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Cumulative Voting in the United States

Richard H. Pildes†
and Kristen A. Donoghue††

Recent Supreme Court decisions involving North Carolina and Georgia cast substantial (if ambiguous) doubt on the continued constitutionality of race-conscious districting.¹ For the previous fifteen years, since the passage of the significant 1982 Amendments to the Voting Rights Act ("VRA"),² race-conscious districting has emerged as the principal tool for ensuring black political representation in circumstances in which voting is polarized along racial lines. Now, however, the Court has declared that strict constitutional scrutiny must be applied whenever race is "the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district."³ The precise scope of this enigmatic rule⁴ will remain uncertain until the Court decides future cases, but the rule undoubtedly puts the intentional creation of black-majority election districts on the defensive. If continued pursuit of minority political representation is going to remain a goal of public policy, the time to consider alternatives other than race-conscious districting has arrived.

The most promising alternatives do away not just with race-conscious districting, but with territorial districting altogether.

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¹ Shaw v Reno, 113 S Ct 2816 (1993); Miller v Johnson, 115 S Ct 2475 (1995).
³ Johnson, 115 S Ct at 2488.
⁴ For an argument that this rule is unintelligible in theory and unimplementable in practice, see Richard Pildes, Principled Limitations on Racial Redistricting (forthcoming 1996)(on file with Richard Pildes at the University of Michigan Law School).
Such alternative voting systems include cumulative voting, limited voting, and preference (or single-transferable) voting. These alternative voting systems may sound like the exotic musings of academic theorists,\(^5\) but such alternatives to territorial districts have long been used in other democratic countries.\(^6\) Even within the United States, these alternative voting systems are quietly but increasingly coming into use, primarily at the local government level.

The purpose of this Article is to provide detailed quantitative and qualitative information, from one of the longest running experiments with cumulative voting in the United States, on the experience of cumulative voting in actual practice. In Chilton County, Alabama, cumulative voting has been in use since 1988 to elect members of the County's principal political bodies, the County Commission and the Board of Education. The academic literature is now filled with abstract arguments about the comparative merits and disadvantages of different voting systems, particularly the choice between territorial districts and alternative voting systems.\(^7\) Rather than continuing this abstract debate, it seems more valuable to assess these theoretical positions pragmatically, by exploring the actual record of alternative voting in practice.

We conducted extensive field interviews with governmental, partisan, and media figures centrally involved in local politics in Chilton County. In addition, we analyzed available election-return data since 1988 to determine the extent of racially polarized voting and what differences, if any, the switch to cumulative

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\(^5\) For works in recent years advocating alternative voting systems to remedy violations of the VRA, see note 52.


\(^7\) See, for example, Douglas W. Rae, *The Political Consequences of Electoral Laws* 69-125 (Yale University Press, 2d ed 1971) (comparing proportional representation and non-proportional representation voting systems generally and identifying thirteen "differential propositions" and seven "similarity propositions" between the systems). For recent scholarly advocacy of alternative voting systems for the United States, which responds to some of the criticisms of such systems, see Douglas J. Amy, *Real Choices/New Voices: The Case for Proportional Representation Elections in the United States* (Columbia University Press, 1993).
voting has made. We briefly summarize our findings at the outset: while not all the predicted benefits of cumulative voting have occurred in Chilton County thus far, neither have the worst fears been realized. In general, our study confirms that the essentials of cumulative voting are working out largely as theorists have predicted *ex ante*. Cumulative voting turns out not to be without cultural and political costs, which we identify as precisely as we can. But those costs do not appear substantial. Any voting system, including the status quo of territorial districting, has costs as well as advantages; indeed, the VRA itself is a response to certain costs of territorial districting. The choice of voting systems is necessarily pragmatic: on balance, which system best, if nonetheless imperfectly, serves the relevant goals of American democracy. The data we report here should make for more informed choices between three of the most important options currently dominating political practice and public debate: territorial districts, race-based districting, and alternative voting systems such as cumulative voting.

I. THREE MEANS TOWARD MINORITY POLITICAL REPRESENTATION

We begin with the assumption that in the context of American history and politics, some significant degree of representation of minorities in American political bodies, particularly blacks, is important for any of several reasons. Many people who otherwise disagree about other aspects of contemporary civil-rights policy are likely to accept this basic starting point in thinking about contemporary American democracy. Just as with police departments and juries, legislative bodies—the quintessential public institutions—might be considered more legitimate, more effective,

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8 To avoid making already complex linguistic and political problems even more intractable, this Article is written in terms of the effects of the VRA and cumulative voting on black voters rather than on minority voters in general. In Chilton County, blacks are the only relevant minority group, within the terms of the VRA, present in demographically significant numbers. Hence, this Article focuses exclusively on black voters. Although blacks were the principal focus of the VRA when originally enacted in 1965, since 1975 the Act also has been used to protect Asian-Americans, Native Americans, Alaskan natives, and persons of Spanish heritage. 42 USC §§ 1973(a), 1973b (f)(2) (1988). One of the defects of current public civil-rights discourse and policy-making is the tendency to generalize the distinct positions and experiences of different minority groups into a universal minority experience. Relevant differentiations are important, if often neglected, to the scope and justifications of different policies. See, for example, Samuel Issacharoff, *Groups and the Right to Vote* (forthcoming in *Emory Law Journal* (1995)). For this reason, this Article is narrowly focused on black political representation and does not address issues of minority representation in general except where the text specifically so indicates.
fairer, or more fully deliberative if they are not completely domi-
nated by one segment of the political community. Similarly, mi-
nority representation might be considered an important means of
promoting a sense of civic inclusion (and hence, perhaps, modera-
tion) among all members of the political community. The reasons
representation might matter would differ among different people,
but the relevance of representation likely elicits considerable
agreement. Our politics and culture have reached the point
where all-white legislative bodies (like all-white police depart-
ments) in the midst of significant racial minorities present real
problems that must be confronted.

Representation here means actual, descriptive representa-
tion, not virtual or other forms of indirect representation: minori-
ties visibly and directly participating as political leaders shaping
public policy on city councils, state legislatures, and the U.S.
Congress. This is a result, not a process-oriented, standard; it
evaluates election systems not only in terms of whether election
processes are "neutral" (whatever meaning neutrality might be
thought to have in this context), but in terms of the results they
produce. The assumption is that, in the context of American
history and politics, no electoral process today is likely to be
considered legitimate, effective, and fair if the outcomes it pro-
duces do not entail some significant degree of actual minority
representation.9

Three principal means define the current repertoire of ap-
proaches to bringing about minority political representation on
political bodies. We call these (1) the Wishful-Thinking Route; (2)
the Race-Conscious-Districting Route; and (3) the Alternative-
Voting-System Route. The first turns out to rest on empirically
false assumptions about the extent of continuing racially polar-
ized voting. The second has been highly effective in enhancing
minority representation, but many are concerned about whether
this success has come at too high a cost to other values. For those
who consider minority representation an important value, but
view the costs associated with race-conscious districting as too
high, alternative voting systems provide the most feasible alter-
native for the foreseeable future.

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9 This assumption is not necessarily uncontroversial, particularly stated so baldly
and without the necessary qualifications. We do not, however, address the issues underly-
ing this assumption here. The focus of this Article is on the means toward this end, not on
the appropriateness of that end itself.
A. The Wishful-Thinking Route

An increasingly common perception is that American politics is becoming racially depolarized enough that the problem of minority political representation is working itself out. Adherents to this view reject the claim that self-conscious public measures are needed to facilitate such representation. Evidence to support this viewpoint comes from a number of black officials elected in recent years from majority-white jurisdictions: Douglas Wilder in Virginia; Carol Moseley-Braun in Illinois; mayors in cities like Cleveland, Dallas, Denver, Durham, New Haven, New York, and Seattle; Alan Wheat’s recent, though failed, bid as the Democratic nominee for United States Senator from Missouri; and the recent election of a second black Republican Congressman, J.C. Watts of Oklahoma, from an overwhelmingly white district.10

Building on these examples, prominent academic commentators now argue that integrated political bodies will come about without direct governmental action. Thus, Professor Carol Swain, a political scientist at Princeton, asserts that “[b]lack politicians are already elected from districts of widely varying racial composition”11 and that, if federal policies are going to enhance minority representation, those policies should concentrate on electing “blacks in districts without black majorities.”12 Abigail Thernstrom similarly has claimed for nearly a decade that the “majority-white county, city, or district in which whites vote as a solid bloc against any minority candidate is now unusual.”13

11 Carol M. Swain, Black Faces, Black Interests 208 (Harvard University Press, 1993).
12 Id at 207. In addition to arguing that safe districts are unnecessary, Swain critiques the view that black representatives are needed to represent black interests. Yet she consistently evaluates how well particular representatives serve their communities by examining the racial distribution of their staffs. Thus, she celebrates black representatives from heterogeneous communities who have racially diverse staffs, for “[s]uch staffs enable representatives to avoid being perceived as representatives of only their own racial group. One way they do this is by placing aides from other racial groups in strategic locations.” Id at 213. Swain fails to appreciate the irony in considering it appropriate to view racially diverse staffs as important to the perception of fair representation from individual legislators, while rejecting the view that racially diverse legislatures are important to the perception of fair representation within Congress as a whole. Swain’s book contains many important and provocative observations, but it is riddled with similar contradictions that leave its general thesis exceptionally unclear. See Randall Kennedy, Blacks in Congress: Carol Swain’s Critique, 2 Reconstruction 34, 37 (1993)(“[A] scholarly performance, Black Faces, Black Interests is profoundly disappointing.”).
These views are echoed in the writings of important public officials, including Supreme Court Justices. Thus, Justice Anthony Kennedy recently declared that the "assumption that majority-minority districts elect only minority representatives, or that majority-white districts elect only white representatives, is false as an empirical matter." But these views turn out to rest on singular and misleading anecdotes, not on a systematic investigation into patterns of racially polarized voting nationwide. More reliable and comprehensive social-scientific studies reveal that racially polarized voting remains pervasive, at least in the South where it has been studied in most detail. Black officeholding has risen dramatically, but not as a result of significant declines in racially polarized voting. Instead, this rise results directly from obligations the VRA has imposed on recalcitrant jurisdictions to create majority-black election districts. By and large, it remains the case that black candidates for public office at all levels, from city councils to the U.S. Congress, can only be elected from "safe" majority-black districts. The first means of ensuring direct minority representation—the assumption that the problem is working itself out through ordinary politics—turns out to be wishful thinking.

The detailed empirical evidence in support of this conclusion is available elsewhere. We only briefly summarize it here. Between 1964 and 1990, the overall number of black state legislators and congressional representatives in the South rose from 2 to 160. But white voters have not recently become more willing to support black candidates. Indeed, even today, "safe" election districts—with black voting-age populations above 50 percent—are almost universally necessary in the region for black candidates to be elected.

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14 Johnson v De Grandy, 114 S Ct 2647, 2665 (1994)(Kennedy concurring in part and concurring in the judgment). See also Miller v Johnson, 115 S Ct 2475, 2486 (1995), quoting Shaw v Reno, 113 S Ct 2816, 2827 (1993)("When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, 'think alike, share the same political interests, and will prefer the same candidates at the polls.'").


16 Chandler Davidson and Bernard Grofman, The Voting Rights Act and the Second Reconstruction, in Davidson & Grofman, eds, Quiet Revolution in the South at 381 (cited in note 117). The South is defined as Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia. Davidson & Grofman, eds, Quiet Revolution in the South at 3-4 (cited in note 17).

17 Pildes, 108 Harv L Rev at 1368-69 (summarizing the social-science literature) (cited
wide, the probability of a white-majority district electing a black representative was less than 1 percent, regardless of a district's median family income, its percentage of high school graduates, or its proportion of residents who were elderly, urban, foreign-born, or who had been residents of the state for more than five years.\textsuperscript{18} In the 1970s, only 1 percent of all Southern state legislative districts with white majorities elected a black legislator.\textsuperscript{19} In the 1980s, nothing changed: districts in which blacks were a minority—no matter how large—continued to elect virtually no black legislators.\textsuperscript{20} The majority of Southern states did not elect a single black state legislator from any majority-white district.\textsuperscript{21} In the average state and local election in Georgia during the 1980s, 86 percent of white voters voted for the white opponent of a black candidate.\textsuperscript{22} In Mississippi, no blacks were elected in 1989 to city councils in districts less than 50 percent black; indeed, until the black population reached close to 70 percent in a district, blacks remained proportionately underrepresented.\textsuperscript{23} In South Carolina, a separate study of 130 elections between 1972 and 1985 at the county, state, and congressional levels revealed the extent of racial polarization.\textsuperscript{24} In contests where white and black candidates ran against each other, on average 90 percent of white voters cast their votes for the white candidates,
while 85 percent of black voters cast their votes for the black candidates. In statistical terms, the racial composition of a precinct explained 80 percent of its voting patterns. This study further disaggregated the data to examine whether the race of voters was serving as a proxy for other variables, such as income, education, or urban residency. But race remained "the basic predictor of outcome"; no other variable had close to the same significance. In a state whose black population is 30 percent, such extreme race-based voting means that black candidates would virtually never be elected outside safe minority districts. Indeed, in 1989 not a single white-majority district in a large city of South Carolina was represented by a black city council member.

While such microscopically detailed data is only available for the Southern states that have been the primary focus of the VRA, information from congressional elections suggests that racially polarized voting continues to be pervasive nationwide. Thus, from the 1970s through the most recent congressional elections, only about 1 percent of white-majority congressional districts have elected black representatives. As a result, even today, significant minority political representation will not come about through ordinary politics and "traditional" electoral practic-

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25 Id at 25.
26 Id.
27 Under current legal standards, racially polarized voting is proven by the pattern of candidate preferences among white and black voters, without further statistical efforts to unpack the reasons that might lie behind those preferences. See Thornburg v Gingles, 478 US 30, 52-74 (1986)(opinion of the Court and plurality opinion of Brennan). But see League of United Latin American Citizens v Clements, 999 F2d 831, 849-863 (5th Cir 1993), cert denied, 114 S Ct 878 (1994)(requiring that partisan and racial factors be distinguished in judicial elections).
28 Loewen, 19 Rev of Black Pol Econ at 28 (cited in note 26).
29 Id at table 2.
31 Orville Vernon Burton, et al, South Carolina, in Davidson & Grofman, eds, Quiet Revolution in the South at 225 table 7.7 (discussing cities with a total population of over ten thousand and a black population of at least 10 percent)(cited in note 17). The pattern was similar, though not quite as stark, for the county councils of South Carolina. In 1989, in county-council districts in which whites were the majority of the population, and in which blacks on average were 23 percent of the population, blacks comprised 4.73 percent of the elected officials. Id at table 7.7A.
32 See Davidson & Grofman, eds, Quiet Revolution in the South (providing data on racially polarized voting in the Southern states that have been the principal focus of VRA litigation: Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas, and Virginia)(cited in note 17).
33 Pildes, 108 Harv L Rev at 1374-75 (cited in note 17).
es: to argue otherwise remains, at least in the near term, wishful thinking sharply at odds with established fact. Until race plays a less dominant role in shaping voters’ electoral preferences, some other means will be necessary to realize the end of more than token minority representation.

B. The Race-Conscious-Districting Route

Since the major, bipartisan amendments to the VRA in 1982, the principal public-policy tool for ensuring minority representation in the face of polarized voting has been the creation of “safe” minority election districts. Such districts are intentionally designed to make minorities effective voting majorities by concentrating minority voters into specific districts. This strategy has been remarkably effective and is the principal reason black officeholding has risen so dramatically in recent years. Race-conscious districting has become the central means of enhancing minority representation.

But as that strategy has been pursued with increasing aggressiveness over the last decade, concerns about its countervailing costs have become more marked. Justice Sandra Day O’Connor, usually temperate and restrained, has invoked the morally laden language of “political apartheid” and political “balkaniz[ation]” to characterize such districts. Similarly, Justice Clarence Thomas has written that race-conscious districting is tantamount to the creation of “political homelands” that can only “deepen racial divisions” with “disastrous implications.”

Justice Kennedy has described race-conscious districting as “carving electorates into racial blocs.”

Others have raised additional concerns. As Professors Samuel Issacharoff and T. Alexander Aleinikoff have observed, safe districts inevitably must be staffed by what they call “filler people.” These are voters who must not be of the relevant minority group that effectively controls a district (to avoid vote-packing

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35 For a summary of the evidence that supports this conclusion, see Pildes, 108 Harv L Rev at 1370-73 (cited in note 17).
36 Shaw, 113 S Ct at 2827.
37 Id at 2832.
38 Holder v Hall, 114 S Ct 2581, 2598, 2599, 2618 (1994)(Thomas concurring).
39 Johnson, 115 S Ct at 2494.
problems), who are not expected to be politically powerful enough to affect electoral outcomes, but who must be placed in districts to fill them out for purposes of one-person, one-vote requirements. The marginalization and alienation of the inevitable "filler people" must be considered among the costs to weigh against the benefits of safe districts.

In addition to these and other potential problems, safe districting is not necessarily fully effective even in enhancing minority representation. This approach is constrained by geographic limitations. Territorial-based safe districts can be constructed only where minority voters are relatively concentrated geographically. This constraint has become more salient as the safe-districting process has reached maturity. The first districts could be designed around the most geographically concentrated minorities, such as in urban centers. But as the pressure to create more majority-minority districts has increased, redistricters have had to find more marginal locations to draw such districts. The result has been the kind of "bizarre" and "highly irregular" safe minority districts at issue in Shaw v Reno. Yet the move toward increasingly contorted district shapes has exacerbated, for many, the troubling political and social fallout from the safe-districting approach. It also has created new problems of its own: the use of more aggressively gerrymandered districts for racial purposes seems to have legitimated more aggressive gerrymandering for many other purposes, particularly self-interested partisan ones.

In short, the Wishful-Thinking Route remains ineffective under current sociopolitical conditions. The Race-Conscious-Districting Route does work, but many complain passionately about its costs and, in any event, it is an inherently limited strategy.

41 113 S Ct at 2825, 2826.
42 Richard H. Pildes and Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich L Rev 483, 569-575 (1993)(providing quantitative evidence that congressional districts in the 1990s are significantly less compact than in the 1980s, with particularly dramatic differences in certain states, such as Georgia, Texas, North Carolina, and Louisiana, that created additional minority districts in the 1990s). See also Timothy G. O'Rourke, Shaw v. Reno: The Shape of Things to Come, 26 Rutgers L J 723, 762-64 (1995)(providing data on the much greater splitting of county boundaries and the division of precincts and cities in 1990s congressional redistricting compared to 1980s redistricting in North Carolina, Louisiana, Texas, and Georgia).
CUMULATIVE VOTING

C. The Alternative-Voting-System Route

The third means of ensuring significant minority representation is to replace traditional election districts and the voting rules that accompany them with alternative voting rules. For purposes of VRA policies, the most promising of these alternatives are limited voting, cumulative voting, and preference voting (or single-transferable voting) systems. All three are forms of semiproportional representation that stand midway between the more direct forms of proportional representation common in many European countries and the Anglo-American alternative of single-member districts.

These alternative voting systems abandon districting in favor of the election of several candidates running at large throughout the relevant jurisdiction. By also modifying winner-take-all voting rules, these systems enable minority groups of voters with intense political preferences for particular candidates to control some number of seats. The rationale for replacing winner-take-all voting rules with alternative voting systems is the same as that which led Congress first in 1842 to replace at-large elections with the territorial districting system and to reestablish that requirement in 1967. At-large congressional elections, in which all

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43 Nothing in the Constitution itself requires the states to create congressional districts. See US Const, Art I, § 2. Indeed, in the first elections after ratification, the majority of new states held at-large congressional elections. Only Massachusetts, New York, Maryland, Virginia, and South Carolina were organized into representative districts. There is evidence that at least some of the Framers expected the states to create districts and intended the Time, Place, and Manner Clause of Article I, Section 4 of the Constitution to act as a brake against factional districting by state legislatures. Andrew Hacker, Congressional Districting: The Issue of Equal Representation 8-10 (Brookings Institution, 1963). For example, James Madison approvingly asserted in the Federalist Number 56: "Divide the largest State into ten or twelve districts and it will be found that there will be no peculiar local interests ... which will not be within the knowledge of the representative of the district." Federalist 56 (Madison), in Clinton Rossiter, ed, The Federalist Papers 346, 347 (Mentor, 1961). Similarly, Alexander Hamilton stated at the New York ratifying convention: "The natural and proper mode of holding elections will be to divide the state into districts in proportion to the number to be elected." Alexander Hamilton, Address at the New York Ratifying Convention, quoted in Carolyn Goldinger, ed, Jigsaw Politics: Shaping the House After the 1990 Census 6 (Congressional Quarterly, Inc., 1990).

As of 1840, nine of the thirty-one states continued to elect representatives at large. In response to the frequent occurrence of a majority party's sweeping an entire state delegation in at-large states, Congress invoked the Time, Place, and Manner Clause of Article I, Section 4 of the Constitution to pass the Reapportionment Act of 1842 ("Reapportionment Act"). The Reapportionment Act required, for the first time, that representatives "shall be elected by districts composed of contiguous territory equal in number to the number of Representatives" for each state. Reapportionment Act of 1842, ch 47, § 2, 5 Stat 491. Despite the Reapportionment Act, New Hampshire, Georgia, Mississippi, and Missouri conducted their 1842 elections under at-large systems. Over protests, Congress
candidates run on a statewide basis, enable the same statewide majority to control all seats. Thus, a party with only 51 percent of statewide voting support could win all seats in a state’s congressional delegation, which regularly occurred in those states with at-large elections.\(^4\) This system came to be viewed as giving majorities too much power to dominate politics at the expense of various minority interests.\(^5\) Recognizing the importance of

seated all the members of these states. Goldinger, ed, *Jigsaw Politics* at 18.


Today, only the seven states entitled to a single representative—Alaska, Delaware, Montana, North Dakota, South Dakota, Vermont, and Wyoming—hold at-large congressional elections. For a good overview of congressional reapportionment acts, see Emanuel Celler, *Congressional Apportionment—Past, Present, and Future*, 17 L & Contemp Probs 268 (1952).

"For the data on the partisan distribution of congressmen depending on whether states used at-large or districted elections from 1789-1842, see Rosemarie Zagarri, *The Politics of Size* 154-57 appendix 3 (Cornell University Press, 1987)(showing that delegations in at-large states were nearly always one-party delegations throughout this period, while districted states had multiparty congressional delegations).

"For example, when New Jersey shifted from at-large to districted congressional elections, one New Jersey legislator noted that "'[t]his method was adopted . . . to counteract . . . the numerous population of those capitals and thus not to swallow up the agricultural by the mercantile interest."' Id at 111, quoting State Gazette and New-Jersey Advertiser (Mar 13, 1798). Even proponents of at-large elections recognized that larger states would be comprised of such diverse interests that districted elections might be more appropriate there: "some states, from their great extent, or unequal figure, from their being divided by distinct interests, or great natural boundaries, might derive a plausible apology for the institution [of districts]."' Id, quoting William Pitt Beers, Address to the Legislature and People of the State of Connecticut (1791). Some states, such as Pennsylvania, initially adopted at-large elections, only to abandon them almost immediately after the first congressional elections because the system allowed small majorities to dominate important minority interests. In the first congressional elections, all eight of
ensuring some degree of representation for significantly sized minorities—which at the time might be geographic, economic, or ideological minorities—Congress required in 1842 that states create districts for congressional elections. Although the concept of alternative voting systems had not been developed at that time, the principles on which it rests are the same as those behind the move away from at-large elections to districts: representative bodies ought to be broadly representative of the political community as a whole, rather than of the interests of only a bloc-voting majority.

Limited voting works by giving voters fewer votes to cast than the total number of seats at issue. Thus, if five seats on a city council are to be filled, voters throughout the city might each be permitted to cast only two votes. The effect of limiting each voter to two votes is to prevent the same majority from dominating each and every seat. Well-organized minority groups that are sufficiently large are thereby enabled to control the outcome of at least one seat.

Pennsylvania's congressmen were Federalists who lived in the eastern part of the state. As one commentator wrote, "I am sure that Pennsylvania will never again suffer eight representatives to be elected out of a mere corner of the state." Id at 113, quoting Carlisle Gazette (Apr 28, 1790). In 1791, the Pennsylvania Assembly passed a law dividing the state into eight districts. Zagarri, The Politics of Size at 113 (cited in note 46).

Reapportionment Act of 1842 § 2, 5 Stat at 491. By the time of the Act, nine states still used at-large elections. See note 45. The largest was Georgia, which was entitled to eight representatives, with a total population of 691,392, and a population entitled to representation of 579,014. United States Department of State, 3 Sixth Census of the United States: 1840 368-69 (Norman Ross Publishing, Inc., 1990). Between 1816 and 1826, twenty-two resolutions were introduced in Congress proposing a constitutional amendment to require districted elections. Herman V. Ames, The Proposed Amendments to the Constitution of the United States During the First Century of Its History, 2 Annual Report of the Am Hist Assoc 57 (1896).

The concept of "threshold of exclusion" describes the minimum size a minority group must reach under various voting rules to have effective control over at least one seat. Richard L. Engstrom, The Single Transferrable Vote: An Alternative Remedy for Minority Vote Dilution, 27 USF L Rev 781, 785-86 (1993). In limited voting, the formula for calculating the threshold of exclusion is \( V/(V+N) + 1 \), where \( V \) is the number of votes a voter may cast and \( N \) is the number of seats to be filled. Id at 786. Thus, with two votes to cast in a five-member election, the threshold would be \( 2/(2+5) + 1 \), so that any group that is 28 percent or more of the voting pool could, in principle, effectively control the outcome with respect to at least one seat. The threshold of exclusion formula assumes complete cohesiveness within the minority group: the formula assumes that each member of the relevant minority casts all of its votes for the "minority-preferred" candidate. Id at 787. The formula also assumes that the majority is completely united in its opposition to the minority-preferred candidate; in practice, majorities are rarely so united and the more crossover support a minority-preferred candidate receives, the smaller the support needed from the minority community to ensure election. Id.
Cumulative voting rests on a similar principle but employs a different technique. Voters receive as many votes to cast as there are seats to fill; voters then may distribute these multiple votes among candidates in any way they prefer. Thus, voters may "plump" all their votes on one candidate—the strategy of choice for minority groups with intense preferences for a particular candidate—or give one vote each to several candidates. If five seats on a city council are to be filled, voters would have five votes each to distribute as they saw fit. Again, the pure majoritarianism of traditional single-member districts is constrained because the same majority cannot dominate the election for all five city-council seats. If the voters in a sufficiently large minority group concentrate all their votes on the same candidate, they can assure that candidate's election regardless of how other voters, including a majority of voters, cast their ballots. Even with extensive racially polarized voting, for example, a cohesive minority group that constituted at least one-sixth of the electorate would be able through cumulative voting to control one of the five city-council seats.\(^{48}\)

Preference voting is a bit more complicated. The mechanics of voting itself are straightforward, if generally unfamiliar in American electoral politics: voters cast one ballot but rank order their preferences for candidates on that ballot. If five candidates are running, each voter ranks them from one to five.\(^{49}\) These rankings then allow votes that would be "wasted" on one candidate to be transferred to another candidate. Votes are wasted either when they are surplus—that is, cast for a candidate who would win without them—or when they are useless—that is, cast for a losing candidate who could not win with them. Preference voting systems transfer these "wasted" votes to the next ranked candidate on a voter's ballot.\(^{50}\)

\(^{48}\) The formula for the threshold of exclusion under cumulative voting is \(1/(1+N)+1\), where \(N\) is the number of seats to be filled. Engstrom, USF L Rev at 786 (cited in note 49). Thus, with five seats at stake and five votes to cast, a minority that casts one vote more than \(1/(1+5)\), or one vote more than one-sixth of the total vote can control the outcome of one seat. Id at 787. Again, this assumes that the minority group votes perfectly cohesively: all members cast all five of their votes for the same minority-preferred candidate. Id.

\(^{49}\) Voters need not rank order all candidates if they prefer not to.

\(^{50}\) For a detailed recent discussion of the mechanics of preference voting and the reasons it is preferred to cumulative voting, see Richard Briffault, Lani Guinier and the Dilemmas of American Democracy, 95 Colum L Rev 418, 435-441 (1995). The process by which votes are counted and transferred is difficult to explain. This is a serious drawback in a democratic society where voting rules should be transparent and readily understood.

The threshold for election under preference voting is \(V/(N+1)+1\), where \(V\) is the total
This vote-transferring process increases the proportion of voters who vote for a winning candidate. It thereby enables electoral minorities to control some seats in a multimember race even in the face of concerted majority opposition. In a race for a five-seat city council with a preference voting system, a candidate with just above one-sixth of the total vote will win a seat. A minority voting bloc of that size is thus sufficient to ensure election of one representative of its choice.

All three alternative voting systems thus fragment the power of electoral majorities in order to facilitate minority representation. For racial minorities, the immediate effect of these systems is similar to that of race-conscious districting within a traditional territorial districting system. Either of these two routes—race-conscious districting or alternative voting systems—enable racial minorities to exercise effective electoral control over some seats even in the face of a hostile, racially polarized majority electorate. But because the two routes employ such different means toward the same end, the secondary consequences vary dramatically.

For those critical of race-conscious districting, alternative voting systems offer several theoretical advantages. They do not "balkanize" the electorate along racial lines. The state does not draw election-district lines on the basis of race, nor does it concentrate voters into specific "safe" districts based on their race. The state does not ascribe political identities to voters by grouping them with other voters deemed to have common political interests. Indeed, the state does not directly single out any particular minorities for special protection through concentration into "safe" districts.

Alternative voting systems enable individual voters to choose, in each and every election, how they want to define their number of votes and N is the number of seats to be filled. Id at 436 n 62. For votes that are wasted because they were cast for losing candidates, the transfer process is straightforward. If no candidate crosses the election threshold in the first round of counting, the last-place candidate is dropped and his or her votes redistributed to the second preference of the voters who had voted for the losing candidate as a first preference. Id. With five seats to be filled and ten thousand voters, for example, 1,667 votes would be required for a candidate to be elected. Id. If no candidate received that many votes in the first round of counting the ballots, the last-place candidate would be dropped.

Surplus votes would be those any candidate received above 1,667. The process of transferring surplus votes is more complex. Given current technology, the best method for redistributing surplus votes is probably to distribute a winning candidate's surplus votes according to the percentage of second-choice preferences registered on the winning candidate's ballots. Briffault, 95 Colum L Rev at 436 n 62.
political identities. If a black voter strongly prefers a particular black candidate in a given election, she can concentrate her vote on that candidate. But if other issues are more salient in the next election—a candidate’s position on schools, for example—a voter can cast her vote based on that issue.

In contrast to alternative voting systems, race-conscious districting in essence defines race as the dominant dimension of electoral politics—and it locks in this judgment for a decade until further redistricting occurs. Alternative voting systems enable voters to regroup themselves in whatever way they choose at each election. These alternatives also do not single out particular groups for special protection; they enable any sufficiently large and cohesive minority voting group—whether racial, ethnic, political, or other—to have effective control over some seats. In addition, because new district lines need not be redrawn every decade, alternative voting systems offer the side benefit of reducing opportunities for political gerrymandering. Some advocates also argue that such systems, by fragmenting majority rule and giving minorities more opportunities to influence electoral outcomes, will lead to more competitive elections and help increase the notoriously low rates of voter turnout in American elections.

To be sure, alternative voting systems might create problems of their own, certainly in theory and perhaps in practice. One familiar concern is that enabling the representation of many minority viewpoints will produce indecisive, even paralyzed, legislative bodies. Another concern is that such systems might

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52 See Lani Guinier, No Two Seats: The Quest for Political Equality, 77 Va L Rev 1413, 1471 (1991) (“...incumbents will find it necessary to mobilize voter interest and participation in an election, a task that will require incumbents to develop substantive programs and proposals.”).

53 See Maurice Duverger, Which is the Best Electoral System, in Arend Lijphart and Bernard Grofman, eds, Choosing an Electoral System: Issues and Alternatives 31, 36 (Praeger, 1984) (“In order to form stable and strong governments, capable of making decisions... plurality [voting] is the best method.”); Enid Lakeman and James D. Lambert, Voting in Democracies: A Study of Majority and Proportional Electoral Systems 154 (Faber and Faber, 1959) (“The wish to limit the number of parties to two is connected with the belief that government can be carried on effectively only by a single party. One party, it is said, must have unhampered power for the time being to carry out its programme.”).
facilitate the representation of extremist or marginal political groups. Indeed, by giving representatives of such groups a public platform and public role, the legitimacy of such groups might even be enhanced.\textsuperscript{54} Less familiar, but potentially troubling, is the possibility that alternative voting systems might increase campaign costs because candidates running at large must compete in an entire jurisdiction, not just a small district. Lastly, at-large representatives might undermine a valuable sense of connection voters have to their representatives in individual districts.\textsuperscript{55} These are the principal concerns about alternative voting systems that critics have raised.

D. Evaluating Different Voting Systems

The choice between alternative voting systems and territorial districts with winner-take-all voting might be approached in at least four different ways. One method is theoretical analysis of the predicted effects of territorial districting with winner-take-all-rules versus alternative voting systems. In the political science literature, numerous commentators have explored the theoretical advantages and disadvantages of different electoral systems.\textsuperscript{56} This literature has not received much attention in legal

\textsuperscript{54} See, for example, Ferdinand A. Hermens, Representation and Proportional Representation, in Lijphart & Grofman, eds, Choosing an Electoral System at 15, 21 (quoting a newspaper article urging repeal of alternative voting systems for making it too easy to elect fringe-party candidates)(cited in note 55); Enid Lakeman, The Case for Proportional Representation, in Lijphart & Grofman, eds, Choosing an Electoral System at 41, 46-47 ("Opponents of proportional representation believe it will [mean] ... that a large party cannot govern without [ ] dependence on support from a small one.") (cited in note 55).

\textsuperscript{55} For a discussion of the connection between representatives and voters in individual districts, see generally, Richard Briffault, Race and Representation After Miller v Johnson, 1995 U Chi Legal F 23, 40-43.

\textsuperscript{56} See Jack F.H. Wright, Australian Experience with Majority-Preferential and Quota-Preferential Systems, in Bernard Grofman and Arend Lijphart, eds, Electoral Laws and Their Political Consequences 124, 136 (Agathon Press, 1986)("Without exception, quota-preferential [single-transferable vote] systems in Australia have given substantially higher proportions of voters the representation they wanted than have the single-member-district systems.")(cited in note 8); Arend Lijphart, Rafael L. Pintor, and Yasnori Sone, The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples, in Grofman & Lijphart, eds, Electoral Laws at 154, 163 (discussing strategic handicaps for large parties and advantages for small parties that limited voting and single nontransferable voting create, noting that "surprisingly[ly] ... the ... elections do not yield very proportional results," but concluding that these systems provide more proportional representation than a plurality voting system)(cited in note 8); Arend Lijphart, Electoral Systems and Party Systems: A Study of Twenty-Seven Democracies 1945-1990 40 (Oxford University Press, 1994)("The more limited the number of votes each voter has, and the larger the number of seats at stake, the more LV tends to deviate from plurality and the more it resembles [proportional representation].") (cited in note 8);
scholarship, however, which has only recently begun to explore the different voting practices democracies might choose.

Historical analysis is a second method for assessing different voting systems. We might explore the ideas and values that motivated the original American choice for a system of territorial districts with winner-take-all rules. Such an inquiry could recover the original values thought to be served by territorial districts. Although little work of this sort has been done to date, it seems clear that alternative voting systems did not begin to be understood until Thomas Hare's pioneering work in the mid-nineteenth century. As a result, no deliberative choice between territorial districts and alternative voting systems was made when the American commitment to the former was established.

United States Senator Charles Buckalew of Pennsylvania, at first a leading proponent of districting, became the leading advocate of cumulative voting and proportional representation by the 1860s. In a speech in Philadelphia in 1867, he described why he would have supported cumulative voting, rather than single-member districts, had the former system been known at the time he campaigned successfully to replace at-large elections with single-member districts:

I drew the amendment to the Constitution of our State by which your city is broken into districts. [ ] What was the idea of that amendment? . . . The idea was to break up the political community, and allow the different political interests which compose it, by choosing in single districts, to be represented in the Legislature of the State. Unfortunately, when that arrangement was made for your city (and for Pittsburgh also, to which it will soon apply), this just, equal, almost perfect system


See note 45.

CUMULATIVE VOTING

of voting [cumulative voting], which I have spoken of to-night, was unknown; it had not then been announced abroad or considered here, and we did what best we could.\(^5^9\)

At the least, this kind of historical analysis can deflate any sense that districting with winner-take-all voting rules reflected a deliberate choice to reject alternative voting systems.\(^6^0\) Beyond that, such analysis might reveal that the aims thought best served in 1789 or 1842 by traditional electoral structures are better served today by more sophisticated structures not conceived of or widely understood then.\(^6^1\)

A third method for evaluating the choice among voting systems is a comparative one. In a study of all lower-house elections conducted since 1945 in twenty-seven democracies, including the twenty-four most durable democracies, only 17 percent used the Anglo-American system of districting and majority rule.\(^6^2\) The rest of the countries used proportional representation systems, ranging from those considered to have stable governments, such as Germany, to those that do not, such as Italy.\(^6^3\) The American institutionalization of democracy—territorial districts and majority rule—is no more "natural" a form of democracy than these other systems, and indeed, stands out as an exception. Comparative study of these systems and the Anglo-American one therefore should provide fertile ground for testing more abstract arguments about the merits of the alternatives.

In this Article, we pursue a fourth approach for assessing alternative voting systems. Unbeknownst to many, in recent years there has been a quiet proliferation of alternative voting systems in the United States. In nearly all contexts, these sys-

\(^5^9\) Charles R. Buckalew, Proportional Representation 62-63 (John Campbell & Son, 1872).
\(^6^0\) In her extensive study of congressional debates on election rules from 1789-1842, Rosemarie Zagarri reports that "[m]ost legislators saw the problem as a choice between two alternatives: at-large or district elections." Zagarri, The Politics of Size at 105 (cited in note 46).
\(^6^1\) Professor Samuel Issacharoff has employed historical analysis of Supreme Court voting-rights jurisprudence to argue that the central values the Court has identified in these cases are better served by alternative voting systems than the current territorial districting system. Samuel Issacharoff, Supreme Court Destabilization of Single-Member Districts, 1995 U Chi Legal F 205.
\(^6^3\) Lijphart, Electoral Systems and Party Systems at 21-46 (cited in note 6).
tems have emerged as voluntary settlements between plaintiffs and local governments in the course of litigation to enforce the VRA. Settlements along these terms have been taking place for a number of years now. As a result, one no longer needs to turn to foreign countries, with different cultural features, to explore alternative voting systems in practice. Nor is it necessary to rely on theoretical speculation about the potential consequences of such systems. Given the relative prevalence of such systems for a significant period of time, we can now learn a good deal about their actual operation from empirical analysis of experience to date in the United States. That empirical approach is the one we pursue here.

II. A Case Study of Cumulative Voting: Chilton County, Alabama

In 1988, in the aftermath of a statewide class-action VRA lawsuit that challenged the use of at-large election schemes for county commissions and school boards throughout Alabama, several local governments entered into consent decrees in which they agreed to try innovative alternative voting systems. The federal district court had found that the at-large electoral structures, combined with pervasive racially polarized voting throughout the state, had led to substantive VRA Section 2 violations. In most places, the court ordered the standard remedy of "safe" majority-minority districts to resolve these violations. But in some places that remedy was unavailing because minority voters were too geographically dispersed to be concentrated into the appropriate number of election districts. Indeed, in some places, minority voters were so dispersed as to make it impossible (without resort to extremely contorted districts, and at times not even then) to create even a single district with a black voting majority.

Chilton County, a rural county in the center of the state, was one such place. After lengthy discussions, the plaintiffs and local political officials agreed to adopt a cumulative voting system. Starting in 1988, Chilton County has elected its two principal political bodies, the County Commission and the Board of Education, through cumulative voting. The County Commission controls an annual budget of approximately $9 million. For nearly a decade now, through two elections for the County Commission

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64 Interview with Julius Kelley, Chilton County Commissioner 1 (Jan 5, 1994) (on file with the University of Chicago Legal Forum).
and the Board of Education, Chilton County has had as much experience with cumulative voting as any American jurisdiction in recent years. The Chilton County experience is particularly noteworthy because voters there have had seven votes to distribute among candidates in any way they see fit, as compared to a more manageable three votes in jurisdictions that others have studied.

We spent several days in Chilton County interviewing local elected officials, party leaders, civic leaders, and journalists to assess how the abstract arguments about cumulative voting are playing out in practice. In addition, we gathered and statistically analyzed election data on a precinct-by-precinct level. In this part, we report the results of these qualitative and quantitative investigations.

A. The Process Leading to Cumulative Voting

1. Background on Chilton County.

Chilton County consists of 694 square miles in the geographic center of Alabama. It includes four incorporated towns: Clanton, which is the county seat, Thorsby, Jemison, and Maplesville. Each town has a mayor-council form of government. The schools are run by a single Board of Education, and the County itself is governed by the Chilton County Commission.

The self-proclaimed “Peach Capital of the World,” Chilton County is a predominantly rural county that maintains a multi-million dollar peach industry. The county also has an emerging manufacturing industry, with plants that produce metal moldings...
for automobiles, timber products, foundry products, furniture, printing presses, and baskets. In the 1990 census, 23.6 percent of Chilton County's population was classified as urban and 76.4 percent as rural. Chilton County's median household income was $21,627 in 1989, as compared to Alabama's average of $23,597, and the national median income of $30,056. 87.7 percent of Chilton County's residents were born in Alabama. Of those twenty-five years and older, 56.6 percent had a high-school education or higher, while only 7.5 percent had a bachelor's degree or higher.

As of the 1990 Census, Chilton County had 32,458 residents, of whom 3,658 (11.3 percent) were black. The black community is extremely dispersed throughout the County, although a few pockets of modestly concentrated black populations do exist. The percentage of black residents in Chilton County is declining, due to an inflow of whites from rapidly growing surrounding counties. Less than a one hour drive on I-65 from both Bir-


74 Bureau of the Census, County and City Data Book 1994 at 23 (cited in note 69).


76 Id.

77 Id at 13. At the time the settlement was approved, the district court noted that Chilton County was 11.86 percent black. Dillard v Chilton County Board of Education, 699 F Supp 870, 872 (M D Ala 1988).

78 Dillard v Chilton County Bd. of Educ., 699 F Supp at 876.

mingham and Montgomery, the county is attracting increasing numbers of predominantly white suburbanites.

2. The litigation backdrop.

Chilton County adopted cumulative voting to settle a voting-rights complaint that arose out of *Dillard v Crenshaw County*, a class-action suit brought by Alabama's oldest statewide black political group, the Alabama Democratic Conference ("ADC"). *Dillard v Crenshaw County* challenged the at-large election systems used by many cities, counties, and county school boards in Alabama. The district court found that the Alabama legislature had intentionally discriminated against black voters when it designed and authorized at-large election schemes for local jurisdictions. The court identified intentional discrimination in the "anti-single-shot" laws passed in the 1950s, the "numbered-place" laws passed in 1961, and in the legislature's century-long pattern of switching between local at-large systems and districted systems in a way that minimized black voting strength. Chilton
County was not a named defendant in the original complaint, but in the wake of the court's finding of liability, the plaintiffs added additional defendants, including Chilton County. In the end, Chilton County was one of 183 cities, counties, and county school boards whose election systems were challenged in *Dillard v Baldwin County Board of Education*.  

3. Chilton County's at-large electoral system.

The pre-*Dillard v Baldwin County Board of Education* electoral systems for the Chilton County Commission and Board of Education were typical of the systems challenged in the lawsuit. Both were five-member bodies elected at large. Each had representatives from all regions of the County due to candidate residency requirements. The County was divided into "numbered posts"—each candidate had to qualify for a specific number and place. Voters throughout the county voted for all seats, but each voter could vote for only one candidate in each place. To be nominated by a political party, a candidate had to win a majority of votes in the primary. If no candidate received a majority, a runoff was held. The probate judge, also elected through an at-large election, served as Chairperson of the County Commission.

4. The Chilton County settlement.

The political leaders of Chilton County were surprised at being added as defendants in *Dillard v Baldwin County Board of Education*. Several noted that Chilton County had black political officials in the past, including a member of the city councils of both Clanton and Jemison. Some asserted a "lack of interest" words of one legislative sponsor, "[i]t has occurred to a great many people, including the legislature of Alabama, that to protect the white people of Alabama, there should be numbered place laws." Id.


The Board of Education had five regions. The County Commission only had four regions since the Probate Judge served as the fifth member.  

*Dillard v Chilton County Bd. of Educ.*, 699 F Supp at 872. The majority-vote requirement did not apply to the general elections. Id.

Interview with John Hollis Jackson, Attorney for the County Commission and the Board of Education of Chilton County 1 (Jan 4, 1995)(on file with the *University of Chicago Legal Forum*).

Interview with Mike Kelley, Publisher of the *Clanton Advertiser* 3 (Jan 4, 1995)(on file with the *University of Chicago Legal Forum*). Eddie Reed, now a member of the County School Board, was a city councilman in Jemison. The black councilman in
CUMULATIVE VOTING

defense:88 the absence of black representatives on bodies like the County Commission and the Board of Education was said to be due to a lack of black candidates.89 Yet despite expressing uncertainty about the County’s liability, County leaders also were interested in settlement. By their accounts, this interest stemmed from litigation costs and, perhaps more importantly, litigation uncertainty.90 Consistently, the County’s lawyer and elected officials expressed fears over possible court-imposed remedies were the County held liable.91

Eventually, the County stipulated to findings that voting was racially polarized92 and to substantive liability.93 On the same day, it filed a proposed settlement agreement that had been reached with the plaintiffs. Conceiving the terms of settlement, however, had proven difficult. The County had been willing to convert to a districted system and to draw a majority-minority district. But, unless the County Commission and Board of Education were increased to at least fifteen members each (an option

Clanton was Ron Simms. According to Jerome Gray of the ADC, Simms had run at large for the City Council three times, losing each time, and eventually was appointed. The City Council seats were then districted, and he was the representative of a majority-black district. Interview with Jerome Gray 12 (Jan 4, 1995)(on file with the University of Chicago Legal Forum).


Interview with Mike Kelley at 6-7 ("[The lack of black representation is] not because they didn’t get elected because they were black. It may [be] because they didn’t run until this system came up.")(cited in note 89); Interview with Jackson at 1 ("We just never thought of it as a problem because they hadn’t run for office here, County-wide . . . . ")(cited in note 88).

One member of the Board of Education who voted for the cumulative voting proposal said that the Board was told that challenging the lawsuit might cost up to $250,000 because the case might go to the United States Supreme Court. See Interview with O.J. McGriff, Chairperson of the Chilton County School Board 1 (Jan 4, 1995)(on file with the University of Chicago Legal Forum). As he put it, "[s]chool dollars would have to have been spent. So there was a unanimous vote to go along with the cumulative voting settlement." Id.

See Interview with Jackson at 6 ("We were concerned about what it was going to cost, because we felt that we definitely would have to at least go to the 11th Circuit with it and there would be fines.")(cited in note 88). See also id at 3 ("We never knew what they would have ordered but we knew that they would be given some relief. I mean we knew that. And we didn’t know what that would be and we felt that this was probably the most acceptable of all."); Interview with McGriff at 1 (discussing the County’s uncertainty about what relief a court might award to the plaintiff class)(cited in note 92).

Dillard v Chilton County Bd. of Educ., 699 F Supp at 874.

Id at 871.
the County leaders viewed as unwieldy and unduly expensive), the geographic dispersion of black voters in the County made the drawing of a contiguous, relatively compact majority-black district impossible.\textsuperscript{94}

In settlement discussions, a private attorney assisting in the settlement process for \textit{Dillard v Baldwin County Board of Education} proposed moving to an alternative voting system.\textsuperscript{95} Alternative voting systems are increasingly common at the local level in Alabama, in part because the leading statewide black political organization understood the concept early and has been a consistent supporter of it. Between twenty and twenty-three jurisdictions in Alabama use limited voting, primarily for municipal elections; indeed, Alabama is the national leader in the use of limited voting.\textsuperscript{96}

Chilton County, however, decided instead to opt for cumulative voting. After a "long, long series of discussions" of both cumulative voting and limited voting, the lawyer representing Chilton County, John Hollis Jackson, concluded that cumulative voting would be preferable.\textsuperscript{97} Those negotiating the settlement for the County feared that limited voting would be perceived as interfering with principles of equality and fair voting because voters would not be permitted to cast a vote for all the seats being filled. Indeed, when the ADC proposed limited voting, the leading local paper editorialized that "being allowed to vote for only one candidate borders on forbidding residents to have the Constitutionally given right to elect those who govern."\textsuperscript{98} In opt-

\begin{footnotesize}
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\item[\textsuperscript{94}] See Interview with Mike Kelley at 1 ("I saw a district drawn one time that started in the Northern part of the county, up at the county line... it's just unbelievable, like a river running catching like this and back over here and back down there... . [E]ven the ADC thought it was a farce because it would have taken votes from every community in the county to make up that district.")(cited in note 89); Interview with Jackson at 1 (cited in note 88).
\item[\textsuperscript{95}] The suggestion apparently came from David Boyd, a lawyer in Montgomery who was acting as an unofficial liaison between the parties in the massive \textit{Dillard} litigation to attempt to settle as many of the cases as possible. Interview with Jackson at 1 (cited in note 88). Boyd first suggested cumulative voting in an answer to a request to identify remedial options. Interview with David Boyd 1 (Sept 9, 1995)(on file with the University of Chicago Legal Forum). He recalls having gotten the idea from reading the academic literature and also from his involvement in previous litigation in which Pam Karlan and Ed Still had raised the possibility. Id. Boyd does not view himself as an advocate for cumulative voting, but as someone who was fulfilling his responsibility to present the range of remedial options. Id.
\item[\textsuperscript{96}] See Gerald L. Ingalls and Theodore Arrington, \textit{The Use of Limited Voting in the United States: Potential and Practice} (unpublished draft manuscript on file with the University of Chicago Legal Forum).
\item[\textsuperscript{97}] Interview with Jackson at 1 (cited in note 88).
\item[\textsuperscript{98}] \textit{Plan Should Be Rewritten}, Independent Advertiser 4A (Nov 18, 1987). The editorial
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ing for cumulative voting, Chilton County became the only Alabama jurisdiction to do so. The motivating force for the decision to accept an alternative voting system was, without a doubt, the fear of what the federal court might impose instead.

Once Jackson agreed to consider a cumulative-voting remedy, he had to persuade the County's political officials to accept it. Initially, they were incredulous. As Jackson put it, they "acted like I was insane to even bring it to them." Jackson held several meetings with the existing County Commission and Board of Education in which various options, including pursuing the litigation, were discussed. As he put it, one day there would be agreement to accept the cumulative voting solution, the next day, the political leaders would be "totally opposed." Eventually, both bodies became persuaded that, as alien as the idea of cumulative voting had seemed initially, it was the best option. After formally voting to adopt the cumulative voting scheme, the two bodies held a joint press conference to begin the process of persuading the County's citizens to accept it. Once the political leaders endorsed cumulative voting as the best alternative under the circumstances, they remained committed to their decision; thus,

went on to state:

The popular vote has served this county well. The fact that the two largest [ ] communities in the county have elected black members to their councils points out clearly that people here do believe in everyone being represented by government. But using the federal court to . . . "assure" victories for their candidates tramples on the freedoms of everyone. If Chilton County was a South American country ruled by dictators we wouldn't be so shocked by the ADC plan. But this is still the United States . . . isn't it?

Id.


See note 93.

Interview with Jackson at 6 (cited in note 88).

Id.

Id at 6-7.
steadfastness played a considerable role in the eventual, begrudg- ing public acceptance of cumulative voting. The parties drafted a formal settlement agreement and the district court approved it, over the objection of some members of the plaintiff class.104

5. Selling cumulative voting to the citizens of Chilton County.

One of the most interesting aspects of the Chilton County experience was the self-conscious way public efforts were made to explain and justify the new system. Cumulative voting was not simply accepted by the County's lawyers in litigation, nor merely formally adopted by the relevant political bodies. Instead, the political leadership, as well as the editor of the major newspaper, made a concerted effort to explain how the new system would work and the reasons for its adoption. Putting aside earlier resistance, the leadership adopted a pragmatic attitude and assumed responsibility for making the new system work.

Details of the settlement negotiations had been reported in the local press,105 and the publisher of the Independent Advertiser, Mike Kelley, had written a hostile editorial against the other alternative voting system under consideration, limited voting.106 Kelley also thought cumulative voting was "the silliest thing [he had] ever heard of. It can't be constitutional . . . ."107 But Kelley was persuaded by Jackson and others—"cooler heads" in his words—that cumulative voting was the best alternative the County had.108

The official announcement of the settlement came at a news conference led by Jackson in February of 1988, with the first cumulative voting elections to take place in that summer's primaries. Thus, there was little time to prepare for the new system. Both the County Commission and Board of Education, which had been five-member bodies with residency requirements, would become seven-member bodies, elected at large with no residency requirements. The move from five to seven members was neces-

104 Dillard v Chilton County Bd. of Educ., 699 F Supp at 876. The six objectors among the plaintiff class presented a five single-member district plan which included one district where most black citizens would live. Id. The court held that this plan failed to satisfy one-person, one-vote requirements because the district in which the majority of blacks would live was twice the population of an ideal district. Id.
105 See (A)DC Wants 1 Man-7 Votes, Independent Advertiser 1 (Jan 29, 1988); Mike Kelley, Boards Reach ADC Pact, Independent Advertiser 1 (Feb 5, 1988).
106 See note 100.
107 Interview with Mike Kelley at 1 (cited in note 89).
108 Id.
necessary for the cumulative voting system to work as intended. The "threshold of exclusion" mathematically defines the smallest, cohesive minority group that can control one seat under different voting systems even if the majority (1) is uniformly hostile to the minority's preferences and (2) distributes its own votes cohesively enough to maximize the majority's effort to defeat minority-supported candidates.\textsuperscript{109} In a traditional majority-rule winner-take-all system, a minimum of 51 percent of the vote is needed. In a cumulative voting system with five seats at stake and each voter having five votes, the threshold is 16.6 percent.\textsuperscript{110} With a black population of around 11.8 percent,\textsuperscript{111} a five-member body would not ensure Chilton County's black population of control over even one seat in the face of extreme racially polarized voting. With a seven-member board, a cohesive minority just above 12.5 percent would effectively control one seat. Even a small amount of white crossover voting, thus, would ensure that Chilton County's black population would be able to elect at least one candidate of its choice to a seven-member board chosen through cumulative voting. Moreover, these theoretical thresholds are calculated on the assumption that the hostile majority distributes its votes optimally among the right number of white candidates; any deviation of the majority from perfectly cohesive voting of this sort lowers the practical election threshold for minority-supported candidates.

In the news conference explaining the new system, the County's attorney, John Hollis Jackson, told voters, "I can confidently say that not one single member of either board like[d] what he had to do."\textsuperscript{112} The same issue of the \textit{Independent Advertiser} that reported the press conference included an editorial entitled "Making the Best of a Bad Situation," indicating that the paper had switched positions and was now reconciled to cumulative voting.\textsuperscript{113} While saying that the federal court order would "anger many residents," and that "[w]e are angry too," the editorial also said that cumulative voting was "the better of the evils" and that it was "time to make the best of a bad situation. Learn the new system and exercise your right to vote."\textsuperscript{114}

\textsuperscript{109} See note 49.
\textsuperscript{110} See note 50.
\textsuperscript{111} See note 79.
\textsuperscript{112} Mike Kelley, \textit{Boards Approve Vote Plan}, \textit{Independent Advertiser} 1 (Feb 10, 1988).
\textsuperscript{113} \textit{Making the Best of a Bad Situation}, \textit{Independent Advertiser} 4 (Feb 10, 1988).
\textsuperscript{114} Id.
The cumulative voting system apparently was met with contempt and disbelief by the general public. Sue Smith, a Republican elected to the Board of Education in 1988, remembered:

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 that 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.  

Nor was this skepticism confined to whites. Bobby Agee, Chilton County's first black County Commissioner, who was elected under cumulative voting, recalled that "I didn't see how it would work . . . . Everybody kept saying it would work, but in the back of my mind I just could not figure out with the white population being as large as it is and the minority population being as small as it is, I kept thinking 'we're still going to lose no matter what.'] . . . ." As the summer primaries approached, the educational efforts of both local government officials and other, more partisan forces, accelerated.

6. Organized educational efforts.

The relevant political bodies, the County Commission and Board of Education, decided to run government-funded advertisements in both local papers explaining how cumulative voting would work. These advertisements featured sample ballots before the primary and general elections in 1988. In addition, many of the key figures in the adoption of cumulative voting took it upon themselves personally to explain the new system to the public. Jackson spoke at local clubs and met with candidates from both parties. The probate judge, who supervises elections, made

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115 Interview with Sue Smith, Former member of the Board of Education and former Chairperson of the Chilton County Republican Party 1 (Jan 6, 1995)(on file with the University of Chicago Legal Forum).
116 Interview with Bobby Agee, Chilton County Commissioner 13-14 (Jan 4, 1995)(on file with the University of Chicago Legal Forum).
117 Interview with Jackson at 12 (cited in note 88).
similar appearances. Members of the County Commission and Board of Education spread word of the system to friends and neighbors. Jackson recalled that "a lot of people worked hard on it even though they didn't believe in it." 118

Political parties and organizations also engaged in educational campaigns. An unusual historical feature of Alabama's black political history has played a significant role in the state's pioneering position in the use of alternative voting systems and, it seems likely, in the apparent success of cumulative voting in Chilton County. In the early 1960s, before blacks were registered to vote in significant numbers, an effective statewide black political organization, the ADC, had already formed. 119 The ADC has been a plaintiff in many of the state's major voting-rights suits, including Dillard v Baldwin County Board of Education, and has been a leading proponent of alternative voting systems. A standard concern with alternative voting systems, particularly cumulative voting, is that they require more sophisticated voting strategies, especially from the minority voters such systems potentially benefit. With an extensive grassroots network throughout Alabama and considerable experience in mobilizing minority voters, the ADC has a great deal of self-confidence in its ability to educate minority voters at the local level about the intricacies of alternative voting systems. In addition to the ADC, a second statewide black political organization, the New South Coalition ("NSC"), has spun off from the ADC as a more moderate alternative and now regularly fields candidates.

Before the 1988 elections, both the ADC and the NSC distributed sample ballots that instructed their constituents how to cast their ballots. Typically, these ballots urged voters to vote seven times for the minority candidate the organization endorsed and marked out how to do so (we have included copies of these sample partisan ballots, from the first cumulative voting election, in Appendix A). 120 The ADC held meetings to explain how cumulative voting worked and had representatives present at many ballot boxes to aid voters who requested assistance. 121 In addition, the two traditional parties in the County, Democrats and

118 Id at 13.
119 Interview with Gray (cited in note 89).
120 See Interview with Agee at 15 (cited in note 118).
121 Interview with Gray at 15-16 (cited in note 89).
Republicans, also distributed sample ballots. Unlike the ADC ballots, however, these ballots, at least in 1988, did not take advantage of the cumulative voting feature and instead asked voters to give one vote to each of the party's seven candidates.

B. Results to Date under the Cumulative Voting System

In this Section, we describe the actual results along several different dimensions of Chilton County's seven-year experience with cumulative voting.

1. Effects on minority representation: descriptive representation.

The primary aim of adopting cumulative voting, in the context of the VRA, is to ensure minority communities effective opportunities to elect candidates of their choice despite a hostile, racially polarized bloc-voting majority. The first and most important test of cumulative voting, then, is whether it succeeds in this essential respect. Questions about the efficacy of cumulative voting rest partly on fears that the system requires sophisticated and cohesive voting strategies from minority communities, which in turn require high levels of knowledge and concerted group action. The alternative of "safe" districts does not require a comparable level of voting sophistication. One concern, then, about cumulative voting is that it will not be as effective as black-majority districts in ensuring the election of candidates that the minority community prefers (typically, black candidates).

a. Black representation.

In fact, cumulative voting has worked just as predicted *ex ante* with respect to enhancing black representation even in the face of racially polarized voting. In elections for the powerful County Commission in 1988, the first held under cumulative voting, Bobby Agee became the first black representative to be elected to the Chilton County Commission since Reconstruction. Indeed Agee, the only black candidate in the general election, not only was elected, but received more total votes than any other candidate in the fourteen-candidate field.

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123 Another black candidate, Robert Binion, had run in the Democratic primary, but had been defeated.
Statistical analysis of the 1988 election reveals that Agee was not the leading vote getter due to cross-racial support. Instead, black voters effectively used the cumulative voting system to concentrate their support for Agee despite almost no white crossover support. Only 1.5 percent of white voters appear to have cast even a single vote for Agee, while virtually all black voters voted for him. More importantly, most black voters gave Agee multiple votes, including many who cast all seven votes for Agee. One means of testing this is by examining the number of precincts in which various candidates received more votes ("bonus votes") than the number of actual voters. Agee received bonus votes in more precincts than any other candidate, indicating that voters were casting more multiple votes for him than for other candidates.

These results also are consistent with the campaign tactics in the 1988 elections. Agee immediately grasped the significance of the cumulative voting system and actively campaigned for seven votes from each voter. His advertisements also asked for all seven votes. In the first election under the new system, this was considered a novel and aggressive move. Several people characterized it as a "bold" strategy, and many people thought it was "not [the] Southern Gentleman [thing to do]."

Most other candidates campaigned in the traditional way, asking for only one vote.

Agee and another black candidate, Robert Binion, both entered the Democratic primary again in 1992, and this time both minority candidates survived. No black Republican candidates ran in the Republican primary. Agee again was elected to the County Commission, placing second in the field of fourteen, while Binion was defeated.

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125 Id at 194.
126 Id at 190.
127 Interview with Agee at 7 (cited in note 118).
128 Interview with Bobby Agee, Chilton County Commissioner 1 (Aug 31, 1995)(on file with the University of Chicago Legal Forum).
129 Interview with Mike Kelley at 2 (cited in note 89).
130 Interview with Agee at 1 (cited in note 130).
131 After the 1988 election, the County Commission selected Agee to serve as Chairperson of the Commission. Agee declined to serve as Chairperson for the first six months of his term, choosing to wait until he had more experience as a commissioner. But Agee accepted the position the second time it was offered, and has served as Chairperson ever
With respect to the Board of Education, one black member has now been elected in each of the two elections utilizing cumulative voting. In 1988, James Hill, a Democrat, was the only black candidate in the general election and placed second. Voting was again extremely polarized along racial lines: estimates are that 1.13 percent of white voters cast a vote for Hill, while nearly all black voters voted for him. Hill apparently received multiple votes from most black voters, thereby enabling his election. In 1994, Hill again ran in the general election, along with another black candidate, Edward Reed. This time, Reed won a seat, placing third, and Hill, despite being an incumbent, lost.

b. Representation of other minorities.

Advocates of cumulative voting assert that, in contrast to race-conscious districting, which enhances the electoral opportunities only of racial minorities, cumulative voting—as a neutral means of enhancing minority representation more generally—ought to enhance minority representation of other groups as well. Cumulative voting has indeed had this effect in Chilton County.

Republicans

Republicans were dramatically underrepresented on the County Commission prior to the 1988 election. In 1988, however, Republicans won three of the seven commission seats. This sudden transformation occurred before the dramatic shift toward the Republican party at the local level in the South. Sue Smith, then Chairperson of the Chilton County Republican Party, believes that cumulative voting contributed to the Republican breakdown of the Democratic monopoly on local political power. In 1992, Republicans again were successful, this time winning two seats on the County Commission.

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132 No blacks had ever served on the Board of Education prior to cumulative voting. Interview with Agee at 1 (cited in note 130).
134 According to Bobby Agee, there has never been a majority of Republicans on the County Commission. As a matter of fact, he does not recall there ever being more than one Republican on the Commission at any one time. Interview with Agee at 1 (cited in note 130).
135 Interview with Smith at 3 (cited in note 117).
Republicans have enjoyed similar success in the Board of Education elections. Only one Republican was on the Board of Education prior to cumulative voting. In 1988, however, three Republicans (including two women) were elected, and in 1994, two Republicans were elected. While more complex statistical work would be required to explain with certainty the causes behind the sudden representation of Republican minorities on these bodies, it seems clear that cumulative voting is a significant factor.

Women

Advocates sometimes assert that alternative voting systems will increase the number of women in office. Indeed, a greater percentage of officeholders are women in countries with alternative voting systems compared to those with single-member territorial districts. The theory is that women must run head-to-head with men in winner-take-all single-member district elections, and in those circumstances, more voters are likely to vote for a man because of gender. Alternative voting systems do not pit candidates directly against each other in the same way; voters must vote for a candidate as opposed to voting against one.

In Chilton County, women have been elected to the Board of Education since cumulative voting began. Only one woman was on the Board before 1988, but in the cumulative voting elec-

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136 Interview with Sue Smith, Former member of the Board of Education and former Chairperson of the Chilton County Republican Party 1 (Sept 20, 1995)(on file with the University of Chicago Legal Forum).

137 Id.


139 In the United States, a recent study has concluded that the low level of women in the United States Congress (11 percent in the House, 7 percent in the Senate) is due to the small number of women candidates and to the power of incumbency. When women do run, they fare as well as men when incumbency is taken into account. See Jody Newman, Women Candidates Can Win . . . When They Run: Perception and Reality, in Voting and Democracy Report: 1995 at 139-140 (cited in note 101). This study, of course, does not compare how well women would do under alternative voting systems compared to single-member districts.

140 Interview with Smith at 1 (cited in note 138).
tion that year, two women, both Republicans, were elected. A third woman, a Democrat, was nearly elected but placed eighth, one position away from a seat. One of the successful women candidates in the 1988 election commented that she was not sure cumulative voting had played a role in the sudden success of women candidates. She did, however, note that more women were running because more women had decided that they could get elected—which might be associated with the use of cumulative voting. Still, women have not been successful in County Commission elections, even since cumulative voting began. The one woman who has run in a primary or general election for the County Commission was defeated.

In sum, since cumulative voting began, groups that previously had not been represented—blacks, Republicans, and women—have been elected in significant numbers to both the County Commission and the Board of Education. With respect to blacks, statistical analysis of the first cumulative voting elections, as well as the analysis of more recent elections that follows in section II. B. 5., demonstrates that cumulative voting is directly responsible for this change. Given the sequence of events, it seems likely that cumulative voting also played a significant role in the election of women and Republicans that began in 1988, but more sophisticated analysis would have to be undertaken to distinguish the various potential causes of the sudden electoral successes of these groups.

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141 Two Republican women ran for election in 1994, Anne Glasscock and Sandra Moone. Glasscock won but Moone lost. Id.
142 Interview with Smith at 3 (commenting that she was “not sure that [the success of women candidates is] a result of cumulative voting. It might be in some respects, but more women have been running. . . . I think it’s just [that] women have decided that they can get elected. . . . I think another reason that women have been elected, and Republicans and minorities to the School Board, is because it’s expanded [from] five members to seven members, so more people were going to be elected.”)(cited in note 117).
143 The candidate was Sandra Gilliand in 1988. Interview with Agee at 1 (cited in note 130). A woman was appointed to the County Commission in 1991 after a commissioner died, but she did not seek reelection at the end of her term. Id.
144 A related but independent question is whether cumulative voting affects not just the electability of candidates, but the willingness of different types of candidates to run, given their greater likelihood of success under a cumulative voting system. We asked several recent less traditional winners whether their decision to run had been influenced by the existence of the cumulative voting system, but none reported that it had been. See, for example, Interview with Smith at 2 (cited in note 117).
2. Effects on minority representation: substantive representation.

Descriptive representation—the actual presence of minorities in political office—is the immediate test of alternative voting systems. Descriptive representation might in and of itself bring about several desirable results: among other effects, it might enhance the legitimacy of political bodies within the community as a whole and foster a greater sense of civic inclusion among political minorities. But a major question is whether more minorities in office translates into substantive representation that is more responsive to the minority community. Previous scholarship concludes that verifiable, material changes in local government policy do occur when racial minorities begin to assume public office. Nonetheless, some continue to question the link between descriptive and substantive representation: whether the increased presence of black public officials translates into tangible policy and other benefits for minority voters. Is minority representation of primarily symbolic importance? Do white officials represent the actual substantive interests of black constituents just as effectively? Indeed, white members of the Chilton County Commission questioned whether there was any need for minority representation on the County’s various administrative bodies.

The two most detailed studies to date involve several cities in California and Florida. The first, a study of the ten most populous cities with the largest black and Hispanic populations in northern California, found that minority incorporation in city government (for which minority representation was considered a prerequisite) directly led to policies and programs that benefitted minorities. Rufus P. Browning, Dale Rogers Marshall, and David H. Tabb, Protest Is Not Enough: The Struggle of Blacks and Hispanics for Equality in Urban Politics 140, 168 (University of California Press, 1984). This study also reported that “minority councilmembers were important in linking minorities to city hall, in providing role models, and in sensitizing white colleagues to minority concerns.” Id at 141. The second, a comprehensive study of six communities in different parts of Florida between the late 1950s and the mid-1980s, reached similar conclusions. See James W. Button, Blacks and Social Change: Impact of the Civil Rights Movement in Southern Communities 15-26, 226-229 (Princeton University Press, 1989). According to this study, “[b]lack representation ‘on the inside’ . . . gave [black citizens] easy, constant, and relatively quick access to the decision-making arena and to white leaders, both public and private.” Id at 226. Furthermore, “[i]n the struggle for improvements in municipal services, black officials were the single most important political factor. This was true for most capital and labor-intensive services.” Id at 227. Black officeholders “also proved instrumental in having blacks appointed to citizen advisory boards and committees.” Id at 228. See, generally, Milton D. Morris, Black Electoral Participation and the Distribution of Public Benefits, in Chandler Davidson, ed, Minority Vote Dilution 271, 281-84 (Howard University Press, 1984). For a survey of several studies on these questions, see Chandler Davidson, The Voting Rights Act: A Brief History, in Bernard Grofman and Chandler Davidson, eds, Controversies in Minority Voting: The Voting Rights Act in Perspective 7, 49 n 139 (The Brookings Institution, 1992).

145 Interview with Agee at 1-2 (“I’ve heard the statement from several of the commis-
In Chilton County, we found at least three significant changes in local government—two policy oriented and one attitudinal—in the wake of the cumulative voting system and the first election of a black County Commissioner. First, the most significant function of the County Commission is to make road-paving decisions. Of the various functions within the Commission's jurisdiction, none occupies more time or matters more to the residents of Chilton County than petitions to have roads paved. The County still has about six hundred miles of unpaved roads, which become muddy in the frequent rains, but financial resources sufficient to pave only eight miles per year.

Before Agee was elected, the County Commission granted road-paving petitions in an ad hoc and informal way. At Agee's urging, the Commission adopted a more formal point system with neutral criteria that eliminated the potential for favoritism. The point system depends on the number of houses on a road, whether the mail carrier travels it, if there is a church present, and the like. According to Agee, he was motivated by several problems in the old system and not solely by the aim of ensuring that road-paving services were distributed more equitably in the black community. But one consequence of adopting general, neutral criteria is that more roads now are being paved where black residents live than were under the system that existed before Agee was elected.

Second, Agee's presence has led to the appointment of more minorities to important administrative boards. One of the

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147 We did not undertake any inquiries into substantive changes in educational policies adopted by the Board of Education in the wake of minority representation.

148 Interview with Agee at 3 (cited in note 118); Interview with Trey Hughes, Reporter for the Independent Advertiser 2 (Jan 4, 1995) (on file with the University of Chicago Legal Forum) (“This county has more than 600 miles of unpaved roads. Very poor county, and they’re going to feel that way until every one of them is paved. If you would go to a commission meeting, . . . every week citizens show up complaining about the roads and the conditions . . . .”).

149 Interview with Agee at 3-4 (cited in note 118).

150 Id at 3. Interestingly, the white attorney for the County Commission and Board of Education, John Hollis Jackson, noted that he couldn't "see a big difference" in the road-paving practices of the County Commission and added "I don't know that they [the minority community] were deprived before." Interview with Jackson at 10 (cited in note 88).
Commission's principal tasks is appointing, by majority vote, these administrative officials. Agee thus cannot appoint anyone directly, but as he says, "the mere fact of me being there and recommending a minority goes a long way." These administrative boards wield considerable power because they operate independently of the County Commission. Agee has succeeded in appointing a minority to the Hospital Board and the Water Board, both of which previously had not had minority members.

The struggle over the Water Board was particularly noteworthy and was commented on by several of our interviewees. The Board, a three-member body, controls millions of dollars a year for spending on matters such as extension of water services to new areas. When a position opened on the Water Board, which a local reporter described as "a pretty big position," Agee pressed to fill it with a minority. The County Commission stalemated in a "bitter, bitter fight" for five months, with various members pushing for their own candidates. Eventually, Agee prevailed. The controversy was resolved only recently, and there is some disagreement about whether any concrete changes in Water Board policies resulting from this appointment can be identified. But several people reported that the minority community felt better with someone on the Board, and Agee is confident that the black community will receive fairer treatment in the provision of water services.

The third benefit observers attributed to Agee's presence was more intangible. Many people, including Agee himself, said that black residents in Chilton County "definitely" took a lot of pride in Agee's presence and felt more connected to local government as a result. As the County's attorney put it, "I do think that

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151 Interview with Agee at 16 (cited in note 118).
152 Id at 1.
153 Id at 16.
154 Many residents currently use wells to supply their water needs. Id at 16-17.
155 Interview with Hughes at 4 (cited in note 150).
156 Id.
157 John Hollis Jackson asserted that a water system extension recently had been placed in a community with a large minority population, but neither the local reporter we spoke with nor Mr. Agee similarly asserted that any significant new developments had taken place. See Interview with Jackson at 10-11 (cited in note 88); Interview with Hughes at 4 (cited in note 150); Interview with Agee at 16-17 (cited in note 118).
158 Interview with Agee at 1 (cited in note 118); Interview with Hughes at 4, 11-12 (cited in note 150).
159 Interview with Agee at 1-2, 16-17 (cited in note 118).
160 Interview with Jackson at 11 (cited in note 88). See also Interview with McGriff at 2 ("With a black commissioner, the black community feels more involved.") (cited in note
the black community is really proud of having elected [black] officials. I think that makes a difference.”

As the reporter who covers local politics put it, black residents like the cumulative voting system “because it works, and for the longest time they had no voice in government and now they do . . . .”

One of the more dramatic long-term consequences of the emergence of black representation on the County Commission, in the wake of cumulative voting, is that Bobby Agee eventually became Chairperson of the Commission. The Chairperson normally is elected by the other commissioners. An unusual clause in the litigation settlement, however, had entitled Agee to serve as Chairperson. The settlement provided that black officials elected to the County Commission or Board of Education could serve as Chairperson for eight months anytime they chose to do so during their initial term in office. Agee, however, did not feel prepared to assume the duties of Chairperson during his first term and did not want to invoke this special clause if unnecessary.

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Interview with Jackson at 16 (cited in note 88). Jackson added:

Naturally when a problem comes up to the County Commission, if you have a black man sitting there as an elected member, a black woman, whatever, they're going to understand a problem from a racial perspective that a white man or a white woman who doesn't have any experience, they just won't be able to recognize it, so it makes a difference, it really makes a difference.

Id. See also Interview with Agee at 5-6 (“Quite naturally I'm the minority representative on that board. Quite naturally I'm going to look out for the best interest of . . . everybody, but I'm going to make sure that the minority interest [is] very well tak[en] care of on that board. And I'm sure the various people from the various areas that they live in feel the same way.”)(cited in note 118).

Interview with Hughes at 5 (cited in note 150).

Interview with Agee at 2 (cited in note 118).

Id.

The clause presumably had been included in response to the experience of some other jurisdictions where blacks who were elected due to VRA litigation faced recalcitrant white elected officials who refused to accept black elected officials on equal terms. The most visible example is described in Presley v Etowah County Comm, 502 US 491 (1992), in which county commissioners, elected at large before VRA litigation, each had the power to grant road contracts independently—a significant source of power and patronage—in their own areas of the county. After the courts forced the county to move to a single-member district plan, the four incumbent commissioners voted to give themselves joint, exclusive authority over roads and to confine two newly elected commissioners (one of whom was black) to overseeing courthouse maintenance and engineering. The Supreme Court held that such changes in the internal distribution of power among elected officials did not require preclearance under Section 5 of the VRA. Id at 510. For other examples of sudden shifts in internal operating rules after black officials are elected, see Susan Feeney and Steve McGonigle, Minority Officials Say Powers Denied Under Racist Tactics,
After being in office for one full term, Agee had established enough credibility and expertise that the other commissioners elected him Chairperson for one year and then reelected him for a second year. We found no evidence that the other commissioners were motivated by the specter of Agee invoking his right to serve as Chairperson under the settlement agreement. In any event, even if that motivation played a role in Agee's initial election (in the sense that the settlement was understood to entitle him to serve as Chairperson once), it could not have played any role in his reelection. Instead, the commissioners we interviewed regularly remarked on Agee's judgment, temperament, and ability as the reasons they voted him Chairperson of the Commission. As one put it, "Agee is the most intelligent and most educated man on the commission."

Agee's elevation to Chairperson of the most powerful local government political body in Chilton County illustrates the integrative role cumulative voting can play. Given racially polarized voting patterns, Agee could not have come close to being elected in an at-large election, even after he had served his first term. Yet given the opportunity to serve that cumulative voting created, he earned sufficient respect from his fellow commissioners to be elected Chairperson twice.

In his role as Chairperson, Agee's influence undoubtedly will expand. The Chairperson is automatically a member of several other boards, including the Industrial Development Board and the Senior Citizens Board, and serves as a liaison between those boards and the County Commission. These additional roles will enhance the range of issues on which Agee can pursue the substantive interests of Chilton County's minority residents, while serving the community as a whole. Based on our investigations, there seems little doubt that the presence of a black elected official on the County Commission as a result of cumulative voting is already producing tangible substantive benefits, as well as intangible feelings of civic inclusion, for the black residents of Chilton County.

Dal Morn News 1A (Aug 14, 1994).

166 Interview with Agee at 2 (cited in note 118).
167 Interview with Julius Kelley at 2 (cited in note 66).
3. Public satisfaction with cumulative voting?

One of the striking discoveries we made was that cumulative voting was widely disliked in Chilton County. Virtually everyone we interviewed reported this fact.\textsuperscript{168} Even more interesting were the reasons for this dislike. The principal reason was the widely shared view that cumulative voting was undemocratic and unconstitutional because it violated the one person, one vote principle.\textsuperscript{169} As one observer put it, "they feel it violates their sense of governmental propriety somehow. They keep saying it's unconstitutional, 'I just know it's unconstitutional.' I hear that all the time."\textsuperscript{170} Indeed, one person reportedly refused to cast more than one of his seven votes "because the system is unconstitutional."\textsuperscript{171} Some attributed this view to the uniqueness of the system: "[I]t goes away from practically the rest of the country and how they vote."\textsuperscript{172} Others attributed this view to the fact that "[o]lder people are just stuck in their ways and they don't want to change."\textsuperscript{173}

These comments are ironic on several levels. The principle of one person, one vote now viewed as so "fundamental" to democratic government was not, of course, constitutionally established until 1964.\textsuperscript{174} 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.\textsuperscript{175} We asked whether it would matter to people in

\textsuperscript{168} Interview with Agee at 7 ("Some people do [like the system], some people just don't. A lot of people think it's unconstitutional, that it goes against the one man[,] one vote way.")(cited in note 118); Interview with Hughes at 8 ("I would say I'm not too keen on the seven to one vote.")(cited in note 150); Id at 1 ("I don't think the public perception of the system is [ ] that positive. . . . [A] lot of people of course do not like it . . . ."); Interview with McGriff at 1 ("Most people don't like the [seven] vote system. It gets away from [one man, one vote]. It's just not right to give on[e] person seven votes to do what he pleases with.")(cited in note 92); Interview with Julius Kelley at 1 ("People in the Cooper area don't like the system. They don't think it's fair.")(cited in note 66); Interview with Smith at 1 ("[I]t's a combination of some people who don't understand it and some people think it's undemocratic, it's unconstitutional, you shouldn't vote more than once for one person, regardless of the situation . . . . Confusion and people who do not think this is the right way to hold elections, it's really a combination of those two things I think . . . .")(cited in note 117).

\textsuperscript{169} See note 170.

\textsuperscript{170} Interview with Jackson at 11-12 (cited in note 88).

\textsuperscript{171} Interview with McGriff at 1 (cited in note 92).

\textsuperscript{172} Interview with Hughes at 2 (cited in note 150).

\textsuperscript{173} Interview with Julius Kelley at 1 (cited in note 66).

\textsuperscript{174} See Reynolds v Sims, 377 US 533 (1964).

\textsuperscript{175} In Cane v Worcester County, Md., 847 F Supp 369 (D Md 1994), the district court
Chilton County if judicial decisions or academic experts had made clear that cumulative voting did not violate one person, one vote, but we were told that judicial decisions or expert opinions would not affect the conviction of many residents.\textsuperscript{176}

This ideological resistance to possessing multiple votes suggests an interesting framing question about cumulative voting. Rather than structuring the system so that each voter has seven votes to cast, each voter could be presented as having one vote, parts of which they could cast for different candidates; thus, voters could be told that they could cast one-seventh of a vote for each candidate, or that they could give their entire vote to one candidate. Would shifting the frame from "seven votes" to "one vote" that could be parcelled out into fractions of one-seventh change the strong "one vote, one person" resistance to cumulative voting experienced in Chilton County?

Yet more irony emerged when we explored whether dislike of cumulative voting was a cover for resistance to minority political power. We ultimately rejected this explanation. We consistently were told—and came to believe—that, whatever complaints people had about cumulative voting, there was general acceptance of the need for minority representation. Many people stated that they understood the importance of minority representation but would have preferred drawing majority-black districts had that been possible.\textsuperscript{177} Indeed, one prominent member of the Board of Education who thought cumulative voting was a terrible system said that he had thought for a long time about what Chilton County could have done instead. He concluded that the County should have set aside one seat on the relevant bodies as a "minority seat," for which all voters would vote but which a minority candidate would have to win.\textsuperscript{178} Thus, he preferred a blatantly imposed the plaintiff's cumulative voting scheme as a remedy for VRA Section 2 violations. The Fourth Circuit reversed this decision, stating that the district court abused its discretion by not providing the county with adequate notice so that it could devise a remedial scheme of its own. \textit{Cane v Worcester County, Md.}, 35 F3d 921 (1994). The Fourth Circuit also acknowledged, however, that "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] 2." \textit{Id} at 927-28, quoting \textit{Holder v Hall}, 114 S Ct 2581, 2601 (1994)(Thomas concurring). The district court subsequently imposed its own cumulative voting plan, \textit{Cane v Worcester County, Md.}, 874 F Supp 687 (D Md 1995), which the Fourth Circuit reversed because neither of the parties supported cumulative voting as an option. \textit{Cane v Worcester County, Md.}, 57 F3d 1065 (1995).

\textsuperscript{176} Interview with Jackson at 12 (cited in note 88).
\textsuperscript{177} See Interview with Mike Kelley at 4 (cited in note 89).
\textsuperscript{178} Interview with McGriff at 1-2 (cited in note 92).
unconstitutional means—the setting aside of a seat for minority officeholders—to a clearly constitutional one—cumulative voting—because of his strong convictions that the latter violated the fundamental, though relatively recent, principle of one person, one vote. Such is constitutional law in action, rather than on the books.

Nonetheless, the widespread dislike of cumulative voting is not to be interpreted as disapproval of the system. Even people who did not like the system appeared to accept it because “it works.” By working, people meant that it did produce the intended result of black elected officials roughly representative of the black population. Based on our interviews, there seemed to be a consensus that cumulative voting was effective, necessary to achieve minority representation, and therefore begrudgingly accepted even while being disliked.

4. Confusion, turnout, and voter interest.

Cumulative voting elections have proceeded relatively smoothly in Chilton County, although citizens disagree about the extent to which voters are confused by the system. The County’s probate judge finds cumulative voting elections more difficult to administer than the at-large, winner-take-all elections. His primary complaint is that many voters make a mistake on their first ballot, necessitating a second attempt and a new ballot. The most typical mistake is overvoting; if a voter records more than seven votes, the machine that is used to tally ballots detects the error and rejects the ballot. The voter then can cast a proper ballot. The County has never run out of ballots, however, since a ballot is printed for every registered voter despite the fact that turnout is nowhere near 100 percent.

The comments of Sue Smith, former Chairperson of the County’s Republican party and former Board of Education member, indicate that voter understanding of the system has grown

177 Interview with Hughes at 8 (cited in note 150). See also Interview with Jackson at 12 (“Even though it may not be desirable, it works[,] it really, really works.”)(cited in note 88).
180 Compare Interview with Gray at 15-16 (cited in note 89), Interview with Hughes at 7 (cited in note 150), and Interview with Jackson at 11 (cited in note 88)(all reporting that voter confusion is not a problem) with Interview with Smith at 1 (reporting that some people still do not understand the system)(cited in note 117) and Interview with Robert Martin, Probate Judge for Chilton County 1 (Jan 4, 1995)(on file with the University of Chicago Legal Forum)(explaining that many voters have to vote several times due to overvoting on their initial attempts).
181 The machine accepts ballots containing fewer than seven votes.
over time. Some citizens are still confused about the fact that they can vote more than once for the same or different candidates. But Smith reported an increasing appreciation of cumulative voting strategies; many voters have come to understand that "if you spread your votes you're diluting your votes." Voters consciously choose between "find[ing] a good [cross section] of people to serve on this Board, or . . . mak[ing their] vote count to help one person in particular get elected . . . ." Moreover, the initial confusion and incredulity surrounding cumulative voting may have had an unanticipated benefit in Chilton County: a resurgence of interest in the political process in general. Smith hypothesized:

When there's confusion about [the voting process] then people are going to ask questions, or they are going to try [to] find out about it[,] which creates more of an interest[,] and that's bound to be good for the voting process in the long run. I [ ] don't know how many people it has discouraged from voting . . . . But I know that the talk . . . has been greater and people have been more interested in it.

Agee reported a similar phenomenon. He believes that the system has encouraged more people to run for office, and that this broadening of candidates has spawned greater interest in elections.

We were unable to gather precise statistical information on whether cumulative voting has led to increased voter turnout. Individuals expressed different opinions about the system's effect on turnout; most felt that it had not made a difference. Bobby Agee, however, thought turnout had in fact increased, especially in the black community.

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182 Interview with Smith at 2 (cited in note 117).
183 Id.
184 Id at 8.
185 Interview with Agee at 10 (cited in note 118).
186 Had we located the data, it would have been difficult to account for the additional factors that affect turnout in order to assess cumulative voting's impact. For example, Chilton County has closed nine polling places since 1988 because they were not accessible to disabled people. Interview with Martin at 1 (cited in note 182).
187 Interview with Smith at 8 (cited in note 117); Interview with Mike Kelley at 8-9 (cited in note 89).
188 Interview with Agee at 10 (cited in note 118).
5. **Statistical analysis of recent cumulative voting elections.**

In this section, we examine the actual voting behavior of white and black voters in the more recent cumulative voting elections since the introductory use of the system. The new seven-seat County Commission and Board of Education were first constituted in 1988. New elections were held in 1992 for the County Commission and in 1994 for the Board of Education. We obtained precinct-by-precinct data on voter registration and turnout, broken down by race, and we used the standard statistical technique of ecological regression analysis to generate estimates of the overall voting behavior of black and white voters. We analyzed the election data to determine the extent of white and black support for white and black candidates, and also to estimate how white and black voters were using their powers to distribute multiple votes among numerous candidates.

### a. Racially polarized voting patterns.

Figures 1 and 2 plot, for each precinct, the percentage of black voters against the percentage of the vote received by black candidates for the 1992 County Commission and 1994 Board of Education elections. For the 1992 election, voting was polarized...
heavily along racial lines: a strong proportional relationship exists between the percentage of black voters and support for black candidates in any given district. Racial voting patterns are more difficult to interpret in the 1994 election, but black candidates continued to poll significantly better in districts with large numbers of black voters.

Using the percentage of black voters in a district to predict electoral polarization outcomes is one means to portray the level of racial polarization even in these cumulative voting elections. The patterns of voting behavior in the 1992 County Commission election and the 1994 Board of Education election, estimated through regression analysis, are presented in Table 1. The "black voters" column lists projected results given a hypothetical district composed of all black voters. The "white voters" column lists estimated results for 100 percent white districts.

Based on these regression analyses of aggregate voting behavior, racial crossover voting appears limited in both elections, especially in 1992. While black voter support for white candidates appeared to rise in 1994, the estimates of black voting behavior for that year are statistically uncertain.

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190 See Figure 1.

191 See Figure 2. There were seventy-eight more votes cast in Enterprise in 1994 than there should have been, given the actual number of voters reported in that polling district. This discrepancy is probably the result of a vote-counting mistake and appears to be a random error. In addition, removing the Enterprise data would have almost no effect on the regression results. The Enterprise figures are, therefore, included in all analyses in this Article.

192 Several technical aspects of the analysis should be noted. First, in 1992, both Maplesville and Veterans Club had a significant black voting population, but black candidates polled better in Maplesville. The estimates of the levels of black support for black candidates would be affected significantly were either Maplesville or Veterans Club dropped from the analysis. Estimates of white voter behavior and black crossover voting, on the other hand, would be affected only slightly. Second, the regression line in 1994 appears to be driven by the Maplesville and Veterans Club points. More importantly, the variables of interest do not appear to be related in a true linear manner. Nonlinear terms were added to the regression equation in an attempt to better fit the model to the data. We decided, however, that the slight improvement in fit gained by adding quadratic terms to the regression equation was not worth the resulting loss in explanatory simplicity. Thus, while we acknowledge the potential nonlinearities in the 1994 data, we decided to use simple bivariate linear regression to generate the voting behavior estimates. See note 205.

193 A 95 percent confidence interval for a point estimate gives the range of points within which, in 95 percent of repeated samples, the true point estimate will be found. The 95 percent confidence interval of black voter support for white candidates is -11.3 to 66.3 percent. The 95 percent confidence interval for black support of black candidates is 35.6 to 90.2 percent. Because these are both extremely wide confidence intervals, we are unable to say with certainty whether there was a high level of black crossover voting in 1994.
Our analysis of racial voting patterns in the 1992 County Commission election is confirmed by exit-poll data others have gathered. The validity of these exit polls is confirmed by the close fit between the self-reports of the 702 voters surveyed and the actual election outcomes. Thus, Agee received at least one vote from 67 percent of blacks who voted in this election; among these black voters, 85.4 percent reported casting all seven votes for Agee. On average, then, black voters who supported Agee did so intensely and took advantage of the "plumping" option cumulative voting creates: Agee received an average of 6.28 votes from each black voter who supported him. In contrast, the exit-poll data confirms that Agee received little white crossover support. Among white voters, Agee came in twelfth among all candidates, ranking ahead only of the other black candidate and one white Republican. Only 13.4 percent of whites cast even a single vote for Agee. In other words, only the use of cumulative voting made Agee's election possible. Had the at-large system remained in place, Agee would not have stood a chance.

Agee's perception of white support might be based on the following interesting anomaly of cumulative voting. Even though Agee received a small fraction of the total white vote and even though a very large percentage of his total votes came from blacks, a relatively significant number of white voters might have voted for Agee. That is, even if Agee's electoral support came overwhelmingly from black votes, more white voters might have voted for him than black voters—simply because whites are such a large majority in Chilton County. Recall that Chilton County is 11 percent black total population; that 67 percent of black voters

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195 This assumes that black and white voting preferences for the black and white candidates running in 1992 would not have been significantly different in an at-large election than they were in the cumulative-voting election. Based on the pre-1992 patterns of racially polarized voting, that assumption certainly appears reasonable.
196 See Interview with Julius Kelley at 2 ("Agee is the most intelligent and most educated man on the commission.").
voted for Agee; and that on average, these voters gave him 6.28 votes each. If only 13.4 percent of white voters voted for Agee and on average gave him only one vote each, Agee would have had more white voters voting for him than blacks. To see why, suppose 1,000 voters; if 11 percent of these are black, and 67 percent of them vote for Agee and give him 6.28 votes each, then Agee would receive 462 total votes from 73 black supporters. He would receive 119 total votes from 119 white voters. Thus, 80 percent of the total votes cast for Agee would come from black voters, but 62 percent of those who voted for him would be white. How would a candidate in a cumulative voting election likely perceive and define his or her support—in terms of voters or votes cast? With cumulative voting, voting can be extremely polarized along racial lines (in terms of total votes cast), yet the pool of those who support a black candidate can include a relatively large percentage of white voters.

White crossover voting, however, did increase slightly but significantly since cumulative voting was initiated in 1988. Reported data on the 1988 elections estimate that Agee received 1.5 percent of the white vote. 197 We estimate that he received 3.4 percent of the white vote in 1992. Agee and the second black candidate in the 1992 general election received similar levels of white voter support, as estimated in Figures 3 and 4. 198 Thus, Agee did receive twice as much white support in 1992 as in 1988, even though the absolute level of that support still remained extremely low.

The two black candidates running for the Board of Education in 1994, on the other hand, polled very differently in white districts. Hill received strong black support but had little backing from predominantly white districts. 199 Reed, on the other hand, received more support from heavily white districts than districts with large numbers of black voters. 200 Reed’s white support was particularly strong in the Jemison Town Hall precinct, where he teaches in the local high school. He has been well-known and respected for years in the area of Jemison. He served on the City

198 The candidates show similar patterns of black voter support, except in Maplesville, where Agee polled 28.4 percentage points higher than Binion. As a result, Agee’s estimated support from black voters is considerably higher than Binion’s. Both candidates, however, have extremely low levels of crossover support.
199 See Figure 5.
200 See Figure 6.
Council in the mid-1980s and was elected Mayor Pro-Tem.²⁰¹
Ironically, after his election the local paper reported that no
black had ever been elected to the City Council—apparently
because the reporter did not know that Reed was black.²⁰²

But even if the Jemison Town Hall results are excluded,
Reed polls higher than any other black candidate in districts
with greater than 90 percent white voting population. Among all
the black candidates in the elections we studied for the County
Commission and Board of Education, Reed was the only one with
substantial white crossover support.²⁰³

b. Voter turnout and votes cast.

Some political scientists and advocates have argued that
alternative voting systems tend to increase voter
turnout.²⁰⁴

White voter turnout remained stable across the two elections. In
both 1992 and 1994, about 65 percent of registered white voters
came to the polls. Black voter turnout, on the other hand, ap-
pears to have dropped almost 15 percentage points from the
County Commission elections in 1992 to the Board of Education
elections in 1994. We can speculate on the causes for this relative
decline,²⁰⁵ but we do not have enough information to provide a
reliable explanation.

Relative turnout is not the only variable which may have an
effect on the voting power of particular groups in a cumulative

²⁰¹ Interview with Mike Kelly at 3-4 (cited in note 89).
²⁰² Interview with Eddie Reed, Member of the Board of Education 1 (Nov 11, 1994)(on
file with the University of Chicago Legal Forum).
²⁰³ As Figures 3 and 4 demonstrate, the pattern of support for the two black candi-
dates in the 1994 election differs greatly. Thus, the 1994 “black candidate vote” variable is
an amalgamation of data from two unrelated distributions. Combining the Hill and Reed
results may, therefore, be an inappropriate use of the data. In light of this fact and given
the nonlinearities in Figure 2, see note 194, the patterns of candidate support in 1994 al-
most certainly should be examined separately for Hill and Reed. The statistical results
presented in Table 1 should be interpreted with this caveat in mind.
²⁰⁴ See Lani Guinier, The Tyranny of the Majority: Fundamental Fairness in Represent-
ative Democracy 152 (The Free Press, 1994)("Bly restoring the link between representa-
tion and voting, alternative election systems encourage voter participation.")(cited in note
53); Lani Guinier, No Two Seats: The Elusive Quest for Political Equality, 77 Va L Rev
1413, 1471 (1991)("[I]ncumbents will find it necessary to mobilize voter interest and
participation in an election, a task that will require incumbents to develop substantive
programs and proposals.")(cited in note 54).
²⁰⁵ For example, black voter turnout nationwide dropped dramatically between the
presidential election in 1992 and the congressional elections in 1994. See Michael
Kranish, Black Leaders Miffed as Clinton Seeks Center, Boston Globe 1 (July 10, 1995);
Jack Germond and Jules Witcover, Hill Democrats, Clinton No Longer Share Road Map,
Baltimore Sun 2A (June 17, 1995); Elizabeth Levitan Spaid, Clinton's Political Hopes Go
South, Christ Sci Mon 1 (Mar 30, 1995).
voting system. In both 1992 and 1994, neither blacks nor whites tended to cast all seven votes allotted to them. On average, voters in all-white districts cast about six votes in both the County Commission and Board of Education elections. In 1992, statistical analysis suggests that black voters, on average, cast only five of their allotted votes.\textsuperscript{6} None of our interviews suggested such a disparity between white and black voters' use of the full range of votes permitted, and thus we have no explanation for this apparent disparity. Whatever its source, however, it was short-lived. By 1994, black voters were casting as many of their allotted votes as white voters in the Board of Education election.\textsuperscript{7}

6. Partisan side effects and fringe candidates.

Interestingly, cumulative voting in Chilton County has indirectly weakened partisan campaigning in ways we did not see predicted in the literature. In a general election under the cumulative voting system to fill the seven-seat County Commission, each party runs seven candidates. When the parties distribute sample ballots or otherwise provide advice about how their supporters should vote, the major parties recommend casting one vote each for the party's seven candidates.

For any individual candidate, however, the optimal strategy is different. Each candidate would like to have as many total votes cast for him or her as possible. Thus, the interests of parties and their candidates diverge under cumulative voting. In the first cumulative voting election, most candidates asked for only one vote and followed the party strategy of recommending that voters distribute the remainder of their votes for the party's other candidates. But by subsequent elections, candidates learned the importance of concentrated support. Many candidates therefore began to distribute their own sample ballots in which they asked voters for all seven votes.\textsuperscript{8} In turn, political parties

\textsuperscript{6} See Table 1. The results of our ecological regression analysis could be consistent—and are not obviously inconsistent—with data others have reported based on exit polls. Thus, Kirksey, Engstrom, and Still report that in the 1992 election, 67.1 percent of black voters voted for Agee and these voters gave him an average of 6.28 votes each; 32.9 percent of black voters cast a vote for Robert Binion, the other black candidate, and 78.7 percent of these voters gave Binion all seven votes. Kirksey, Engstrom, & Still, Voting Rights Review at 12 (cited in note 196). If the 22.3 percent of black voters who voted for Binion but did not give him seven votes instead gave him, on average, only one vote, then black voters in the jurisdiction as a whole would have used on average 4.8 of their seven votes. Thus, our finding that black voters in the 1992 general election only used five of their seven votes, on average, is consistent with the exit-poll data reported thus far.

\textsuperscript{7} See Table 1.

\textsuperscript{8} Interview with Jackson at 13 (cited in note 88); Interview with Mike Kelley at 2
have cut back on sample ballots that recommend vote dispersion; in 1994, the Republican party urged voters to pick one Republican candidate and to give that candidate all seven of their votes. Several County leaders reported that in ways like this, cumulative voting has begun to erode traditional party politics. Candidates increasingly tend to run as individuals, rather than as representatives of parties. Those who noticed this effect of cumulative voting viewed it as a benefit at the local-government level; the new system was perceived to be leading voters to elect candidates based more on individual qualities than in previous elections. Of course, in another sense cumulative voting has revitalized party politics by helping Republicans to break the monopoly on local political power that Democrats long held under the traditional majority-rule system.

A longstanding concern about cumulative voting is that it enables the election of extremist or fringe candidates. Because the system is neutral with respect to the minorities it empowers, any sufficiently large minority that votes cohesively can, in principle, attain one seat. In addition to empowering racial, partisan, and gender minorities, the concern has been that the system also will empower intense ideological minorities—groups of voters with extreme political views on specific issues or a set of issues.

After seven years, there is no evidence of this problem arising in Chilton County. While the potential for election of fringe candidates exists in theory, it has not occurred in practice. Whether there is any general lesson in Chilton County’s failure to elect extremist candidates must be left to speculation. Perhaps political and cultural forces particular to Chilton County make it a generally moderate area; some observers reported that most people, white and black, were “in the middle” and “rather consen-

209 Interview with Smith at 2-3 (cited in note 117).
210 Interview with Jackson at 13 (cited in note 88).
211 See Interview with Mike Kelley at 3 (“It’s almost created something that I like, and that is, it’s almost done away with politics as a party because you don’t ask to support the party ticket anymore[.] You say ‘[v]ote for me seven times.’ That means that all seven Democrats and all seven Republicans are running against each other. They’re not running by Democratic opponent or Republican opponent, they’re running against people.”)(cited in note 89).
On the other hand, it might result from structural features concerning the nature of local-government politics and elections, in which case Chilton County's experience might be of greater predictive value for other local governments contemplating alternative voting systems. Local-government elections tend to be pragmatic, rather than ideological, and local officeseekers have numerous incentives to fit themselves within the existing party structure—whether for reasons of financial and other support, future political prospects for higher office, or other considerations. Thus, although cumulative voting theoretically does give fringe candidates better electoral prospects, other structural features of local elections might moderate this possibility.

In fact, some Chilton County observers believe cumulative voting actually tends to produce more centrist candidates—at least more centrist minority candidates—than the alternative of "safe" minority districts. Bobby Agee, the most successful minority candidate, is considered a moderate. Robert Binion, considered more radical, has been unsuccessful twice in seeking a County Commission seat despite his endorsement by and affiliation with the ADC, the statewide black political organization. The Executive Director of the ADC speculated that Binion and other more radical black candidates would have a better chance of being elected in a majority-minority single-member district. Whether this is so depends on the distribution of preferences among white and black voters for these two candidates, as well as the geographic distribution of the black voters who supported the two candidates. Based on exit polls, 67.1 percent of black voters cast a vote for the more "moderate" Agee, compared to only 32.9 percent for the more "radical" Binion. Thus, the claim that the ADC-supported Binion would have stood a better chance in a majority-black district would require black voters to shift their

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213 Interview with Jackson at 4 ("[W]e don't tend to have fringe[-]type candidates for office here.... [W]e don't have—on the white side—we don't have the white extremists, and on the black side we don't have the black extremists.")(cited in note 88).

214 Interview with Gray at 7 (cited in note 89).

215 It also depends on whether those preferences would remain the same regardless of which voting rules were in use. That is, districted elections tend to focus voters on head-to-head competition between two or more candidates, whether in the primary or general election. Cumulative-voting elections do not directly pit individual candidates against each other. The different ways the two voting systems focus voters' attention might influence the preferences voters have for different candidates in ways that require further exploration before conclusions could be drawn about whether safe districts or cumulative voting, if either, tend to produce more centrist minority candidates.

preferences dramatically when voting in a black-majority territorial district. Given the magnitude of the shift that would have been required in Chilton County, it seems likely that the more moderate Agee would have defeated Binion even in a single-member district race.

7. **Problems with cumulative voting's at-large feature.**

Before cumulative voting was adopted, Chilton County used at-large elections for the County Commission and Board of Education. This at-large system retained, however, one attribute of a districted system: residency requirements for candidates. Voters throughout the County voted for each seat, but candidates were required to run for specific seats from specific residency districts. Cumulative voting replaces districted elections and necessarily does away with residency districts. As a result, a concern is whether the move toward at-large elections has entailed any significant costs associated with the loss of individual districts.

One specific fear, expressed at the time the system was introduced, was that elected representatives would be disproportionately concentrated in more densely populated parts of the County, such as the city of Clanton. In practice, however, this problem has not materialized. Candidates have continued to be elected from all parts of the County.\(^{217}\) Perhaps voters in different areas concentrate their votes on candidates from their areas, or perhaps candidates tend to focus their campaigning on different areas. Whatever the dynamics, the different areas of the County all continue to be represented under the cumulative voting system.

A more significant cost, however, has been the decline in specific geographic links between constituents and elected representatives. Legislators often serve an "ombudsman" role in which they serve as intermediaries in conflicts between their constituents and government agencies.\(^{218}\) The poor and minorities tend to be most dependent on legislators for this role, for they typically lack the traditional alternative mechanisms, such as lobbyists, lawyers, or personal contacts, for resolving these conflicts. Politicians...
CUMULATIVE VOTING

cal scientists have concluded that constituents more easily iden-
tify representatives from single-member districts than at-large
systems, although the studies do not examine legislators elected
through alternative voting systems, such as cumulative vot-
ing. We discovered, however, that cumulative voting does cre-
ate problems of this sort. The lack of a direct tie between an
individual representative and constituents was perhaps the most
serious disadvantage of the shift to cumulative voting that we
discovered.

Several individuals cited the abandonment of residency re-
quirements as the major problem they had experienced under
cumulative voting. A number of people commented that they did
not know to call on either the County Commission or the Board
of Education when they had an issue to discuss. In the former
system of residency districts, the representative from a particular
“district” was understood to be the person to turn to for local
problems. Sue Smith, former member of the Board of Education,
remarked:

[Y]ou lose the feeling of “this is my representative on
this Board.” And I feel that way on the County Commis-
ion now. If I had a problem to speak with the County
Commission about I would call two or three of them be-
cause I don’t really know which one I ought to make
contact with. I think that’s a sense of frustration for the
general population . . .

Representatives also described some costs in moving to at-
large elections. For better or worse, they now feel a general sense
of responsibility to citizens of the entire County. When asked
about the disadvantages of cumulative voting, Agee cited the at-
large feature, because “you’ve got more people to satisfy . . .
where, if you had a district you’d be concerned with just satisfying
those people in that district . . .

Jewell, Representation in State Legislatures at 146-49 (cited in note 220).
Interview with Smith at 7 (cited in note 117).
Interview with Agee at 7 (cited in note 118). Agee went on to say that this was
“really not a major problem.” Id.

At the time of the cumulative-voting settlement, another change was made in the
structure of the County Commission that several people complained about, but that is not
a feature of cumulative voting per se. The County’s probate judge traditionally had served
as Chairperson of the Commission. His position was full time, and his office was located
in downtown Clanton, making him accessible to the citizenry. Under the new system, the
commissioners elect a Chairperson from among themselves, meaning that the Chairper-
son, like the commissioners, serves part time, and often out of his home. Jackson cited
8. The dynamics of racial politics.

The effect of cumulative voting on race relations in the political sphere beyond electoral returns and formal policies adopted is, of course, more difficult to assess. We know that black politicians have been elected to the central political bodies for the first time, that important countywide policies are indeed more responsive to the black community than before, and that Bobby Agee has come to be highly regarded in his role as Chairperson of the County Commission. One concern about systems like cumulative voting, however, is that they work from the top downwards rather than from the bottom upwards in the kind of coalitions they encourage. That is, in single-member districts with only two candidates to choose between, voters must form broad coalitions supporting one or the other candidate. Thus, such systems are thought to encourage linkages between different groups at the grassroots level. Cumulative voting rewards small, cohesive groups; rather than attempting to dissolve conflicts at the voting level, such systems in a sense transfer those conflicts up to the representative level. The hope is that representatives will be better able to reach out to each other than are constituents and that the discovery of common ground among representatives ultimately will influence their constituents to find overlapping consensus as well.

We have only limited information on these more nebulous issues. As far as the white community goes, its hostility toward the system of cumulative voting does not appear to extend to the black candidates elected. The whites we spoke to expressed a general acceptance of the need for the system and a general respect for the presence and performance of the black officials elected through the system. Recall that Julius Kelly, a white Republican elected to the County Commission, described Bobby Agee as the most educated and talented member of the Commission.222 Several remarked that the minority community feels a “great deal of pride” in Agee’s presence on the County Commission and admitted that black interests are better represented since his election.223 Similar respect was expressed towards Eddie Reed, the newest black member of the Board of Education.

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222 See note 167.

223 See Interview with Jackson at 11 (cited in note 88).
Our long conversations with Bobby Agee left the impression that cumulative voting has provided a thoughtful advocate for the black community and has begun to decrease racial polarization in politics. Agee reported that in his first campaign, he felt he was considered "the black candidate." He was the only candidate who campaigned in black neighborhoods and when he was elected, the other representatives viewed him as "the black representative." By the second election, however, many white candidates had gained an appreciation for the power of the black vote, and actively campaigned in black neighborhoods. In addition, Agee reported that he now receives more phone calls and requests from white constituents than black constituents, in line with the demographics of Chilton County. Agee's final comment sounds almost quaint in its resonance with the civil-rights discourse of the 1960s: people in Chilton County, he says, are starting to "[g]et away from race, creed[,] and color." They are "look[ing] at [the] ability of [the] person."  

9. The problem of multiple minority candidates.

A recognized concern about cumulative voting is that it functions best to ensure the election of a single minority candidate, but not as well when more than one minority candidate seeks office. This problem is more acute in jurisdictions in which the black population is large enough to support two minority candidates. Chilton County is not such a place, given its 11 percent black population and seven-seat elective bodies. Yet even here, we found significant evidence that cumulative voting does create problems of intraminority competition. To the extent that these problems turn out to be serious, however, they do not argue in favor of abandoning alternative voting systems. Instead, they argue in favor of more sophisticated variations of alternative voting systems—in particular, preference (or single-transferable) voting.

In the County Commission races, two black candidates ran in the 1992 primary and in the 1994 primary and general elections. Agee, who won, generally was considered more moderate than

224 Interview with Bobby Agee, Chilton County Commissioner 1 (May 9, 1994)(on file with the University of Chicago Legal Forum).
225 Interview with Agee at 14 (cited in note 118).
226 Id at 5. However, Agee reports that most of the calls from blacks seem to go to him. Id at 6.
227 Interview with Agee at 1 (cited in note 226).
228 Id.
Robert Binion, who lost. Binion was supported by and affiliated with the ADC. Jerome Gray, head of the ADC, described the problems that cumulative voting poses when more than one black candidate runs in the midst of racially polarized voting. For example, cumulative voting puts a premium on minority voters being highly organized and cohesive; if minority voters disperse their votes between two black candidates, both risk defeat. As Gray put it, "you almost have to discourage the number of potential candidates . . . in the cumulative voting system because you [ ] know that if you've got too many running what it does in terms of denying any black candidate [enough votes] to reach the threshold . . . ." Thus, cumulative voting discourages the political airing of divergent positions within the black community even when only one seat is likely to be filled by a minority candidate.

When more than one seat could be filled through an alternative voting system despite racially polarized voting—as in a jurisdiction with 1,000 voters, 250 of whom are black, and a ten-member legislature—the problem of intragroup competition is far worse. With cumulative voting, it would take only ninety-one votes to win a seat. This means that black voters would have to form themselves into two cohesive groups of ninety-one each, with a third cohesive group of sixty-eight that might join with twenty-three sympathetic whites to elect a third candidate representative of the minority community. As Richard Briffault rightly has observed, any assumption that voters would be able to calculate and execute the optimal strategy for using cumulative voting in this kind of circumstance rests on "an unduly optimistic appraisal of the ability of a large group of ordinary voters to organize itself and to assign different specific voters to different candidates."

Our findings suggest that the multiple minority candidate scenario poses a small problem for cumulative voting even at this stage in Chilton County's experiment. The problem does not appear to be severe, however, particularly in light of the small black population in Chilton County. But for other jurisdictions considering alternative voting systems, especially those with

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229 Interview with Gray at 6 (cited in note 89).
230 This example is used in Guinier, The Tyranny of the Majority at 96-97 (cited in note 55).
minority communities large enough to support more than one candidate, the early signs suggest some caution. Cumulative voting is best suited to contexts in which a group can focus its votes on a single candidate. For other contexts, the better choice might well be preference (or single-transferable) voting systems.\(^{232}\)

Preference voting enables groups to rank multiple candidates in order of preference. If a group's first preference fails to garner enough votes to be elected, those votes are redistributed to the group's second preference. As a result, preference voting avoids or minimizes the problem of intergroup competition; a small group need not vote with perfect cohesion and accurate \textit{ex ante} calculation about how to optimize its political preferences. For example, a socially conservative black voter might give her first-place vote to a black candidate who opposes abortion, and then, if race dominates her views on this issue, give her second-place vote to a pro-choice black candidate. Thus, preference voting enables small groups to express their political differences without the cost of fracturing themselves and losing the opportunity to elect even one candidate. Advocates of preference voting over cumulative voting also argue that the former is more likely to encourage diversity of representation, facilitate interracial political alliances, and foster more competitive elections.\(^{233}\) We further wonder whether preference voting, in which voters perform an act familiar to them from other contexts, would avoid the surprising perceptual problem we discovered with cumulative voting's seeming "departure" from one person, one vote. While this is not the place to consider fully the merits of preference voting versus cumulative voting, we conclude from our work in Chilton County that the problem of multiple minority candidates is likely to be genuine under cumulative voting. As a result, in many contexts, preference voting might well be the better alternative voting system, at least in theory.\(^{234}\)

\footnotesize{\textsuperscript{232} See notes 50 and 52. \\
\textsuperscript{233} For a concise and lucid presentation of the case for preference voting over cumulative voting, see Briffault, 95 Colum L Rev at 436-441 (cited in note 52). \\
\textsuperscript{234} The most significant disadvantage of preference voting, perhaps, is that the system is difficult to explain and even more foreign to American experience than limited voting or cumulative voting. Any democratic voting system must be generally accepted as fair and legitimate. The perception that preference voting is complex and unfathomable would count against its adoption.}

A final concern about cumulative voting is that it might raise the cost of campaigning compared to the cost of campaigning in single-member districts. As an at-large electoral system, cumulative voting might force candidates to campaign throughout the jurisdiction, rather than in a specific district in which the candidate can target a small subset of voters. If so, this would be a significant problem for cumulative voting because the minority-preferred candidates whose representation the system seeks to facilitate are typically least likely to be able to raise substantial campaign funds.

Thus far, however, cumulative voting does not appear to have increased the cost of campaigns in Chilton County. Some candidates appear to target their campaigning to specific areas, in effect replicating a district-based election. Others campaign throughout the County. But none of the candidates indicated that campaign expenses had been increased by the shift to cumulative voting. Agee reported spending only $580 to get elected. He also noted that under the previous system, in which candidates were elected at large but from specific residency districts, candidates still faced the same choice of seeking votes throughout the County or in targeted areas. Thus, neither Agee nor other elected officials to whom we talked provided any evidence that cumulative voting had increased campaign costs in Chilton County.

CONCLUSION

If significant minority representation is an important goal of public policy, the Wishful-Thinking Route will not achieve it, at least under current sociopolitical circumstances. Racially polarized voting remains pervasive enough today (most notably in the South where it has been studied most extensively) that any as-

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235 Compare Interview with Julius Kelley at 1 (describing focus of his efforts at specific areas of Chilton County)(cited in note 66) and Interview with Mike Kelley at 5 (observing that some candidates seemed to concentrate on specific areas)(cited in note 89) with Interview with Agee at 5-6 (noting that candidates campaign throughout Chilton County, which is Agee's approach)(cited in note 118) and Interview with McGriff at 1 (describing himself as campaigning throughout the entire county)(cited in note 92).

236 Jerome Gray, Executive Director of the ADC, did speculate that cumulative voting might make it more expensive to run and hence more difficult for organizations like his to recruit black candidates. But he did not seem to suggest that this problem had become serious enough to be considered a major disadvantage of cumulative voting. Interview with Gray at 7 (cited in note 89).
sumption of a willingness among white voters to vote for black candidates in significant numbers is factually inaccurate. On the other hand, the race-conscious drawing of "safe" minority electoral districts has been extremely successful at creating minority officeholders. That approach, however, also entails significant costs. The remaining option, though less familiar in practice, is the use of alternative voting systems, such as limited voting, cumulative voting, and preference voting. There is no longer any need to speculate abstractly about the advantages and disadvantages of these alternative voting systems. Through voluntary settlement of VRA litigation, a significant number of local governments throughout the United States have been using these systems for long enough that a record of their experience is now available.

Based on the seven-year experience with cumulative voting in Chilton County, Alabama, we conclude that the system is yielding most of the advantages claimed on its behalf and few of the problems that have concerned its critics. Cumulative 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. As black officeholding has increased, voting has become less racially polarized, the black community has received a fairer distribution of public services, and black residents have felt more included in local government. Campaigning at large for the relevant local offices has not become unduly expensive, nor have fringe candidates with extremist views been elected to office.

Cumulative voting does remain widely unpopular, even after seven years, based on the widespread perception in Chilton County that it violates the one-person, one-vote constitutional principle. In addition, there are costs associated with the move back to at-large elections, which cumulative voting requires. Voters no longer feel as clear about who "their" representative is. But voters do not appear to be confused by the system and they generally acknowledge that "it works": it brings about minority representation despite racially polarized voting and the geographic dispersion of black voters.

The choice of electoral systems necessarily must be a pragmatic one. No democratic voting system is ideal; each system serves certain values well and others poorly. The question is

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not whether cumulative voting is without costs, but how those costs compare to those of the available alternatives. Given the options of majority rule, racially polarized voting, and minimal minority representation, on the one hand, or the creation of racially defined “safe” election districts, on the other, cumulative voting—warts and all—appears increasingly appealing, at least for local governments, as experience with it grows. Perhaps the Chilton Counties will become the Philadelphias of the twenty-first century as American democracy continues the ongoing process of self-renewal and reinvention.

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Rev 2121, 2198 (1990) ("Political institutions and decision procedures . . . specify whose views will be counted in determining the collective will and define the means by which the collective will can be recognized. No uniquely 'rational' institutional architecture exists for constructing that will. Each bundle of institutions and practices represents a distinct social construction of the collective will. . . . Political communities might choose for many reasons to determine their collective will through one particular set of institutions and decisions rules." (emphasis omitted))(internal citations omitted)).
Table 1

1992: County Commission Election

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Note: Standard errors are in parentheses

1994: Board of Education Election

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Note: Standard errors are in parentheses
FIGURE 1
1992 County Commission Election
Black Voter Percentage vs. Black Candidate Vote Share

Each point on the graph represents a single precinct. From left to right, the precincts are: Lay Dam, Enterprise, Cane Creek, Union Grove, Pletcher, Providence N/W, Providence, Clanton Facility Building, Collins Chapel, Mineral Springs, Library Rep District #72, Mars Hill, Isabella, Courthouse, Old Grammer School, Thornsby Town Hall, Fairview, Cooper, Mt. Creek, Jemison Town Hall, Shoults, Stanton, Kincheon, Verbena, Macedonia, Maplesville, Veterans Club.
Each point on the graph represents a single precinct. From left to right, the precincts are: Providence E. Chilton, Collins Chapel, Union Grove, Providence N/W, Cane Creek, Library, Clanton Facility Building, Mars Hill, Thorsby Town Hall, Courthouse, South Chilton Fire Station, Enterprise, Jemison Town Hall, Fairview, Verbena, Isabella, Maplesville, Veterans Club.
Each point on the graph represents a single precinct. From left to right, the precincts are: Lay Dam, Enterprise, Cane Creek, Union Grove, Pletcher, Providence N/W, Providence, Clanton Facility Building, Collins Chapel, Mineral Springs, Library Rep District #72, Mars Hill, Isabella, Courthouse, Old Grammer School, Thornsby Town Hall, Fairview, Cooper, Mt. Creek, Jemison Town Hall, Shouts, Stanton, Kincheon, Verbena, Macedonia, Maplesville, Veterans Club.
FIGURE 4
1992 County Commission Election
Black Voter Percentage vs. Binion Vote Share

Each point on the graph represents a single precinct. From left to right, the precincts are: Lay Dam, Enterprise, Cane Creek, Union Grove, Pletcher, Providence N/W, Providence, Clanton Facility Building, Collins Chapel, Mineral Springs, Library Rep District #72, Mars Hill, Isabella, Courthouse, Old Grammer School, Thornsby Town Hall, Fairview, Cooper, Mt. Creek, Jemison Town Hall, Shoults, Stanton, Kincheon, Verbena, Macedonia, Maplesville, Veterans Club.
FIGURE 5
1994 Board of Education Election
Black Voter Percentage vs. Hill Vote Share

Each point on the graph represents a single precinct. From left to right, the precincts are:
Providence E. Chilton, Collins Chapel, Union Grove, Providence N/W, Cane Creek, Library,
Clanton Facility Building, Mars Hill, Thornsby Town Hall, Courthouse, South Chilton Fire
Station, Enterprise, Jemison Town Hall, Fairview, Verbena, Isabella, Maplesville, Veterans
Club.
Each point on the graph represents a single precinct. From left to right, the precincts are: Providence E. Chilton, Collins Chapel, Union Grove, Providence N/W, Cane Creek, Library, Clanton Facility Building, Mars Hill, Thornsby Town Hall, Courthouse, South Chilton Fire Station, Enterprise, Jemison Town Hall, Fairview, Verbena, Isabella, Maplesville, Veterans Club.
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ALABAMA DEMOCRATIC CONFERENCE
Chilton County
OFFICIAL GUIDE BALLOT
GENERAL ELECTION
November 8, 1994

This is the official Guide Ballot for State Offices recommended by
the Alabama Democratic Conference (ADC). Local candidates
were endorsed by the local leaders. Let us vote together, United
we stand, divided we fall.

Step 1: Shade in box next to the
Republican. Shade in box next to the
Democratic.

Step 2: Then for State Auditor,
write in a name in the write-in column
and shade in the box next to it.

Step 3: Shade in "Yes" on the first seven amendments.

Step 4: That's It.

VOTE STRAIGHT DEMOCRATIC, EXCEPT FOR
STATE AUDITOR.

FOR A FREE RIDE TO THE POLLS,
CALL:
CLANTON AREA:
755-0598
755-6739
755-4818
755-2120
755-4844
280-6172
280-1186
JEMISON AREA:
686-2716

END OF BALLOT
The Alabama New South Coalition recommends those candidates marked as its slate for this election. We believe that they would best represent your interests. Thank you for considering our recommendations.

ANSC co-endorse McNair and Shelby in the U.S. Senate race. Choose one