics who were not voters” living in the Village, and they asserted that these individuals were considered in the ultimate decision.¹⁷³ William Gheen, president of Americans for Legal Immigration PAC, likened the scheme to racial gerrymandering:

It works only when a minority votes in a racist fashion . . . instead of choosing candidates on their qualifications. Imagine [a federal program that turns] 12 million illegal aliens into voters. . . . Envision a future of when that happens. A lot of people aren’t really thinking about [when the U.S. would] suddenly have a new voting bloc of 12 million illegal aliens.¹⁷⁴

Additionally, the *New York Post* published a scathing editorial, which stated that Port Chester “was forced to swallow a goofy voting scheme that makes sense only if the aim is to erase the distinction between legal and illegal immigrants.”¹⁷⁵ It went on to note that the remedy was made possible even though “many of the Latinos are here illegally, so they can’t vote. No matter. The cockeyed voting system was put in place to satisfy a claim of discrimination based on their total numbers, as though immigration status has no consequence to election results.”¹⁷⁶

These critics should be disabused of false notions. First, any section 2 remedial scheme aims to give the minority population a real opportunity to elect a *preferred* candidate—not a minority candidate. “Racial” voting, however, is a reasonable concern. But this concern can be countered. For instance, recognizing that the new system will change the

¹⁷² Erick Erickson, *Add Federal Judge Stephen Robinson to the “Must Impeach” List*, REDSTATE (June 16, 2010, 9:26 AM), <http://www.redstate.com/erick/2010/06/16/add-federal-judge-stephen-robinson-to-the-must-impeach-list>.

¹⁷³ Bob Unruh, *1-Man, 6-Vote Racial Plan Used to Choose Board’s 1st Minority*, WORLDNETDAILY (Aug. 8, 2010, 10:18 PM), <http://www.wnd.com/?pageID=188173>.

¹⁷⁴ *Id.* (alterations in original) (internal quotation marks omitted).

¹⁷⁵ Michael Goodwin, *Dave: To Bankruptcy—& Beyond!*, N.Y. POST, June 20, 2010, available at http://pagesixsixsix.com/f/print/news/local/dave_to_bankruptcy_beyond_mFBh1VG1XBj1DNCzBHWBJ.

¹⁷⁶ *Id.*

status quo—which has been deemed to constitute racial bloc voting already—is meant to ameliorate racial voting, not breed it.¹⁷⁷ Further, as Mulroy notes in describing the “self-district[ing]” principles of alternative systems, “[v]oters . . . have complete freedom to identify what interests and issues are most germane to them, and vote accordingly for any candidate(s) (of any race), anywhere in the jurisdiction, perceived to represent those concerns.”¹⁷⁸

Second, the claim about illegal aliens’ controlling the vote is without merit here. In *Port Chester*, the court did discuss the total population (both citizens and noncitizens), the voting age population (VAP), and the citizen voting age population (CVAP) of Hispanics in its liability analysis, but placed an emphasis on CVAP in finding that the minority-majority district of Hispanics was sufficiently large and geographically compact enough to show a real opportunity to elect.¹⁷⁹ However, Gheen’s is an argument that has been used in other cases. Because “[t]he Constitution requires inclusion of all inhabitants in the apportionment base for congressional districts but does not specify procedures for drawing local districts or deciding who must be included,” decisions about whether to draw lines according to total population, VAP, or CVAP has been the focal point of contention in recent years.¹⁸⁰ But the first prong of *Gingles*, which includes the benchmark districts that are drawn during the liability phase of a section 2 claim, have usually been interpreted by the courts as embracing CVAP.¹⁸¹ The Port Chester district that was used as a benchmark conforms to this standard.

Regarding the implementation of the system, the *Post* noted that “[t]axpayers were robbed, with the town spending \$300,000 on the process and maybe \$1 million in legal fees—all for an election in which 3,000 people voted. The turnout was

¹⁷⁷ See Mulroy, *The Way Out*, *supra* note 12, at 352-53.

¹⁷⁸ *Id.* at 354.

¹⁷⁹ See *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 421-23 (S.D.N.Y. 2010).

¹⁸⁰ Carl E. Goldfarb, Note, *Allocating the Local Apportionment Pie: What Portion for Resident Aliens?*, 104 YALE L.J. 1441, 1456 (1995); Persily, *supra* note 53, at 778. For other districting purposes, Goldfarb argued that “excluding noncitizens from the apportionment base would impose greater hardships on a community,” in that the district’s resources would likely be more swiftly depleted. Goldfarb, *supra*, at 1455. Many critics of districting that relies on total population or VAP of a minority group also neglect to recognize that legal aliens, who cannot vote, “partake of life in the community just as much as citizens, paying all taxes and drawing on all community services.” *Id.* at 1456.

¹⁸¹ See text *supra* note 53.

about twenty-five percent of registered voters, the same as in previous elections. But cheer up: A Latino candidate won.”¹⁸²

Even some of the Village’s voters expressed unease: “That was very strange. . . . I’m not sure I liked it. All my life, I’ve heard, ‘one man, one vote,’” said Arthur Furano, a Village resident.¹⁸³ This sort of reaction is not at all unique with the implementation of alternative voting practices. In an empirical study of communities in which cumulative voting was implemented, Richard H. Pildes and Kristen A. Donoghue found that cumulative voting was disliked for just this reason—the “widely shared view that cumulative voting was undemocratic and unconstitutional because it violated the one person, one vote principle.”¹⁸⁴ But the claim attacking the constitutionality of the cumulative voting system on “one person, one vote” grounds is without merit.¹⁸⁵ In another community where cumulative voting was implemented in 1988, one individual recalled,

When the idea was first proposed, as far as the public reaction, we thought it was a joke, because the idea that one person could vote seven times in one particular race was just really unheard of at that time, and many people thought it was just something they were grasping at straws kind of a thing, and it would not ever come into effect here. Once it became the law under the settlement of this court case, a lot of people still didn’t believe it.¹⁸⁶

Joseph Kenner, a Village Trustee who voted to appeal the *Port Chester* Court’s vote-dilution ruling, describes the new system as “a little unusual.”¹⁸⁷ Kenner would like to see the district court’s decision overturned.¹⁸⁸ He would also like to see

¹⁸² Goodwin, *supra* note 175.

¹⁸³ See Fitzgerald, *supra* note 126.

¹⁸⁴ Pildes & Donoghue, *supra* note 42, at 282.

¹⁸⁵ *Id.* While perhaps understandable because of the unusualness of the cumulative voting system, these sentiments are not properly placed.

The principle of one person, one vote now viewed as so ‘fundamental’ to democratic government was not, of course, constitutionally established until 1964. Moreover, cumulative voting does not violate the principle of one person, one vote; as long as each person has equal voting power, the formal number of votes cast is irrelevant to the equal-protection concerns embodied in the one person, one vote doctrine.

Id.

¹⁸⁶ *Id.* at 270 (quoting Sue Smith, a Republican voted onto the Board of Education in Chilton County under a cumulative voting electoral process).

¹⁸⁷ Telephone Interview with Joseph Kenner, Vill. of Port Chester Tr. (Mar. 28, 2011).

¹⁸⁸ *Id.*

a return to the old system that Port Chester had in place—an at-large, multimember voting scheme; he asserts that candidates should be expected to garner as many votes as possible in more traditional ways, like going door-to-door, building natural coalitions with voters, and holding candidate forums.¹⁸⁹ The new scheme, he says, was also very costly.¹⁹⁰ He notes that one current issue with the Village residents' reception of the system could be that the villagers associate the *voting scheme* aspect with the section 2 lawsuit *liability* aspect, which he believes carries a “stigma.”¹⁹¹ Kenner explains that voters have certainly expressed tremendous outrage over the court's order, which directed Port Chester to change its voting system.¹⁹² The outrage also stems from the fact that this unusual system was implemented to achieve a desired outcome—one that, in this case, is based on race.¹⁹³

But Kenner also asserts that, of the options available at the remedy phase in the district court, cumulative voting was truly the best for the Village.¹⁹⁴ Due to the small geographic area, the relative geographic dispersion of Hispanics within the Village, and a districting system's potential to “crack” other cohesive groups, Kenner believes that a districting system would be impractical.¹⁹⁵ One of Kenner's main concerns with the new system is the elimination of staggered terms, which was ordered by the court as necessary in order for the Hispanic population to meet the threshold of exclusion. Voting for all six Board seats concurrently means that, during any given election, all seats can be replaced with a set of newcomers, eviscerating institutional knowledge.¹⁹⁶ Kenner also noted that it is too soon to tell whether the Board's partisan diversity will work to hamstring any Village initiatives; but no group on the Board holds an absolute majority.¹⁹⁷

With this kind of misunderstanding and general unease, it is necessary for the DOJ to proffer its position regarding alternative voting systems.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

III. IS CUMULATIVE VOTING A VIABLE REMEDIAL SCHEME FOR SECTION 2 VIOLATIONS?

As mentioned, the DOJ has never actively sought cumulative voting as a remedy for a section 2 violation. But the DOJ's arguments in the *Port Chester* case can be extrapolated to glean a wider perspective of the DOJ's position. The DOJ required an in-depth educational program in the Village because cumulative voting is complex and has broad strategic implications. The DOJ may require other conditions to ensure that cumulative voting comports with the mandates of section 2 and the Voting Rights Act. Section 5 provides some indication.

A. *The Interplay Between Sections 2 and 5: What the DOJ Might Seek Under a Cumulative Voting System*

In its opposition to Port Chester's proposed remedy of cumulative voting, the DOJ admonished FairVote, amicus for the Village's proposed remedy, for drawing parallels between the DOJ's section 5 and section 2 positions.¹⁹⁸ Steven J. Mulroy has likewise drawn comparisons between the two Voting Rights Act sections, looking to section 5 preclearance objections in an effort to glean what kinds of remedial schemes might be appropriate under section 2.¹⁹⁹ Section 5 provides that certain jurisdictions that are "covered" must obtain federal approval—i.e., preclearance—from the Attorney General before changing any of their voting procedures.²⁰⁰ Covered jurisdictions are those with particularly discriminatory voting histories.²⁰¹ To be precleared by the Attorney General, a "covered jurisdiction[] must demonstrate that electoral changes are discriminatory neither in purpose nor in effect, a standard the Supreme Court interpreted to require a showing that the changes do not worsen, or cause retrogression to, existing opportunities for political participation by minority voters."²⁰² The covered

¹⁹⁸ Memorandum of Law of the United States of America in Support of Plaintiffs' Joint Proposed Remedial Plan, *supra* note 95, at 20 ("FairVote also improperly conflates election schemes that the Department has not objected to in the preclearance process versus remedies that it has endorsed.").

¹⁹⁹ See, e.g., Mulroy, *Full Representation*, *supra* note 14.

²⁰⁰ 42 U.S.C. § 1973(c) (2006). See Luis Fuentes-Rohwer, *Judicial Activism and the Interpretation of the Voting Rights Act*, 32 CARDOZO L. REV. 857, 868 (2011) [hereinafter Fuentes-Rohwer, *Judicial Activism*].

²⁰¹ Fuentes-Rohwer, *Judicial Activism*, *supra* note 200, at 868.

²⁰² Ellen Katz, *Not Like the South? Regional Variation and Political Participation Through the Lens of Section 2*, in VOTING RIGHTS ACT: REAUTHORIZATION

jurisdiction must submit any proposed voting-system change to the Attorney General, who “may interpose an objection by informing the jurisdiction of the decision no later than 60 days after a voting change has been submitted.”²⁰³

There is undoubtedly interplay between section 5 and section 2. Interestingly, it was a section 5 case—*Allen v. State Board of Elections*—that first allowed vote dilution challenges under the Voting Rights Act.²⁰⁴ In that case, the Supreme Court noted that certain registration processes might not just deny access to the ballot, but might also dilute minority votes.²⁰⁵ Witnesses before Congress have also testified that “[s]ection 2 would be inadequate without [s]ection 5 to enforce it.”²⁰⁶ Indeed, “[s]ection 5 operates to protect the gains that plaintiffs obtain through section 2 litigation.”²⁰⁷ Port Chester, for example, is subject to preclearance requirements now that the litigation is over.²⁰⁸ And if an agreed upon remedial plan is not implemented correctly, section 5 ensures that the plan will work going forward.²⁰⁹ Also similar to section 5, section 2 lets states choose their own method of complying with the Voting Rights Act.²¹⁰

Because of the similarities between sections 2 and 5, an examination of the DOJ’s administrative preclearance determinations might therefore reveal the DOJ’s position on

OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER 183, 190 (Ana Henderson ed., 2007).

²⁰³ See *Section 5 of the Voting Rights Act*, *supra* note 19.

²⁰⁴ See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (“The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.”).

²⁰⁵ *Id.*

²⁰⁶ Kristen Clarke, *The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?* 43 HARV. C.R.-C.L. L. REV. 385, 416 (2008) (citing *Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 146 (2006) [hereinafter *Section 5 Hearing*] (statement of Anita Earls, Director, Advocacy, University of North Carolina School of Law)).

²⁰⁷ *Id.* (quoting *Section 5 Hearing*, *supra* note 206, at 145 (statement of Anita Earls, Director, Advocacy, University of North Carolina School of Law)).

²⁰⁸ Consent Decree, *supra* note 123, ¶¶ 9, 11. Port Chester is subject to prior clearance under section 3(a) of the Voting Rights Act, which is largely identical to section 5. *Id.*; compare 42 U.S.C. § 1973a(c) (2006) (section 3(a)), with 42 U.S.C. § 1973(c) (2006) (section 5).

²⁰⁹ Clarke, *supra* note 206, at 416 (citing *Voting Rights Act: An Examination of the Scope and Criteria for Coverage Under the Special Provisions of the Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 34 (2005) (statement of Jose Garza, Counsel for the League of United Latin American Citizens)).

²¹⁰ *Georgia v. Ashcroft*, 539 U.S. 461, 482 (2003) (“Section 5 gives States the flexibility to choose one theory of effective representation over the other.”).

alternative voting systems, like cumulative voting.²¹¹ Evaluating the only cumulative voting preclearance objection from the Attorney General that existed in 1995, Steven J. Mulroy found that a DOJ investigation revealed no serious effort in the community to “solicit the views of the minority community, to investigate whether the minority community had a complete understanding of the cumulative voting system, or to provide bilingual education to the minority community regarding the new system.”²¹² Another objection rejected cumulative voting because the system would use “numbered posts,”²¹³ which can also have a dilutive effect.²¹⁴ Since then, another letter of objection from the Attorney General shows that a district wished to change from its single-member districting scheme to cumulative voting with staggered terms.²¹⁵ In its analysis, the DOJ noted that the district’s Hispanic population, which had been successful under the seven single-member districting scheme to elect school board officials, would be unlikely to meet the threshold of exclusion.²¹⁶

These objections are telling in that they evince what the DOJ requires when implementing a cumulative voting system: namely, that the minority population can, in fact, meet the threshold of exclusion, and that the plan for education about the system prior to implementation is comprehensive.

But there are notable distinctions between section 2 and section 5, which likely explain why the DOJ admonishes comparison of its positions regarding one or the other section. Section 2 concerns the opportunity of a minority group to elect its preferred representative, while section 5 merely asks whether a change has the effect of denying or abridging the right to vote. Furthermore, “[s]cholars and Supreme Court [J]ustices have begun to observe ‘discord and inconsistency’

²¹¹ See Mulroy, *Full Representation*, *supra* note 14.

²¹² *Id.* Based on these factors, the Attorney General objected to a change in voting scheme in Cochran County, Texas, from its five-member city council elected under a traditional at-large system by plurality vote to cumulative voting on September 12, 1994. *Id.*

²¹³ See Defendant’s Pre-Hearing Remedy Brief, *supra* note 98, at 8. “Numbered Posts” are “[p]ositions on a city council or school board, somewhat similar to designated areas, where candidates run from a particular ‘post’ but still have to be elected at-large. Some numbered posts require that the candidate be a resident of a particular geographical area.” *Glossary*, *supra* note 10.

²¹⁴ See, e.g., *Holder v. Hall*, 512 U.S. 874, 888 (1994) (O’Connor, J., concurring).

²¹⁵ Letter from Assistant Att’y Gen. to Haskell Consol. Indep. Sch. Dist. (Sept. 24, 2001), available at http://www.justice.gov/crt/about/vot/sec_5/pdfs/l_092401.pdf.

²¹⁶ *Id.*

between the antidilution goal of [s]ection 2 and the antiregression goal of [s]ection 5.”²¹⁷ Also, section 2 is permanent, while section 5 will sunset in 2031.²¹⁸ Therefore, to the extent that section 5 positions can elucidate the DOJ’s stance regarding section 2, they reveal little more than does the Port Chester consent decree: the DOJ requires community education because of the strategic nature of cumulative voting and the potential for community confusion, and the threshold of exclusion must be met generously.

The DOJ’s strong preference for single-member districts still stands in the way of full support for cumulative voting. But, after *Bartlett*, the preference for single-member districts should again be questioned.

B. The Presumption of Single-Member Districts: Why the DOJ Advocates for Them, Why They Should Again Be Questioned, and Whether They Are Legally Replaceable

As discussed, in Voting Rights Act cases like *Port Chester*, the DOJ typically argues that there is a heavy presumption in favor of single-member districts to remedy section 2 violations. The *Port Chester* Court, however, did not address this proposition in its opinion. This is likely because the court did not have to reach the question—the Village’s proposed remedy was factually and legally defensible according to the court, and so it paid due deference to the legislature.²¹⁹ As we have seen, single-member districts have in fact been the preferred benchmark for measuring Voting Rights Act violations and for remedying impermissible vote dilution.²²⁰ But, for reasons explained below—especially in light of *Bartlett*—presumptions of single-member districts must once again be questioned, and the DOJ must evaluate whether other systems might serve as permissible and more beneficial remedies.

²¹⁷ *Ashcroft*, 539 U.S. at 491 (Kennedy, J., concurring) (“There is a fundamental flaw . . . in any scheme in which the Department of Justice is permitted or directed to encourage or ratify a course of unconstitutional conduct in order to find compliance with a statutory directive.”). Here, Justice Kennedy recognizes the tension between race-motivated districting and the prevalent use of this kind of line drawing to stave off vote dilution; see also *Absoch et al.*, *supra* note 49, at 107.

²¹⁸ See *Section 5 of the Voting Rights Act*, *supra* note 19.

²¹⁹ See, e.g., *Cane v. Worcester Cnty.*, 35 F.3d 921, 927 (4th Cir. 1994) (“Once a violation of [section] 2 of the Voting Rights Act has been established, a district court should give the appropriate legislative body the first opportunity to devise a remedial plan.”).

²²⁰ See *supra* Part I.B.

1. Critiques of Single-Member Districts as the Traditional Cure

Single-member districts are typically implemented as a cure for at-large, “winner-take-all” election practices.²²¹ However, the favoring of single-member districts can be criticized for a number of reasons. First, as the Supreme Court noted in *Gingles*, the multimember, at-large form was not “responsible for minority voters’ inability to elect its candidates”; rather, it was the winner-take-all practice in place *within* the at-large district that diluted the minority vote.²²² Thus, in thinking about the methodology of the electoral process in an at-large system, as opposed to the at-large system itself, cumulative voting could be an effective remedy. A cumulative voting system that retains a multimember district, but changes the method by which governmental seats are elected, is just as preferable as single-member districts, provided that the scheme affords the minority the potential to elect representatives articulated in *Gingles*.²²³ Theoretically, this kind of representation can be achieved whenever the threshold of exclusion is exceeded. The rule that at-large systems should be changed completely because the winner-take-all nature diluted votes previously should not apply to cumulative voting, because cumulative voting is specifically “designed to enhance minority political opportunity.”²²⁴ While alternative voting schemes like cumulative voting are still at-large, they are not winner-take-all. And while the *Gingles* Court attacked a multimember system, multimember systems are not necessarily invidious.²²⁵ Single-member districts were not even prevalent until 1842, when Congress decided that the House of Representatives should be elected from single-

²²¹ See Mulroy, *The Way Out*, *supra* note 12, at 338, 362 (“An oft-repeated principle in voting rights cases is that single-member districts are ‘strongly preferred’ to at-large plans for court-ordered . . . remedies.”).

²²² See *Thornburg v. Gingles*, 478 U.S. 30, 50 & n.17 (1986); see also Karlan, *supra* note 63, at 235-36.

²²³ *Gingles*, 478 U.S. at 50 n.17; see also Karlan, *supra* note 63, at 235.

²²⁴ See Mulroy, *The Way Out*, *supra* note 12, at 362-63 (discussing the fact that multimember district criticism stems from their “winner-take-all” nature).

²²⁵ *Holder v. Hall*, 512 U.S. 874, 897 (1994) (Thomas, J., concurring) (“[T]here is no principle inherent in our constitutional system, or even in the history of the Nation’s electoral practices, that makes single-member districts the ‘proper’ mechanism for electing representatives to governmental bodies or for giving ‘undiluted’ effect to the votes of a numerical minority.”).

member districts.²²⁶ While multimember districts are attacked under section 2, they are still part and parcel with the American system of government.²²⁷

Second, as mentioned, single-member districts that create geographic compactness of minorities became ultrasensitive to constitutional attack under the Equal Protection Clause.²²⁸ In *Port Chester*, the Village identified the *Shaw* line of cases as a potential concern.²²⁹ The *Shaw* cases make the remedy of cumulative voting seem attractive as a remedial measure because cumulative voting does not require district drawing on the basis of race, thus avoiding the risk of an equal-protection violation. The *Port Chester* Court noted favorably, too, that a cumulative voting plan would obviate concerns of racial gerrymandering.²³⁰ Especially now that *Bartlett* has foreclosed the possibility of remedying voter dilution with coalitional or crossover districts, courts should again consider cumulative voting and other alternative voting systems as replacements for single-member districts to eradicate the risks of racial gerrymandering. But there may be other factors that give a kind of “presumptive rightness” to single-member districts that other alternative systems do not enjoy—like the question of the liability-remedy relationship.

2. The Test for Liability and Its Relation to Remedy: Are Single-Member Districts Legally Replaceable?

Single-member districts have carried a heavy presumption in section 2 cases likely because of *Gingles*. Although the first *Gingles* precondition truly speaks to the dilution problem and potential violation, it also contemplates a remedy.²³¹ The first *Gingles* factor forces the plaintiff to show that the grievance can be remedied by demonstrating that there is a problem with the current voting scheme, and that the

²²⁶ *Id.* at 898.

²²⁷ *Id.*

²²⁸ See, e.g., Pildes & Donoghue, *supra* note 42, at 241 (“Supreme Court decisions . . . cast substantial . . . doubt on the continued constitutionality of race-conscious districting.”).

²²⁹ Defendant’s Pre-Hearing Remedy Brief, *supra* note 98, at 10.

²³⁰ *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 453 (“[C]umulative voting and alternative voting schemes have received focus precisely because they avoid the *Shaw* problem that plagued drawing single-member districts.” (citing Jason Kirksey, et al., *Shaw v. Reno and the New Election Systems: The Cumulative Voting Alternative*, VOTING RIGHTS REV. 10 (1995))).

²³¹ *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

scheme can be rectified with another scheme—hence, that dilution exists.²³² Indeed, the first *Gingles* precondition calls on the plaintiff to establish that there is an injury and to show that his injury can be redressed.²³³ This precondition requires demonstrating that a dilutive plan—like an at-large winner-take-all system—injures the section 2 plaintiffs by failing to draw an available remedial district that would give those plaintiffs a chance to elect their chosen candidate.

Accordingly, the political subdivision at issue must have a minority group that is “sufficiently large and geographically compact to constitute a majority in a single-member district.”²³⁴ Therefore, to show injury, the section 2 plaintiff must come forward with a proposed plan that shows the minority group can constitute a majority in a single-member district. In *Bartlett*, the Supreme Court finally determined what this majority constituted for the sake of the geographical “compactness” requirement: the minority population must be fifty percent or more of VAP or CVAP in a given district.²³⁵

Drawing these types of districts as a remedy to pass the first *Gingles* precondition is necessary, and courts have struggled with establishing a reasonable alternative practice as a benchmark against which to measure the existing voting practice.²³⁶ These decisions, however, ultimately concluded that the district system is the benchmark.²³⁷ Even in *Port Chester*, the expert who aided the DOJ in assessing the districts noted that “showing that Hispanics represent a majority of CVAP in a single member district is a typical method for arguing that there is an ability to elect [the minority’s candidate of choice].”²³⁸ Each of the hypothetical districts used by the DOJ in *Port Chester* did just that. In one plan, the total CVAP of Hispanics in one district was 50.51 percent; in the other, the

²³² *Id.*

²³³ *Id.* at 50-51 & n.17 (1986).

²³⁴ *Gingles*, 478 U.S. at 50.

²³⁵ *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009) (noting that section 2 requires first, the creation of a “majority-minority” district, in which a minority group composes a numerical of fifty percent or more of the voting-age population, and second, that a court is *not* required to draw crossover districts according to section 2).

²³⁶ *See, e.g., Holder v. Hall*, 512 U.S. 874, 881 (1994).

²³⁷ *See Bartlett*, 129 S. Ct. at 1247 (“To the extent there is any doubt whether [section] 2 calls for the majority-minority rule, we resolve that doubt by avoiding serious constitutional concerns under the Equal Protection Clause.”).

²³⁸ *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 425 & n.10 (S.D.N.Y. 2010) (internal quotation marks omitted).

total CVAP of Hispanics was 56.27 percent in the opportunity-to-elect district.²³⁹

Therefore, in *Port Chester*, while the remedy was cumulative voting, a cumulative voting system was not used during the liability phase to show that the minority group had a potential to elect. It seems counterintuitive that the remedy used to show that a political subdivision has violated section 2—the same remedy that shows that a non-dilutive scheme is possible—would not be implemented to cure the violation after liability was determined.

a. The Unlikelihood That the Gingles Benchmark Will Change

It seems unlikely that the first *Gingles* precondition will be reconstructed to allow for new benchmarks. In *Voinovich v. Quilter*, the Supreme Court noted that, to allow “atypical” claims under section 2, like crossover district claims, the first *Gingles* requirement “would have to be modified or eliminated,” presumably because the “compactness” requirement would not be at issue.²⁴⁰ The Court recently recognized this dilemma in *Bartlett v. Strickland*, where it refused to allow crossover districts to constitute a benchmark for the first *Gingles* precondition.²⁴¹

Those in favor of cumulative voting have suggested that, if cumulative voting was the remedy of choice, another test should supplant the typical benchmark of drawing single-member districts for elections: the “threshold of exclusion” test. For example, Steven J. Mulroy has argued that a narrow view of the first *Gingles* prong, limiting the benchmark to single-member districts, is unjustified.²⁴² His argument turns on the language of the first *Gingles* precondition, which requires that the minority group has the “*potential* to elect representatives”

²³⁹ *Id.* at 425. In *Bartlett*, 129 S. Ct. 1231, the Supreme Court ruled definitively that in order to meet the first *Gingles* precondition, the proposed district must comprise more than fifty percent VAP (or CVAP) of the district’s population. While *Port Chester* was decided before the Supreme Court’s decision in *Bartlett*, the majority-minority district proposed by the DOJ—and used to determine liability—pass muster under *Bartlett*.

²⁴⁰ See *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (noting the first *Gingles* requirement “would have to be modified or eliminated” to allow crossover-district claims).

²⁴¹ *Bartlett*, 129 S. Ct. at 1237.

²⁴² See Mulroy, *The Way Out*, *supra* note 12, at 369. Mulroy asserts that, when the Supreme Court devised the first *Gingles* precondition, it was not contemplating an alternative voting system, which is why the compactness requirement centers around single-member districts. But he argues this should not foreclose alternative voting systems from applying to the first *Gingles* precondition. *Id.* at 363-64.

in the absence of the challenged structure or practice.²⁴³ Focusing on the “potential to elect” portion of this precondition, Mulroy determined that the *compactness* portion need not be met.²⁴⁴ Rather, Mulroy urged for a substitute benchmark with a “threshold of exclusion” prong, which would afford minority voters the same opportunity—or “potential”—to elect their preferred candidate.²⁴⁵ In essence, Mulroy asserted that the first *Gingles* precondition was more flexible than it appeared or than it had been construed by the courts.²⁴⁶ But the Supreme Court has never framed the requirement as anything other than a majority-minority rule.

There are difficulties with proposing a new *Gingles* benchmark for the first precondition to establish liability. First, as a practical matter, the current single-member district benchmark test of *Gingles* is straightforward. Mulroy acknowledged this.²⁴⁷ The plaintiff presents a “map of an illustrative majority-minority district to demonstrate the first *Gingles* prong of ‘compactness,’” and a court can rule easily on whether the first precondition is met.²⁴⁸ But, as Mulroy also noted, the threshold of exclusion benchmark is a simplistic formula to apply, too.²⁴⁹ This is crucial—the *Bartlett* Court recognized the importance of a clear, numerical rule (fifty percent VAP/CVAP) when it struck down the potential of a legally-mandated crossover district.²⁵⁰ One large problem with the idea of judicially enforceable crossover districts was the

²⁴³ See *id.* at 364 (emphasis added).

²⁴⁴ See *id.* at 368.

²⁴⁵ See *id.* at 369.

²⁴⁶ See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (noting that the *Gingles* requirements “cannot be applied mechanically and without regard to the nature of the claim”).

²⁴⁷ See Mulroy, *The Way Out*, *supra* note 12, at 345.

²⁴⁸ *Id.* Mulroy recognizes that an idea to replace the *Gingles* compactness requirement would be met with criticism because the requirement “is an objective, easily quantifiable, ‘bright line’ standard which allows for easy judicial implementation.” *Id.* at 369.

²⁴⁹ *Id.* at 370-71 (“All that is needed to be known is the minority’s percentage of the jurisdiction’s population, the number of seats on the governing body in question, and the type of alternative electoral system requested in the plaintiffs’ complaint. From these three facts one would be able to calculate whether the plaintiff can make out a prima facie case of ‘potential to elect,’ as understood in *Gingles*.”).

²⁵⁰ *Bartlett v. Strickland*, 129 S. Ct. 1231, 1245 (2009) (“Unlike any of the standards proposed to allow crossover-district claims, the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with [section] 2.”).

necessity of the courts to engage in political questioning.²⁵¹ Cumulative voting, by contrast, does not demand that the courts delve into politics or line-drawing. Rather, it applies a simple formula to determine the remedy. Therefore, it, too, is a desirable standard for the judiciary.

But to the extent that the “benchmark” for determining the sufficiency of the first *Gingles* precondition was never very exact—and thus perhaps open to interpretation—that has since changed after *Bartlett*. There was no precise bar by which to measure the exactitude of what constituted a majority within a given majority-minority district, and so the “threshold of exclusion” benchmark might have actually been a cleaner, more precise method by which to determine ability to elect. *Bartlett*, however, established a clear numerical threshold defining the “majority” under the first *Gingles* factor; in order for the majority-minority population to avail itself of an opportunity to elect its candidate of choice in section 2 challenge, it must show it can constitute at least fifty percent of VAP/CVAP in a drawn district.²⁵² Furthermore, the Court expressly noted in *Bartlett* that “[a]llowing crossover-district claims would require us to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our [section] 2 jurisprudence.”²⁵³ Indeed, while the refusal to reformulate the first *Gingles* precondition rested on the particular facts of *Bartlett*, it is telling in that the Court considers any change to *Gingles*’ preconditions to be offensive to *stare decisis*—thus, the first precondition, according to the Court, is not as flexible as once thought.²⁵⁴

The argument might be made, however, that *Bartlett* need not foreclose completely the idea that single-member districts can be replaced by the threshold of exclusion within

²⁵¹ *Id.* at 1244 (noting that if section 2 required crossover districts, the judiciary would be “in the untenable position of predicting many political variables and tying them to race-based assumptions”).

²⁵² *Id.* at 1246 (noting that only a district with a minority population of more than fifty percent of the VAP/CVAP can provide a remedy to minority voters under section 2). It is perhaps worth noting that, while the *Bartlett* decision was rendered after the *Port Chester* case was decided, the majority-minority district in Port Chester proposed by the DOJ did, in fact, have both VAP and CVAP voting populations of over fifty percent. Mulroy argued that a minority population in a given subdivision could have a potential to elect its preferred candidate under the threshold of exclusion if the minority population was too geographically dispersed for the legislature draw a district with more than fifty percent minority VAP/CVAP. Mulroy, *Alternative Ways Out*, *supra* note 118, at 1881. *Bartlett* requires such a district be drawn for the first *Gingles* precondition.

²⁵³ *Bartlett*, 129 S. Ct. at 1244.

²⁵⁴ See generally McLoughlin, *supra* note 49.

the first *Gingles* prong. As Mulroy has argued in the past, “[w]here the plaintiffs do not challenge the use of at-large elections per se, but instead some discrete feature of the particular at-large system being used, a different analysis obtains.”²⁵⁵ The challenge might be “to such electoral features as majority vote . . . [or] staggered term[] requirements,” which do not require single-member districts absolutely.²⁵⁶ Moreover, attaching the threshold of exclusion as a benchmark for the first *Gingles* precondition would not disrupt the other two *Gingles* preconditions.²⁵⁷ The *Bartlett* Court, in dicta, made a point of noting that using crossover districts as a benchmark within the first *Gingles* prong could cause tension with the third necessary *Gingles* precondition—that the white majority votes as a bloc.²⁵⁸ The threshold of exclusion, on the other hand, would not produce such a tension, and the third *Gingles* prong would still need to be met.

Even if there exists the possibility that the threshold of exclusion could be used to replace the districting benchmark of the first *Gingles* prong, though, it still seems unlikely that the Court would adopt the threshold of exclusion as a replacement for the precise standard that the *Bartlett* Court set forth.

b. Cumulative Voting as a Judicially Imposed Remedy

While *Bartlett* might have defined an exact numerical for the purposes of liability under the first *Gingles* precondition, cumulative voting should still constitute a judicially enforceable and imposed remedial measure when the political subdivision at issue desires it. Indeed, after *Bartlett*, a political subdivision must take the first step of proving liability by showing potential majority-minority districts with a minority VAP/CVAP of more than fifty percent. Thereafter, courts should adopt the view—as the *Port Chester* Court did—that the remedy and the benchmark need not be related. In this sense, the first *Gingles* precondition requires the existence only of a *hypothetical* benchmark for the purpose of measuring

²⁵⁵ Mulroy, *supra* note 12, at 365.

²⁵⁶ *Id.* at 355-56.

²⁵⁷ *Id.* at 373 (noting that “plaintiffs would still have to prove racial bloc voting”).

²⁵⁸ *Bartlett*, 129 S. Ct. at 1244 (“Mandatory recognition of claims in which success for a minority depends upon crossover majority voters would create serious tension with the third *Gingles* requirement that the majority votes as a bloc to defeat minority-preferred candidates.”).

vote dilution, not an *actual* remedy, so the remedy should be viewed as a separate entity. In *Holder v. Hall*, Justice O'Connor articulated the difference between the two and explained that an

alternative benchmark is often self-evident. In a challenge to a multi-member at-large system, for example, a court may compare it to a system of multiple single-member districts. Though there may be disagreements about the precise appropriate alternative practice in these cases, . . . there are at least some objectively determinable constraints on the dilution inquiry.²⁵⁹

In other words, the first two preconditions merely contemplate an objective basis used to assess the vote-dilution inquiry; they do not have to be seen as contemplating a remedy or the “precise appropriate alternative practice” that will ultimately be implemented.²⁶⁰

There are, of course, cases that suggest a different interpretation, even diametrically opposed to the notion that one can separate the *Gingles* benchmark requirement from a remedial plan. On a rudimentary level, “any federal decree must be a tailored remedial response to illegality.”²⁶¹ On its face, an understanding of this proposition tells us that the benchmark that determined illegality should be the benchmark used to cure that illegality. Other courts construe the benchmark dilemma in a similar manner. “The inquiries into remedy and liability . . . cannot be separated: A district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system.”²⁶²

But if the first *Gingles* benchmark is inextricably linked to the remedy imposed, then, after *Bartlett*, the *only* plans political subdivisions could employ as remedial measures would be single-member districts with a minority VAP/CVAP of more than fifty percent. The potential foreclosure of alternative

²⁵⁹ *Holder v. Hall*, 512 U.S. 874, 888 (1994) (O'Connor, J., concurring).

²⁶⁰ See Mulroy, *The Way Out*, *supra* note 12, at 364 (citing *SCLC v. Sessions*, 56 F.3d 1281, 1302 (11th Cir. 1995) (Hatchett, J., dissenting)) (“Under this analysis, a plaintiff who can satisfy the compactness requirement with an illustrative district (as well as the other *Gingles* preconditions and Senate factors) can potentially obtain an alternative system as relief.”).

²⁶¹ *LULAC v. Clements*, 999 F.2d 831, 847 (5th Cir. 1993).

²⁶² *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (en banc); see also *Cottier v. City of Martin*, 604 F.3d 553, 571 (8th Cir. 2010) (Smith, J., dissenting) (finding that “*Bartlett's* explanation of the majority-minority rule with regard to liability directly affects the imposition of a [section] 2 remedy, as issues of liability and remedy are inextricably intertwined”).

voting systems again implicates *Shaw* and equal-protection violations. The Supreme Court—which has continually expressed its disdain for race-conscious line-drawing—would be better served by allowing for alternative voting practices as cures, so long as the plaintiffs in these cases meet all of the requirements of a vote-dilution claim at the liability phase, at least so long as the defendant jurisdiction desires the alternative system. The mandate, expressed by federal circuit courts of appeals, that the defendant political subdivision’s remedial plan should prevail whenever possible in section 2 cases²⁶³ should trump any inkling that the liability benchmark and the remedial plan need be identical. This was precisely the case in *Port Chester*. At that juncture, after liability has been proved with district drawing and a numerical majority, the plaintiff has proved an opportunity to elect. If a section 2 violation is then found, the qualities of cumulative voting that are most appealing—its easily applied numerical standard (the threshold of exclusion) and its imperviousness to an equal-protection attack—are ideal for the remedy stage. Therefore, while some circuit courts of appeals have determined that liability and remedy are inextricably linked in section 2 cases, the Supreme Court has not.²⁶⁴ The courts would be better served, if restricted to numerical single-member districts in determining liability under *Bartlett* and *Gingles*, to contemplate less race-conscious remedies like cumulative voting. This is why it is imperative for the DOJ to define some initial standards concerning the circumstances under which cumulative voting can be used as a remedial measure.

IV. PROPOSAL

The DOJ must establish clear guidelines regarding the implementation of cumulative voting. In light of the recent *Bartlett* decision and the national attention the *Port Chester* case has received, it is an optimal time for the DOJ to define the circumstances under which cumulative voting should be considered an appropriate remedy for a section 2 violation.

Undoubtedly, the DOJ should provide guidance about the educational program that should be implemented along with the cumulative voting system, which should be

²⁶³ See, e.g., *Cane v. Worcester Cnty.*, 35 F.3d 921, 927 (4th Cir. 1994).

²⁶⁴ *Cottier*, 604 F.3d at 570-71 (“Admittedly, *Bartlett* concerned only the liability stage of a [section] 2 case, not the remedial stage.”).

comprehensive. This is evidenced by the all-inclusive educational program the DOJ demanded in Port Chester, along with notes in the DOJ's preclearance objection letters and stances in recent litigation.²⁶⁵ The DOJ should also ensure it outlines precise measures that must be taken by bilingual communities (like Port Chester), which must ensure that populations of non-English speaking voters receive the attention and education necessary to understand the system—which, of course, is more complex than other voting systems. The DOJ might consider devising its own educational manual about cumulative voting, so that voters are aware that it is currently a system in use in a number of jurisdictions, and so that voters can become familiar with alternative voting systems uniformly. Residents in political subdivisions where cumulative voting is implemented should be given sufficient information about applicable voting strategies. Moreover, the DOJ should also seek—most of all—to rid constituents of faulty notions: that cumulative voting violates the “one man, one vote” requirement, or that cumulative voting constitutes impermissible proportional representation.²⁶⁶ This education would not be done in vain; where the system has been implemented, voters seem to understand the process.²⁶⁷

The DOJ should communicate aptly that the political subdivision endeavoring to implement the system should have a healthy fiscal budget. The hefty educational plan creates real costs, and the DOJ should assess the political subdivision's

²⁶⁵ See, e.g., Mulroy, *Full Representation*, *supra* note 14 (“[M]ost important, consideration of any proposed implementation of [cumulative voting] must involve an analysis of the political sophistication of the local minority community and the likelihood of that community employing the necessary strategic voting. Where these factors are lacking, the cumulative . . . vote remed[y] will be viewed, understandably, as ineffective.”); see also U.S. Memorandum in Opposition to Euclid City Sch. Dist., *supra* note 69, at 4 n.4 (“The United States believes the . . . cumulative voting proposal also fails because it does not provide an adequate plan to educate the voters or to implement the voting scheme.”).

²⁶⁶ See, e.g., Slatky, *supra* note 12.

²⁶⁷ See, e.g., O'Neill, *supra* note 59, at 366 (“Fifty-seven local governments used cumulative voting as of 1997. The continued use of these methods for casting ballots provides strong evidence that they are not too complicated for the electorate.”).

capacity to launch the new system.²⁶⁸ For example, Port Chester spent roughly \$300,000 on its implementation procedures.²⁶⁹

The DOJ should also pronounce what it believes are the most advantageous size and demographic makeup of a political subdivision endeavoring to implement the system. Cumulative voting has most often been used in smaller political subdivisions, like school boards. Because of the more complicated nature of the system, and because cumulative voting requires voters to vote strategically—“plumping” their votes for a given candidate, or aggregating votes with others within their community—implementation of the system in a large subdivision could suffer, at least where vote dilution is the violation.²⁷⁰

Finally, the DOJ should be clear about the numerical figures it wants the political subdivision to use when calculating the threshold of exclusion, so that the minority voters in the district have a real “potential to elect” their preferred candidate. For example, in a recent section 2 case, the DOJ noted that the threshold of exclusion, as it relates to the real opportunity to elect, should be calculated based on the total electorate that actually showed up to the polls.²⁷¹ The DOJ wanted the number assigned to the minority voting population to reflect historical data.²⁷² The court, however, used a different figure: it assumed as a starting point for threshold of exclusion analysis that minority voters would go to the polls at two-thirds the rate of non-minority voters.²⁷³ Therefore, the DOJ should ensure that, when calculating the threshold of exclusion, the minority population will have an actual, realistic opportunity to elect its preferred candidate.

²⁶⁸ A Port Chester Village spokesman noted, “We put so much emphasis on education—we may have spent \$100 a voter—because we knew it would be critical to success . . . [T]he next community can point to Port Chester and say ‘That’s how it’s done.’” Jim Fitzgerald, *One Man, Six Votes: Port Chester Experiment Could Expand*, NBC N.Y. (June 18, 2010, 7:00 PM), <http://www.nbcnewyork.com/news/local/One-Man-Six-Votes-Port-Chester-Experiment-Could-Expand-96690469.html>.

²⁶⁹ Semple, *Trying to Make History*, *supra* note 1.

²⁷⁰ Rick Pildes, *The Return of Alternative Voting*, ELECTION LAW BLOG (July 20, 2009, 9:21 AM), http://electionlawblog.org/archives/2009_07.html (“Many academics . . . been supportive of greater use of alternative-voting systems, particularly in local government elections, where I believe they might be most appropriate.”).

²⁷¹ U.S. Memorandum in Opposition to Euclid City Sch. Dist., *supra* note 69, at 6-7.

²⁷² *Id.*

²⁷³ *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 763 (N.D. Ohio 2009).

CONCLUSION

Remedial schemes for section 2 violations are again in limbo after *Bartlett*. The Department of Justice should be more elastic in its acceptance of alternative voting schemes, and should be clearer about its position regarding cumulative voting and other alternative voting schemes. From the DOJ's litigation strategy in *Port Chester*, we know successful implementations require, at the very least, education and assurance that the minority voters will have the potential to elect a seat once the remedial scheme is up and running.

Courts are continually “required to confront a number of complex and essentially political questions in assessing claims of vote dilution under the Voting Rights Act.”²⁷⁴ The “central difficulty” is often “determining a point of comparison against which dilution can be measured.”²⁷⁵ Perhaps, in the end, “[t]he matters the Court has set out to resolve in vote dilution cases are questions of political philosophy, not questions of law. As such, they are not readily subjected to any judicially manageable standards that can guide courts in attempting to select between competing theories.”²⁷⁶ Rather, the parameters for these political questions, and of alternative electoral systems, should be established by the DOJ, so that political subdivisions have a sense of how to best govern their citizens, and afford as many as possible a fair say in representation.

Shawna C. MacLeod[†]

²⁷⁴ *Holder v. Hall*, 512 U.S. 874, 896 (1994) (Thomas, J., concurring).

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 901-02; *see also* *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting) (noting that results might be undesirable when courts are forced to choose between competing standards of political philosophy).

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