Proportional Representation and the Voting Rights Act

Assessing challenges, remedies, and reforms at the federal and state levels.

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Introduction

THE VOTING RIGHTS ACT (VRA) of 1965 remains a core legal tool for preventing racial discrimination in voting. Proportional representation (PR) offers an additional mechanism for ensuring the fair representation of minority communities, yet some suggest it may be subject to challenges under the VRA. This report addresses a series of issues related to PR and the VRA, explaining that the two are, in fact, compatible and that PR might be adopted more widely as a remedy under both the VRA and state VRAs when other systems are found to be unlawful.

First, the report provides background information about these topics. In particular, PR can refer to either a certain kind of electoral system or rough equivalence between a group's share of votes in a jurisdiction and its share of legislative seats. Second, the report discusses the legal vulnerability of PR systems under the VRA. In most cases — when these systems are working as expected — they create little risk of VRA liability because they represent minority voters at least as well as (often better than) single-member districts plausibly could. Third, the report comments on PR systems as potential remedies for VRA violations. PR systems (including related semi-PR approaches) have been adopted to cure racial vote dilution dozens of times — typically through settlements, and occasionally at the request of defendants.

Fourth, the report explores the emerging role of PR systems under state voting rights acts (SVRAs). Certain SVRAs explicitly or implicitly contemplate conversion to PR or semi-PR systems to remedy statutory violations. Certain SVRAs also abandon deference to defendants with respect to choices among remedies — a feature of VRA doctrine that has sometimes prevented the adoption of PR systems. Lastly, the report identifies potential federal and state reforms that could facilitate wider conversion to PR systems through voting rights litigation. Federally, the VRA could recognize these systems as available remedies and drop the requirement that minority populations be geographically compact. At the state level, SVRAs could not merely acknowledge the availability of these systems but also favor or even mandate their use over other options.

Background

PROPORTIONAL REPRESENTATION HAS two distinct meanings, both of which intersect with the Voting Rights Act in important ways. The first is a certain kind of *electoral system* — specifically, one in which multiple legislators are elected from a single electoral unit, through not a plurality rule but rather another approach that tends to result in a group's seat share coming close to its vote share. There are four general categories of PR systems: open-list, closed-list, mixed-member and proportional ranked choice voting.[1] Under either open- or closed-list PR, each party prepares a slate of candidates from which a certain number are elected depending on the party's electoral performance. The order of this candidate slate is set by the party itself under closed-list PR and by voters (who get to cast a ballot not just for a party but also for a candidate) under open-list PR.[2] Under mixed-member PR, single-member districts are combined with compensatory top-up seats, which are allocated among parties to ensure that their seat shares correspond to their vote shares.[3] And under proportional ranked choice voting, voters rank candidates from most to least preferred, and these rankings are then used to elect as many candidates as there are seats.

In the United States, jurisdictions have experimented with both proportional ranked choice voting and two *semi-PR* systems: cumulative voting and limited voting. Under cumulative voting, voters have as many votes as there are seats, which voters can allocate as they please among candidates. Under limited voting, voters vote for fewer candidates than there are seats (sometimes just one candidate). The reason cumulative and limited voting are called semi-PR systems is that they rely on voter and candidate coordination and can produce worse than proportional outcomes if voters or candidates act suboptimally. In contrast, true PR systems are more robust to varying voter and candidate behavior.[4] For the sake of brevity, all subsequent references to PR systems in this report include semi-PR systems unless otherwise stated.[5]

The second meaning of PR is a certain kind of *relationship* — namely, a proportional relationship — between the votes received and the seats won by a group's candidates. A group here can be any meaningful political entity: a political party; a racial or ethnic minority; a religious denomination; a professional organization; and so on. PR systems like the ones described above are designed to produce seat-vote proportionality in many circumstances.[6] Seat-vote proportionality can also (but certainly need not) arise from single-member districts, with winners determined by a plurality rule. When the Supreme Court refers to PR, it usually means PR in this seat-vote sense. In its 2019 decision holding that partisan gerrymandering is nonjusticiable, for example, the Court defined "proportional representation" as "'allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.'"[7]

Both forms of PR play roles in litigation under Section 2 of the VRA, the statute's core operative provision. To prevail in a racial vote dilution suit under Section 2, a plaintiff must first satisfy the

three prongs set forth by the Supreme Court in the 1986 case of *Thornburg v. Gingles*. It must be possible to create an additional, reasonably compact majority-minority district; minority voters must be politically cohesive; and white bloc voting must exist, too.[8] If all three *Gingles* prongs are satisfied, a court proceeds to analyze the totality of circumstances. Most of the relevant circumstances are identified by the Senate report that accompanied the 1982 amendments, and focus on historical and ongoing racial discrimination as well as the particular features of the challenged electoral system.[9]

Some of the text of Section 2 is also pertinent at the totality-of-circumstances stage, and implicates PR in the seat-vote sense. "The extent to which [minority] members...have been elected to office...is one circumstance which may be considered," the provision states.[10] The prior electoral failure of minority candidates therefore weighs in favor of liability, while their prior electoral success cuts the other way. Section 2 adds that "nothing in this section establishes a right to have [minority] members...elected in numbers equal to their proportion in the population."[11] Section 2 thus does not *require* minority representation in proportion to the minority share of the population. But PR in the seat-vote sense does not *violate* Section 2 either, meaning the provision is not offended ipso facto by an electoral system that results in proportional minority representation.

Building on this statutory language, in the 1994 case of *Johnson v. De Grandy*, the Supreme Court recognized as a relevant factor at the totality-of-circumstances stage the extent to which existing minority representation diverges from proportional minority representation. Unlike the text of Section 2, the Court in *De Grandy* conceived of minority representation as the share of *districts* that are *minority-opportunity districts*, not the share of *legislators* who are *minority legislators*. As the Court pointed out, this "concept is distinct from the subject of the proportional representation clause of § 2," because that clause "speaks to the success of minority *candidates* as distinct from the political or electoral power of minority *voters*."[12] Understood this way, "as the relationship between the number of [minority-opportunity] districts and the minority group's share of the relevant population," proportionality "is *always* relevant evidence in determining vote dilution, but is *never* itself dispositive."[13] Specifically, "[l]ack of proportionality is probative evidence of

> "The Supreme Court recognized as a relevant factor...the extent to which existing minority representation diverges from proportional minority representation.

vote dilution," while "the presence of proportionality [suggests] the absence of dilution."[14]

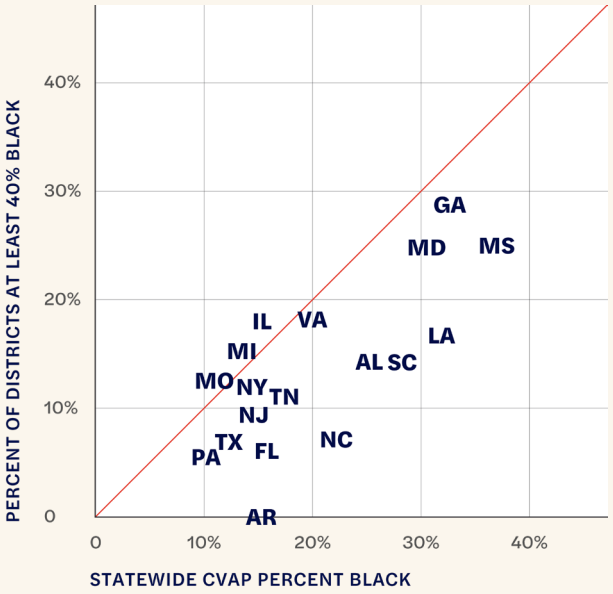
In the nearly three decades since *De Grandy*, this proportionality factor has pushed modestly toward proportional minority representation. Other parts of the *Gingles* framework, however, have pushed more forcefully in the opposite direction. Most significantly, many minority populations are too geographically dispersed to be able to elect their preferred candidates in a proportional share of reasonably compact districts.[15] Additionally, there is insufficient racial polarization in voting in some parts of the country (especially outside the South) to satisfy *Gingles*'s second and third prongs.[16] As a result, as the charts on the following page indicate, minority voters remain disproportionately underrepresented in almost all states. The charts plot the share of districts that are more than 40 percent Black or Hispanic (a reasonable threshold for minority-opportunity district status) versus the share of the citizen voting age population that is Black or Hispanic. At both the congressional and state legislative levels, almost all states fall below the 45-degree line that denotes proportional minority representation.[17]

Accordingly, PR in the seat-vote sense is part of Section 2 doctrine itself. Disproportional minority underrepresentation supports (but does not compel) liability, while proportional minority representation is probative (but not dispositive) evidence that the provision has not been violated. In contrast, PR in the institutional sense has no place in the doctrinal analysis but can still be involved in Section 2 litigation in two ways: First, PR systems can be challenged on the grounds that they infringe Section 2 by providing minority voters with insufficient representation. Second, PR systems are available as remedies after racial vote dilution has been established. The next two sections consider, in turn, PR systems as potentially unlawful and as potentially remedial.

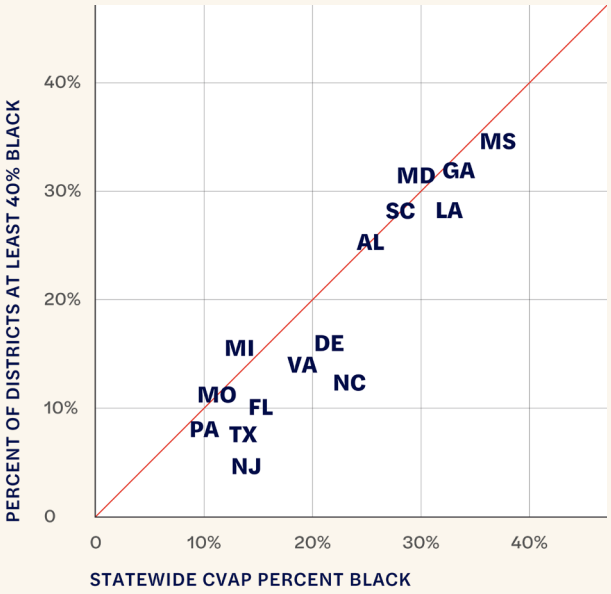
Relative Racial Representation

Source: *Districts for a New Decade — Partisan Outcomes and Racial Representation in the 2021-22 Redistricting Cycle* (See endnote 17).

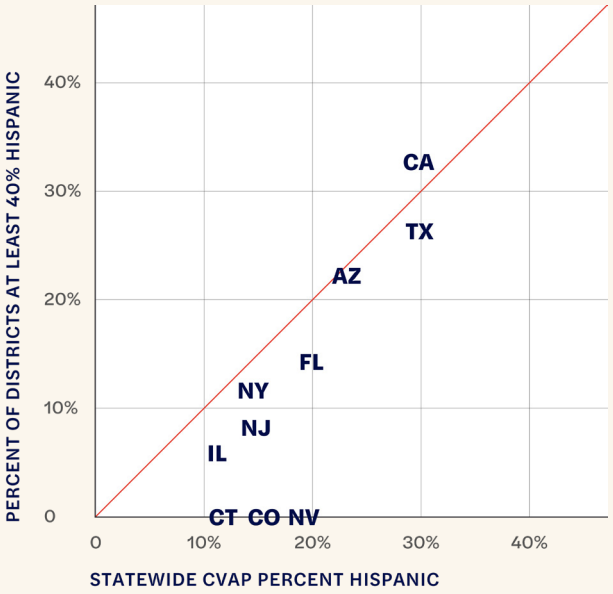
Relative Black Representation in the U.S. House of Representatives



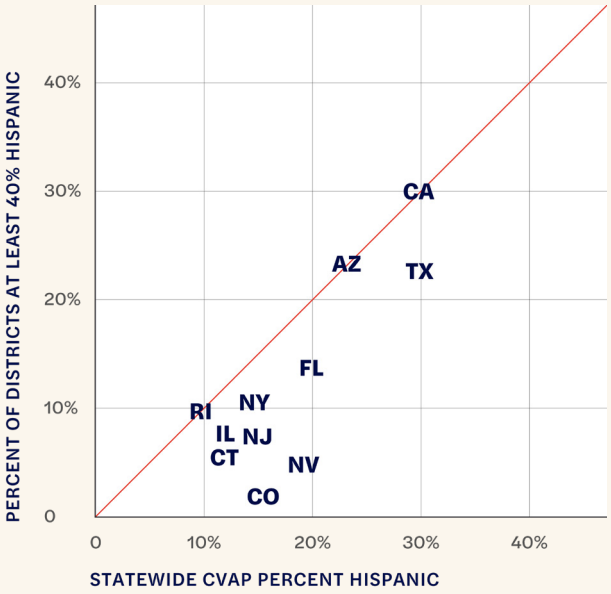
Relative Black Representation in State Legislatures



Relative Hispanic Representation in the U.S. House of Representatives



Relative Hispanic Representation in State Legislatures



Challenges to Proportional Representation Systems

TO DATE, TO MY KNOWLEDGE, no PR system has been challenged in court as a violation of Section 2. Certainly no such suit (if any exists) has succeeded. Nor would a future Section 2 attack on a PR system be likely to prevail — though the prospect cannot be entirely dismissed. To see why a claim like this would probably fail, it is worth marching through the elements of Section 2 doctrine. A claim like this would probably founder on *Gingles*'s first prong and/or the proportionality factor recognized by *De Grandy*.

In a conventional dispute over an at-large electoral system[18] or a single-member-district plan, to satisfy *Gingles*'s first prong, a plaintiff must prove that an additional, reasonably compact majority-minority district can be constructed. The typical at-large electoral system targeted by a Section 2 suit results in no minority representation at all. So in this kind of case, it is usually enough for a plaintiff to show that a single, reasonably compact majority-minority district can be created.[19] On the other hand, many single member district plans that are the subjects of Section 2 claims (especially in modern times) already include one or more reasonably compact minority opportunity districts. So here, a plaintiff must demonstrate that at least one extra reasonably compact majority-minority district can be drawn.[20]

Applying these principles to a challenge to a PR system, a plaintiff would likely[21] have to prove that the number of reasonably compact majority-minority districts that can be constructed *exceeds* the number of seats that minority-preferred candidates generally win under the PR system. In other words, a plaintiff would likely have to prove that single-member districts could yield *greater* minority representation than that already attained through the PR system. Suppose, for instance, that minority-preferred candidates generally win two of five seats under a PR system. Then to satisfy *Gingles*'s first prong, a plaintiff attacking this system would likely have to show that at least three reasonably compact majority-minority districts can be created.

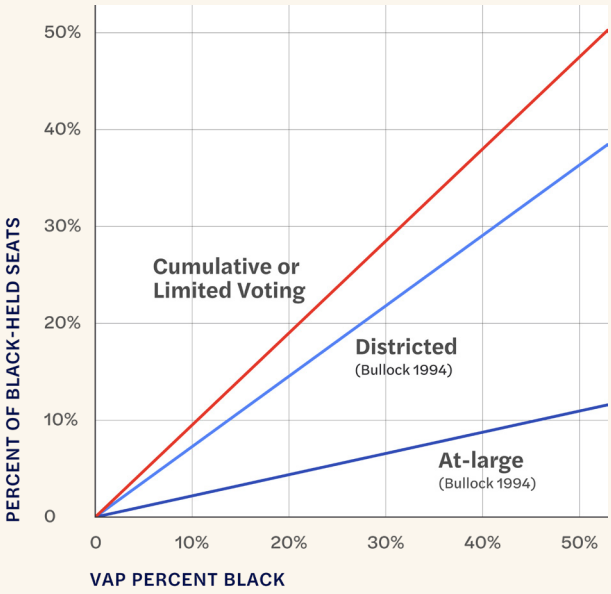
However, a plaintiff would often be unable to make this showing. Often, that is, it would not be feasible to draw a number of reasonably compact majority-minority districts that exceeds the number of seats that minority-preferred candidates generally win under the challenged PR system. Why not? Because minority-preferred candidates typically win *more* seats under PR than under single-member districts. Consequently, in the usual case, it is difficult or impossible to design single-member districts that provide greater representation to minority voters than does PR. Put another way, PR systems are designed to provide proportional representation to all groups, including minority groups. In contrast, single-member districts are notorious for overrepresenting majority groups and underrepresenting minority groups. These properties of single-member districts make it unlikely (though not impossible) that they could improve on PR from the perspective of minority representation.

The chart below, drawn from work by Shaun Bowler, Todd Donovan and David Brockington on cumulative and limited voting, makes this point with respect to these electoral systems. The chart shows how the share of seats won by Black candidates in southern localities in the 1990s relates to the Black share of the voting-age population in these jurisdictions. The dark blue line plots this relationship for at-large electoral systems; the light blue line for single-member districts; and the red line for cumulative and limited voting. Crucially, the line for cumulative and limited voting is above the other two lines. In the typical southern locality, Black voters elect more Black representatives under cumulative and limited voting than they do under single-member districts (let alone at-large electoral systems).[22] Improving on the minority representation enabled by cumulative and limited voting, using single-member districts, would therefore be an uphill battle. Doing so would require pushing a nonproportional electoral system (single-member districts) to beat the performance of semi-proportional electoral systems (cumulative and limited voting).

The same is true with respect to proportional ranked choice voting. Using computer-generated district maps and several models of voter behavior, the MGGG Redistricting Lab estimated the minority representation that would likely arise if single-member congressional districts were replaced by three- or five-member congressional districts using proportional ranked choice voting. These estimates are displayed as blue circles in

Relative Representation Under Different Systems

Seats-Population Relationship, Small Southern Places



Single-member districts are notorious for overrepresenting majority groups and underrepresenting minority groups.

Source: *Electoral Reform and Minority Representation 101* (See endnote 22)

the figure on page 11, with larger circles indicating more frequent outcomes. For comparison, the figures also show the minority voting-age population in each state (the yellow squares) and the current representation by minority U.S. House members in each state (the red dots).[23] The figures confirm that minority voters are currently underrepresented in most states, as the red dots are usually to the left of the yellow squares. More relevant here, the figures also demonstrate that proportional ranked choice voting would almost always result in *greater* minority representation compared to single-member districts. The blue circles denoting the likely outcomes under proportional ranked choice voting are almost always to the right of the red dots.[24] So again, improving on the minority representation made possible by proportional ranked choice voting, using single-member districts, would frequently be infeasible. At present, at least, single-member districts almost always fall short of proportional ranked choice voting in this regard.

Other forms of true PR, though not yet implemented in the United States, are also superior to single-member districts in terms of minority representation based on their record abroad. In 17 countries using a form of list PR, 21 minority groups are overrepresented relative to their population share, while only 13 are underrepresented. On the other hand, in eight countries using single-member districts, about the same number of minority groups are overrepresented (nine) as are underrepresented (eight).[25] Additionally, open-list PR systems where voters cast a single vote for a candidate are at least as beneficial for minority representation as limited voting systems where voters cast a single vote.[26] More generally, the international literature on minority representation in ethnically divided countries shows that nonproportional systems such as single-member districts fare worse than list PR systems.[27] As a particularly compelling example, indigenous Maori populations in New Zealand had a small number of set-aside seats when the country elected its parliament exclusively through single-member districts, but never earned more than seven percent of total seats.[28] After the country adopted mixed-member PR, however, the Maori seat share immediately jumped to 13 percent and rose again in the following years. Today, most Maori representation comes not from set-aside seats but rather from list seats from parties courting the Maori vote.[29] Context matters, of course, but the international evidence strongly suggests that list or mixed-member PR, although untried in the United States, would be at least as effective for minority representation as the PR and semi-PR methods that have been used to date.

This is not to say, however, that a plaintiff attacking a PR system could never satisfy *Gingles*'s first prong. In at least some circumstances — potentially after great effort — a plaintiff might be able to draw a number of reasonably compact majority-minority districts that exceeds the number of seats that minority-preferred candidates generally win under the PR system. In that case, the suit would advance to *Gingles*'s second and third prongs. These prongs would pose no particular difficulty for a plaintiff attacking a PR system, since that system's use has no obvious relation to the extent of racial polarization in voting. Assuming the prongs could be satisfied, the suit would then progress to the totality-of-circumstances stage, beginning with the factors identified by the 1982 Senate report. Establishing these factors also would not be especially onerous for a plaintiff attacking a PR system, since that system's use has no clear connection to historical and ongoing racial discrimination (the focus of the factors).[30] So assume the factors could be shown as well.

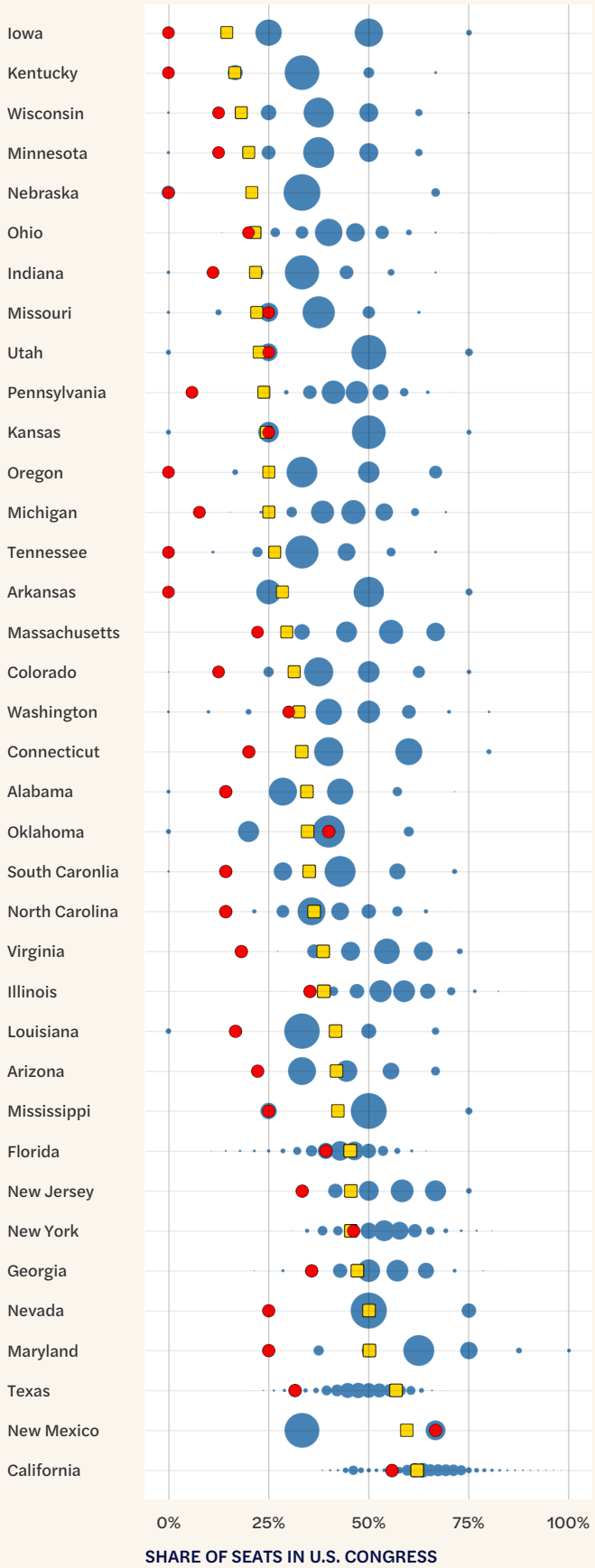
At this point, the suit would reach *De Grandy*'s proportionality factor — the issue that would typically sink the suit (if it even made it this far). Return to the two figures about the minority

Projecting Racial Representation Under Proportional Representation

Simulations using random districts and varied voting scenarios for the 37 states with at least three U.S. House members show that proportional ranked choice voting would almost always result in greater minority representation compared to single-member districts.

Source: *Modeling the Fair Representation Act* (See endnote 24)

- Current POC percent of Congressional seats
- Current POC percent of voting age population
- Size of blue circle indicates frequency of result



representation provided by cumulative, limited and proportional ranked choice voting. These levels of minority representation tend to be higher than those associated with single-member districts. This is why it would be hard for a plaintiff challenging a PR system to satisfy *Gingles*'s first prong. Additionally, the levels of minority representation provided by cumulative, limited and proportional ranked choice voting tend to be close to proportional representation. In the first figure, the line indicating the relationship between Black representation and Black population under cumulative and limited voting is almost indistinguishable from a 45-degree line denoting perfect proportionality. In the second figure, most of the blue circles corresponding to likely minority representation under proportional ranked choice voting are near — or even to the right of — the yellow squares capturing the minority population in each state.

In most cases, accordingly, a court considering *De Grandy*'s proportionality factor would conclude that it weighs heavily against liability. In most cases, after all, minority voters enjoy close to proportional representation under PR systems. They rarely experience disproportionally low representation of the sort that cuts in favor of liability under *De Grandy*. To be sure, as the Court emphasized in *De Grandy*, proportional minority representation is not a safe harbor for a jurisdiction sued under Section 2. In practice, though, proportional minority representation drastically reduces the likelihood of a Section 2 violation. As a team led by Ellen Katz determined, every lawsuit between 1994 and 2005 "that found proportionality identified no violation of Section 2."[31]

In light of this analysis, how could a Section 2 suit against a PR system possibly succeed? One answer is that, as just noted, proportionality is not an ironclad defense under *De Grandy*. It is conceivable (though highly implausible) that a PR system resulting in proportional minority representation could be struck down if a court ruled that *Gingles*'s prongs were all satisfied and the Senate factors mostly supported liability. More realistically, a PR system could be vulnerable under Section 2 if it did *not* give rise to proportional minority representation. Per the studies discussed above, PR systems usually yield proportionality. But they do not *necessarily* do so. If minority voters turn out at particularly low rates, or if they exhibit less political cohesion, then they can be disproportionally underrepresented despite the use of a PR system.[32] In this anomalous case, *Gingles*'s first prong would be easier to satisfy since the minority representation threshold that single-member districts would have to exceed would be lower. Here, too, *De Grandy*'s proportionality factor would weigh in favor of liability since minority representation would lag minority population.[33]

To reiterate, though, this scenario is the exception, not the rule. It occurs only when a PR system does not work as expected and instead produces disproportionally low minority representation. When, more commonly, a PR system does lead to proportionality, it is virtually immune from attack under Section 2. Not completely immune since, again, proportionality is not a safe harbor under *De Grandy*, but very close, practically, to legally safe.

Proportional Representation Systems as Remedies

THE VERY PROPERTIES OF PR systems that render them poor targets for Section 2 suits make them good remedies for Section 2 violations. In particular, because PR systems generally outperform single-member districts in terms of minority representation, PR systems tend to be more effective remedies after liability has been found. And because PR systems frequently result in proportional minority representation, they are able to fully cure racial vote dilution in many circumstances — to produce sufficient minority political influence that "one is not entitled to suspect (much less) infer dilution," as the Court put it in *De Grandy*.[34]

> "Because PR systems frequently result in proportional minority representation, they are able to fully cure racial vote dilution in many circumstances.

For these reasons, "[f]ederal court decisions have repeatedly described [PR systems] as a potential remedy in Voting Rights Act cases,"[35] and "[t]here is no case law that rejects [PR systems] as a lawful remedy under the Voting Rights Act."[36] For example, Justice Sandra Day O'Connor once noted that "a court could design an at-large election plan that awards seats on a cumulative basis, or by some other [proportional] method that would result in a plan that satisfies the Voting Rights Act."[37] Justice Clarence Thomas similarly observed that "nothing in…the Voting Rights Act…prevent[s] [courts] from instituting a system of cumulative voting as a remedy under § 2, or even from establishing [ranked choice voting]."[38] The Fifth and Eleventh Circuits (homes to much of racial vote dilution litigation) concur that "state policy choices may require the district court to carefully consider remedies such as cumulative voting [and] limited voting,"[39] and that remedial "opportunities for effective minority participation" include "cumulative voting and transferable preferential voting."[40]

Importantly, courts have not felt free to impose PR systems as remedies over jurisdictions'

objections. Courts have reasoned that jurisdictions may choose how to cure racial vote dilution (provided that their choices, in fact, comply with Section 2 and thus avoid violating the provision anew). So jurisdictions have discretion as to whether to replace an unlawful at-large electoral system or single member district plan with a new single member district plan or a PR system.[41] As Steven Mulroy has written, "[t]he first rule is 'defendant's choice.'"[42] "In Section 2 cases, the court must defer to the defendant as long as the defendant's remedy is legally acceptable."[43]

Consequently, PR systems have been adopted following racial vote dilution litigation in only three scenarios. One is when the plaintiff and the defendant agree on the conversion to a PR system. In this case, a settlement typically memorializes this agreement.[44] Another scenario is when the defendant proposes a PR system as a remedy, the plaintiff prefers different relief (e.g., single-member districts crafted to provide sufficient minority representation), and the court sides with the defendant. In this case, the court is supposed to side with the defendant as long as the defendant's proposal avoids a new Section 2 (or other legal) violation.[45] And the last scenario is when the plaintiff offers a PR system as a remedy and the defendant fails to submit any (or any lawful) option. In this case, the court may impose the plaintiff's proposal or other relief fashioned by the court.[46]

Absent from any of these scenarios, of course, is the judicial adoption of a PR system over a jurisdiction's outright opposition. When trial courts have sided with plaintiffs urging a switch to a PR system — and defendants have disagreed and put forward valid alternatives — these rulings have been reversed on appeal. In a 1988 case, for instance, the Fourth Circuit held that the trial court erred when it "reject[ed] the [defendant's] remedial single-member district plan and impose[d] instead its own modified version of the plaintiffs' limited voting plan."[47] Limited voting might be "more effective" than single-member districts, but the only issue was the "adequacy of the [defendant's] plan," which did pass legal muster.[48] Likewise, in a 2000 case, the Seventh Circuit reversed a trial court that ordered the remedial use of cumulative voting. While cumulative voting "has the benefits of remedying the vote dilution problem while avoiding the constitutional challenges that afflict the drawing of district lines," the trial court should have "respect[ed] the [defendant's] preference for single-member districts."[49]

In sum, according to a database compiled by Justin Levitt, PR remedies have been adopted in Section 2 cases close to a hundred times.[50] The vast majority of these policies have been put in place through settlements. Only twice has a PR remedy been imposed by a court at a defendant's request and over a plaintiff's objection: in Euclid, Ohio, where the defendant preferred limited voting,[51] and in Port Chester, New York, where the defendant favored cumulative voting.[52] Only in Ferguson, Missouri, was a PR remedy, cumulative voting, ordered after the plaintiff endorsed it and the defendant took no position. Among the variants of PR, cumulative and limited voting account for almost all PR remedies following racial vote dilution litigation (cumulative voting being nearly twice as popular as limited voting). Only once has Section 2 litigation ended in the institution of proportional ranked choice voting: in Eastpointe, Michigan, via settlement.[53]

Proportional Representation and State Voting Rights Acts

UNDER THE VRA, THEN, PR systems are almost immune from challenge themselves and available to remedy violations when other electoral systems are ruled unlawful. For decades, the VRA was essentially the only law applicable to racial vote dilution. In recent years, however, state voting rights acts conferring protections beyond the VRA's have proliferated. Nine states have enacted SVRAs — California, Connecticut, Florida, Illinois, Minnesota, New York, Oregon, Virginia, and Washington — mostly since 2018. SVRAs diverge from the federal baseline in numerous ways, with respect to not only racial vote dilution but also racial vote denial, retrogression and litigation procedure.[54] Among these differences, three are relevant here because they make it easier for courts to impose PR systems as remedies after finding liability.

> "Certain state voting rights acts suggest (without quite saying) that PR systems are available to cure racial vote dilution in some circumstances.

First, and most obviously, certain SVRAs explicitly state that courts may consider PR systems as remedies. To illustrate, the Connecticut Voting Rights Act defines an "alternative method of election" as an electoral system other than "an at-large method of election or a district-based method of election," including (but not limited to) "proportional ranked choice voting, cumulative voting and limited voting."[55] The statute continues: "Appropriate remedies" after a violation is identified "may include…an alternative method of election."[56] The New York Voting Rights Act follows the same strategy of incorporating PR systems into the notion of an "alternative method of election"[57] and then providing that "appropriate remedies…may include…an alternative method of election."[58]

Second, and more commonly, certain SVRAs suggest (without quite saying) that PR systems are available to cure racial vote dilution in some circumstances. As in the California Voting Rights

Act, this suggestion is located in a provision made up of two key clauses. The first clause abandons *Gingles*'s first prong by making clear that "[t]he fact that members of a protected class are not geographically compact or concentrated *may not* preclude…a violation of [the statute]."[59] (Because of *Gingles*'s first prong, geographically dispersed minority groups cannot prevail in racial vote dilution suits under Section 2 of the VRA.) The second clause then states that the geographic distribution of minority voters "*may* be a factor in determining an appropriate remedy."[60] In addition to the California Voting Rights Act, the SVRAs of Minnesota, New York, Oregon and Washington contain this kind of provision.[61]

Critically, where minority voters are geographically dispersed, it is difficult or even impossible to remedy racial vote dilution through single-member districts. In this situation, single-member districts frequently cannot accumulate enough minority voters to enable them to elect their preferred candidates, even if the districts are shaped very strangely.[62] On the other hand, the geographic dispersion of minority voters is no obstacle to curing racial vote dilution through PR systems. It simply makes no difference where minority voters live if no districts have to be drawn and all voters in a given area participate in the same election. Accordingly, PR systems are the "appropriate remedy" contemplated by the California Voting Rights Act and other SVRAs where minority voters are not "geographically compact or concentrated."[63] Under these conditions, PR systems are most likely to ensure adequate representation for minority voters.

Confirming this reading of the California Voting Rights Act, at least, the California Supreme Court recently emphasized that the statute's "remedies [are not] limited to district elections."[64] To the contrary, the statute "permits consideration of [PR] remedies such as cumulative voting, limited voting or ranked choice voting."[65] Moreover, in 2019, Palm Desert, California, settled a California Voting Rights Act suit by switching from at-large elections to a hybrid regime, in which four of five city council seats are elected through multimember districts using proportional ranked choice voting.[66] In 2022, Albany, California settled a threatened California Voting Rights Act suit by instituting proportional ranked choice voting for the citywide election of all five city council seats.[67] These settlements are further proof that the California Voting Rights Act (and other SVRAs that share its language) can result in the adoption of PR systems.

Third, certain SVRAs eliminate the deference to defendants that is a hallmark of remedial proceedings under the VRA. The Connecticut Voting Rights Act announces that "[t]he court shall not give deference or priority to a remedy proposed by a municipality simply because it has been proposed by such municipality."[68] Minnesota's and New York's SVRAs include similarly worded provisions.[69] This statutory language overcomes a major obstacle to the adoption of PR systems in federal court: the doctrinal rule that they cannot be judicially imposed — even if they would yield greater minority representation than would single-member districts — if defendants object, and offer lawful alternatives, to them. Under the approach of Connecticut's, Minnesota's and New York's SVRAs, a jurisdiction's position on the appropriate remedy is entitled to no extra weight. A court is free to order the use of a PR system if the court concludes that this step would supply the most effective relief, regardless of the view of the defendant (or, for that matter, the plaintiff).

Potential Reforms

IF PR SYSTEMS GENERALLY result in more minority representation compared to single-member districts — as well as other benefits like greater partisan fairness and an end to the need to draw district lines — a natural question is how voting rights law could be reformed to favor the conversion to PR systems. At the federal level, one answer is that the VRA could be amended to replicate the features of SVRAs that facilitate switching to PR systems in the wake of litigation. So, first, the VRA could refer explicitly to various PR systems and affirm they are valid remedies that courts may properly impose. If the text of the VRA itself anticipated the adoption of PR systems, parties would likely propose them as remedies more often, and courts would have fewer qualms about ordering them into effect.

> “ The VRA could be amended to replicate the features of state voting rights acts that facilitate switching to PR systems in the wake of litigation.

Second, the VRA could abolish *Gingles*'s first prong and state that the geographic distribution of a minority population is relevant at the remedial — but not the liability — stage. More Section 2 suits would succeed if plaintiffs no longer had to prove that an additional reasonably compact majority-minority district could be created. In some of these newly successful cases, the geographic dispersion of minority voters would preclude, or at least counsel against, the use of single-member districts as remedies. As noted above, it is harder for single-member districts to include enough minority voters to enable them to elect their preferred candidates when their residential patterns are more diffuse. To reiterate, though, PR systems are not subject to this difficulty. The geographic distribution of minority voters within a jurisdiction employing a PR system has no bearing on the degree of minority representation that can be achieved. PR systems, then, would commonly be the most effective remedies

in circumstances where *Gingles*'s first prong could not (but no longer had to) be satisfied.

Third, the VRA could stipulate that no deference is due to the defendant's remedial preference. The defendant could still submit a proposed remedy, but that proposal would be treated like that of any other party, without any thumb on the scale on its behalf. This revision would make it possible — unlike under current federal law — for a court to impose a PR system even if the defendant opposes it and offers a lawful alternative remedy. The defendant's opposition would no longer be dispositive (or even probative). Instead, the court would make its own independent determination as to how best to cure the statutory violation. If a PR system is the best option, in the court's judgment, the contrary view of the defendant (or the plaintiff) would be immaterial.

Of course, all these reforms are simply transfers of ideas from the state to the federal level. Going beyond the existing innovations of SVRAs, both these statutes and the VRA could be amended to favor PR systems as remedies after liability is found. In other words, there could be a presumption that PR systems should be adopted to cure racial vote dilution, rebuttable only if these policies were less likely to work for some reason (like low minority voter turnout or political cohesion).[70] In a similar spirit, true PR systems like proportional ranked choice voting, open- and closed-list PR, and mixed-member PR could be endorsed over semi-proportional systems like cumulative and limited voting. As flagged earlier, true PR systems are more likely to achieve seat-vote proportionality for racial, ethnic and other groups than are semi-proportional systems. Lastly, instead of being instituted only after successful litigation, PR systems could be established directly by voting rights laws in targeted jurisdictions. For example, a state might decide that racial vote dilution is present wherever a locality exceeds a certain diversity threshold and underrepresents minority voters by more than a certain amount. The state could then decree that any locality captured by this formula must switch to a PR system, without the need for an antecedent lawsuit. This approach would use a different governmental tool — regulation rather than litigation — to pursue proportional minority representation.[71]

PR CAN REFER TO either a particular electoral system or a particular seat-vote relationship; both meanings play roles in VRA doctrine. Challenges to PR systems under Section 2 of the VRA are very unlikely to succeed because these policies typically lead to minority representation that is both greater than under single member districts and proportional to groups' population shares. Precisely because PR systems have these characteristics, they have often served as remedies in Section 2 suits, though only when consented to by defendants. At the state level, SVRAs diverge from the VRA by making it easier in several respects for PR systems to be imposed through racial vote dilution litigation. These innovations could also be implemented at the federal level — and at both levels, proportional minority representation could be sought in other ways, too.

Notes

1 This report's descriptions of PR systems are quite general; for more detail see, for example, *Proportional Representation, Explained*, Protect Democracy, https://protectdemocracy.org/work/proportional-representation-explained/ (last visited June 1, 2024), and *Electoral Systems*, Ace Project, https://aceproject.org/ace-en/topics/es/default (last visited June 1, 2024). Ranked choice voting can also be used in single-winner elections, in which case it is often called instant-runoff voting. All references to ranked choice voting in this report are to its proportional version in elections with multiple winners, which is sometimes also called single transferable vote.

2 *See, e.g., Proportional Representation, Explained, supra* note 1.

3 *See, e.g., id.*

4 *See, e.g., PR Library: Types of Voting Systems*, FairVote, https://fairvote.org/archives/types_of_voting_systems/ (last visited June 1, 2024).

5 This is not to minimize the significant differences between semi-PR and PR systems, but rather because PR systems are more robust than semi-PR systems in terms of providing minority representation. Accordingly, if semi-PR systems comply with the VRA or function as effective vote-dilution remedies under the VRA, then PR systems almost certainly do, too.

6 Note that party-list and mixed-member PR are designed to produce seat-vote proportionality only for parties — not for other potentially meaningful groups.

7 Rucho v. Common Cause, 139 S. Ct. 2484, 2499 (2019) (quoting Davis v. Bandemer, 478 U.S. 109, 130 (1986) (opinion of O'Connor, J.)).

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

9 *See* S. Rep. 97-417, at 28-29 (1982).

10 52 U.S.C. § 10301(b).

11 *Id.*

12 Johnson v. De Grandy, 512 U.S. 997, 1014 n.11 (1994).

13 *Id.* at 1025 (O'Connor, J., concurring).

14 *Id.* at 1025-26.

15 *See generally* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329, 1339-61 (2016) (documenting the increasing geographic dispersion of some minority populations).

16 *See generally* Shiro Kuriwaki, *The Geography of Racially Polarized Voting: Calibrating Surveys at the District Level*, 118 Am. Pol. Sci. Rev. (forthcoming 2024).

17 *See* Christopher Warshaw et al., *Districts for a New Decade — Partisan Outcomes and Racial Representation in the 2021-22 Redistricting Cycle*, 52 Publius: J. Federalism 428, 445-46 (2022); *see also* Allen v. Milligan, 599 U.S. 1, 28-29 (2023) (citing these findings).

18 In the typical at-large electoral system, each voter may cast as many votes as there are officeholders to be elected, and a cohesive popular majority may often win every seat.

19 *Gingles* itself was this kind of case; it mostly involved multimember districts with at-large elections that elected no candidates preferred by Black voters. *See* 478 U.S. at 41.

20 *See, e.g., Milligan*, 599 U.S. at 33 (noting that "the whole point of the enterprise" of *Gingles*'s first prong is whether "an additional majority-minority district could be drawn").

21 I qualify this discussion only because, to my knowledge, no court has interpreted *Gingles*'s first prong in the context of a Section 2 challenge to a PR system.

22 *See* Shaun Bowler et al., Electoral Reform and Minority Representation 101 (2003). Bowler and his coauthors do not conduct the same comparison for Latino voters, but they do find a strong positive (indeed super-proportional) relationship between the Latino share of the electorate and the share of seats won by Latino candidates. *See id.* at 104-05.

23 Note that the red dots *do not* necessarily indicate current numbers of minority-opportunity districts.

24 *See* MGGG Redistricting Lab, Modeling the Fair Representation Act 16 (July 7, 2022); *see also* Gerdus Benade, Ranked Choice Voting and Proportional Representation 25 (2021) (conducting a similar analysis for four localities and finding that, "[i]n all four case studies, [proportional ranked choice voting] is predicted to secure [minority]-preferred candidates a fraction of the seats roughly equal to the [minority] population share").

25 *See* Andrew Reynolds, Electoral Systems and the Protection and Participation of Minorities 13 (2006).

26 *See* Margherita Negri, *Preferential Votes and Minority Representation in Open List Proportional Representation Systems*, 50 Soc. Choice Welfare 281, 294-95 (2018). Both single-vote limited voting and single-vote open-list PR allow voters to vote for any candidate on the ballot, and mathematically ensures the election of a candidate based on the same threshold of votes.

27 *See* Daniel Bochsler, *Electoral Rules and the Representation of Ethnic Minorities in Post-Communist Democracies*, 7 Eur. Yearbook Minority Issues Online 153, 157 (2007).

28 *See* David Lublin & Matthew Wright, *Engineering Inclusion: Assessing the Effects of Pro-Minority Representation Policies*, 32 Electoral Stud. 746, 749 (2013).

29 *See id.*

30 One might speculate, however, that ongoing racial discrimination is less severe in a jurisdiction that voluntarily chose to adopt a PR system, which provides greater representation to minority voters. Such a system also lacks any of the elements, specified by several Senate factors, that particularly disadvantage minority voters.

31 Ellen Katz et al., *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, 39 U. Mich. J.L. Reform 643, 730-31 (2006).

32 *But see* MGGG Redistricting Lab, *supra* note 24, at 24 (finding that, even in a low-turnout scenario where "people of color turn out to vote at only 75% the rate of their White counterparts"..."the proportionality trend is robust" under ranked choice voting).

33 However, lower political cohesion among minority voters might result in not just disproportionality but also an inability to satisfy *Gingles*'s second prong. In this case, a PR system producing disproportionally low minority representation still would not be vulnerable to a Section 2 attack.

34 Johnson v. De Grandy, 512 U.S. 997, 1017 (1994).

35 Mo. St. Conf. of NAACP v. Ferguson-Florissant Sch. Dist., 219 F. Supp. 3d 949, 957 (E.D. Mo. 2016).

36 United States v. Village of Port Chester, 704 F. Supp. 2d 411, 448 (S.D.N.Y. 2010).

37 Branch v. Smith, 538 U.S. 254, 310 (2003) (O'Connor, J., concurring).

38 Holder v. Hall, 512 U.S. 874, 910 (1994) (Thomas, J., concurring in the judgment).

39 LULAC v. Clements, 986 F.2d 728, 814-15 (5th Cir.1993), *rev'd on other grounds*, 999 F.2d 831 (5th Cir.1993) (en banc).

40 United States v. Marengo Cty. Comm'n, 731 F.2d 1546, 1560 n.24 (11th Cir. 1984).

41 *See, e.g., Village of Port Chester*, 704 F. Supp. 2d at 447-48 ("The Court must also defer to the choice of the governing legislative body so long as the choice is consistent with federal statutes and the Constitution."); United States v. Euclid City Sch. Bd., 632 F. Supp. 2d 740, 750 (N.D. Ohio 2009) ("When evaluating a defendant's proposal, a court is not to inquire whether the defendants have proposed the very best available remedy, or even whether the defendants have proposed an appealing one.").

42 Steven Mulroy, *Alternative Nondistrict Vote Dilution Remedies Under the Voting Rights Act* 8 (Univ. of Memphis Sch. of Law Rsch. Paper No. 111, Sept. 2011).

43 *Id.* (internal quotation marks omitted). But note that, if the defendant is a local jurisdiction, its discretion as to which electoral system to adopt may be limited by state law.

44 For a recent example, see *Ala. St. Conf. of NAACP v. City of Pleasant Grove*, No. 2:18-cv-02056-LSC, 2019 WL 5172371, at *1-3 (N.D. Ala. Oct. 11, 2019).

45 For an example, see *Village of Port Chester*, 704 F. Supp. 2d at 447-53.

46 *See Mo. St. Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 219 F. Supp. 3d 949, 953-62 (E.D. Mo. 2016).

47 McGhee v. Granville Cnty., 860 F.2d 110, 115 (4th Cir. 1988).

48 *Id.* at 120.

49 Harper v. City of Chicago Hghts., 223 F.3d 593, 599, 601 (7th Cir. 2000).

50 *See also* Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 St. Louis U. Pub. L. Rev. 97, 98 (2010) ("There are about 100 local governing bodies across seven states now using [cumulative voting] or [limited voting]...[a]lmost all of these adoptions [having] been in response to vote dilution litigation...").

51 *See* United States v. Euclid City Sch. Bd., 632 F. Supp. 2d 740, 755-71 (N.D. Ohio 2009).

52 *See* United States v. Village of Port Chester, 704 F. Supp. 2d 411, 447-53 (S.D.N.Y. 2010).

53 *See* United States v. City of Eastpointe, No. 4:17-CV-10079, 2019 WL 2647355, at *2 (E.D. Mich. June 26, 2019).

54 *See generally* Ruth M. Greenwood & Nicholas O. Stephanopoulos, *Voting Rights Federalism*, 73 Emory L.J. 101 (2023).

55 Connecticut Voting Rights Act, Pub. Act. No. 23-204, § 410(a)(1), 2023 Conn. Acts 1, 819 (Reg. Sess.).

56 *Id.* § 411(e)(1), 2023 Conn. Acts at 825.

57 N.Y. Elec. Law § 17-204(3) (McKinney 2024).

58 *Id.* § 17-206(5)(a).

59 Cal. Elec. Code § 14028(c) (West 2024) (emphasis added).

60 *Id.* (emphasis added).

61 *See* Minn. Stat. § 200.54(2)(d) (2024); N.Y. Elec. Law § 17-206(2)(c)(viii); Or. Rev. Stat. § 255.411(4) (2024); Wash. Rev. Code § 29A.92.030(5) (2024).

62 *See generally* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. Chi. L. Rev. 1329, 1384-88 (2016).

63 Cal. Elec. Code § 14028(c).

64 Pico Neighborhood Ass'n v. City of Santa Monica, 534 P.3d 54, 66 (Cal. 2023).

65 *Id.* at 67.

66 *See* Sherry Barkas, *Palm Desert Lawsuit Settlement Includes Two-District Elections; Ranked-Choice Voting System Possible for 2020*, Palm Springs Desert Sun (Dec. 12, 2019, 5:08 PM), https://www.desertsun.com/story/news/local/palm-desert/2019/12/12/palm-desert-reaches-california-voting-rights-act-settlement/4410780002/.

67 *See* Albany, Pre-Litigation Settlement Agreement and Release of All Claims (Feb. 22, 2022); Mala Subramanian, City Att'y, City of Albany City Council Agenda Staff Report (Feb. 22, 2022).

68 Connecticut Voting Rights Act, Pub. Act. No. 23-204, § 411(e)(2), 2023 Conn. Acts 1, 826 (Reg. Sess.).

69 *See* Minn. Stat. § 200.58 (2024); N.Y. Elec. Law § 17-206(5)(b) (McKinney 2024).

70 Analogously, there could be a presumption that PR systems do not violate the VRA or SVRAs.

71 *See, e.g.,* Greenwood & Stephanopoulos, *supra* note 50, at 143-46 (discussing how SVRAs could be amended to issue mandates to localities).

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