Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections

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The Supreme Court has recently held in two cases that judicial elections are covered by section 2 of the Voting Rights Act of 1965[1], and that trial judges are not exempt from the Act because they happen to hold "single person offices"—that is, exercise an authority independent of others who hold a similar office.[2] The immediate, practical effect of the decision will be to remove a jurisdictional hurdle for the Blacks and Latinos who have suits

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1. 42 U.S.C. § 1973 (1988):

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

2. Chisom v. Roemer, 111 S.Ct. 2354 (1991); Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S.Ct. 2376 (1991).

pending in several states[3] charging that multimember judicial elections violate section 2.

The plaintiffs in suits challenging the election of trial judges from multi-member districts still face the necessity of proving that the "totality of circumstances" outweighs the state's asserted interest in using multi-member districts. The *Houston Lawyers' Association* Court noted in dictum,

> we believe that the State's interest in maintaining the electoral system—in this case, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry . . . .[4]

Thus, the defendants in cases attacking the election of trial judges will assert that their present system (using jurisdiction-wide elections) outweighs the interests of the plaintiffs in having a judiciary which is less dilutive of the minority's voting strength. This article asserts that the use of two modified at-large election plans—limited voting and cumulative voting—as remedies would "maintain[ ] the link between a district judge's jurisdiction and the area of residency of his or her voters," while satisfying the dilution claims of the Black and Latino plaintiffs.[5] Modified at-large rules are, as the name implies, at-large election rules with modifications to allow political or racial minorities to elect *some* of the members of a legislative body or *some* judges, in contrast to the winner-take-all rules of most American elections which allow a bare majority to elect *all* the members of a multi-member body.[6]

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3. The pending cases are listed below. Unless otherwise noted, the suit challenges the at-large election of trial judges in a large number of jurisdictions in the entire state.

Alabama—SCLC v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989) (at-large elections and numbered places for trial judges);

Arkansas—Hunt v. Arkansas, No. PB-C-89-406 (E.D. Ark. 1989);

Florida—Nipper v. Martinez, No. 90-447-Civ-J-16 (M.D. Fla. 1990) (three counties); Davis v. Martinez, C.A. No. 9040098-MP (N.D. Fla. 1990) (six counties);

Georgia—Brooks v. State Bd. of Elections, Civ. No. 288-146 (S.D. Ga. 1989);

Louisiana—Chisom v. Roemer, 839 F.2d 1056 (5th Cir. 1988), *cert. denied,* 488 U.S. 955 (1988), 917 F.2d 187 (5th Cir. 1990), *rev'd* 111 S.Ct. 2354 (1991) (two-judge district used for election of state supreme court judges); and Clark v. Edwards, 725 F.Supp. 285 (M.D. La. 1988) (trial and intermediate appeals court judges);

Ohio—Mallory v. Eyrich, 666 F. Supp. 1060 (S.D. Ohio 1987), *rev'd.* 839 F.2d 275 (6th Cir. 1988) (countywide election of municipal judges in Cincinnati; issue of remedy pending after admission of liability);

Texas—LULAC v. Clements, 902 F.2d 293 (5th Cir. 1990) (panel decision later withdrawn), 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.*, Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S.Ct. 2376 (1991) (at-large elections and numbered posts).

4. *Houston Lawyers' Ass'n,* 111 S.Ct. at 2381.

5. "Modified at-large" is a term coined by Prof. Lani Guinier. I concur in its use because it emphasizes the commonalities of modified at-large rules with at-large plans more usually found in the United States. Guinier, *No Two Seats: The Elusive Quest for Political Equality,* 77 VA. L. REV. (forthcoming Nov. 1991) (on file with author).

6. *See infra* part II for a discussion of the rules of these systems.

Minorities object to at-large voting in judicial elections because it dilutes minority voting strength. State officials object to subdividing judicial districts because it will result in narrowly drawn, racially defined single-member districts, and many think this will undermine judicial objectivity (or, at least, the appearance of such objectivity). Modified at-large plans are a compromise that give something to each side in the present controversy: minority voters will be able to elect candidates of their choice, but districts will not be used.

In this Article, I use the facts and arguments from cases in three states—Mississippi, Texas, and Alabama—as the basis of the discussion. The Mississippi and Texas cases have gone to judgment after a trial on the merits. The parties settled the Mississippi case on appeal, and it has provided the basis for new elections. The United States Supreme Court has remanded the Texas case to the Fifth Circuit for that court to consider the appeal by the Texas trial judges from the decision on the merits. In contrast, the Alabama case is still pending and had been stayed during the pendency of the Texas case in the Supreme Court. The Alabama case has been chosen for discussion in this Article because of the policy arguments made by the defendants.

In part I, I discuss the nature of the judge's job as a representative of the public and the necessity of a racially inclusive bench. Part II explains the mechanics of modified at-large elections. Part III of this Article discusses the method of electing judges and the progress of the above three lawsuits. In Part IV, I consider one of the arguments made by the defendants in Alabama regarding problems of judicial favoritism if small districts elect judges. Part V discusses the impediment to the adoption of modified at-large voting presented by the constraints the Supreme Court has placed on the definition of actionable vote dilution. In part VI, I discuss the benefits of modified at-large rules over single-member districts. In the final part, I deal with several objections that have been raised to modified at-large plans.

I. JUDGES AS "REPRESENTATIVES"

The majority in *LULAC* held that section 2 of the Voting Rights Act applied only to "representatives," and that judges are not representatives because they do not represent the people, but serve them by making decisions based on principles higher than the popular will.[7] The Supreme Court rejected this reading of the Act and held that

> the better reading of the word "representatives" describes the winners of representative, popular elections. If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply

7. *LULAC*, 914 F.2d at 625-28.

> because they are chosen by popular election, then the same reasoning should apply to elected judges.[8]

I suggest a slightly different rationale. "Represent" also means "to act for"; judges represent (act for) the people in enforcing and interpreting the law. The political scientist Hanna Pitkin noted this in discussing the judge as representative:

> This sense of representing may be illustrated by considering the question of whether judges are representatives . . . . It can take various forms, depending on the view of representation a writer adopts. From a formalistic standpoint, a judge is an agent of the state like all government officials. His pronouncements are not private expressions of opinion, but official utterances of the state. Hence he represents the state. In a democracy where all agencies of the government are servants of the sovereign people, the judge might be said to represent the people.[9]

Under this theory, the public views the judge's orders as legitimate because she is acting for the people, not because they believe she has any personal, non-judicial power over the litigants. Indeed, many white southerners of the last thirty-five years have considered federal judges' orders to be illegitimate exactly because they did not reflect the societal views of the dominant group in the region.[10] As discussed more fully in part IV, it appears that the defenders of the status quo believe that legitimacy attaches only to judges elected by a majority, rather than by some smaller group.

Even in non-legislative contexts, it is important that representatives be viewed as the legitimate stand-ins for the people. For instance, I suggest that the legitimacy of the courts is enhanced if all major groups in society see some of "us" on the court, even if one of "them" tries a particular case. This concept is known as "civic inclusion."

Professor Pamela Karlan has explained the nature of civic inclusion in a recent article:

> [T]he *Reynolds [v. Sims]*[11] majority's emphasis on equal political access for all voters . . . rests on a belief in the distinctive values that inclusion in governmental decisionmaking brings: a sense of connectedness to the community and of greater political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable and intelligent governmental decisionmaking . . . . [Civic inclusion] accepts the bedrock diversity of modern America and seeks to bring diverse groups into the governing circle because, quite simply, the best way to ensure that all points of view are taken into account is to create decisionmaking bodies in which all points of view

8. *Chisom*, 111 S.Ct. at 2366.

9. HANNA F. PITKIN, THE CONCEPT OF REPRESENTATION 116-17 (1967) (footnote omitted).

10. "The Supreme Court of the United States is not the Court of last resort. The citizens of the sovereign states are the court of last resort. If the citizens of the South are determined to maintain segregation in their schools and in their social order, then their will shall prevail." HERMAN E. TALMADGE, YOU AND SEGREGATION 76 (1955).

11. 377 U.S. 533 (1964). The *Reynolds* Court held that the equal protection clause requires that seats in both houses of the state legislature be apportioned on the basis of population.

> are represented by people who embody them. It is not enough that there are people who can only imagine what minority interests might require.[12]

II. THE RULES OF MODIFIED AT-LARGE ELECTIONS

The special rules of modified at-large elections allow a minority group to have a better chance of electing candidates of its choice than the group would have in the typical at-large system. For instance, in the usual at-large election to fill five seats, each voter would have five votes to cast for five different candidates; in a cumulative voting system, the voter could cast all five votes for one candidate or split them among several candidates. In limited voting plans, the voter would have fewer votes to cast than the number of seats to be filled.

By allowing voters to cast their ballots in this way, modified at-large rules lower the "threshold of exclusion," the proportion of the voters at which a particular group will be able to elect one candidate, assuming that all other voters vote strategically.[13] The equation for the threshold of exclusion is $1/(1+S)$ for cumulative voting, and $V/(V+S)$ for limited voting, where V is the number of votes cast by each voter, and S is the number of seats to be filled.[14] In contrast, at-large elections (and single-member district elections,

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12. 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, 180 & n.27 (1989). The idea of "power sharing" in governing bodies is not new. In 1875, the governor of South Carolina commended the idea to the legislature:

> I am confident, from various indications, that the principle of minority representation is growing in favor among all the people of the State. It offers in theory, certainly, and in practice, so far as yet tested, a mode of reaching that highest result of our representative system, the true proportional influence of each class or party into which our voting population may be divided. The rule of the majority is not thereby destroyed, while the voice and influence of the minority are not wholly suppressed.

N.Y. Times, Nov. 29, 1875, at 2. Since South Carolina had a black majority at the time, white conservatives (that is, those who were not associated with the radical wing of the Republican Party) had proposed cumulative voting as early as 1871 on the grounds that "[u]nder [cumulative voting] the true office of suffrage, which is to collect the sense of a whole community, will be subserved . . . . The proposition is that the cumulative system secures thorough and general representation of all the interests in the political body." Committee Report, Taxpayers' Convention, Columbia, S.C., May 1871, quoted in JAMES S. PIKE, THE PROSTRATE STATE: SOUTH CAROLINA UNDER NEGRO GOVERNMENT 239 (1874).

13. Assuming that all voters vote strategically, a minority group casting ballots equal to the threshold of exclusion will be able to elect one person. If the non-minority group does not vote strategically, the minority group may be able to win a seat with a proportion of the votes less than the threshold. For instance, black candidates for the Chilton County, Alabama Commission were able to win even though Blacks had less than the threshold of exclusion because the white majority came nowhere close to its optimum strategy of spreading votes evenly among seven candidates for seven seats. Edward Still, *Cumulative and Limited Voting in Alabama*, *in* THE IMPACT OF ELECTORAL SYSTEMS ON MINORITIES AND WOMEN (W. Rule & J. F. Zimmerman, eds., forthcoming 1992).

14. *See* Karlan, *supra*, note 12, at 224, 232; Edward Still, *Alternatives to Single-Member Districts*, *in* MINORITY VOTE DILUTION 253-58 (Chandler Davidson, ed., 1984).

as well) have a threshold of exclusion of 50%, if there is a majority-vote runoff requirement.[15]

While most Americans are unfamiliar with modified at-large rules, corporations use cumulative voting often.[16] Since most elections in the United States are winner-take-all rather than inclusive, election plans are defended and attacked by reference to winner-take-all principles. As long as the debate continues to be expressed in winner-take-all terms, the participants will not think about inclusive plans like modified at-large voting. For instance, during oral argument in *Chisom v. Roemer,* Justice Kennedy responded to a mention of limited voting by calling it "proportional representation" in a tone of voice that suggested proportional representation was a ridiculous proposition. Such hostility, I have found in talking to others, is usually based on the hearer's assumption that proportional representation foreordains the result of the election and eliminates usual decisionmaking by voters. These otherwise intelligent people fail to see that at-large winner-take-all elections foreordain that the racial minority will be excluded from representation if there is racially polarized voting, which is the usual situation in the United States. Unfortunately, many people accept such outcomes as the natural state of affairs. In contrast, modified at-large allows voters to form voluntary constituencies rather than have constituencies imposed upon them by legislative action.

Plaintiffs in vote dilution suits are beginning to breach this barrier by using concepts of civic inclusion,[17] even though they still couch their complaint in terms of "equal access" and usually want or settle for single-member districts.[18] Single-member district plans usually result in greater diversity in the legislative body while preserving the form of winner-take-all elections; thus, they provide a remedy with which both sides can usually be comfortable.

Modified at-large voting meets the goals of civic inclusion better than districts. Empirical studies of recent modified at-large elections show that racial minorities win elections at a level close to the minority percentage in the

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15. The general formula for the threshold of exclusion for all four election plans mentioned in this paragraph is $V/(V+S)$. In a majority-vote single-member district or at-large system, V and S have the same value, resulting in a threshold of ½. The same threshold formula applies to cumulative voting if one thinks of the voter as having only one vote divided into V fractional parts. If the limited vote rules give the voter only one vote—sometimes called the single non-transferable vote—the threshold of exclusion is the same as for Cumulative Voting. *See* Karlan, *supra* note 12, at 223-25, 232.

16. *See,* ABA Model Business Corporation Act § 33. *See also,* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success,* 89 MICH. L. REV. 1077, 1139 n.298 (1991) (collecting sources).

17. *See* Karlan, *supra* note 12, 221-22.

18. In LULAC v. Clements, 902 F.2d 293, the Latino plaintiffs have steadfastly championed single-member districts, while the black intervenors have mentioned modified at-large elections as a possible remedy in their intervention papers. In oral argument before the Court of Appeals, the Latinos described modified at-large as "experimental," while the black intervenors argued that these plans provided a viable alternative to single-member districts. Telephone Interview with Sherrilyn Ifill, counsel for Houston Lawyers' Association (Mar. 18, 1991).

population.[19] Modified at-large plans allow voters to form "voluntary districts" with like-minded voters.[20] While a districting plan is imposed on the voters by an outside group (the legislature, the city council, a court) and may last for a decade or more, modified at-large elections allow voters to make grouping decisions for themselves at each election. Districting plans are based on the implicit assumption that voters have an identity of interest with their geographical neighbors. While my neighbors and I may have a common interest in whether the city repaves the street in front of our houses or rezones the lot on the corner for use as a fraternity house, on other issues we probably have no commonality. Districting relies on geographical proximity, while modified at-large plans are based on a community of perceived interest. Under a modified at-large plan, a like-minded group of voters has a greater chance of electing a legislator than under traditional at-large voting.

III. THE BACKGROUND TO THE SUITS

Alabama, Mississippi, and Texas share common features relating to the election and powers of the judges of the general jurisdiction trial courts. The judges are nominated in partisan primaries and elected in general elections.[21] Where a particular district or circuit elects more than one judge, the candidates must run for a designated position, but are elected by the voters at large. Once elected, judges of the general trial courts have jurisdiction over the matters arising within the judicial power of the state, but generally sit in the jurisdiction that elected them. Each state has some provision for the temporary assignment of a judge from her home territory to another to handle docket overloads or recusals by the judges who would normally sit.[22]

Alabama: The Southern Christian Leadership Conference's suit complains about the election of judges in ten of the state's circuit courts and several

19. Edward Still, Cumulative and Limited Voting in Alabama: The Aftermath of Dillard v. Crenshaw County, (1988) (unpublished paper); Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Voter Dilution: The Case of Alamogordo, New Mexico,* 5 J. LAW & POLITICS 469 (1989); Leon Weaver, *Semi-Proportional and Proportional Representation Systems in the United States, in* CHOOSING AN ELECTORAL SYSTEM: ISSUES AND ALTERNATIVES 191 (Arend Lijphart & Bernard Grofman eds. 1984); Karlan, *supra* note 12, 173, 227 n.226; Delbert A. Taebel et al., *Alternative Electoral Systems as Remedies for Minority Vote Dilution,* 11 Hamline J. Pub. L. & Pol'y 19 (Spring 1990); Richard L. Cole et al., *Cumulative Voting in a Municipal Election: A Note on Voter Reactions and Electoral Consequences,* 43 W. POL. Q. 191 (1990). These studies involve only a few modified at-large systems in relatively small jurisdictions.

20. Karlan, *supra* note 12, at 226 & n.224 and accompanying text.

21. All three states began popular election of judges before the Civil War. In 1832, Mississippi was the first state in the nation to require popular election of all judges. Alabama and Texas followed suit in 1849 and 1850, respectively. RALPH A. WOOSTER, THE PEOPLE IN POWER: COURTHOUSE AND STATEHOUSE IN THE LOWER SOUTH, 1850-1860, 73-76 (1969).

22. ALA. CODE § 12-17-25, -27 (1986); MISS. CODE ANN. § 9-1-105 (Supp. 1990); TEX. GOVT. CODE ANN. § 74.052-.061 (1988); TEX. RULES OF COURT (1990).

district courts.[23] Although U.S. District (now Circuit) Judge Joel Dubina rejected Alabama's motion to dismiss,[24] he has stayed the trial of the case because of the pendency of *Houston Lawyers Association v. Mattox*[25] in the Supreme Court.[26]

Mississippi: In 1987, United States District Judge William Henry Barbour, Jr. held that Mississippi's at-large judicial elections violated section 2 of the Voting Rights Act in four chancery court districts, three circuit court districts, and one county court.[27] After remedy proceedings lasting nearly eighteen months, the court ordered single-member district elections for these courts.[28] The court did not change the boundaries of the chancery or circuit court districts, but simply set up nonresidential electoral subdistricts. Put another way, the judges stand for election in subdistricts in which the candidates do not have to live; the candidate is only required to be a resident of the larger circuit or chancery district in which she will serve.[29] The court rejected the plaintiffs' proposal to use modified at-large voting on the grounds that it was "experimental and contrary to most election laws of Mississippi."[30]

The affected counties held special elections in June 1989 and five Blacks were elected to judgeships. An incumbent black judge was defeated in the same election.[31]

Texas: Hispanic voters brought suit attacking the countywide election of judges in nine districts containing 172 judges out of 375 in the whole state.[32] After a bench trial, United States District Judge Lucius Desha Bunton, III found that this method of election violated section 2 of the Voting Rights Act and enjoined the state defendants from holding further elections under the at-large winner-take-all system. As an interim remedy for the 1990 elections, the court utilized a remedy similar to that in Mississippi: the court divided the nine districts into nonresidential electoral subdistricts for the purpose of electing judges, but retained the countywide district as the venue of each court. The

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23. First Amended Complaint, SCLC v. Siegelman, 714 F.Supp. 511 (M.D. Ala. 1989) (No. 88-D-462-N). Circuit courts are general jurisdiction trial courts, while district courts handle misdemeanors and a limited group of civil claims.

24. SCLC v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989).

25. Houston Lawyers' Association v. Mattox, *cert. granted,* 111 S.Ct. 775 (1991) (No. 90-813), *rev'd. sub nom.* Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S.Ct. 2376 (1991).

26. SCLC v. Siegelman, C.A. 88-D-462-N (M.D. Ala. filed Dec. 5, 1990).

27. Martin v. Allain, 658 F. Supp. 1183, 1187 (S.D. Miss. 1987). The court also rejected challenges to one chancery district, two circuit districts, and two county courts.

28. Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988).

29. *Id.* at 332. The court noted that subdistricts with district-wide residency requirements were already used in Mississippi for the Supreme Court and justice courts.

30. *Id.* at 336-37.

31. FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, 204 (1990); *Mississippi Elects Black Judges,* N.Y. Times, June 22, 1989, at A16. As a result of the *Martin* case, there are now eight black circuit and chancery court judges in Mississippi. Letter from Frank Parker to Edward Still, July 15, 1991 (on file with the YALE LAW & POLICY REVIEW).

32. Eight of the districts are coextensive with one county each: Harris, Tarrant, Dallas, Bexar, Travis, Jefferson, Hector, and Midland. The ninth district contains Lubbock and Crosby Counties.

court based its interim order on an agreement between the plaintiffs and the state attorney general, but the district judge went beyond the agreement to abolish partisan judicial elections.[33]

Several intervening Harris County judges appealed and obtained a stay of the interim remedial order. The state appealed from the finding of liability and from the abolition of partisan elections for judges. A panel of the Fifth Circuit reversed by a vote of 2-1 on the basis that section 2 of the Voting Rights Act did not reach single office holders, such as trial judges, although it did cover collegial courts.[34] The panel distinguished *Chisom v. Edwards* in which the Fifth Circuit had held that section 2 of the Voting Rights Act applied to the election of judges on the Louisiana Supreme Court.[35]

On rehearing, the Fifth Circuit sitting *en banc* reversed the district court by a vote of 12-1.[36] A seven-member majority overruled *Chisom v. Edwards* and held that section 2 did not apply to the election of any judges "for the cardinal reason that judges need not be elected at all . . . ."[37] Four judges, in an opinion by Judge Higginbotham, agreed with the panel opinion on the single-office holder exception.[38]

The Supreme Court disagreed with Judge Higginbotham's single-office holder theory as a jurisdictional bar, but held such concerns "relate to the question whether a vote dilution violation may be found or remedied rather than whether such a challenge may be brought."[39] In this way, the Court held that suits against at-large judicial elections may be heard by federal courts, but left in place at least a potential defense for the states. The Supreme Court reversed the judgment of the court of appeals and remanded the case.[40]

IV. THE PROBLEM OF JUDICIAL FAVORITISM

Plaintiffs in judicial election cases seek to tear down the barriers preventing the election of Blacks to judicial office. For instance, the *SCLC v. Siegelman* complaint alleges that "[t]he numbered place, at-large election system plan for circuit and district judges was enacted and has been maintained by the State of Alabama for the purpose and with the intent of diluting the voting strength

33. Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S.Ct. 2376, 2379 (1991).

34. LULAC v. Clements, 902 F.2d 293, 308 (5th Cir. 1990)(panel decision later withdrawn), 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.*, Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S.Ct. 2376 (1991).

35. 839 F.2d 1056, *cert. denied*, 488 U.S. 955 (1988), *vacated sum nom.*, Chisom v. Roemer, 853 F.2d 1186 (5th Cir. 1988), *reh'g denied*, 857 F.2d 1473 (5th Cir. 1988)(en banc), 917 F.2d 187 (5th Cir. 1990), *and rev'd*, 111 S.Ct. 2354 (1991).

36. LULAC v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc).

37. *Id.* at 622.

38. *Id.* at 634.

39. Houston Lawyers' Ass'n v. Attorney Gen. of Texas, 111 S.Ct. 2376, 2381 (1991).

40. *Id.*

of Blacks."[41] To remedy this situation, the plaintiffs asked the court to "[o]rder the State to develop an election system for circuit and district judges which will provide equal access to the political process and will not dilute the voting strength of Black citizens of the State of Alabama."[42]

The attorneys representing the Alabama state judges contend that the cure for lack of representation of Blacks will be worse than the disease:

> Single-member district systems would tie judges to election from small districts composed of many fewer people than would constitute the electorate in an at-large election system. The temptation—some would say the need—for judges to look after constituents in the courtroom would increase enormously: this system would represent the apotheosis of "home cooking."[43] . . . As for the effect on litigants, ironically the constitutional protection of unpopular minorities might suffer most, outside of minority districts. In short, a single-member district system would create enormous pressure for constituency-based justice at its worst.[44]

The plaintiffs and defendants are not even talking about the same problems. The plaintiffs complain about the discrimination inherent in at-large elections and ask the court to reform the election system; the defendants say any cure to this problem will inevitably lead to other problems, such as judicial favoritism and "home cooking." Since the defendants oppose single-member judicial subdistricts as well as modified at-large plans, we need to determine whether modified at-large plans would meet many goals of both the plaintiffs and the defendants—the civic inclusion principle and the winner-take-all principle.[45]

I doubt the sincerity of this judicial favoritism objection because it includes a self-indictment of the fairness of the people making the assertion. The *SCLC v. Siegelman* defendants probably would not admit that trial judges presently hold a bias against residents of another county or racial group. Why then should the defendants argue that judges will become biased if a smaller group elects them? If having fewer people vote for a judge is more likely to make the judge unfair, then the judges of the smaller circuits in Alabama are more likely to be unfair than those elected in the large urban areas. For instance, the Seventeenth Circuit (Greene, Marengo, and Sumter Counties) has 49,411 people, while the Tenth Circuit (Jefferson County) has 651,525.[46] Obviously, according to the argument of the Alabama defendants, residents of the Seventeenth Circuit are more likely to get "home cooking" from their judges. Taking

41. First Amended Complaint at 18, SCLC v. Siegelman, 714 F.Supp. 511 (M.D. Ala) (No. 88-D-462-N).

42. *Id.* at 21.

43. "Home cooking" is lawyers' slang (at least in Alabama) for local favoritism by courts and juries.

44. Brief in Support of Motion for Reconsideration at 2-3, SCLC v. Siegelman, 714 F. Supp. 511 (M.D. Ala.) (No. 88-D-462-N).

45. Subdistricts need not be single-member districts. For instance, a remedial plan could call for dividing an urban county in two or more districts, each electing several judges.

46. The population per judge varies because of the greater number of lawsuits in commercial centers such as Jefferson County.

the defendants' argument to its extreme, they would have to advocate the statewide election of judges.

The defenders of the status quo are apparently satisfied with the judge-to-constituent ratio in the Seventeenth Circuit. Under modified at-large voting, the same number of people would choose one judge in the Tenth Circuit as currently choose the single judge in the Seventeenth. Under either modified at-large or winner-take-all rules, the threshold of exclusion for the election of the one judge in the Seventeenth Circuit is 50%. Thus (assuming that the whole population could and did vote) the threshold of exclusion would be 24,706. If modified at-large were used in the Tenth Circuit to elect its twenty-four judges, the threshold of exclusion would be 26,061 (1/25 of the total population).

While modified at-large elections cannot meet all winner-take-all criteria, they may be able to meet some goals of the defenders of the status quo. Like the Mississippi subdistricts, modified at-large plans will allow less than a majority of all the voters of the judicial district to choose a judge for the whole district. However, more voters will have elected each judge in a modified at-large election than in an election using subdistricts. If the Alabama defendants are sincere in their objection to having a small number of voters elect a judge, they should consider modified at-large plan. For example, if a constituency were to elect ten judges, the threshold of exclusion would be 50% if the election were by traditional at-large rules, 9% under a modified at-large system, and 5% of the total electorate (and 50% of each district) if subdistricts were used.[47]

V. The Problem of "Geographically Compact" Minorities

In describing the proof plaintiffs must present in racial vote dilution cases, the Supreme Court has stated,

> unless there is conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group. . . . First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.[48]

The "geographically compact" requirement (which is not found in section 2) makes sense only if one assumes that the sole alternative to a multimember

47. For a discussion of the formula for the threshold of exclusion, *see supra* note 15.

48. Thornburg v. Gingles, 478 U.S. 30, 48-51 (1986) (footnotes and citations omitted).

plan is a single-member district plan. Certainly, if a minority group cannot show that it can form a single-member district, and if single-member districts are the only remedy a court will impose, there is not much point in fighting over whether the white voters are consistently defeating candidates supported by the minority group.[49]

On the other hand, if a court could adopt a remedy that would not require a geographically compact minority group, it could focus on the size and political strength, not the compactness, of the minority group. Modified at-large election plans are such remedies.

In *Martin v. Allain* the district judge followed the *Thornburg* analysis and found that

> [a]lthough evidence has established that throughout the state the minority group is politically cohesive and the white majority votes sufficiently as a bloc to usually defeat the minority's preferred candidate, only in a few districts have the plaintiffs established that the minority group is sufficiently large and geographically compact in the [judicial] district to constitute a majority in a single-member district.[50]

Fifteen months after the decision on the merits, the court reopened the record to receive evidence about modified at-large plans.[51] The court rejected modified at-large plans, holding "there is an adequate remedy in single-member sub-districts without imposing a radically new, judge-made process."[52]

Thus, we have a chicken-and-egg problem. The court held that the plaintiffs had to prove that single-member districts could solve their problems, and then held that single-member districts were an adequate solution to those problems that could be remedied by single-member districts. If the district court had not felt constrained by the *Thornburg* formulation of the proof "generally" needed, it probably could have found additional Mississippi judicial districts diluted black voting rights and might have welcomed the solution that modified at-large elections could provide.

The blindness to modified at-large as a remedy affects the way litigants present cases as well. The plaintiffs in the Alabama and Texas suits at first complained about a large number of multi-judge jurisdictions, but later amended their complaints to focus only on districts in which they would be able to

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49. The preference for single-member districts is based on Connor v. Johnson, 402 U.S. 690 (1971).

> The lawyers for the [Connor v. Johnson] plaintiffs had made a strong case that multimember districts in Hinds County [Mississippi] were racially discriminatory. . . . [T]he Supreme Court could order single-member districts without departing from its repeatedly expressed position that multimember districts are not per se unconstitutional or from the line of precedent rejecting Fourteenth Amendment challenges to such districts.

Parker, *supra* note 31, at 114. The irony of the "Connor rule" is that it was a boost for the black and Latino plaintiffs at the time but now restricts the relief to which they are entitled.

50. Martin v. Allain, 658 F. Supp. 1183, 1204 (S.D. Miss. 1987).

51. Martin v. Mabus, 700 F. Supp. 327, 336 (S.D. Miss. 1988).

52. *Id.* at 337.

prove that Blacks or Latinos were "sufficiently large and geographically compact to constitute a majority in a single-member district."[53]

VI. The Benefits of Modified At-Large Elections for Minorities and Majorities

While single-member districts are usually preferable for minorities over at-large elections, modified at-large rules can solve one practical problem that bedevils districting plans. Any election depending on districts is subject to gerrymandering and dilution (and sometimes inflation) of a minority group's voting power.[54] The remedial decision in *Martin v. Mabus* is an example of the problems caused by drawing single-member subdistricts. The plaintiffs sought subdistricts with 65% black majorities. The usual rule of thumb is that Blacks need a 65% population majority in a district to get a real voting majority because of "the discrepancy between black total population and black voting age population, . . . low voter registration and . . . low voter turnout among minorities . . . ."[55] The district court rejected much of the plaintiffs' plan for subdistricts on the grounds that it "over-emphasized black voting strength and provided for proportional representation of Blacks."[56] The court drew its own plan based on the idea that Blacks needed only a 60% majority in a district to win and that districts with more than 65% black majorities would constitute "packing of all minority voters into one sub-district [and] leav[ing] them without influence in other sub-districts and would further racially polarize these judicial elections."[57]

Of the fourteen majority black subdistricts the district court created, only three had black majorities of 65% or more. Frank Parker has described the result of these elections and the judge's decision to use 65% as a ceiling rather

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53. Petition for Writ of Certiorari at 5 n.2, Houston Lawyers' Ass'n v. Mattox, No. 90-813 (suit against 44 counties, amended to attack only 10); First Amended Complaint, SCLC v. Siegelman, No. 88-D-462-N (M.D. Ala. filed Oct. 27, 1988).

54. Subdistricting of judicial elections presents an additional problem associated with geographical dispersion of lawyers. To put it simply, only lawyers may become judges, and lawyers may be geographically maldistributed in urban areas. To alleviate this problem, the jurisdiction must either abandon the usual residency requirement which makes the electoral district and the venue of the court coextensive or retain some form of at-large elections, either traditional or one of the alternative election plans discussed in this article. This may not be much of a problem because in urban areas (the most likely targets of judicial election suits) there are generally a higher number of lawyers per judge. According to statistics provided by the Alabama State Bar, there are 113 lawyers per circuit judge in the Tenth Judicial Circuit (Jefferson County, the most populous county in the state). Compare this to the 22 lawyers per circuit judge in the First Judicial Circuit (Choctaw, Clarke, and Washington counties). Relatively, the Tenth has more choice or a greater pool of potential candidates than the First, but perhaps we should focus on how little choice each has. We would be quite concerned if there were only 20 people constitutionally eligible to be mayor, or governor, or president.

55. *Martin*, 700 F. Supp. at 333. *See also* United Jewish Organizations v. Carey, 430 U.S. 144, 164 (1976).

56. *Martin*, 700 F. Supp. at 330.

57. *Id.* at 333-34.

than a floor: "Although seventeen Black candidates ran for state court judgeships, only five were elected. Three of the five who won were elected in districts that were over 65% Black."[58] We can only guess at how many might have won if the subdistricts had been drawn another way. The court made an inherently political decision when it decided to avoid concentrating Blacks. In a modified at-large system, the court would not have to group the voters geographically; instead the voters would group themselves behind their favored candidates.

While modified at-large rules will usually be adopted because there is polarized voting in the society, the success of modified at-large does not depend upon continued polarized voting, and it does not institutionalize the divisions in society by drawing a "black district," a "Latino district," and a "white district." In a district which is 65% or more black and in which there is racially polarized voting, the minority of Whites is likely to feel as closed out of the political process as Blacks felt when they were the minority in the multimember at-large plan. Modified at-large elections would allow those Whites to form voluntary constituencies with their ideological allies in the same way that Blacks or Latinos could. Thus, the burden of the election plan would not be shifted from a minority group in a multimember district to the new minorities in each of the single-member districts or subdistricts. The members of the county-wide majority who are minorities in their own districts may harbor a resentment at the "affirmative action" that has placed them in a powerless minority.[59]

Finally, modified at-large elections allow biracial coalitions to form as racially polarized voting decreases. Racially homogenous single-member districts tend to freeze the racial divisions of society by making it unnecessary for candidates to appeal to any group other than their own.[60] In these single-member districts, all compromises (if any) must take place in the legislative arena, rather than among the public.

VII. Possible Objections to Modified At-Large

In *Chapman v Meier*,[61] the Supreme Court mentioned several objections to at-large elections. While the Court was not dealing with modified at-large elections, it is instructive to consider these objections. The Court listed four objections—three it termed "practical weaknesses." "First," the Court said,

58. Parker, *supra* note 31, at 204.

59. Note, *Affirmative Action and Electoral Reform*, 90 YALE L. J. 1811, 1828-29 (1981).

60. *See* United Jewish Organizations v. Carey, 430 U.S. 144 at 172-73 (Brennan, J., concurring) (racially safe districts may frustrate "potentially successful efforts at coalition building across racial lines"); *see also* Guinier, *supra* note 16, at 1139 & n.300, 1148 & n.331. Prof. Guinier offers a stinging criticism of single-member districts in her forthcoming article. Guinier, *supra* note 5.

61. 420 U.S. 1 (1975).

"as the number of legislative seats within the district increases, the difficulty for the voter in making intelligent choices among candidates also increases."[62] This same problem will arise with modified at-large, but will be no greater—and perhaps less—than under winner-take-all rules. If limited voting were used, voters would be able to narrow their attention to a small number of candidates rather than having to make a large number of bilateral choices for each judicial position.

"Second, when candidates are elected at large, residents of particular areas within the district may feel that they have no representative specifically responsible to them."[63] As noted in part IV, this feature is considered an asset by the defenders of the status quo. Under modified at-large, a voter might feel she has someone on the bench looking after her interests, but the judge is unlikely to know which voters actually elected her. To the extent that the judge attempts to please all potential voters, modified at-large will be the same as the present plans.

"Third, it is possible that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts."[64] This objection is not applicable to the election of trial judges.

Finally, the Court discussed the possibility that at-large voting will "operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[65] Modified at-large rules are designed to counteract this winner-take-all tendency in at-large elections.

The status quo defenders might raise the objection that modified at-large is confusing to voters. A study of a recently-adopted cumulative voting plan shows that nearly all the voters understood the proper way to cast a ballot and that only a small minority found the system more complex than other election rules.[66]

The minority group might also legitimately oppose modified at-large elections because the minority group will have to vote more or less uniformly to avoid splitting its strength. Take, for example, a judicial circuit electing five judges and having a 25% black population. At least 80% of the Blacks must vote for one candidate in a modified at-large election to get that candidate elected (assuming similar registration and turnout rates for the minority and majority). If the circuit were divided into five single-member districts—one with a 65% or more majority of Blacks—the Whites would not be able to

62. *Id.* at 15.
63. *Id.* at 15-16.
64. *Id.* at 16.
65. *Id.* at 17, quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
66. Engstrom et al., *supra* note 19, at 194. Ninety-five percent of the voters knew they could cast all three votes for one candidate; 13% found the cumulative voting plan "more difficult to understand" than other local elections in which they had voted.

defeat a black-preferred candidate in that one district if there were a runoff. In the absence of a runoff, two or more candidates seeking the black vote might splinter that vote sufficiently to allow a white-preferred candidate to be elected. In this situation, Blacks would be dependant upon runoffs to preserve their choices, even though Blacks have brought suits against runoffs in at least two jurisdictions.[67]

VII. CONCLUSION

Modified at-large plans are admittedly not used widely in the United States. However, advocates on both sides of judicial election cases should consider modified at-large plans as antidotes to racial and ethnic exclusion from the judiciary. Plaintiffs will find that modified at-large meets their goals of civic inclusion; defendants will discover that modified at-large election plans do not justify their fears of abandoning the present system. Finally, the knowledge that such alternatives to single-member districts or subdistricts are available may change courts' perceptions. Workable remedies *do* exist for the problem of dilution of minority voting strength in judicial elections and thus for violations of section 2 of the Voting Rights Act of 1965.

67. Whitfield v. Democratic Party of Arkansas, 902 F.2d 15 (8th Cir. 1990) (per curiam), *cert. denied sub nom.* Whitfield v. Clinton, 111 S.Ct. 1089 (1991); Butts v. City of New York, 779 F.2d 141 (2d Cir. 1985), *cert. denied,* 478 U.S. 1021 (1986).