St. Mary's Law Journal

Volume 30 | Number 3 Article 1

1-1-1999

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ARTICLE

KEEPING THE PROMISE: ESTABLISHING NONTRANSFERABLE ELECTION SYSTEMS IN JURISDICTIONS COVERED BY SECTION FOUR OF THE VOTING RIGHTS ACT

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I. INTRODUCTION

The Voting Rights Act of 1965[1] (VRA) was enacted to enforce the promise embodied nearly one hundred years earlier in the Fifteenth Amendment to the United States Constitution: the right to vote shall not be abridged on the basis of race.[2] The VRA prohibits any denial or abridgment of the right to participate in the electoral process on racial grounds, regardless of whether such denial is

1. 42 U.S.C. §§ 1971-75d (1994).

2. *See* U.S. CONST. amend. XV (stating that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude").

intentional or unintentional.[3] Moreover, states and political subdivisions with histories of disenfranchising African-American voters are subject to special obligations under the Act.[4] In particular, because Congress was frustrated that these states were able to remain "one step ahead" of the federal courts by passing new discriminatory laws as soon as the old ones were struck down, the Act requires any change in election procedures in "covered jurisdictions" to be approved in advance.[5] Either the District Court for the District of Columbia or the Attorney General of the United States must, therefore, ensure that any such change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."[6] This requirement also applies to the redrawing of congressional districts after each decen-

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3. *See* 42 U.S.C. § 1973(a) (1994); *see also* NAACP v. New York, 413 U.S. 345, 350 (1973) (providing that the purpose of the VRA is "to insure that no citizens' right to vote is denied or abridged on account of race or color" (citing South Carolina v. Katzenbach, 383 U.S. 301 (1966)). The act provides, in part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any state or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color . . . .

42 U.S.C. § 1973(a) (1994).

4. *See* 42 U.S.C. § 1973c (1994) (requiring a state or other political subdivision to seek either a declaratory judgment or approval by the Attorney General before any change in qualifications, prerequisites, standards, practices, or procedures with respect to voting can be enforced). Section 1973c applies to any jurisdiction that is covered under 42 U.S.C. § 1973b. *See id.* The Attorney General or the Director of the Census is charged with the authority to determine whether a state or political subdivision is subject to Section 1973b. *See id.* § 1973b(b). Section 1973b(b) provides the factors to be considered in determining whether a state or other political subdivision is subject to the section, which include whether "50 per centum of the persons of voting age residing therein were registered on November 1, 1964." *Id.* A determination made by the Attorney General or the Director of the Census is not subject to review by any court and becomes effective once it is published in the Federal Register. *See id.* A list of the covered jurisdictions is maintained in Title 28, Part 51 of the Code of Federal Regulations, which is entitled "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, As Amended." *See* 28 C.F.R. pt. 51 app. (1998).

5. *See* 42 U.S.C. § 1973c (1994) (prohibiting the enforcement of any change in voting procedures of a covered jurisdiction unless the jurisdiction has obtained either preclearance from the Attorney General or a declaratory judgment from the United States District Court for the District of Columbia); *see also* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 11-16 (1987) (relating the reasons behind the VRA's enactment and the reasoning behind Congress' approval for changes in election procedures in covered jurisdictions).

6. 42 U.S.C. § 1973c (1994).

nial census.[7] Importantly, in order to obtain approval, or "preclearance," from the Attorney General, these states must demonstrate that they have taken steps to ensure that minority voters have an opportunity to elect minority candidates.[8]

One reason that racial minorities have historically been unable to elect minority candidates to office in a consistent and meaningful manner is that non-minorities vote reliably in bloc for non-minority candidates.[9] Because minority voters are simply outnumbered, minority candidates do poorly in our "winner-take-all" system.[10] What has traditionally been thought to be the only way to prevent this phenomenon is the most straightforward one: structure districts in such a geographical manner that, in at least a few districts, non-white voters outnumber white voters.[11] These

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7. *See id.* (requiring a jurisdiction to seek approval before it can enforce "*any* . . . standard, practice or procedure with respect to voting different from that in force or effect on November 1, 1964" (emphasis added)). Pursuant to a constitutional mandate, a census of the population of the United States is taken every ten years. *See* U.S. CONST. art. I, § 2, cl. 3. Based on its population, each state is then apportioned a number of representatives to the House of Representatives. *See id.* States are required to redraw congressional district lines accordingly, taking into account population shifts in order to maintain an equal number of persons in each district. *See* Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969) (recognizing that a state's "Congressional districting plan will usually be in effect for at least 10 years," and that states must make a good-faith effort to provide districts based on an equal population of voters).

8. *See* Timothy G. O'Rourke, Shaw v. Reno*: The Shape of Things to Come* (noting that following the 1982 amendments to the VRA, most states expected that the Attorney General would withhold preclearance until majority-minority districts were created), *in* AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO* AND THE FUTURE OF VOTING RIGHTS 43, 70 (Anthony A. Peacock ed., 1997); Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After* Shaw v. Reno *and Its Progeny*, 25 FORDHAM URB. L.J. 641, 650 (1998) (discussing how the Attorney General encourages states to create majority-minority districts to obtain preclearance).

9. *See* Steven A. Light, *Too (Color) Blind to See: The Voting Rights Act of 1965 and the Rehnquist Court*, 8 GEO. MASON U. CIV. RTS. L.J. 1, 22-23 (1997) (noting that, in Georgia, white racial bloc voting is one factor that has caused blacks to occupy only 7.6% of the state's elected positions, despite a 25% black population); Frank R. Parker, *The Mississippi Congressional Redistricting Case: A Case Study in Minority Vote Dilution*, 28 HOW. L.J. 397, 414 (1985) (discussing how southern blacks have been "politically handicapped" by racial bloc voting).

10. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 337-38 (1998) (noting that the winner-take-all system dilutes minority voting strength because majority groups usually vote in bloc to fill all available positions).

11. *See* DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (stating that "[c]onsciousness of race in redistricting through the creation of majority-minority districts, properly performed, alleviates" the inequities of minority vote dilution), *aff'd in part, ap-*

"majority-minority" districts do, in fact, reliably produce victories for minority candidates.[12] In this regard, the Attorney General generally refuses to grant preclearance to any congressional redistricting plan unless at least a few of its districts are majority-minority in nature.[13]

The difficulty, however, is that creating majority-minority districts requires deliberate and intricate attention to the race of the voters in a given geographical area.[14] In addition, because racial minority populations are usually somewhat geographically sparse, the states must forego traditional districting principles, such as respect for political subdivisions, compactness, and contiguity,[15] in creating these majority-minority districts.[16] Furthermore, this dis-

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peal dismissed in part, 115 S. Ct. 2637 (1995); Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 338 (1998) (noting that a traditional remedy to minority vote dilution caused by the winner-take-all system is to create single-member districts in which minorities constitute the majority).

12. *See* Laughlin McDonald, *Can Minority Voting Rights Survive* Miller v. Johnson*?*, 1 MICH. J. RACE & L. 119, 160-61 (1996) (attributing the increase of African-American officeholders to the Voting Rights Act). In fact, manipulation of certain key demographic variables can virtually guarantee the results of any election. *See* Edward Still, *Alternatives to Single-Member Districts* (demonstrating how sophisticated gerrymandering can produce different election outcomes), *in* MINORITY VOTE DILUTION 249, 251-52 (Chandler Davidson ed., 1984).

13. *See, e.g.*, Miller v. Johnson, 515 U.S. 900, 907 (1995) (noting that the Department of Justice had refused preclearance of a Georgia districting plan because it "created only two majority-minority districts"); Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 780 (1998) (noting that states covered by the VRA were often required to create a certain number of majority-minority districts in order to receive preclearance from the Department of Justice); Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After* Shaw v. Reno *and Its Progeny*, 25 FORDHAM URB. L.J. 641, 650 (1998) (stating that the Justice Department encourages states to create majority-minority districts to obtain preclearance).

14. The U.S. Census Bureau maintains census information electronically on a street-by-street format, thereby allowing districting authorities to include or exclude people in nearly perfect detail. *See* DAVID BUTLER & BRUCE CAIN, CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES 60-61 (1992).

15. *See* Shaw v. Reno, 509 U.S. 630, 647 (1993) (explaining that traditional districting principles are objective factors used to defeat claims of racial gerrymandering).

16. *See* Bush v. Vera, 116 S. Ct. 1941, 2008 (1996) (Souter, J., dissenting) (noting that "it is in theory and in fact impossible to apply 'traditional districting principles' in areas with substantial minority populations without considering race"); *cf. Shaw*, 509 U.S. at 671-73 (White, J., dissenting) (stating that the Court's "simultaneous discomfort and fascination with irregularly shaped districts" will thwart states' attempts to ensure minority representation).

tricting method exposes such plans to strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution[17] for so obviously and pervasively legislating on the basis of race.[18] At the same time, courts have consistently found the VRA to be a valid exercise of Congress' power to enforce the Fifteenth Amendment,[19] giving the states no choice but to comply.[20] Southern states attempting to redraw their congressional districts after the last census, therefore, find themselves navigating between the Scylla of the VRA and the Charybdis[21] of the Equal Protection Clause.[22] In fact, of the several post-1990-census

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17. *See* U.S. CONST. amend. XIV (providing that "[n]o state shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws"). Under strict scrutiny, the Court's most stringent manner of review, a statute will be invalidated unless the government can demonstrate that the statute is "narrowly tailored to achieving a compelling state interest." Miller v. Johnson, 515 U.S. 900, 904 (1995).

18. *See Bush*, 116 S. Ct. at 1970 (O'Connor, J., concurring) (emphasizing that although remedying inequality in the political system may necessitate a race-based remedy, the Fourteenth Amendment requires the courts to look for excessive racial considerations by the states); *Shaw*, 509 U.S. at 642 (determining that race-based laws, particularly those which distinguish between individuals on the basis of race, fall within the core of the Equal Protection Clause's prohibition against racial discrimination); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 679 n.8 (1966) (reiterating that the Fourteenth Amendment forbids discrimination against voters on the grounds of race); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (invalidating a districting plan that deliberately excluded African-American voters). The purpose of the plan invalidated in *Gomillion* was to ensure the victory of white candidates. *See id.*

19. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (holding that the VRA is an appropriate means by which Congress has carried out its constitutional responsibilities); United States v. Marengo County Comm'n, 731 F.2d 1546, 1556-63 (9th Cir. 1984) (holding that "Section 2 does not conflict with or contract any right protected by the Constitution, and nothing in the Constitution either explicitly or implicitly prohibits a results standard for voting rights violations"); Prosser v. Elections Bd., 793 F. Supp. 859, 869 (W.D. Wis. 1992) (recognizing that the VRA is constitutional, despite its discriminatory character, because it implements the Fifteenth Amendment); Major v. Treen, 574 F. Supp. 325, 342-49 (E.D. La. 1983) (concluding that "§ 2 is an appropriate expression of Congressional enforcement authority").

20. *See Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting) (acknowledging that states may face liability under the VRA if they do not create majority-minority districts).

21. The Scylla and Charybdis are two of the many perils Odysseus encounters in Homer's epic tale, *The Odyssey*. *See* HOMER, THE ODYSSEY 149-53 (Samuel Butler, trans., Walter J. Black, Inc. 1944). As Odysseus navigates his ship through the Straits of Messina, he is forced to seek a delicate course between the Scylla, a giant, six-headed beast perched in a cliff-side cave, and the Charybdis, a whirlpool of such violent force that if a ship were sucked in, "Poseidon himself could not save [it]." *Id.*

22. *See Bush*, 116 S. Ct. at 2006 (Souter, J., dissenting) (analogizing the predicament that southern states face to "walking a tightrope" and noting that "if [states trying to comply with the VRA] draw majority-black districts they face lawsuits under the equal protec-

majority-minority districting plans the Supreme Court has reviewed thus far, few have survived strict scrutiny.[23]

One solution to the problems posed by drawing congressional districts is to establish nontransferable election systems in jurisdictions covered by the VRA. Nontransferable election systems allow each voter to cast multiple votes but force the voter to select fewer candidates than the positions to be filled.[24] The result is that significant minority voting blocs, voting cohesively, are able to elect at least some of their own chosen representatives, despite constituting forty-nine percent or less of the electorate.[25] Thus, by implementing a nontransferable election system, these groups finally have the opportunity to achieve adequate representation in ways that the current winner-take-all system does not allow. Additionally, the implementation of a nontransferable election system alleviates the need to create a "majority-minority" district in order to promote the election of racial minorities.

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tion clause; if they do not, they face both objections under Section 5 of the Voting Rights Act and the lawsuits under Section 2" (quoting Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 289 (1995-1996))).

23. *See Bush*, 116 S. Ct. at 1960-65 (utilizing strict scrutiny to determine that an underlying racial basis existed in creating districts in Texas and holding that the district was therefore invalid); Miller v. Johnson, 515 U.S. 900, 910-15 (1995) (invalidating a Georgia majority-minority district on the grounds that, in creating the district, race was the legislature's dominant consideration); *Shaw*, 509 U.S. at 642-49 (determining that, under strict scrutiny, a majority-minority district with race as its only basis for creation is invalid). The Court has permitted a few of these plans to stand, but only where the district court found as a matter of fact that the majority-minority districts were both geographically compact and did not subordinate traditional districting principles to racial motivations. *See* Lawyer v. Department of Justice, 117 S. Ct. 2186, 2195 (1997) (holding that because Florida neither violated traditional districting principles nor subordinated such principles to race when creating a majority-minority district, the district was valid); *see also* DeWitt v. Wilson, 856 F. Supp. 1409, 1413 (E.D. Cal. 1994) (deciding that because a California district was created by relying on traditional redistricting principles instead of race, the district did not fall within the narrow *Shaw* holding), *aff'd in part, appeal dismissed in part*, 115 S. Ct. 2637 (1995).

24. *See* Edward Still, *Alternatives to Single-Member Districts* (discussing how limited, or nontransferable, voting works), *in* MINORITY VOTE DILUTION 249, 253 (Chandler Davidson ed., 1984).

25. *See id.* (noting that "[i]n theory, [nontransferable voting] prevents the majority from making a clean sweep of all seats by voting a straight ticket"); *see also* Pamela S. Karlan, *Maps and Misreadings: The Rule of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 224 (1989) (stating that nontransferable voting has been used by various local governments because it "assure[s] minority representation by preventing the majority from shutting out the minority").

In this regard, this Article proposes amendments to the current federal election statutes to allow for the implementation of nontransferable voting in jurisdictions covered by the VRA. Part II begins by providing a brief background of the VRA and an overview of the recent Supreme Court decisions that have declared unconstitutional the majority-minority voting districts that states are currently under federal directive to create. Part III discusses how nontransferable election systems operate and how they provide a workable solution to this problem. Part IV explains the changes to federal law that would be necessary before a nontransferable election system could be implemented. Finally, Part V sets forth a proposed statute, with commentary that explains the changes necessary for establishing nontransferable election systems in jurisdictions that are covered by the VRA. Part V also discusses how these proposed changes would function.

II. DISTRICTING BY RACE

A. *The Voting Rights Act*

The VRA was enacted in 1965 to eliminate racial discrimination in the electoral process by removing obstacles that African-American citizens faced in registering to vote and casting their ballots.[26] For nearly a century after the Fifteenth Amendment to the United States Constitution was ratified, African Americans in southern states who attempted to exercise their right to vote faced substantial barriers including intimidation, physical violence, literacy tests, voting "qualifications," and poll taxes.[27] The primary goal of the

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26. *See* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1250-51 (1989) (describing the reasons for the VRA's enactment). This new legislation represented an attempt on the part of the federal government to eliminate many of the long-standing barriers that had stood in the way of southern blacks "who attempt[ed] to take the revolutionary step of registering to vote." *Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Nicholas Katzenbach, Attorney General of the United States).

27. *See Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Attorney General Nicholas Katzenbach) (indicating that "[t]here has been case after case of similar intimidation—beatings, arrests, lost jobs, lost credit, and other forms of pressure against Negroes who attempt to . . . register[ ] to vote"); *id.* at 308 (statement of Burke Marshall, ex-Assistant Attorney General in charge of Civil Rights Division, Department of Justice) (describing the use of literacy tests by southern states to discriminate against black voters); *see also* Don Edwards, *The Voting Rights Act of 1965, As Amended* (discussing the discrimination

VRA was to end these practices that, despite the constitutional guarantee of the Fifteenth Amendment, had been extremely successful in deterring racial minorities from exercising their voting rights.[28] Notably, the Supreme Court upheld the constitutionality of the VRA, including its preclearance provisions, only a year after its enactment.[29]

In response to that decision, southern states quickly shifted their strategies from hindering African American registration to diluting[30] their votes through various techniques.[31] In this respect, African-American voters often found that they were omitted from registration lists, excluded from party precinct meetings, harassed by election officials, and relegated to substandard voting facilities.[32] In addition, African-American candidates faced substantial

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and disenfranchisement black voters faced during the time between the ratification of the Fifteenth Amendment and the enactment of the VRA), *in* THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS 3, 3-4 (Lorn S. Foster ed., 1985); ABIGAIL M. THERNSTROM, WHOSE VOTE COUNTS? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 2 (1987) (listing the techniques used to disenfranchise black voters from the 1890s to the 1960s).

28. *See Voting Rights: Hearings on H.R. 6400 Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 9 (1965) (statement of Attorney General Nicholas Katzenbach) (noting "[The VRA] is designed to deal with the two principal means of frustrating the 15th amendment: the use of onerous, vague, unfair tests and devices enacted for the purpose of disenfranchising Negroes, and the discriminatory administration of these and other kinds of registration requirements."). Attorney General Katzenbach also declared, "To enforce the provisions of this act . . . and get people registered is what we are trying to do." *Id.*

29. *See* South Carolina v. Katzenbach, 383 U.S. 301, 308 (1966) (noting that the sections of the VRA in question provide the proper means for Congress to further its constitutional obligations).

30. Vote dilution can be defined as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group." Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1442 n.14 (1996) (quoting Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING 7, 24 (Bernard Grofman & Chandler Davidson eds., 1992)).

31. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 185-92 (1989) (discussing two cases challenging voter dilution); Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After* Shaw v. Reno *and Its Progeny*, 25 FORDHAM URB. L.J. 641, 648 (1998) (stating that following the VRA's enactment, many jurisdictions passed measures that circumvented minority voter involvement).

32. *See Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 21 (1969) (statement of Frank Parker, attorney, U.S. Comm'n on Civil Rights) (discussing the

obstacles to being elected; offices were abolished, the terms of white incumbents were extended, appointment was substituted for election, filing fees were inflated, information was withheld, and artificial requirements were imposed for getting on the ballot.[33] Consequently, Congress was forced to review within a few years of the VRA's passage these flagrant attempts by states to dilute votes that African Americans cast.[34]

As a result of the continuing discrimination, Sections 4 and 5 of the VRA, which were originally relatively minor provisions,[35] be-

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many forms in which discrimination against black voters has manifested, including "discriminatory purging of or failure to purge voter lists, . . . disqualification of ballots cast by black voters on technical grounds, and harassment of black voters, poll watchers, and campaign workers"); *id.* at 51 (U.S. Comm'n on Civil Rights Staff Report) (listing the several methods used by a number of Mississippi localities to discourage black participation in the voting process); *id.* at 217 (statement of Hon. Emanuel Celler, Chairman, Subcomm. No. 5 of the House Comm. on the Judiciary) (describing the devices used by southern states to dilute minority voting strength); *see also* Don Edwards, *The Voting Rights Act of 1965, As Amended* (describing discriminatory attempts employed after the VRA's enactment to discourage minorities from voting), *in* THE VOTING RIGHTS ACT: CONSEQUENCES AND LIMITATIONS 3, 7 (Lorn S. Foster ed., 1985).

33. *See Voting Rights Act Extension: Hearings on H.R. 4249, H.R. 5538, and Similar Proposals Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 91st Cong. 217 (1969) (statement of Hon. Emanuel Celler, Chairman, Subcomm. No. 5 of the House Comm. on the Judiciary).

34. *See id.* at 10 (statement of Howard A. Glickstein, Esq., General Counsel and Acting Staff Director, U.S. Comm'n on Civil Rights) (acknowledging that "the long-established political atmosphere and tradition of discrimination in voting—factors which this committee hoped the [original 5-year plan of the VRA] would dissipate—are weakened but by no means dead"); *id.* at 20 (statement of Frank Parker, attorney, U.S. Comm'n on Civil Rights) (stating that "[w]hites residing in [several Alabama] counties have attempted to frustrate the achievement of the goals of the Voting Rights Act through racial discrimination in the electoral process and through election contrivance, designed to prevent the black candidates from winning and to weaken the voting power of black voters"); *id.* at 51 (U.S. Comm'n on Civil Rights Staff Report) (summarizing the reasons that localities in Mississippi were still governed by all-white governing bodies after the passage of the VRA, which include fear of economic reprisal for supporting or voting for black candidates, implementation of inconvenient voter registration procedures, and removal of names from poll lists); *id.* at 182 (statement of Hon. William F. Ryan, Representative from New York) (recounting the findings of an Alabama voter registration project report, which stated that "[t]he local board of registrars . . . attempt[ed] to hinder the registering of Negro voters").

35. During the first four years of the VRA's operation, the Department of Justice placed very little emphasis on Section 5, and covered jurisdictions complied only minimally. *See* HOWARD BALL ET AL., COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT 78 (1982) (discussing the voluntary submissions to the Department of Justice and how the Department had very little understanding of what Section 5 entailed). In fact, the Attorney General under President Nixon effectively excluded redistricting from enforcement efforts under Section 5 and had even advocated the provi-

came increasingly critical tools used to enforce the guarantees of the Fifteenth Amendment.[36] Specifically, these provisions designated jurisdictions within the country—where voting discrimination had been widespread and flagrant—as being covered by the Act; Sections 4 and 5 also outlawed obstacles to the exercise of voting rights in covered jurisdictions and prohibited any change in voting procedures in those jurisdictions without obtaining advance clearance from the Attorney General or the United States District Court for the District of Columbia.[37] The Supreme Court, as a check against vote dilution effects, subsequently read these preclearance provisions broadly to apply to virtually any change in the manner in which an election is conducted.[38] As a result, a decade after the VRA's enactment, the preclearance provisions had come to be regarded as the "centerpiece of the act."[39]

The VRA also created a parallel tool against vote dilution by providing, in Section 2 of the Act, a private cause of action to challenge any voting practice or procedure that "results in a denial or abridgment" of the right to vote on the basis of race, color, or language minority status.[40] According to the statute, a court assessing such a claim must determine whether members of the plaintiff racial group have "less opportunity than other members of the elec-

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sion's repeal. *See* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1285 n. 201 (1989).

36. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989) (noting that the preclearance requirement of the VRA "was viewed largely, although not exclusively, as a response to the possibility that southern states would develop new ways to stop blacks from registering and voting"); Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After* Shaw v. Reno *and Its Progeny*, 25 FORDHAM URB. L.J. 641, 648 (1998) (discussing how the judiciary and the executive branch responded to southern states' attempts at circumventing the VRA, particularly by using the preclearance requirement).

37. *See* 42 U.S.C. §§ 1973b, 1973c (1994).

38. *See* Georgia v. United States, 411 U.S. 526, 531 (1973) (stating that Section 5 is not "concerned with a simple inventory of voting procedures," but with the effect that changes in voting practices have on black voters); Perkins v. Matthews, 400 U.S. 379 (1971) (reiterating that the VRA reached "only state enactment which altered the election law of a covered state in even a minor way" (citing Allen v. State Bd. of Elections, 393 U.S. 544 (1969))).

39. *Extension of the Voting Rights Act, 1975: Hearings on H.R. 939, H.R. 2148, H.R. 3247, and H.R. 3501 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 94th Cong. 26 (1975) (statement of Hon. Arthur S. Flemming, Chairman, U.S. Comm'n on Civil Rights).

40. *See* 42 U.S.C. § 1973(a) (1994).

torate to participate in the political process and to elect representatives of their choice."[41] Therefore, by permitting supervision of *existing* voting procedures, Section 2 actually acted as a powerful counterpart to Section 5's mechanisms for supervising *changes* in voting procedures.[42]

Later, during the 1980s, the Justice Department adopted the position that the Attorney General would withhold preclearance to covered jurisdictions proposing changes to voting procedures that would "clearly" violate Section 2 of the VRA, even if the changes would not themselves cause a dilution of existing minority voting strength.[43] By effectively incorporating Section 2 into Section 5, the Justice Department dramatically expanded the preclearance procedure to allow the Attorney General to force covered jurisdictions to adopt changes that provided minority voters with enhanced opportunities to elect candidates of their choice.[44] Accordingly, covered jurisdictions quickly realized that the only way to comply with the new requirements was to formulate districts in which a demographic majority of the electorate was nonwhite, thereby giving rise to the "majority-minority" voting district in which victory for a nonwhite candidate, which was otherwise nearly impossible, was virtually guaranteed.[45]

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41. *Id.* § 1973(b).

42. *See* Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 146 (1994) (noting that Section 2's results test looks only for the presence of vote dilution, whereas the Section 5 test examines the proposed changes themselves); *see also* Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1442 (1996) (characterizing Section 2 as a "broader test").

43. *See* 28 C.F.R. § 51.55(b)(2) (1995). 28 C.F.R. § 51.55(b)(2) provides, in part:

> In those instances in which the Attorney General concludes that, as proposed, the submitted change is free of discriminatory purpose and retrogressive effect, but also concludes that a bar to implementation of the change is necessary to prevent a clear violation of amended section 2, the Attorney General shall withhold section 5 preclearance.

44. *See* Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1449 (1996) (noting that the Justice Department can object to new plans without proving discriminatory purpose and force jurisdictions to adopt majority-minority districts).

45. *See* Richard H. Pildes, *The Politics of Race: Quiet Revolution in the South*, 108 HARV. L. REV. 1359, 1373 (1995) (relating that "Black candidates simply will not be elected in meaningful numbers absent safe districts with substantial Black majorities"); *see also* Deval L. Patrick, *What's Up Is Down, What's Black Is White*, 44 EMORY L.J. 827, 838 (1995) (noting that "of the thirty-nine black members of the House of Representatives, all

Although the Attorney General's broad powers under Section 5 and the individual voters' cause of action under Section 2 had provided weapons against minority vote dilution, a series of Supreme Court cases have effectively nullified much of Section 5 and transformed Section 2 into a double-edged sword.[46] Unfortunately, the result has been that southern states are thrown into an intolerable "no-win" situation in which neither provision seems to permit compliance with the other.

B. *Majority-Minority Districting Under Fire:* Shaw v. Reno *and* Bush v. Vera

Despite its earlier rulings that gave rise to the success of the VRA in 1993, the Supreme Court handed down the first in a line of decisions that has threatened to halt the VRA's progress in its tracks. In both *Shaw v. Reno*[47] and *Bush v. Vera*,[48] the Court ruled 5-4 that jurisdictions covered by the VRA violated the Equal Protection Clause in creating majority-minority districts so as to ensure the election of minority candidates from those districts.[49] These holdings, as well as their progeny, present a major dilemma for covered jurisdictions and a serious obstacle to the VRA's implementation.

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but four were elected from [majority-minority] districts"); Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1449 (1996) (providing "that in 1989, only 1% of 1534 southern state legislators from majority-white districts were black" (citing Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111 (1991))).

46. *See* Bush v. Vera, 116 S. Ct. 1941, 1951 (1996) (affirming a district court decision which held that majority-minority districts in Texas, which were created in an attempt to comply with the VRA, were unconstitutional because they were not narrowly tailored to serve a compelling governmental interest); Shaw v. Reno, 509 U.S. 630, 642 (1993) (holding that a valid claim exists where a plaintiff alleges that a districting plan "can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification").

47. 509 U.S. 630 (1993).

48. 116 S. Ct. 1941 (1996).

49. *See Bush*, 116 S. Ct. at 1951 (holding that majority-minority districts in Texas were unconstitutional because they were "not narrowly tailored to serve a compelling state interest"); *Shaw*, 509 U.S. at 642 (reversing a district court's dismissal of a suit on the grounds that it failed to state a claim).

1. *Shaw v. Reno*

In *Shaw v. Reno*, the Court permitted several white voters to maintain a challenge against North Carolina's congressional districting plan that took effect following the 1990 census.[50] The voters had filed suit under Section 2 of the VRA, alleging dilution of their voting rights[51] in North Carolina's plan to create a second majority-minority district.[52] Although the Court acknowledged that North Carolina implemented the plan because Attorney General Janet Reno had objected to the state's previous plan, which had created only one majority-minority district,[53] the Court declared the new districting plan a constitutionally suspect "racial gerrymander" and subjected the plan to strict scrutiny.[54]

Relying on cases such as *Gomillion v. Lightfoot*,[55] which had invalidated voting districts drawn to *prevent* African-American voter success, the majority reasoned that "the central purpose [of the Equal Protection Clause] is to prevent the States from purposefully discriminating between individuals on the basis of race."[56] The Court further commented that "[i]t is unsettling how closely the North Carolina plan resembles the most egregious racial gerrymanders of the past."[57] The majority ultimately concluded:

> Racial classifications of any sort pose the risk of lasting harm to our society . . . . Racial classifications with respect to voting carry particu-

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50. *See Shaw*, 509 U.S. at 649 (allowing a plaintiff to maintain a cause of action alleging that legislation, although neutral on its face, lacks sufficient justification because it separates voters into districts based on race). In *Shaw*, the plaintiffs had alleged that a North Carolina majority-black district was formed by unconstitutional racial gerrymander. *See id.* at 642.

51. *See id.* at 633-64.

52. Forty counties in North Carolina are "covered jurisdictions" under the VRA. *See* 28 C.F.R. pt. 51 app. (1998). Attorney General Reno contended that an additional majority-minority district should be established in North Carolina. *See Shaw*, 509 U.S. at 635. The proposed district would "give effect to black and Native American voting strength" in that area of the country. *See id.* In response, the General Assembly added District 12, which was "160 miles long and, for much of its length, was no wider than the I-85 corridor" that runs through the district. *See id.*

53. *See Shaw*, 509 U.S. at 635, 653-54.

54. *See id.* at 653. On rehearing, the Supreme Court found that North Carolina failed to meet that standard. *See* Shaw v. Hunt, 517 U.S. 899, 918 (1996) (holding that the North Carolina district was "not narrowly tailored to the State's asserted interest in complying with § 2 of the Voting Rights Act").

55. 364 U.S. 339 (1960).

56. *Shaw*, 509 U.S. at 642.

57. *Id.* at 641.

> lar dangers. Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.[58]

Therefore, the result in *Shaw* was that, even though North Carolina designed its districting plan in accordance with what appeared to be its obligations under federal law, the plan was presumptively unconstitutional for having used racial criteria in doing so.[59]

2. *Bush v. Vera*

Three years later, the Court elaborated upon *Shaw* in *Bush v. Vera*. In *Bush*, Texas had created three majority-minority districts in an effort to satisfy its obligations under the VRA.[60] However, the majority concluded that Texas' districting plan would be subject to strict scrutiny because race was a "predominant factor" in drawing up the plan,[61] even though five members of the Court agreed that compliance with the VRA was a "compelling" state interest.[62]

Although the *Bush* case was ultimately described as "a mixed motive case,"[63] the Court considered it "evidentially significant that at the time of the redistricting, the State had compiled detailed racial data for use in redistricting, but made no apparent attempt to compile, and did not refer specifically to, equivalent data regarding

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58. *Id.* at 657.

59. *See id.* at 657-58 (remarking that the use of race to separate voting districts is unjustified unless some compelling governmental interest is furthered).

60. *See* Bush v. Vera, 116 S. Ct. 1941, 1950-51 (1996). Texas created two new districts in which nonwhite voters comprised the majority of the population, and it also reconfigured an existing district to create a nonwhite voter majority. *See id.* at 1952-53 (describing the state's effort to comply with the VRA).

61. *See id.* at 1952, 1955.

62. *See id.* at 1969 (O'Connor, J., concurring) (stating that "the States have a compelling interest in complying with the [VRA]"); *id.* at 1989 (Stevens, J., dissenting) (noting, "The plurality begins with the perfectly obvious assumption[ ] that a State has a compelling interest in complying with § 2 of the Voting Rights Act"); *id.* at 1998 (Souter, J., dissenting) (recognizing that "compliance with § 2 of the Voting Rights Act is a compelling state interest"). Justices Ginsberg and Breyer joined both dissents written by Justice Stevens and Souter separately.

63. *Id.* at 1952. The Court described the case as one of "mixed motives" because evidence existed showing that the appellant had several goals in drawing district lines, including the creation of a majority-minority district and protection of incumbency. *See id.*

communities of interest."[64] Thus, because the Texas plan subordinated traditional districting criteria to racial considerations, the plan faced strict scrutiny as a racial gerrymander.[65] As a result, by holding the districting plan unconstitutional, the Court once again blocked a state's attempt to use race in conforming to what the state reasonably believed it had a federal directive to do.[66]

C. *The* Shaw *Problem: Mixed Messages from the Court and Congress*

The result of the *Shaw* line of cases[67] is that southern states have received mixed messages from the Court and Congress and are therefore left in an intolerable position.[68] With the number of representatives to which these states are entitled fluctuating in re-

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64. *Id.* at 1955. Although little agreement exists as to what "communities of interest" means, one commentator has defined the term as "roughly synonymous with 'recognition and maintenance of patterns of geography, social interaction, trade, political ties, and common interests.'" Timothy G. O'Rourke, Shaw v. Reno: *The Shape of Things to Come*, *in* AFFIRMATIVE ACTION AND REPRESENTATION: *SHAW V. RENO* AND THE FUTURE OF VOTING RIGHTS 43, 83 (Anthony A. Peacock ed., 1997) (quoting Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 87 (1985)). In addition, "[c]ommunities of interest might also be defined in terms of the unique or prevailing characteristics of places or regions . . . or in terms of patters of social or economic intercourse that are geographically identifiable . . . . " *Id.*

65. *See Bush*, 116 S. Ct. at 1953 (describing the different factors used to determine that strict scrutiny should apply to the districting plan).

66. *See id.* at 1956-57 (holding that because political considerations had been subordinated to racial considerations, the districts were invalid); *see also* Miller v. Johnson, 515 U.S. 900, 910 (1995) (refusing to allow a majority-minority district that Georgia created under the Attorney General's order).

67. The "*Shaw* line of cases" refers to *Shaw* and two cases decided thereafter, *Miller v. Johnson* and *Bush v. Vera*. *See Bush*, 116 S. Ct. at 1951 (holding that several majority-minority congressional districts in Texas were unconstitutional because "they [were] not narrowly tailored to serve a compelling state interest"); *Miller*, 515 U.S. at 928 (affirming a district court decision that a majority-minority district in Georgia was unconstitutional under *Shaw*); Shaw v. Reno, 509 U.S. 630, 649 (1993) (holding that a cause of action exists under the Equal Protection Clause where a plaintiff alleges that a redistricting plan has no explanation other than an attempt to separate voters on racial grounds).

68. *See Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting) (stating that as a result of "today's decisions, States may find it extremely difficult to avoid litigation flowing from decennial redistricting"). Justice Stevens explained, "On one hand, States will risk violating the Voting Rights Act if they fail to create majority-minority districts. If they create those districts, however, they may open themselves to liability under *Shaw* and its progeny." *Id.*; *see id.* at 2006 (Souter, J., dissenting) (comparing the dilemma states face to "walking a tightrope" and commenting that if states create majority-minority districts, they will encounter lawsuits under the Equal Protection Clause, but if they do not create these districts, their districting plans will be challenged under Section 5 of the VRA (quoting

sponse to population changes,[69] a redrawing of congressional districts is required to accommodate such changes. However, to obtain the Attorney General's preclearance, these states must ensure that their minority representation in Congress does not decrease. In fact, if a covered jurisdiction fails to maximize or—at the very least—maintain the number of minorities that it sends to Congress by establishing voting districts capable of electing them, the Attorney General will refuse to approve the jurisdiction's districting plan.[70] Yet, the only apparent way of guaranteeing that the proposed districting plan will be approved appears to be race-conscious districting, which the *Shaw* and *Bush* decisions make exceedingly perilous.[71]

Although the Supreme Court has indicated that a majority-minority districting plan could avoid strict scrutiny if the legislature does not subordinate "traditional race-neutral districting principles . . . to racial considerations,"[72] the Court has failed to clarify this caveat to its otherwise sweeping constitutional pronouncements.[73] Thus, although majority-minority districts may theoreti-

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Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 289 (1995-1996))).

69. *See* U.S. CONST. art. I, § 2 (stating that the number of representatives states are entitled to is to be determined by reference "to their respective numbers").

70. *See* Beer v. United States, 425 U.S. 130, 141 (1976). In *Beer*, the Court established the "nonretrogression principle," which is stated as follows: "the purpose of [the VRA] has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Id.* at 141; *see* United Jewish Orgs. v. Carey, 430 U.S. 144, 159 (1977) (stating that the VRA creates a "nonretrogression test," which is "satisfied where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority"). Thus, a change meets this test "if minorities are equally well off or better off after the change than before it, even if the change leaves undisturbed a status quo that still does not fairly reflect minority voting strength." Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 195 (1983); *see also* Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 792 (1998) (discussing the nonretrogression test); Heather K. Way, Note, *A Shield or a Sword? Section 5 of the Voting Rights Act and the Argument for the Incorporation of Section 2*, 74 TEX. L. REV. 1439, 1445-46 (1996) (describing the *Beer* retrogression standard).

71. *See Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting) (noting that states will be subject to lawsuits brought pursuant to *Shaw* and its progeny for creating majority-minority districts).

72. Miller v. Johnson, 515 U.S. 900, 916 (1995).

73. *See Bush*, 116 S. Ct. at 2006 (Souter, J., dissenting) (noting that states have been charged with preventing vote dilution and abstaining from creating majority-minority districts, but they have not been given any guidance in how to accomplish both goals simulta-

cally be drawn in a manner that is consistent with both the VRA and the Equal Protection Clause, the Court has left covered jurisdictions without any meaningful guidance regarding how to do so.[74] The unfortunate result is that the majority-minority districting solution that jurisdictions covered by the VRA are left to depend upon is not only inadequate, but effectively prohibited.[75]

Ultimately, the dilemma faced by covered jurisdictions is extremely precarious. Under Section 5, such states must draw districts that the Attorney General believes will produce minority candidate victories.[76] When the states do so, however, they expose

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neously); Marcia Coyle, *Where to Draw Line on Race in Redistricting?*, NAT'L L.J., Dec. 11, 1995, at A21 (quoting Samuel Issacharoff of the University of Texas School of Law as stating that "[t]he court has identified a problem, but they haven't told us either what it is they want the political process to look like or what states are to avoid"). Frank R. Parker of American University, Washington College of Law has also stated that "[t]he court has never given states any real guidance in any of these cases as to what defenses can be mounted to justify creation of majority-minority districts, except to say districts should be compact in shape." *Id.* Along these same lines, Brenda Wright of the Lawyers Committee for Civil Rights Under Law asserted that "[i]f the court doesn't recognize the need to provide states with some breathing room under the act, then Justice Ginsburg's predictions about all redistricting ending up in the courts will be correct." *Id.*

74. *See Bush*, 116 S. Ct. at 2006 (Souter, J., dissenting) (writing that "[t]he States, in short, have been told to get things just right, no dilution and no predominant consideration of race short of dilution, without being told how to do it"). Justice Souter continued in *Bush* by asserting that "neither the moral force of the Constitution nor the mercenary threat of liability can operate effectively in this obscurity." *Id.* at 2006-07; *see* Pamela S. Karlan, *Still Hazy After All These Years: Voting Rights in the Post-*Shaw *Era*, 26 CUMB. L. REV. 287, 288 (1995-1996) (criticizing the Court for adopting an "I know it when I see it" approach to racial gerrymandering and commenting that "[t]he Court has set itself upon a course . . . of reviewing challenged districts one by one and issuing opinions that depend so idiosyncratically on the unique facts of each case that they provide no real guidance to either lower courts or legislatures"); Steven J. Mulroy, *The Way Out: Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies,* 33 HARV. C.R.-C.L. L. REV. 333, 348 (1998) (analogizing the VRA to a floor and the *Shaw* line of cases to a ceiling and commenting that "it seems the ceiling is rapidly collapsing to the floor, allowing less and less discretion for drawers of redistricting plans to draw districts that provide minorities fair electoral opportunities without running afoul of the Constitution").

75. *See Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting) (commenting that, as a result of the potential problems states may face after *Shaw* and *Bush*, these "States may simply step out of the redistricting business altogether").

76. *See* Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779, 792 (1998) (explaining that the Supreme Court, in *Beer v. United States*, 425 U.S. 130 (1976), developed a Section 5 "nonretrogression" preclearance test that was satisfied "'where the reapportionment increased the percentage of districts where members of racial minorities protected by the Act were in the majority'" (quoting United Jewish Orgs. v. Carey, 430 U.S. 144, 159 (1977))); Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After* Shaw

themselves to lawsuits by majority voters under the Equal Protection Clause.[77] The Supreme Court has, thus, effectively nullified majority-minority districting with assumptions about the role of race in politics that conflict with the very heart of vote dilution litigation—the simple fact that the American voting system is racially polarized.[78] Assuming that the Court does not retreat from this hard-line stance,[79] jurisdictions will need another mechanism for electing minority candidates to Congress following the 2000 census that will shield them from strict scrutiny analysis.[80]

III. THE SOLUTION TO THE *SHAW* PROBLEM: THE NONTRANSFERABLE ELECTION SYSTEM

The ultimate goal of any democratic government is a truly "representative" governing body.[81] In this respect, although the VRA

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v. Reno *and Its Progeny*, 25 FORDHAM URB. L.J. 641, 650 (1998) (stating that as a condition to granting preclearance, the Attorney General encourages states to create majority-minority districts).

77. *See Bush*, 116 S. Ct. at 1991 (Stevens, J., dissenting) (contending that as a result of *Bush* and *Miller*, if states create majority-minority districts, such states will likely face lawsuits under the Equal Protection Clause).

78. *See* Donovan L. Wickline, Note, *Walking a Tightrope: Redrawing Congressional District Lines After* Shaw v. Reno *and Its Progeny*, 25 FORDHAM URB. L.J. 641, 663 (1998) (explaining that the Court has created a tension in its approach to Section 2 remedies of vote dilution between majority-minority districting and the necessary application of strict scrutiny to such racially motivated districting).

79. Although six of the eleven justices who have heard challenges to majority-minority districts have rejected the proposition that a constitutional harm exists even when race is used in districting and the voting power of a racial group is not diluted as a result, a mere 5-4 majority has prevailed in each individual decision. These decisions are often fractured with multiple concurrences using differing rationales. *See, e.g.*, Reno v. Bossier Parish School Bd., 117 S. Ct. 1491 (1997) (containing three separate opinions); Bush v. Vera, 116 S. Ct. 1941 (1996) (producing six separate opinions, none signed by more than three justices); Johnson v. DeGraudy, 512 U.S. 997 (1994) (resulting in three separate opinions).

80. Section 4 of the VRA, which imposes these special requirements on southern states, is scheduled to expire in 2007 unless it is renewed. *See* 42 U.S.C. § 1973b(a)(8) (1994) (providing that the provisions under Section 4 expire twenty-five years after the effective date of the amendments). If the VRA is renewed, such a mechanism will probably also need to be in place for the 2010 census as well.

81. *See* JOHN LOCKE, TWO TREATISES ON GOVERNMENT 289-90 (Legal Classics Library 1994) (1698) (asserting that "it [is] the interest as well as the intention of the People to have a fair and equal representative"); *see also* ALEXANDER BICKEL, THE LEAST DANGEROUS BRANCH 192 (1962) (stating that "[i]n a diverse, federated country . . . organized as a representative, not a town-meeting democracy, we strive . . . for truly representative government, which reflects the electorate and is at the same time stable and effective").

does not require proportional racial representation,[82] general agreement exists that the disproportionate nature of schemes that do not have any majority-minority districts at all is undesirable.[83] Still, majority-minority districting was originally proposed as a vehicle for ensuring that a fair amount of minority candidates were elected, and nothing in the VRA itself requires that such districts be drawn.[84] The VRA's objective *is* minority representation for southern states; the method of attaining that objective, so long as it is constitutional, is less important. Consequently, the surest way to prevent the application of strict scrutiny under *Shaw* and its progeny is to remove state action that involves racial considerations in its calculus.[85] The shift to nontransferable voting for electing representatives to Congress in states subject to the VRA would accomplish just that.

A. *How Nontransferable Voting Works*

Also known as "limited" or "restricted" voting, nontransferable voting may be succinctly defined as a method of election in which the voter may cast multiple votes, but no more than one vote for any candidate and only for a number of candidates smaller than the total number of positions to be filled.[86] Under such a system, the

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82. *See* 42 U.S.C. § 1973(b) (1994) (providing that "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population").

83. *See* United Jewish Orgs. v. Carey, 430 U.S. 144, 168 (1977) (noting that the creation of majority-minority districts can be an effective means "to prevent racial minorities from being repeatedly outvoted by creating districts that will afford fair representation to the members of those racial groups who are sufficiently numerous and whose residential patterns afford an opportunity of creating districts in which they will be in the majority"); Stephen Wolf, Note, *Race Ipsa: Vote Dilution, Racial Gerrymandering, and the Presumption of Racial Discrimination*, 11 NOTRE DAME J.L. ETHICS & PUB. POL'Y 225, 262 (1997) (noting that minorities are not likely to win elections unless they can form coalitions to become a majority, which majority-minority districting allows).

84. Indeed, the Act merely outlaws any change in voting procedures that results in the "denial or abridgment" of a citizen's right to vote on the grounds of race. *See* 42 U.S.C. § 1973(a) (1994).

85. *See* Shelley v. Kraemer, 334 U.S. 1, 13 (1948) (stating that "the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States").

86. *See* Edward Still, *Alternatives to Single-Member Districts*, *in* MINORITY VOTE DILUTION 249, 253 (Chandler Davidson ed., 1984). The idea of limited or nontransferable voting is most often attributed to John Stuart Mill, the English political philosopher who, in the 1860s, propounded the idea that:

prescribed number of candidates winning the most votes in each district will be declared elected.[87] In essence, nontransferable voting means that each voter may consider every candidate, but the voter's choice is "limited" to a number fewer than the number of candidates running.[88]

With a nontransferable voting system, a cohesive non-majority segment of the electorate is given an opportunity to elect a small number of representatives by preventing a unified majority from voting in bloc to fill all the positions being voted on.[89] In the sys-

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> In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule over the rest: there is a part whose fair and equal share of influence in the representation is withheld from them, contrary to all just government, but, above all, contrary to the principle of democracy, which professes equality as its very root and foundation.

JOHN STUART MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 146 (1862), *quoted in* Marshall v. Edwards, 582 F.2d 927, 936 (5th Cir. 1978); *see also* Arthur Eisenberg, Book Review, *The Millian Thoughts of Lani Guinier*, 21 N.Y.U. REV. L. & SOC. CHANGE 617, 618 (1994-1995) (noting that Mill envisioned several electoral mechanisms through which proportional representation could be achieved, which later became known as limited and cumulative voting). Indeed, limited voting is known to have been used as early as 1867 in Great Britain. *See* Edward Still, *Alternatives to Single-Member Districts* (stating that Great Britain used limited voting between 1867 and 1885 in several constituencies), *in* MINORITY VOTE DILUTION 249, 253 (Chandler Davidson ed., 1984).

Interestingly, a similar idea surfaced in the United States in 1844 when Thomas Gilpin submitted an obscure paper to the American Philosophical Society of Philadelphia in which he proposed a proportional representation system as an alternative to the American congressional districting scheme. *See* Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 303 n.58 (1995) (citing JENNIFER HART, PROPORTIONAL REPRESENTATION: CRITICS OF THE BRITISH ELECTORAL SYSTEM 1820-1945 13-14 (1992)). Gilpin argued that his proposed system would give more protection to minority voters than would the traditional districting scheme. *See id.* However, Gilpin's proposal was not discovered in America until twenty years later. *See id.*

87. *See* Edward Still, *Alternatives to Single-Member Districts* (providing an example of a limited voting election), *in* MINORITY VOTE DILUTION 249, 253 (Chandler Davidson ed., 1984).

88. *See* Arend Lijphart et al., *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES, 154, 154 (Bernard Grofman & Aren Lijphart eds., 1986).

89. *See* Cane v. Worcester County, 847 F. Supp. 369, 374 n.7 (D. Md. 1994) (stating that "[l]imited voting . . . promotes minority representation in many cases by preventing the majority from filling all the seats"), *aff'd in part, rev'd in part*, 35 F.3d 921 (4th Cir. 1994); *see also* Nipper v. Smith, 39 F.3d 1494, 1559 (11th Cir. 1994) (Hatchett, J., dissenting) (acknowledging that limited or nontransferable voting can be an effective means of

tem currently employed in every congressional district in the country, any forty-nine percent minority will consistently lose every election to any fifty-one percent majority; hence the term "winner take all."[90] However, in a nontransferable voting district, a significant, but non-majority, portion of the electorate that votes as a block can elect its preferred candidate to the seat that the majority, which is "limited" to fewer than all of the seats, cannot reach.[91] For example, in an election to fill three vacancies on a county commission in which the electorate is forty-five percent Democrat and fifty-five percent Republican, all three seats would be claimed by Republican candidates under the current winner-take-all system; in a nontransferable system in which each voter was allowed to vote for only two candidates rather than three, one of the three seats would go to a Democratic candidate, assuming the Democrats vote in bloc.[92]

Several states have used nontransferable voting for local elections, including Pennsylvania, Massachusetts, Indiana, Connecticut, and New York, as well as in the District of Columbia.[93] In 1961, for

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remedying the vote diluting effects of the winner-take-all election system); League of United Latin Am. Citizens v. Clements, 986 F.2d 728, 769 (5th Cir. 1993) (noting that limited voting systems give "minority voters a meaningful opportunity to elect candidates of their choice"); Edward Still, *Alternatives to Single-Member Districts* (explaining the benefits limited voting schemes offer to minority factions), *in* MINORITY VOTE DILUTION 249, 255 (Chandler Davidson ed., 1984).

90. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 79 (1994) (describing the problems with the winner-take-all system).

91. *See* Edward Still, *Alternatives to Single-Member Districts* (describing the way in which limited or nontransferable voting works), *in* MINORITY VOTE DILUTION 249, 253-55 (Chandler Davidson ed., 1984).

92. The threshold percentage of the electorate needed for a minority victory is determined by the following formula: (number of votes each voter can cast)/(number of votes each voter can cast + number of seats available). *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 340 (1998) (illustrating the threshold of exclusion formula used in limited or nontransferable voting systems). Thus, when three vacancies exist and each voter may cast a vote for two candidates, a 40% minority, voting cohesively, can win one seat (2 / (2+3) = .40). *Cf. id.* (explaining the threshold of exclusion formula for limited voting). This particular result, of course, depends on voter cohesion. *See id.* at 370 (emphasizing that "[i]f the population of the cohesive minority exceeds [the minimum mathematical percentage of the voting electorate needed to ensure the election of at least one candidate], the minority has a proven 'potential to elect'").

93. *See* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR EQUALITY 125 (1992).

example, ten seats on the City Council of the City of New York were elected on a two-per-borough basis using borough-wide nontransferable elections.[94] That system guaranteed the election of at least five non-Democrats at a time when nearly all the council members elected in winner-take-all districts were Democrats.[95] Numerous Connecticut municipalities also continue to use nontransferable voting.[96] In addition, Philadelphia has used these election systems since 1951 for its seven at-large council seats, and almost every Pennsylvania county currently elects commissioners by this same method.[97] Nontransferable voting systems have also been used to elect representatives to the national legislatures of Japan and Spain.[98] In fact, most democratic countries, and almost all non-English-speaking democracies, use nontransferable voting or a similar proportional representation system.[99]

B. *Advantages of Nontransferable Election Systems*

1. Achieving the Goals of the VRA

A legislative shift from the current winner-take-all system to a nontransferable system would significantly further the goals of the VRA. First, and most importantly, voters with minority racial ancestry would be empowered to elect candidates of their choice

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94. *See* Blaikie v. Power, 193 N.E.2d 55, 56 (N.Y. 1963) (providing an example of the nontransferable voting system used in New York), *appeal dismissed*, 375 U.S. 439 (1964).

95. *See* Richard Briffault, Book Review, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 472 n.67 (1995) (discussing the effectiveness of limited voting in *Blaikie*).

96. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 164 (1985) (describing how Connecticut is one jurisdiction that utilizes nontransferable systems).

97. *See id.* at 163-64.

98. *See* Arend Lijphart et al., *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 154, 166-68 (1986).

99. *See* Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1123-24 (1998) (stating that all Western European countries, except for Britain and France, use some form of proportional representation); *see also* AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENT IN TWENTY-ONE COUNTRIES 152 (1984) (classifying the electoral formulas for various democracies); Arend Lijphart, *Comparative Perspectives on Fair Representation: The Plurality-Majority Rule, Geographical Districting, and Alternative Electoral Arrangements* (discussing the two basic types of proportional representation and the countries that utilize each type), *in* REPRESENTATION AND REDISTRICTING ISSUES 143, 155-57 (Bernard Grofman et al. eds., 1982).

without consistently losing to a bare majority of white voters.[100] Because a significant, cohesive voting bloc would then be able to elect at least a few candidates, geographic regions infamous for electing all-white congressional delegations could finally take steps to diversify their representation.[101] After electing candidates of their choice to public office, minority voters also would immediately witness the power and value of their own enfranchisement.

Second, nontransferable voting systems have a proven success record in terms of remedying minority vote dilution in jurisdictions covered under Section 4 of the VRA.[102] For instance, the first attempt to use such a system to remedy vote dilution in a covered jurisdiction was as part of a settlement in litigation against the Conecuh County Democratic Executive Committee in Alabama.[103] Although the county was forty-one percent African American, it had never elected a single African-American candidate to the forty-member Committee.[104] The settlement adopted an election system wherein voters were limited to a number of votes equal to half the number of seats to be filled.[105] This new system proved to be very successful; in the first election under the system, African-American candidates in thirteen out of the fourteen precincts were victorious in the primaries, and fifteen candidates were ultimately elected to the Committee.[106]

In another instance, a North Carolina district court ordered that a nontransferable election system be used to remedy minority vote dilution in elections for the Granville County Board of Commis-

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100. *See* Nipper v. Smith, 39 F.3d 1494, 1559 (11th Cir. 1994) (Hatchett, J., dissenting) (noting that limited voting is one form of alternative electoral systems that would alleviate the problems of vote dilution); League of United Latin Am. Citizens v. Clements, 986 F.2d 728, 769 (5th Cir. 1993) (acknowledging that limited voting systems enable minority voters to elect candidates of their choice despite the fact that they do not constitute a majority of the voters).

101. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 227-29 (1989) (providing examples of how limited or nontransferable voting has been successful in allowing black voters in the South to elect candidates for the first time "in modern history").

102. *See id.* (explaining how nontransferable voting systems were used to remedy Section 2 violations in North Carolina and Alabama).

103. *See id.* at 227-28 n.226.

104. *See id.* at 227.

105. *See id.* (providing an example that if ten members are to be selected, then each individual casts five votes).

106. *See id.* at 227-28.

sioners.[107] No African American in modern history had ever been nominated, much less elected, to a position on the Board despite the fact that 39.5% of the county's registered voters were African American.[108] Because a proposed majority-minority districting scheme would have been inadequate for demographic and other reasons, the court ordered that the seven members of the Board serve staggered terms and be elected under systems allowing no voter to cast more than two votes in each election.[109] There, the result exceeded what the calculations would have predicted: the first primary nominated three African-American and eight white candidates, and three of the five candidates eventually elected to the Board were African American.[110]

Yet another example involves a nontransferable election system employed as part of a settlement in a suit brought by voters residing in several towns in Alabama.[111] In that case, African-American candidates won in thirteen of the fourteen towns in which they ran, and the sole losing African-American candidate lost by only a single vote.[112] These were the first ever African-American victories in ten of the thirteen municipalities.[113] As it did in the Conecuh County elections, the Granville County elections, and in those of several other covered jurisdictions,[114] nontransferable voting once

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107. *See* McGhee v. Granville County, 860 F.2d 110, 114 n.3 (4th Cir. 1988) (outlining the district court's plan to implement a "limited" or nontransferable voting system).

108. *See id.* at 113.

109. *See id.* at 114.

110. *See id.* at 114-15 n.5 (noting the candidates' status at the time the case was decided). The Fourth Circuit reversed the district court's decision for wrongly rejecting the majority-minority proposal, but it did not criticize the legitimacy of nontransferable systems per se. *See id.* at 121.

111. *See* Dillard v. Town of Cuba, 708 F. Supp. 1244, 1246-47 n.3 (M.D. Ala. 1988) (listing related lawsuits).

112. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 349 (1998) (citing Richard L. Engstrom, *Modified Multi-Seat Election Systems As Remedies for Minority Vote Dilution*, 21 STETSON L. REV. 743, 758-60 (1992)).

113. *See id.*

114. Several other counties in North Carolina and Alabama have followed similar strategies, as well as political subdivisions in Georgia. *See, e.g.*, Moore v. Beaufort County, 936 F.2d 159, 260-62 (4th Cir. 1991) (describing the limited voting plan adopted as a settlement in a North Carolina vote-dilution suit); Harry v. Bladen County, Civ. No. 87-72-CIV-7, 1989 WL 253428, at *3 (E.D.N.C. Dec. 11, 1989) (stating that a limited voting plan, adopted as a settlement in a vote-dilution suit in North Carolina, "gave black citizens a realistic opportunity to elect" a proportional number of black candidates); Dillard v. Town of Cuba, 708 F. Supp. 1244, 1246 (M.D. Ala. 1988) (holding that a limited voting system,

again successfully remedied violations of the VRA and increased minority representation in government.

Adopting nontransferable election systems would also advance another important goal of the VRA, exemplified by the notion that "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society."[115] For example, participants in a nontransferable system are able to decide freely who will represent them, and the state has no involvement in what factors (racial or otherwise) that a particular participant will use in the process.[116] In fact, perhaps the most attractive advantage of nontransferable election systems is that voters are in no way limited to race in deciding whom they will select. As a result, libertarians, the disabled, homosexuals, and any other non-majority segment of the electorate all have the opportunity to obtain some degree of representation without fear of losing to a fifty-one-percent majority.[117]

In addition, nontransferable election systems prevent other failings of the majority-minority districting strategy. Under the current framework, because little doubt exists that representatives elected from a "'safe-white' or 'safe-black'" districts will be re-elected, such representatives may become less responsive to their constituents[118] and voter participation may decline.[119] However,

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implemented as a settlement in a vote-dilution law suite in two Alabama towns, did not violate federal law or the Constitution).

115. Reynolds v. Sims, 377 U.S. 533, 555 (1964). Ironically, this statement is the opening sentence of the Court's analysis in *Shaw*. *See* Shaw v. Reno, 509 U.S. 630, 639 (1993).

116. *See* Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 965 F. Supp. 72, 80 (D.D.C. 1997) (upholding the constitutionality of limited voting systems because they "treat all voters in the county—black or white—in precisely the same way"), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998); *cf. Shaw*, 509 U.S. at 642-45, 649-51, 657 (referring repeatedly to the centrality of racial "classifications" for the *Shaw* cause of action).

117. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1148-49 n.331 (1991) (noting that proportional voting allows politically cohesive interest groups to advance their interests); Darren Rosenblum, *Geographically Sexual?: Advancing Lesbian and Gay Interests Through Proportional Representation*, 31 HARV. C.R.-C.L. L. REV. 119, 143 (1996) (acknowledging that proportional voting systems can be effective in electing other non-majority candidates).

118. Representatives with such "electoral security" have been observed to "become complacent, not consulting their constituents as frequently as representatives from other kinds of districts do." CAROL M. SWAIN, BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS 72 (1993). They are also more inclined to perceive themselves as "trustees," able to decide themselves what is in their communities' best interests rather than "delegates" for their constituents. *See* Richard Briffault,

with a nontransferable election system that uses voter-selected interests and preferences rather than either race or geography, elected officials would remain more representative of, and responsive to, their constituencies.

Incidentally, several forms of proportional and semi-proportional election systems other than nontransferable systems offer similar benefits. Major examples include "preference voting," in which the voter lists her preferred candidates in rank-order, and "cumulative voting," in which the voter is entitled to a number of votes equal to the number of positions to be filled and may freely distribute them amongst all the candidates or any one candidate.[120] Despite certain attractive qualities of these systems, the proposals embodied in this Article reject these two alternative systems as inferior to nontransferable voting for several reasons.

First, although both have been used occasionally in American elections, neither has been used as often, or with the same rate of success, in electing racial minorities as nontransferable systems.[121] Second, both are more complicated and confusing for the voter than nontransferable election systems.[122] Third, unlike a move to nontransferable voting, both cumulative voting and preference vot-

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Book Review, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 430 n.41 (1995).

119. *See* Rodolfo O. de la Garza & Louis DeSipio, *Save the Baby, Change the Bathwater, and Scrub the Tub: Latino Electoral Participation After Seventeen Years of Voting Rights Act Coverage*, 71 TEX. L. REV. 1479, 1516 (1993) (finding, as a result of a study on the impact of districting on Latino electoral participation, that the creation of majority-minority districts "may have the unintended effect of distancing all but the most committed voters from elections even while they assure that Latinos (and African-Americans) are elected to office").

120. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 340-42 (1998) (describing cumulative and preference voting as viable solutions to the conflict that arises from *Shaw* and the cases outlawing vote dilution).

121. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 232-33 (1989). *But see* Dillard v. Chilton County Bd. of Educ., 699 F. Supp. 870, 876 (M.D. Ala. 1988) (upholding a cumulative scheme as "fair, reasonable adequate and . . . not illegal or against public policy"), *aff'd*, 868 F.2d 1274 (11th Cir. 1989).

122. *See* Saul Levmore, *Taxes As Ballot*, 65 U. CHI. L. REV. 387, 396 n.31 (1998) (noting that single-transferable voting and cumulative voting systems have not been widely adopted because of their complexity); Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 155-56 (1982) (explaining that the complexity of cumulative voting might pose problems to minority voters, many of whom have less familiarity with the voting process).

ing would require modifications to voting machines currently in use.[123] Fourth, neither system is as accurately representative as nontransferable voting because cumulative systems favor smaller but more cohesive minorities,[124] and preference systems allow the winning candidates to be determined by the popularity of the losing candidates, thereby threatening significant over-representation.[125]

Accordingly, nontransferable election systems are the most promising and workable option when considering alternative methods of election as a solution to the problem presented by *Shaw* and its progeny. Although the VRA itself does much to remove the impediments to African-American voters who wish to participate in the electoral process, a nontransferable voting system would take the next step of safeguarding the effectiveness of their votes by preventing their nullification in the face of a majority-white electorate.

2. Passing Constitutional Muster

Before any electoral system can be implemented, especially one designed to remedy the effects of minority vote dilution, the constitutionality of the system must be analyzed, particularly in the light of *Shaw* and its progeny. In addition to achieving the ends of the VRA, nontransferable election systems are consistent with the Constitution and avoid the *Shaw* problem altogether because voters "district" themselves; that is, dispersed non-majority members of the electorate can secure representation without the need for the state to draw districts to unite them on the basis of race.[126] Also, courts have consistently rejected First, Fifth, and Fourteenth

123. *See* Richard Briffault, Book Review, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 437 n.67 (1995) (noting that because voters are allowed to cast multiple votes for each candidate in cumulative voting systems, voting machines would have to be modified to implement this system).

124. *See* Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 94 YALE L.J. 144, 156 (1982) (observing that one disadvantage of cumulative voting is that it leads to extremism and polarization among the elected body).

125. *See id.* at 151 (discussing the problems with single-transferable or preference voting systems).

126. *See* Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 965 F. Supp. 72, 80 (D.D.C. 1997) (acknowledging that limited voting does not "contemplate any racial classifications among voters"), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998).

Amendment challenges to such systems as used in state and local elections.[127] Moreover, the Supreme Court of the United States has summarily affirmed two of these decisions.[128]

Specifically, several decisions have rejected the claim that nontransferable voting systems violate the "one person, one vote" principle. The courts addressing this argument have reasoned that each person's vote under a nontransferable system counts as much as any other's.[129] As one court stated:

> The Equal Protection Clause is thus satisfied . . . unless plaintiffs can demonstrate that this scheme is designed to dilute the voting or representational strength of a particular political element . . . . Plaintiffs cannot sustain this burden by demonstrating merely that the statute encourages representation for political minorities or by a showing that in a particular instance a particular minority has succeeded in electing a commissioner . . . . The statute may be viewed as having an effect which encourages a fairer or more effective representation than would otherwise result if a simple plurality rule were used in

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127. *See, e.g., Cleveland County Ass'n*, 965 F. Supp. at 79-80 (determining that the use of a limited voting system does not trigger strict scrutiny under the Equal Protection Clause because the plan "does not contemplate any racial classifications among voters"); Orloski v. Davis, 564 F. Supp. 526, 530-31 (M.D. Pa. 1983) (finding that limited voting is a legitimate means of encouraging minority representation); Kaelin v. Warden, 334 F. Supp. 602, 605, 609 (E.D. Pa. 1971) (holding that a limited voting scheme, implemented to elect county commissioners, did not violate the "one man, one vote" principle, nor did it violate the Equal Protection Clause); People v. Carpentier, 198 N.E.2d 514, 518 (Ill. 1964) (rejecting Fourteenth Amendment challenges to a limited voting nomination system used to nominate state representatives in an at-large election); Blaikie v. Power, 193 N.E.2d 55, 59 (N.Y. 1963) (stating that the implementation of limited voting in a New York City Council election did not violate the state constitution's prohibition against depriving a voter's right to vote for a candidate of his choice), *appeal dismissed*, 375 U.S. 439 (1964).

128. *See* Hechinger v. Martin, 411 F. Supp. 650, 653 (D.D.C. 1976) (holding that limited voting systems are "entirely consistent with First Amendment principles of freedom of expression and association"), *aff'd*, 429 U.S. 1030 (1977); LoFrisco v. Schafer, 341 F. Supp. 743, 751 (D. Conn.) (rejecting a Fourteenth Amendment challenge to a limited voting system used in school elections), *aff'd*, 409 U.S. 972 (1972).

129. *See Cleveland County Ass'n*, 965 F. Supp. at 80 (commenting that although limited or nontransferable voting provides greater opportunities for minority candidates to be elected, it does not guarantee that these candidates will be elected); *Orloski*, 564 F. Supp. at 530 n.4 (acknowledging that even if the one-person-one vote standard applied, it would not be violated by limited voting); *LoFrisco*, 341 F. Supp. at 748 (noting that the plaintiff's vote is not diluted by the limited voting system); *Kaelin*, 334 F. Supp. at 605 (providing that as long as the one-man-one-vote doctrine is not violated, a proportional voting system is constitutional); *Carpentier*, 198 N.E.2d at 518 (holding that the nomination scheme for the Illinois legislature, which limited the number of candidates each party could nominate, did not violate the one-person-one-vote principle).

> which the majority elects all the commissioners, for this would necessarily discriminate by entirely discounting the votes of the minority electors.[130]

Arguments that the First Amendment prohibits nontransferable voting as an impediment to the free association and political activity of majority groups have likewise been rejected.[131] For example, in *Hechinger v. Martin*,[132] the United States District Court for the District of Columbia rejected an argument that a limited voting system amounted to a violation of the plaintiff's First Amendment freedom of association.[133] Instead, the court noted, "On the contrary, it appears that the minority representation provision is more compatible with the First Amendment than the plaintiffs' requirement would be."[134]

Importantly, Congress already possesses the authority to implement nontransferable election systems. Because the Constitution expressly grants Congress the power to control the format of congressional elections,[135] Congress could require that these election systems be implemented in all congressional elections *nationwide*, not merely upon those jurisdictions covered by the VRA. In addition, given the outstanding success of nontransferable voting systems in remedying racial vote dilution, the Attorney General has

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130. *Kaelin*, 334 F. Supp. at 605; *accord LoFrisco*, 341 F. Supp. at 748 (stating, "Given the fact of the restriction on number of nominees and number of votes an elector has, [plaintiff]'s individual vote does get as much weight as that of any other individual. One could not say before the election that the votes of a discernable minority or group would be worth less than those of other voters.").

131. *See Hechinger*, 411 F. Supp. at 652-54.

132. 411 F. Supp. 650 (D.D.C. 1976), *aff'd*, 429 U.S. 1030 (1977).

133. *See Hechinger*, 411 F. Supp. at 652. The statutes that the court reviewed in *Hechinger* limited the number of candidates each party could nominate, and consequently elect, to the District of Columbia Council. *See id.* at 651. Although the *Hechinger* statutes differed slightly from the nontransferable voting system proposed in this Article, the two systems are sufficiently analogous for *Hechinger* to support the proposition that nontransferable voting is not unconstitutional under the First Amendment. Indeed, the system proposed in this Article is even less suspect because, unlike the *Hechinger* statutes, nontransferable voting does not contain any express limitations on the amount of candidates each party can elect, the very grounds upon with the plaintiffs in *Hechinger* attacked the statute. *See id.* at 652.

134. *Id.* at 652.

135. *See* U.S. CONST. art. I, § 4, cl. 1 (leaving to the state legislatures the power to determine the "Times, Places and Manner of holding Elections for Senators and Representatives," but then stating that, "the Congress may at any time by Law make or alter such Regulations").

regularly precleared the implementation of nontransferable election systems in jurisdictions covered by Section 4 of the VRA.[136]

Furthermore, nontransferable voting does not create any tension with the VRA's proviso that clarifies the intended purpose of the VRA, which states that when a court is faced with litigation under the VRA, "[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[137] This provision poses no barrier to nontransferable election systems because these systems provide no guarantee whatsoever that any particular group—racial, age, sex, or unprotected altogether—will elect its members.[138] Instead, by helping to build multi-racial coalitions and alliances based on voter similarities other than race, nontransferable voting is much less of a "quota" system than that which our current districting methods have been criticized as promoting.[139]

Most importantly, the adoption of nontransferable election systems will avoid the problems raised by the proscription of *Shaw* and its progeny against subordinating traditional districting principles to race.[140] As discussed earlier, nontransferable voting does

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136. *See* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1284 n.196 (1989) (noting that limited and cumulative voting systems adopted by consent decrees were granted preclearance in *Harry v. Bladen County*, Civ. No. 87-72-CIV-7 (E.D.N.C. Apr. 21, 1988), and *United States v. City of Augusta*, Civ. No. CV 187-004 (S.D. Ga. July 22, 1988)).

137. *See* 42 U.S.C. § 1973(b) (1994).

138. *See* Kaelin v. Warden, 334 F. Supp. 602, 605 (E.D. Pa. 1971) (stating that "the effect of [nontransferable voting] is never wholly predictable for it is possible for a board of commissioners to be elected consisting of three members of the same party, three members of different parties or three independents").

139. *See* Jeffrey G. Hamilton, Comment, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519, 1556-57 (1994) (concluding that majority-minority districting could not survive Justice Powell's anti-quota analysis in *Regents of the Univ. of California v. Bakke*, 438 U.S. 265, 315-20 (1978)).

140. *See* Bush v. Vera, 116 S. Ct. 1941, 1951 (1996) (applying strict scrutiny to a districting scheme that subordinates traditional districting principles to race); Miller v. Johnson, 515 U.S. 900, 905 (1995) (indicating that strict scrutiny applies to redistricting schemes that are so oddly shaped they are unexplainable on any grounds except for that of race); Shaw v. Reno, 509 U.S. 630, 649 (1993) (stating that a cause of action exists when a plaintiff can demonstrate that a districting plan, "though neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race").

not subordinate traditional districting principles to race because it does not "contemplate any racial classifications among voters."[141] That is not to say, of course, that implementing nontransferable election systems would not have somewhat of a racial motivation. Obviously, it would, but legislation that is merely conscious of racial demographics, without more, would not be subjected to strict scrutiny.[142] Rather, voters under nontransferable election systems would simply be freed from the geographical coincidences that divide them under the traditional winner-take-all system. Because the nontransferable system allows voters to unite with each other for any reason whatsoever—ideological, racial, or otherwise—depicting nontransferable voting as "predominantly" motivated by race, as forbidden by the *Shaw* line of cases, would be difficult.[143]

In fact, the District Court for the District of Columbia, in *Cleveland County Association for Government by the People v. Cleveland County Board of Commissioners*,[144] expressly upheld the validity of nontransferable voting against a *Shaw* challenge.[145] In that case, Cleveland County had adopted a system of at-large limited voting in the Board of Commissioners elections pursuant to a consent decree that resolved an earlier Section 2 vote-dilution lawsuit.[146] The plaintiffs challenged the consent decree by arguing that it violated the Fifteenth Amendment and, relying on *Shaw* and its progeny,

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141. Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 965 F. Supp. 72, 80 (D.D.C. 1997), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998).

142. *See Cleveland County Ass'n*, 965 F. Supp. at 80 (noting that race consciousness alone does not trigger strict scrutiny); *see also Miller*, 515 U.S. at 915-16 (recognizing that race conscious districting—rather than racially motivated districting—will not be subject to strict scrutiny); *cf.* Board of Educ. v. Mergens, 496 U.S. 226, 249 (1990) (distinguishing between religious motive and religious intent in upholding facially neutral statute under the Establishment Clause).

143. *See Miller*, 515 U.S. at 916 (indicating that to show a district was created on racial grounds, a plaintiff must prove that race was the motivating factor behind the legislature's determination of district boundaries).

144. 965 F. Supp. 72 (D.D.C. 1997), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998).

145. *See Cleveland County Ass'n*, 965 F. Supp. at 80. The D.C. Circuit reversed on the ground that the consent decree had been entered into in violation of a state law that regulated changes to elections procedures, but the court left intact the portion of the ruling dealing with *Shaw* and nontransferable voting itself. *See* Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 142 F.3d 468, 468 (D.C. Cir. 1998).

146. *See Cleveland County Ass'n*, 965 F. Supp. at 74-75.

the Equal Protection Clause.[147] In support of their challenge to the decree, the plaintiffs argued that under *Shaw*, the plan was predominantly motivated by race because, by necessity, race is the "predominant factor" in any settlement of a Section 2 case.[148] The court disagreed with the plaintiffs' characterization of *Shaw* and emphasized that the *Shaw* line of cases applies principally to cases where a flagrant disregard for traditional districting principles exists.[149] In upholding the nontransferable voting plan, the court further explained that "[i]t is the classification of individuals on the basis of race, not the mere motivation to facilitate equal opportunity for representatives of all races, that requires heightened scrutiny."[150] The court also noted that nontransferable voting:

> [D]oes not contemplate any racial classifications among voters. It does not separate voters or distinguish among voters or candidates along racial lines. It treats all voters in the county—black or white—in precisely the same way. Voting occurs county-wide, with no separation of candidates or voters, geographic or otherwise, and each voter has the same number of votes. The fact that [nontransferable] voting provides a greater opportunity to elect minority candidates more readily does not render this election feature constitutionally suspect.[151]

Essentially, if Congress has any power at all under Section 2 of the Fifteenth Amendment that is not inconsistent with the Equal Protection Clause, it must include implementation of an election system that has so consistently proven itself as an effective tool against minority vote dilution.

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147. *See id.* at 75.

148. *See id.* at 80.

149. *See id.*

150. *Id.*

151. *Id.* As further argument in favor of nontransferable voting's constitutionality, Congress may utilize its power under Section 2 of the Fifteenth Amendment to remove procedural constraints that inhibit racial minorities from electing representatives of their choosing must be part of that power. *See* U.S.CONST. amend. XV, § 2 (stating, "The Congress shall have power to enforce this article by appropriate legislation"); U.S. CONST. amend. XV, § 1 (stating that citizens' right to vote is not to be denied or abridged on the basis of race, color, or previous condition of servitude); 42 U.S.C. § 1971 (1994) (detailing the methods and manners in which the right to vote will not be infringed).

C. *Possible Disadvantages of Nontransferable Election Systems*

As is the case with any form of election system, nontransferable voting is not without its possible disadvantages. In fact, nontransferable voting has drawn criticism on the grounds that it does not give each voter a "say" in the election of each representative,[152] that it will create a highly fragmented, multi-party system because it allows small groups to achieve representation,[153] and that it creates problems for large parties in determining the number of candidates to nominate.[154] Each of these potential drawbacks will be discussed in turn.

The criticism that nontransferable voting will deny voters a say in the election of each representative centers around the idea that because the system limits the amount of votes each voter can cast, voters might feel that not all of the elected candidates are reflective of the entire electorate.[155] This criticism is a curious one because the current single-member districting method is even less effective in giving voters a say in the election of representatives.[156] Indeed,

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152. *See* Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 148-49 (1982).

153. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 230 (1989) (discussing the disadvantages of nontransferable, or limited, voting schemes); Daniel S. Polsby & Robert D. Popper, *The Third Criterion: Compactness As a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 306 (1991) (stating that "a multi-member system amplifies local differences"). Polsby and Popper indicate that "[f]actions rather than coalitions will send representatives to the assembly, to struggle for their factious enthusiasms undiluted by the need for compromise." *Id.*

154. *See* Arend Lijphart et al., *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples* (providing that parties who nominate too many candidates in limited voting systems risk losing their proportional share of representation), *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 154, 159 (Bernard Grofman & Arend Lijphart eds., 1986); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 230 (1989) (noting that in limited voting systems, larger parties "may not always adopt the most effective nominating and voting strategies").

155. *See* Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 148-49 (1982).

156. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 3 (1994) (discussing James Madison's concerns that the majority who prevailed in democratic elections might not represent, or might be indifferent toward, the minority); AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENTS IN TWENTY-ONE COUNTRIES 150 (1984) (commenting that in the single-member districting method, "the candidate supported by the largest number of votes wins, and all other voters remain unrepresented").

under the current system, a candidate may win an election despite the fact that forty-nine percent of the electorate voted against that candidate.[157] Moreover, at least two courts have rejected this very criticism because each person's vote is still given the same weight.[158] In any event, a nontransferable system forces candidates to appeal to a broader electorate because their support may potentially come from any particular voter.[159]

Similarly, the criticism that nontransferable voting will create a highly fragmented system is also unfounded, particularly in the context of preventing minority vote dilution.[160] Several commentators have suggested that "fragmentation" is actually an *advantage* to proportional representation systems.[161] One of the most commonly cited benefits of fragmentation is that it allows representatives with a broader base of viewpoints to be elected, which in turn results in an elected body that more accurately reflects the true political views of the electorate.[162] In comparison, the single-mem-

157. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 338 (1998) (noting that under traditional election systems, a cohesive voting bloc constituting fifty-one percent of the electorate will control one-hundred percent of the seats that are up for election).

158. *See* LoFrisco v. Schaffer, 341 F. Supp. 743, 748 (D. Conn.) (rejecting a plaintiff's argument that he was being denied the right to vote on the grounds that he could only vote for two of three vacant seats), *aff'd*, 409 U.S. 972 (1972); Blaikie v. Power, 193 N.E.2d 55, 59 (N.Y. 1963) (upholding the constitutionality of a limited voting election over the plaintiff's objection that the system deprived him of the "right to vote for a candidate of his choice"), *appeal dismissed*, 375 U.S. 439 (1964).

159. *See* Nipper v. Smith, 39 F.3d 1494, 1559 (11th Cir. 1994) (commenting that one of the advantages of nontransferable voting is that it diminishes the problem of elected officials being "too closely linked with their political constituencies").

160. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 231 (1989).

161. *See* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 678-79 n. 134 (1998) (discussing the advantages of fragmentation in the political process); Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1188 (1998) (commenting that having a wider array of views on an elected body is an advantage of proportional representation); *cf.* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1161-62 (1993) (discussing how the current form of single-member districting, by giving voters only two choices, has fostered negative campaigns).

162. *See* Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1188 (1998) (noting that having a legislature that reflects the views of the electorate is a desirable goal of democracy); *see also* Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the*

ber districting system, and its lack of fragmentation, has drawn criticism for causing an oversimplification of the political process by giving voters typically only two perspectives on a given issue.[163]

The criticism that large parties will encounter problems in determining how many candidates to nominate for a nontransferable election is likewise without basis. This criticism essentially centers around the fact that large parties who nominate too few or too many candidates will suffer a severe loss.[164] This criticism is faulty, however, because it fails to recognize that large parties who fall prey to this phenomenon do so because they must have been attempting to circumvent notions of fair play by nominating more candidates than the number to which they had been entitled.[165] If larger parties do not attempt to squeeze out minority parties, and instead decide to adopt a more conservative and realistic nomination strategy, these parties will be proportionately represented in a nontransferable election.[166]

Regardless of the criticisms of a nontransferable election system, the benefits of such a system certainly outweigh any disadvantages. Not only has a nontransferable system proven to be an effective remedy to the vote-dilution problems of the winner-take-all system, but it also has the advantage of being race-neutral because

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Democratic Process, 50 STAN. L. REV. 643, 678-79 n. 134 (1998) (commenting that "fragmentation should have the beneficial effect of getting all citizens to understand the diverse interests and points of view that exist in their society and deepening their understanding of how to fairly accommodate these interests").

163. *See* Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 CARDOZO L. REV. 1135, 1161 (1993) (criticizing winner-take-all systems for giving voters only two real choices); Samuel Issacharoff & Richard H. Pildes, *Politics As Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 678-79 n. 134 (1998) (commenting that "[t]he single-member district system simplifies unnecessarily the process of social discussion").

164. *See* Arend Lijphart et al., *The Limited Vote and the Single Nontransferable Vote: Lessons from the Japanese and Spanish Examples*, *in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 154, 159 (Bernard Grofman & Arend Lijphart eds., 1986). If the parties overestimate their electoral support and nominate too many candidates, the voters who support them may distribute their votes among all those parties' candidates. *See id.* In the event this problem occurs, the possibility arises that voters for the large party will have spread their votes over too large an area, which would allow a smaller party to gain more seats than those to which it would normally have been entitled. *See id.* The converse of this problem is also apparent: if large parties do not nominate enough candidates, they risk forfeiting a portion of their representative power.

165. *See id.* at 163.

166. *See id.*

dispersed non-majority voters can secure representation without the need for states to unite them on the basis of race.[167]

IV. Making Nontransferable Election Systems Possible: Exempting Covered Jurisdictions from Single-Member Districting

Despite its powerful advantages and constitutional soundness, no congressional election has ever employed nontransferable voting.[168] There is, in fact, only a single obstacle preventing nontransferable elections as an alternative to majority-minority districting: Title 2, Section 2c of the United States Code, which requires each state to elect its representatives in single-member districts.[169] Because nontransferable election systems require multi-member districting, in order to implement nontransferable voting in jurisdictions covered by the VRA, these covered jurisdictions must be exempted from this statute.[170]

A. *The Idea of Single-Member Districts*

Congress has required single-member districting for congressional elections since 1842.[171] The original rationale behind this requirement involved the concern that larger states might try to enhance their influence in Congress by using at-large systems to elect unified delegations.[172] The current version of this statute, codified at Title 2, Section 2c, states, "there shall be established by law a number of districts equal to the number of Representatives

167. *See* Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 965 F. Supp. 72, 80 (D.D.C. 1997) (acknowledging that limited or nontransferable voting does not "contemplate any racial classifications among voters"), *rev'd on other grounds*, 142 F.3d 468 (D.C. Cir. 1998).

168. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. Rev. 173, 224-230 (1989).

169. *See* 2 U.S.C. § 2c (1994) (stating that "no district [is] to elect more than one Representative").

170. Some states have, in the past, elected representatives at large in violation of this statute, but Congress has never refused to seat anyone so chosen. *See* Joel F. Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?*, 17 Law & Contemp. Probs. 276, 285 (1952).

171. *See* Kenneth C. Martis, The Encyclopedia of the United States Congress 651, 652-53 (Donald C. Bacon et al. eds., 1995).

172. *See* Joel Francis Paschal, *The House of Representatives: "Grand Depository of the Democratic Principle"?*, 17 Law & Contemp. Probs. 276, 281 (1952) (examining the original controversy surrounding the manner in which representatives were to be elected).

to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative."[173] This language was adopted in 1967 and prohibits at-large elections for congressional representatives in all states except those apportioned only one representative.[174]

As for the regulation of primaries, federal law has been much more flexible. Under Section 5 of Title 2 of the United States Code, candidates for the nomination in each state "shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State."[175] Accordingly, amendments to Section 2c, to remove the burden of single-member districting, and Section 5, to require nontransferable primary elections in covered jurisdictions, are both necessary.

B. *The Feasibility of Abandoning Single-Member Districting*

Congress could validly replace single-member districting with multi-member districting in covered jurisdictions. The Supreme Court in fact has repeatedly upheld the validity of multi-member districting,[176] holding that "multi-member districts will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'"[177] In addition, if campaigning in a multi-member district imposes higher costs on the candidate, this burden alone does not rise to the level of an unconstitutional encumbrance on minority candidates.[178]

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173. 2 U.S.C. § 2c (1994).

174. *See* Shayer v. Kirkpatrick, 541 F. Supp. 922-26 (W.D. Mo. 1982) (discussing Congress' intent to eliminate at-large elections in states having more than one representative), *aff'd sub nom.* Schatzle v. Kirkpatrick, 456 U.S. 966 (1982).

175. 2 U.S.C. § 5 (1994).

176. *See, e.g.*, Kilgarlin v. Hill, 386 U.S. 120, 126 (1967) (per curiam) (allowing multi-member districts in Texas); Burns v. Richardson, 384 U.S. 73, 88 (1966) (holding that because no invidious result was shown, a multi-member scheme would be allowed to stand).

177. *Burns*, 384 U.S. at 88 (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

178. *See* Simkins v. Gressette, 631 F.2d 287, 293-94 (4th Cir. 1980) (stating that showing that a minority group discriminated against does not have a proportional number of representatives elected is not enough to demonstrate invidious discrimination); Goldblatt v. City of Dallas, 414 F.2d 774, 775-76 (5th Cir. 1969) (finding that no discrimination was intended by influence from wealthy persons in a city-wide election).

Of course, districting cannot be abandoned entirely in these states. For example, Texas, a covered jurisdiction under the VRA,[179] is currently apportioned thirty representatives in Congress.[180] If nontransferable voting were to be instituted without any districting at all in Texas, each ballot would have to list several dozens of candidates. This undoubtedly would leave voters confused and unable to consider their selections thoughtfully.[181] Further, each candidate would have to campaign everywhere throughout the largest state in the continental United States, making campaigning considerably more expensive. The success of minority candidates likely would be impaired, and the high-exposure, well-funded (and typically white) incumbents would be favored.[182]

Although these problems do not render multi-member districting unconstitutional, they are important concerns. Accordingly, covered jurisdictions should instead create fewer, yet larger, districts than the single-member districting system allows.[183] Although the ballots will obviously be longer than under the single-member system, there has been no evidence of significant voter confusion in those state and local elections employing nontransferable voting.[184] Furthermore, although candidates will have to campaign in a larger area, this difficulty cannot be worse than the complications associated with campaigning in grotesquely-shaped

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179. *See* 28 C.F.R. pt. 51 app. (1998) (delineating the jurisdictions covered by the VRA).

180. *See* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 350 (Edith R. Hornor ed., 1997).

181. *See* Connor v. Finch, 431 U.S. 407, 414 (1977) (recognizing the weakness of multi-member districting in elections for unusually large numbers of positions); Chapman v. Meier, 420 U.S. 1, 15-16 (1975) (commenting on the difficulty in making intelligent voting decisions in multi-member districts).

182. *See* Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 153-54 (1982) (noting that limited voting tends to favor broad-based, rather than minority, candidates).

183. In creating these larger districts, covered states would thus be free to use the "traditional districting principles" the Supreme Court prefers. *See* Bush v. Vera, 116 S. Ct. 1941, 1952 (1996) (outlining traditional districting principles and their relationship to the application of strict scrutiny).

184. The Supreme Court has observed that even single-member districts, when shaped in a strange fashion in order to create racial majorities, promote voter confusion. *See id.* at 974 (determining that "voters 'did not know the candidates running for office' because they did not know which district they lived in").

districts under the current system.[185] Overall, creating slightly fewer, slightly larger congressional districts could clear the way for nontransferable election systems and the benefits that would follow.

Another potential problem with abandoning single-member districting in favor of multi-member districts with a nontransferable election system is that the resulting districts would be several times larger and would contain several times as many constituents.[186] Proponents of single-member districts take the position that the smaller single-member districts facilitate easier access to that district's representative.[187] However, this advantage of single-member districting pales in comparison to the advantages nontransferable election systems offer.

For example, the argument that single-member districting facilitates greater access to representatives overlooks two obvious points. First, because the average size of a congressional district is approximately 570,000 constituents,[188] expecting a significant portion of that district's electorate to know their representative personally under the current system is unrealistic.[189] Second, this argument overlooks the fact that a multi-member districting scheme could actually increase the accessibility of representatives. Under the current system, up to forty-nine percent of the electorate could be without a representative of the same political ideol-

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185. *See id.* (recognizing that, in districts with bizarre shapes, "[c]ampaigners seeking to visit their constituents 'had to carry a map to identify the district lines, because so often the borders would move from block to block'").

186. *See* Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1140 (1998) (noting that proportional election systems result in representatives having an electorate that is much larger than it would be under a single-member districting scheme).

187. *See id.* This concern was the subject of debate during the framing of the Constitution. *See* THE FEDERALIST No. 55, at 372 (James Madison or Alexander Hamilton) (Jacob E. Cooke ed., 1961)). In particular, a great deal of debate surrounded the constitutional requirement that no congressional district was to be comprised of fewer than 30,000 constituents; some feared that this number was too large for the constituents to know their representative and for their representative to understand his constituents' concerns. *See id.* at 375-76.

188. *See* Paul L. McKaskle, *Of Wasted Votes and No Influence: An Essay on Voting Systems in the United States*, 35 HOUS. L. REV. 1119, 1141 n.91 (1998) (calculating that because the 1990 population of the U.S. was 248,718,301 and because the House of Representatives is comprised of 435 members, the "average" congressional district consists of 570,000 constituents).

189. *See id.* at 1141.

ogy.[190] On the other hand, with multi-member nontransferable elections, persons holding a minority political view are more likely to elect a representative who shares their political view and who is more receptive to their concerns.[191] Thus, implementing a nontransferable election system is arguably less problematic and actually more feasible than some allege.

V. IMPLEMENTING NONTRANSFERABLE ELECTION SYSTEMS: A PROPOSAL

A. *Statutory Changes and Commentary*[192]

The proposed statutory changes,[193] which immediately follow, entail: (1) an amendment to the current Section 2c of Title 2 of the United States Code, the single-member districting statute, which would exempt states covered by Section 4 of the VRA; (2) the

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190. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 7 (1994) (stating that under an at-large election system, "[a]s little as 51 percent of the population could decide 100 percent of the elections"); AREND LIJPHART, DEMOCRACIES: PATTERNS OF MAJORITARIAN AND CONSENSUS GOVERNMENTS IN TWENTY-ONE COUNTRIES 150 (1984) (noting that under the single-member districting scheme, voters who supported their representative's opponent remain unrepresented).

191. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 339 (1998) (commenting that proportional representation schemes offer the advantage of giving cohesive electoral minorities a greater ability to elect candidates of their choice); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness As a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 306 (1991) (stating that an advantage to multi-member districting, as opposed to single-member districting, is that voters in multi-member districts have an opportunity to vote for candidates whose views resemble their own).

192. Throughout Part V.A., *italicized text* denotes proposed revisions to the United States Code.

193. This proposal is not the first attempt to implement multi-member districting or proportional representation in congressional elections. House Representative Cynthia McKinney (D-Ga) introduced bills entitled "The Voters' Choice Act" during the 104th and 105th Congresses. *See* H.R. 3068, 105th Cong. (1997); H.R. 2545, 104th Cong. (1995). The bill submitted during the 104th Congress, H.R. 2545, would have given states the option to draw multi-member districts and to implement either limited, cumulative, or preference election systems. *See* H.R. 2545 §2(a). The subsequent bill differed in that it would have allowed states to chose any form of proportional representation meeting certain enumerated criteria. *See* H.R. 3068. Both bills died in committee. Search of Westlaw, US-BILLTRK Database (Mar. 10, 1999); Search of Westlaw, CONG-BILLTXT104 (Mar. 19, 1999). This Article rejects these proposals because they were neither compulsory nor sufficiently detailed to provide states with the guidance and incentive needed to abandon the single-member districting system.

adoption of a new Section 2d to Title 2, which would create multi-member districts and establish nontransferable election systems in Section 4 states; and (3) an amendment to Section 5 of Title 2, which would require the primary elections in Section 4 states to be held also under a nontransferable system. A discussion of each amendment immediately follows the proposed section or group of subsections. Part VII, the Appendix, contains the complete text of the proposal.

In general, the proposed language would abolish single-member districts in covered jurisdictions and replace them with four-member districts, allowing nontransferable voting to occur. Each voter could vote for exactly one of the several candidates for those four offices. The result would be that no majority group would be able to prevent minority voting blocs from electing at least one candidate of their choice in each district.

1. Amendments to 2 U.S.C. § 2c: Composition of Congressional Districts

Under the proposed changes, Section 2c of Title 2 would be amended to read as follows:

> 2 U.S.C. § 2c: Number of Congressional Districts; Number of Representatives from each District.
>
> In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of *subsection (a) of Section 22 of the Act of June 18, 1929, entitled "An Act to provide for apportionment of Representatives" (46 Stat. 26), as amended, except in the case of any State or political subdivision subject to the provisions of section 2d of this title,* there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

The first step toward establishing a nontransferable election system entails relieving Section 4 covered jurisdictions of the century-and-a-half old requirement for single-member congressional districts. The only change necessary for exempting covered jurisdic-

tions from this statute involves inserting an explicit exemption for jurisdictions required to use nontransferable systems under the new Section 2d. Once single-member districts are no longer mandatory in these jurisdictions, nontransferable voting becomes a viable option.

2. Addition of 2 U.S.C. § 2d: Districting and Voting Under Nontransferable Election Systems

A new section, Section 2d, would also need to be added to Title 2 in order to effectuate nontransferable election systems.[194]

a. Definitions

2 U.S.C. § 2d: Districting and Voting Under Nontransferable Election Systems

(a) Definitions. For purposes of this section —

(1) The term "apportioned" shall mean entitled in the One Hundred Sixth Congress or in any subsequent Congress thereafter to an apportionment of Representatives made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled "An Act to provide for apportionment of Representatives" (46 Stat. 26), as amended.

(2) The term "covered jurisdiction" shall mean any State or political subdivision with respect to which the prohibitions set forth in subsection (a) of section 4 of the Act of August 6, 1965, entitled "Voting Rights Act of 1965" (79 Stat. 437), as amended, are in effect.

(3) The term "nontransferable election system" shall mean a method of election in which no voter may cast a number of votes greater than half the number of candidates to be elected or more than one vote for any one candidate, except in electing those Representatives to the House of Representatives of the Congress of the United States in which case the voters may cast only one vote regardless of the number of candidates.

(4) The term "Representative" shall mean Representative to the House of Representatives of the Congress of the United States.

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194. Subheadings a-g that are in Roman type are for the purpose of assisting the reader in locating provisions of the proposal and are not part of the proposed changes.

Because Chapter 1 of Title 2 does not contain a definitional section, this subsection defines four key terms. Generally, the word "apportionment" refers to the number of representatives to which a state is entitled under census figures, but it has not explicitly been defined anywhere in the Code.[195] Thus, this proposal defines "apportioned" in the way that the term is treated in Section 2c to Title 2, but it is updated to reflect the current congressional session.

"Covered jurisdiction" is defined using the same wording as that which the VRA uses to refer to Section 4 jurisdictions.[196] The term "Representative" is defined so that the new nontransferable election system is imposed only on elections for representatives to Congress, excluding elections for senators and any election for state or local officials. "Nontransferable election system" is then defined in a manner similar to the working definition discussed earlier in Part III. Importantly, the definition used is broad enough to allow flexibility in structuring primaries, as exemplified by the proposed amendments to 2 U.S.C. § 5 in Part V.A.3.

b. Multi-Member Districting

(b) Multi-Member Districting.

(1) Prior to December 31, 1999, every covered jurisdiction apportioned two or more Representatives shall have its congressional districts redrawn in accordance with this subsection, after having first complied with the procedures set forth in section 1973c of title 42 of the United States Code for so doing.

(2) A covered jurisdiction apportioned no fewer than two and no more than four Representatives shall elect its Representatives at large.

(3) A covered jurisdiction apportioned a number of Representatives that is both (A) greater than four, and (B) divisible by four without producing a fractional result, shall establish by law exactly one district for every four Representatives appor-

195. Nor is the term "district" defined. However, of the approximately twenty-one other provisions of the Code that use the word "district" to refer to a congressional district, only 2 U.S.C § 2c (the single-member districting section) needs to be amended because none of the other provisions use the word in a context that is inconsistent with multi-member districting.

196. *See* 42 U.S.C. § 1973c (1994) (providing that Section 4 jurisdictions are the same as those covered in Section 5 of the VRA).

tioned to the covered jurisdiction, each district to elect four Representatives.

(4) A covered jurisdiction apportioned a number of Representatives that is (A) greater than four, but (B) not divisible by four without producing a fractional result, shall establish by law as many districts from which four Representatives each are to be elected as the total number of Representatives apportioned to the covered jurisdiction will mathematically permit, and also exactly one district from which the remaining one, two, or three Representatives apportioned to the covered jurisdiction shall be elected.

(5) All elections for Representatives held in districts established under subsections (b)(2), (b)(3), and (b)(4) of this section shall be conducted in accordance with subsection (c) of this section.

The intent of subsection (b) is to delineate the multi-member districting requirement in general terms. First, it provides a December 31, 1999 deadline, which will allow ample time for candidates for the 2000 elections to learn where their districts are and campaign accordingly. Most importantly, under subsection (b)(1), covered jurisdictions are not excused from the usual VRA preclearance requirements, which act as safeguards against both inadvertently retrogressive and invidious racial gerrymanders in drawing their new multi-member districts. Furthermore, only covered jurisdictions that are apportioned more than one representative must comply with this legislation because covered jurisdictions with only one representative, such as Alaska,[197] do not draw districts and are therefore unaffected by *Shaw* and its progeny.[198]

Under subsections (b)(2)-(4), each covered jurisdiction must create as many four-member districts as its congressional apportionment will permit. Any representatives "left over"—a remainder of three, two, or one after the division—are elected in a less populous district. Thus, a state such as North Carolina, which has a congressional apportionment of twelve,[199] would have to draw three dis-

197. *See* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 14 (Edith R. Hornor ed., 1997).

198. *See* 2 U.S.C. § 2c (1994) (providing that the states are to establish a number of districts that is equal to the number of representatives allotted to each state).

199. *See* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 270 (Edith R. Hornor ed., 1997).

tricts, and each would elect four representatives. Alabama, which is currently apportioned seven representatives,[200] would create one four-member district and one three-member district. Subsection (b)(5) requires all congressional elections held in these multi-member districts to be conducted with nontransferable voting as defined in subsection (c).

c. Compliance with *Reynolds v. Sims*

(6) Within each covered jurisdiction, the districts established under subsections (b)(3) and (b)(4) of this section shall consist of proportionately equal whole numbers of persons in each State, excluding Indians not taxed, such that every district from which four Representatives are to be elected shall consist of a number of such persons—

(A) equal to that of every other district from which four Representatives are to be elected, and

(B) one-third greater than that of any district from which three Representatives are to be elected, and

(C) two times greater than that of any district from which two Representatives are to be elected, and

(D) four times greater than that of any district from which one Representative is to be elected.

Subsection (b)(6) requires that all of the districts in a state be equipopulous, that is, consisting of equal numbers of people[201] proportionate to the number of representatives elected in the district. This subsection would therefore merely codify the "one person, one vote" principle established in *Reynolds v. Sims*.[202] In *Reynolds*, the Supreme Court held that the Equal Protection Clause requires legislative districts electing the same number of representatives to contain equal numbers of people so as to prevent any one voter from having more representation than any other.[203] Thus, under this subsection, Virginia, a covered jurisdic-

200. *See id.* at 6.

201. Subsection (b)(5) excludes "Indians not taxed" from this number per constitutional mandate. *See* U.S. CONST. art. I, § 2 (providing the method by which Representatives are apportioned, which includes "adding to the whole number of free persons . . . excluding Indians not taxed, three fifths of all other persons").

202. 377 U.S. 533 (1964).

203. *See* Reynolds v. Sims, 377 U.S. 533, 561-68 (1964); *see also* Karcher v. Daggett, 462 U.S. 725 (1983) (invalidating a districting scheme in which a .06984% population disparity existed among the districts). In *Reynolds*, voters of several Alabama counties

tion apportioned eleven representatives,[204] would create two four-member districts consisting of an equal number of persons and also a third three-member district consisting of only two-thirds the population of either of the other districts.

d. Preclearance and the Deadline for Implementation

(c) Nontransferable election system.

(1) Prior to December 31, 1999, every covered jurisdiction apportioned two or more Representatives shall have restructured its system for the election of Representatives in accordance with this subsection, after having first complied with the procedures set forth in section 1973c of title 42 of the United States Code for so doing, such that all elections for Representatives held in districts established under subsections (b)(2), (b)(3), and (b)(4) of this section shall be conducted in accordance with subsections (c)(2) and (c)(3) of this section.

Subsection (c)(1) imposes both the usual preclearance requirement and a December 31, 1999 deadline for implementing the nontransferable election system, just as subsection (b)(1) did for reformatting the current districts into multi-member districts. The remainder of subsection (c) explains specifically how the nontransferable system is to be designed.

e. Designing the Nontransferable System

(2) During any election for Representatives within a district established under subsection (b) of this section, the ballots or voting

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brought suit against state election officers challenging the way in which votes for the Alabama legislature were apportioned. *See Reynolds*, 377 U.S. at 537. Specifically, the plaintiffs alleged that the apportionment for the legislature was based on the 1900 census, despite a provision in the Alabama Constitution that required decennial reapportionment. *See id.* at 540. The plaintiffs further asserted that, because the population growth among Alabama counties between 1900 and 1960 had been so uneven, several counties had become victims of "serious discrimination with respect to the allocation of legislative representation." *Id.* In holding that the United States District Court for the Middle District of Alabama was correct in ordering a reapportionment of the Alabama legislature, the Supreme Court acknowledged that the Equal Protection Clause guarantees all voters equal participation in their states' elections. *See id.* at 566. The Court concluded that this right is violated when a person's vote becomes "diluted when compared with votes of citizens living in other parts of the State." *Id.* at 568.

204. *See* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 374 (Edith R. Hornor ed., 1997).

> *machines shall list all candidates running for the office of Representative of that district, from which the voter shall be instructed to select exactly one as the voter's preferred candidate. The voter may also abstain, select a write-in candidate, or exercise any other preference option available to the voter under the state law not inconsistent with the provisions of this section.*

Subsection (c)(2) basically requires that the ballots or voting machines[205] list all of the candidates running for each position, and that the voter be instructed to vote for exactly one. The voter may also abstain, select a write-in candidate, choose "none of the above," or indicate any other preference allowed under state law.

> *(3) During any election within a district established under subsections (b)(2), (b)(3), or (b)(4) of this section, the candidates that shall be declared elected are those respectively receiving the greatest number of votes, the second greatest number of votes, the third greatest number of votes, and/or the fourth greatest number of votes such that the number of candidates declared elected equals the number of Representatives to be elected in the district as set forth in subsection (b) of this section.*

Subsection (c)(3) declares that, depending on the district's size, the two, three, or four candidates receiving the most votes are victorious. Limiting the voter to a single vote in a four, three, or two-member district election creates a "minority threshold" of 20, 25, or 33%, respectively.[206] This means that minority voting blocs of at least these sizes will be able to elect a representative.[207] Thus, because most districts created under this legislation would be four-member districts, minorities constituting at least 20% of the population and voting in a bloc will be able to elect at least one candidate of their choice for every four representatives their state is

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205. *See* 2 U.S.C. § 9 (1994) (mandating that "[a]ll votes for Representatives in Congress must be by written or printed ballot, or voting machine the use of which has been duly authorized by the State law"). These machines are already equipped to make multiple voting possible because under the current and proposed election systems alike, the voter has exactly one vote to cast and multiple candidates can run for an office.

206. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems As Voting Rights Remedies*, 33 HARV. C.R.-C.L. L. REV. 333, 340 (1998) (describing the procedure for calculating the threshold of exclusion in limited or nontransferable voting systems).

207. *See id.* (stating that by gaining the threshold number of votes, a minority group can ensure that it will elect at least one candidate).

apportioned.[208] So organized, nontransferable voting will reliably produce minority representatives in jurisdictions covered by Section 4 of the VRA.

f. Response to *Gregory v. Ashcroft*

> *(d) Enforcement.*
> *This section is enacted pursuant to the power of Congress to regulate the Time, Place, and Manner of congressional elections and to enforce the Fourteenth and Fifteenth Amendments to the Constitution of the United States. This section shall for all purposes be considered a statute designed to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, including for the purpose of enforcement by judicial proceeding pursuant to sections 1973a, 1973j, and 1973l of title 42 of the United States Code and related statutes and regulations.*

This provision allows judicial enforcement by specifying that the enactment is what the VRA describes as a statute "to enforce the voting guarantees of the fourteenth or fifteenth amendment"[209] in order to establish standing for any "aggrieved person" challenging a covered jurisdiction's noncompliance.[210] This explicit invocation of federal authority to enact this legislation is also a response to the Supreme Court's holding in *Gregory v. Ashcroft*[211] that "Congress should make its intention 'clear and manifest' if it intends to preempt the historic powers of the States."[212] Because Congress has

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208. This number is approximate because smaller districts—those containing fewer than four representatives—will impose a slightly higher threshold. For example, in a district containing three representatives, a minority faction will have to exceed the minimum threshold of 25% of the votes to be insured of gaining a seat, as opposed to a threshold of 20% in a four-person district. *See supra* note 92. Although smaller districts require a higher minority threshold, they offer the advantage of guaranteeing a higher proportion of representation if that threshold is met. For instance, in a three-person district, a minority candidate whose votes exceeded the 25% threshold will possess 1/3 of the representation of that district, as opposed to 1/4 in a four-person district.

209. 42 U.S.C. § 1973a(c) (1994).

210. *See id.* §§ 1973j, 1973l (authorizing courts to adjudicate VRA claims and to impose criminal and civil sanctions on delinquent jurisdictions).

211. 501 U.S. 452 (1991).

212. *See* Gregory v. Ashcroft, 501 U.S. 452, 461 (1991) (quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). In *Gregory*, the Court resolved an ambiguity in the Age Discrimination Employment Act against the federal government for lack of such a "plain statement." *See id.* at 470.

traditionally deferred its powers to regulate congressional elections to the states,[213] this subsection is designed in a manner such that a court considering how far this legislation was intended to reach will not hesitate to apply it ahead of inconsistent state laws.

g. Standard Clauses

(e) Termination.

Any state or political subdivision which, at any time after restructuring its system for the election of Representatives in accordance with this section, ceases to qualify as a covered jurisdiction, as that term is defined in subsection (a)(2) of this section, shall no longer be subject to the provisions of this section nor excepted from the provisions of section 2c of this title.

Subsection (e) works with the definition of the term "covered jurisdiction" in subsection (a), above, and also with subsection (f)(4), below, to exclude all non-covered jurisdictions and any former-covered jurisdictions released from VRA requirements.[214] A jurisdiction in the latter situation would revert to single-member districting.

(f) Construction.

(1) Nothing in this section impairs the authority of a covered jurisdiction from enacting or enforcing any state or federal legislation not inconsistent with the provisions of this section or the statutes or Constitution of the United States.

(2) Nothing in this section shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision. Nothing in this section shall deprive any person who is a Representative on December 31, 1999, or any earlier date on which the Representative's district was redrawn or the election

213. *See* 2 U.S.C. § 2a(c) (1994) (noting that states are "redistricted in the manner provided by the law thereof after any apportionment"). Other than the districting law, the only federal statutes imposing any specific "time, place, and manner" of congressional elections on states, as Article I, Section 4 allows Congress to do, are Sections 1, 1a, 1b, 7, 8, and 9 of Title 2. *See id.* §§ 1, 7, 8 (specifying the dates that representative, senatorial, and vacancy elections are to be held); *id.* § 9 (requiring voting by paper ballot or voting machine); *id.* §§ 1a, 1b (requiring certification of senatorial victories by the governor and secretary of state).

214. *See* 42 U.S.C. § 1973k (1994) (establishing judicial termination procedures for states able to demonstrate that their laws no longer threaten minority voting rights).

procedures therein restructured to comply with the provisions of this section, the right to remain as a Representative until the expiration of such person's term.

(3) Nothing in this section supersedes, restricts, or limits the application of, or requires conduct prohibited by, the Act of August 6, 1965, entitled "Voting Rights Act of 1965" (79 Stat. 437), as amended.

(4) Nothing in this section shall be construed to require, authorize, or condone multi-member districting, at-large elections, or nontransferable election systems for the election of Representatives in any state or political subdivision which is not both a covered jurisdiction and apportioned two or more Representatives. Nothing in this section shall be construed to require or prohibit multi-member districting, at-large elections, or nontransferable election systems for the election of any local, state, or federal officer not a Representative as that term is defined in subsection (a)(4) of this section.

The provisions of this subsection explain how the enactment is to be judicially interpreted in order to ensure that the rights of state legislatures, individual voters, and current officeholders are not adversely affected. Under subsection (f)(1), states retain the authority to enact all peripheral legislation necessary to effectuate this new system. Subsection (f)(2) makes clear that individual voting rights are not to be diminished, and that representatives in office at the time of the redistricting maintain their offices. Subsection (f)(3) specifies that this legislation in no way limits or affects the VRA. Subsection (f)(4) stresses the narrowness of the legislation: only elections for congressional representatives are affected, and all other federal, state, and local multi-member districting is not required, prohibited, or condoned.

(g) Appropriations.

There are hereby authorized to be such sums as are necessary to carry out the provisions of this Act.

(h) Severability.

If any provision of this Act, or the application thereof, is held invalid, the validity of the remainder of this Act and the applications of such provision to other persons and circumstances shall not be affected thereby.

(i) Effective date.
This section shall take effect on the date of its enactment. Nothing in this section affects any rights or duties that matured, penalties that were incurred, or proceedings that were begun before its effective date.

The appropriations, severability, and effective date provisions are standard clauses.[215] Specifically the proposed legislation provides that it is to go into immediate effect after passage in order to allow covered jurisdictions ample time to implement the new system prior to the December 31, 1999 deadline.

3. Amendments to 2 U.S.C. § 5: Primary Elections

Finally, the nominations for representatives in Section 4 jurisdictions would also need to be conducted under nontransferable election systems. The current Title 2, Section 5 states simply that nominations for representative in a state conducting at-large elections are to be held in the same manner as gubernatorial elections unless the state's laws prescribe otherwise.[216] However, the proposals above would be gutted if minority candidates could not win in the primaries due to the old winner-take-all election formats.[217] Covered jurisdictions should, therefore, be exempted from the Section's general rule and instead required to hold primaries under nontransferable election systems.

Thus, Section 5 would be amended as follows:

2 U.S.C. § 5: Nominations for Representatives at large; *Nominations for Representatives in Multi-member Districts.*

(1) Candidates for Representative or Representatives to be elected at large in any State, except in the case of any state or political subdivision subject to the provisions of section 2d of this title,

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215. *See, e.g.*, 5 U.S.C. § 584 (Supp. II 1996) (authorizing appropriations for Subchapter IV of Title 5, Section 5 of the United States Code, which deals with alternative means of dispute resolution in the Administrative Procedures Act); 5 U.S.C. § 5344 (1994) (providing the effective date for a government pay raise); 7 U.S.C. § 2582 (1994) (providing for the severability of any provision in Chapter 57 of Title 7, which deals with plant variety protection).

216. *See* 2 U.S.C. § 5 (1994).

217. *See* Note, *Alternative Voting Systems As Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 148 n.25 (1982) (noting that if limited voting is not applied to the nominating process as well, a majority could potentially fill all the open seats).

shall be nominated in the same manner as candidates for governor, unless otherwise provided by the laws of such State.

(2) Candidates for Representative or Representatives to be elected in any multi-member district in any State or political subdivision subject to the provisions of section 2d of this title shall be nominated under a nontransferable election system as that term is defined in subsection (a)(4) of section 2d of this title.

The proposed additions to Section 5 allow covered jurisdictions to hold primaries under nontransferable election systems, but they do not go into further detail about how to conduct those primary elections. This omission is intended to allow flexibility on the part of states and political parties to design their primaries as appropriate for their own individual situations. Because a "nontransferable election system" is broadly defined to allow multiple votes not beyond half the number of candidates to be elected, each party's primary can nominate enough candidates to run for the seats open in the district. For example, in the typical four-member district, each major political party would probably want to elect four or more nominees to compete for the four seats.[218] The state would not be bound to allowing each voter only a single vote in such a primary, unlike the general election itself as provided in 2 U.S.C. § 2d(c)(2), but the state would still be required to preclear the adopted procedures with the Attorney General to ensure against minority vote abridgment. As a consequence, the primary elections would also produce a fair number of minority candidates without having to draw majority-minority districts in order to do so.

As demonstrated, the legislative changes to Title 2 of the United State Code proposed herein would free jurisdictions covered by Section 4 of the VRA of the burden of single-member districting so as to permit nontransferable primary and congressional elections. The practical effect of this proposed legislation is discussed below.

B. *Nontransferable Voting in Action and the Need for Change*

The implementation of a nontransferable election system, as proposed, would reliably produce integrated congressional delegations

218. The state could also specify a maximum number of candidates any party could nominate. *See, e.g.*, Lobsenz v. Davidoff, 182 Conn. 111, 118-19 (1980); Coon v. Allegheny Bd. of Electors, 488 Pa. 977, 1000-01 (1980). *See generally* 26 AM. JUR. 2D *Elections* § 209 (1996).

for southern states. The state of Louisiana provides a good example. In the year 2000, Louisiana's population is projected to be 36.29% non-white[219] and represented by seven representatives in the U.S. House of Representatives.[220] Under subsection (b) of the proposed legislation, these representatives would be elected from one four-member district and one three-member district. Assuming the minority population is somewhat evenly-dispersed throughout the state and votes relatively cohesively,[221] each district will elect one minority candidate because minority voters will exceed the thresholds (20% and 25% respectively)[222] in each district. Thus, the state's seven-member delegation would include two minority representatives, without any need for majority-minority districting.

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219. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 38 (118th ed. 1998) (projecting the non-white population in Louisiana to be 1.649 million in the year 2000 along with a white population of 2.895 million).

220. *See* ALMANAC OF THE 50 STATES: BASIC DATA PROFILES WITH COMPARATIVE TABLES 150 (Edith R. Hornor ed., 1997).

221. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral As Voting Rights Remedies*, 33 HARV. C.R.-C.L.L. REV. 333, 370 (1998) (emphasizing the importance of voter cohesion in order to attain a "potential to elect"). Yet, even if the 39.5% minority population is not evenly dispersed, non-white voters might still be able to elect two of the seven candidates. If the minority population is concentrated in one of the two multi-member districts, the percentage of minorities in that district would be greater than the percentage of minorities statewide. Therefore, the district with the concentrated minority population would have the opportunity to elect two minority candidates so long as the minority population constituted a percentage of the population that exceeded twice the threshold of exclusion percentage.

For example, in a four-member district in which each voter casts one vote, the threshold of exclusion is 20% using the formula discussed *supra* in note 92. For such a district, the formula is (1)/(1) + 4, which equals 1/5, or .20. If the minority population constituted a percentage of the population greater than 40%, non-minority voters would constitute less than 60% of the electorate. Therefore, non-minority voters would be assured of electing *only* two candidates because they could not exceed three times the 20% threshold of exclusion, which is necessary to elect three candidates.

222. These percentages are arrived at by using the formula discussed *supra* in note 92. Under the proposed statutory amendments, each voter is allowed one vote, regardless of how many seats are up for election. *See supra* Part V.A.2.a. Therefore, for a four-member district, the formula is (1) / (1) + (4), which equals 1/5, or 20%. For a three-member district, the formula is (1) / (1) + (3), which equals 1/4, or 25%.

Similarly, Georgia's projected 30.95% minority population[223] could also elect two representatives of its seven, and Mississippi's projected 36.90%[224] could elect four representatives of its sixteen. Across the nation, states and municipalities covered by Section 4 of the VRA could avoid the *Shaw* problem simply by adopting nontransferable voting systems that render majority-minority districting wholly unnecessary. At the same time, the primary objectives of the VRA would be advanced like never before possible, and minority voters would be empowered to elect candidates of their choice and witness the true power of their voting strength.

As demonstrated by these examples, proposed changes to the statute would, by establishing nontransferable election systems, maximize the number of racial minorities elected to Congress from jurisdictions covered by Section 4 of the Voting Rights Act. In order to do so, Congress must exercise its constitutional powers both to enforce the provisions of the Fifteenth Amendment and to control congressional elections by freeing these jurisdictions from procedures forcing them to use racial considerations in drawing congressional districts.[225] Congressional action is particularly necessary because the Supreme Court has unequivocally forbidden, in a series of decisions over the past six years, the use of racial considerations in drawing district lines.[226] Right or wrong, as a matter of constitutional interpretation, these decisions place southern states in an intolerable position in the face of the year 2000 census. Once new redistricting plans are implemented to accommodate the change in population, these states risk either denial of preclearance under the VRA for failing to produce minority congressional delegations or invalidation of their districting plans under the Equal Protection Clause. In sum, these jurisdictions ought not to be forced to navigate between the Scylla of the VRA and the Charybdis of the Fourteenth Amendment.

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223. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 37-38 (118th ed. 1998) (projecting the population in Georgia to be comprised of 2.627 million non-whites and 5.436 million whites in the year 2000).

224. *See id.* (projecting the population in Mississippi to be comprised of 1.06 million non-whites and 1.774 million whites in the year 2000).

225. *See supra* Part IV.

226. *See supra* Part II.B.

VI. CONCLUSION

This Article proposes amending federal law to impose multi-member districting and nontransferable election systems in jurisdictions covered by the VRA. Nontransferable election systems offer a solution to the intolerable dilemma that covered jurisdictions currently face. These systems permit voters to district themselves along any criteria they deem important—racial or otherwise—without fear of losing everything to a fifty-one percent majority in the current winner-take-all system. Not only will this proposed method of election pass constitutional muster, but it will also preserve and enhance the ability of minorities to elect representatives of their choice in such a way as to more accurately reflect their voting strength. In addition, nontransferable voting would likely re-energize the political process by increasing minority participation and representation. More importantly, the United States will be able to keep the Fifteenth Amendment's promise that no American will ever again be excluded from political participation on the basis of race.

APPENDIX: PROPOSED STATUTORY MODIFICATIONS

Italicized text denotes the proposed revisions or additions to the United States Code.

2 U.S.C. § 2c: Number of Congressional Districts; Number of Representatives from each District.

In each State entitled in the Ninety-first Congress or in any subsequent Congress thereafter to more than one Representative under an apportionment made pursuant to the provisions of *subsection (a) of Section 22 of the Act of June 18, 1929, entitled "An Act to provide for apportionment of Representatives" (46 Stat. 26), as amended, except in the case of any State or political subdivision subject to the provisions of section 2d of this title,* there shall be established by law a number of districts equal to the number of Representatives to which such State is so entitled, and Representatives shall be elected only from districts so established, no district to elect more than one Representative (except that a State which is entitled to more than one Representative and which has in all previous elections elected its Representatives at Large may elect its Representatives at Large to the Ninety-first Congress).

2 U.S.C. § 2d: Districting and Voting Under Nontransferable Election Systems

(a) Definitions. For purposes of this section—

(1) The term "apportioned" shall mean entitled in the One Hundred Sixth Congress or in any subsequent Congress thereafter to an apportionment of Representatives made pursuant to the provisions of subsection (a) of section 22 of the Act of June 18, 1929, entitled "An Act to provide for apportionment of Representatives" (46 Stat. 26), as amended.

(2) The term "covered jurisdiction" shall mean any State or political subdivision with respect to which the prohibitions set forth in subsection (a) of section 4 of the Act of August 6, 1965, entitled "Voting Rights Act of 1965" (79 Stat. 437), as amended, are in effect.

(3) The term "nontransferable election system" shall mean a method of election in which no voter may cast a number of votes greater than half the number of candidates to be

elected or more than one vote for any one candidate, except in electing those Representatives to the House of Representatives of the Congress of the United States in which case the voter may cast only one vote regardless of the number of candidates.

(4) The term "Representative" shall mean Representative to the House of Representatives of the Congress of the United States.

(b) Multi-member districting.

(1) Prior to December 31, 1999, every covered jurisdiction apportioned two or more Representatives shall have its congressional districts redrawn in accordance with this subsection, after having first complied with the procedures set forth in section 1973c of title 42 of the United States Code for so doing.

(2) A covered jurisdiction apportioned no fewer than two and no more than four Representatives shall elect its Representatives at large.

(3) A covered jurisdiction apportioned a number of Representatives that is both (A) greater than four, and (B) divisible by four without producing a fractional result, shall establish by law exactly one district for every four Representatives apportioned to the covered jurisdiction, each district to elect four Representatives.

(4) A covered jurisdiction apportioned a number of Representatives that is (A) greater than four, but (B) not divisible by four without producing a fractional result, shall establish by law as many districts from which four Representatives each are to be elected as the total number of Representatives apportioned to the covered jurisdiction will mathematically permit, and also exactly one district from which the remaining one, two, or three Representatives apportioned to the covered jurisdiction shall be elected.

(5) All elections for Representatives held in districts established under subsections (b)(2), (b)(3), and (b)(4) of this section shall be conducted in accordance with subsection (c) of this section.

(6) Within each covered jurisdiction, the districts established under subsections (b)(3) and (b)(4) of this section shall consist of proportionately equal whole numbers of persons in each State, excluding Indians not taxed, such that every district from which four Representatives are to be elected shall consist of a number of such persons–

(A) equal to that of every other district from which four Representatives are to be elected, and

(B) one-third greater than that of any district from which three Representatives are to be elected, and

(C) two times greater than that of any district from which two Representatives are to be elected, and

(D) four times greater than that of any district from which one Representative is to be elected.

(c) Nontransferable election system.

(1) Prior to December 31, 1999, every covered jurisdiction apportioned two or more Representatives shall have restructured its system for the election of Representatives in accordance with this subsection, after having first complied with the procedures set forth in section 1973c of title 42 of the United States Code for so doing, such that all elections for Representatives held in districts established under subsections (b)(2), (b)(3), and (b)(4) of this section shall be conducted in accordance with subsections (c)(2) and (c)(3) of this section.

(2) During any election for Representatives within a district established under subsection (b) of this section, the ballots or voting machines shall list all candidates running for the office of Representative of that district, from which the voter shall be instructed to select exactly one as the voter's preferred candidate. The voter may also abstain, select a write-in candidate, or exercise any other preference option available to the voter under the state law not inconsistent with the provisions of this section.

(3) During any election within a district established under subsections (b)(2), (b)(3), or (b)(4) of this section, the candidates that shall be declared elected are those re-

spectively receiving the greatest number of votes, the second greatest number of votes, the third greatest number of votes, and/or the fourth greatest number of votes such that the number of candidates declared elected equals the number of Representatives to be elected in the district as set forth in subsection (b) of this section.

(d) Enforcement.

This section is enacted pursuant to the power of Congress to regulate the Time, Place, and Manner of congressional elections and to enforce the Fourteenth and Fifteenth Amendments to the Constitution of the United States. This section shall for all purposes be considered a statute designed to enforce the voting guarantees of the Fourteenth and Fifteenth Amendments to the Constitution of the United States, including for the purpose of enforcement by judicial proceeding pursuant to sections 1973a, 1973j, and 1973l of title 42 of the United States Code and related statutes and regulations.

(e) Termination.

Any state or political subdivision which, at any time after restructuring its system for the election of Representatives in accordance with this section, ceases to qualify as a covered jurisdiction, as that term is defined in subsection (a)(2) of this section, shall no longer be subject to the provisions of this section nor excepted from the provisions of section 2c of this title.

(f) Construction.

(1) Nothing in this section impairs the authority of a covered jurisdiction from enacting or enforcing any state or federal legislation not inconsistent with the provisions of this section or the statutes or Constitution of the United States.

(2) Nothing in this section shall be construed to deny, impair, or otherwise adversely affect the right to vote of any person registered to vote under the law of any State or political subdivision. Nothing in this section shall deprive any person who is a Representative on December 31, 1999, or any earlier date on which the Repre-

sentative's district was redrawn or the election procedures therein restructured to comply with the provisions of this section, the right to remain as a Representative until the expiration of such person's term.

(3) Nothing in this section supersedes, restricts, or limits the application of, or requires conduct prohibited by, the Act of August 6, 1965, entitled "Voting Rights Act of 1965" (79 Stat. 437), as amended.

(4) Nothing in this section shall be construed to require, authorize, or condone multi-member districting, at-large elections, or nontransferable election systems for the election of Representatives in any state or political subdivision which is not both a covered jurisdiction and apportioned two or more Representatives. Nothing in this section shall be construed to require or prohibit multi-member districting, at-large elections, or nontransferable election systems for the election of any local, state, or federal officer not a Representative as that term is defined in subsection (a)(4) of this section.

(g) Appropriations.
There are hereby authorized to be such sums as are necessary to carry out the provisions of this Act.

(h) Severability.
If any provision of this Act, or the application thereof, is held invalid, the validity of the remainder of this Act and the application of such provision to other persons and circumstances shall not be affected thereby.

(i) Effective date.
This section shall take effect on the date of its enactment. Nothing in this section affects any rights or duties that matured, penalties that were incurred, or proceedings that were begun before its effective date.

2 U.S.C.§ 5: Nominations for Representatives at Large; *Nominations for Representatives in Multi-member Districts.*

(1) Candidates for Representative or Representatives to be elected at large in any State, except in the case of any State or political subdivision subject to the provisions of section 2d of this title, shall be nominated in the

same manner as candidates for governor, unless otherwise provided by the laws of such State.

(2) Candidates for Representative or Representatives to be elected in any multi-member district in any State or political subdivision subject to the provisions of section 2d of this title shall be nominated under nontransferable elections system as that term is defined in subsection(a)(4) of section 2d of this title.