

VOTING RIGHTS ACT SECTION 2:  
WHY REPRESENTATION OF WOMEN CANDIDATES MAY DESERVE CONSIDERATION IN  
DECISIONS ABOUT SECTION 2 REMEDIES IN VOTING RIGHTS CASES

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## I. Introduction

The Voting Rights Act (VRA) is “generally considered the most successful piece of civil rights legislation ever adopted by the United States Congress.”<sup>2</sup> Since the formula for determining pre-clearance found in Section 4 of the VRA was found unconstitutional in *Shelby County v. Holder* in 2012, Section 2 of the VRA, which prohibits intentional discrimination against minority communities, has become even more important to prohibit racial discrimination in voting. Section 2 tackles an important inquiry: whether it can be “shown that . . . [members of the minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>3</sup>

This paper introduces the idea that, when remedying voting systems that violate Section 2 by discriminating against minority communities, judges should preference remedial plans that not only cure the discrimination but also promote, or at least do not discourage, representation of female candidates. We recognize that introducing attention to how a remedy affects certain classes of candidates is novel. At the same time, we can show that:

- Having more women in office has an important value for a community and especially for female members of protected classes.
- Female candidates are significantly more likely to win in multi-winner elections (that is, elections where voters can elect more than one candidate) than in single-winner elections.
- Traditional voting rights remedies have overwhelmingly required replacing multi-winner elections with single-winner elections.
- Fair representation voting methods<sup>4</sup> are often effective voting rights remedies, while maintaining a multi-winner structure that, on average, will be better for female candidates.

We will present evidence that fair representation voting remedies would likely result in more representation of women – both women of color and women generally – and offer arguments suggesting about how this should affect VRA remedies.

## II. Section 2 Vote Dilution Claims and Women’s Representation

### A. Section 2 vote dilution claims based on at-large voting

Vote dilution of racial minorities is a serious problem in the many jurisdictions in the United States that demonstrate racially polarized voting – that is, the electoral choices of racial and language minority voter are consistently trumped by the majority. Vote dilution refers to practices that diminish minorities’ political influence in places where they are allowed to vote. Examples of vote-dilution practices include winner-take-all at-large elections and redistricting

plans that keep minorities' voting strength weak.”<sup>5</sup> In winner-take-all at-large elections, voters cast ballots for candidates in a large, fixed geographic area (typically city-wide). When it is determined that these systems violate Section 2, the common remedy is “premised on winner-take-all, at-large electoral schemes is to replace them with winner-take-all, single-[winner] districts.”<sup>6</sup>

### B. *Women's representation matters*

As written in the VRA, Section 2 claims cannot be brought on behalf of women as a class.<sup>7</sup> But, when a judge has a choice between an effective remedy in a Section 2 claim that may harm women's representation and an equally effective remedy that may enhance it, judges should choose the remedy that will not diminish women's representation.

Studies show that women representatives operate in a legislature differently than men.<sup>8</sup> For example, women representatives provide female constituents with an opportunity to talk with a woman representative about their concerns, promoting more engagement between voters and their elected officials. Jane Mansbridge, a Professor at the Harvard Kennedy School, argues that representatives and voters with shared experiences (such as African-Americans and women) are better able to communicate with each other and can “also forge bonds of trust based specifically on the shared experience . . . .”

Providing remedies in voting rights cases that both result in more women being elected – including more women who are candidates of choice of the racial minority community – and dramatically increase the number of constituents represented by at least one female representative will strengthen remedies for voters who have faced past electoral discrimination – including racial minorities *and* women.<sup>9</sup>

Notably, the legislative history of the Voting Rights Act itself provides a basis for this factor to be an important measure of a system's representativeness. As explained by the Department of Justice, the Senate Committee on the Judiciary issued a report to accompany the 1982 legislation (“Senate Report”) that “suggested several factors for courts to consider when determining if, within the totality of the circumstances in a jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2.”<sup>10</sup> One of these factors was “whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members.”<sup>11</sup>

Consider a specific example. Suppose a community has a proven history of racially polarized voting, and a judge orders a remedy to the traditional system of winner-take-all, at-large elections to single winner district elections.

- In one scenario, the judge imposes single-winner districts. But, as true in many such remedies, a majority of voters in the protected class do not live in one of the districts that has been designed to elect a candidate of choice of that protected class. Most of the winners are men.

- In a second scenario, the judge imposes a fair representation voting method (discussed below), but maintains at-large elections. Both male and female members of both the white majority and the protected class win in the election.

Suppose a single mother is frustrated with school policies that she believes treat her daughter unfairly and wants to take her concerns to the school board. In her district system, it is possible – even likely – that her only representative on the school board is a white man representing her white majority district. With a fair representation system, however, she would be able to approach as a constituent someone that she likely helped elect. She also would be nearly certain to have one or more female representatives who see her as a constituent as well.

Fair representation voting will promote more engagement between voters and their representatives, and having both male and female representatives will increase the overall responsiveness of the legislative body to community concerns.

### *C. Women’s representation is higher in multi-winner districts*

Women face a multitude of barriers when it comes to running for and winning elected office. These barriers have led to the current underrepresentation of women in elected office.

In particular, “[o]ne explanation for this underrepresentation is that women’s chances of winning office may be reduced by certain features of the electoral system.”<sup>12</sup> Research shows that women are elected at higher rates in multi-winner districts when compared to single-winner districts.<sup>13</sup> After the 2012 elections, for example, six of the ten states with the highest percentages of women in their state legislatures used multi-winner districts.<sup>14</sup> This has been consistently true in state legislative elections for decades.

FairVote’s initial research into local elections also shows that this is likely to be true. In a September 2014 study, FairVote found that in the 100 most populous cities, women won 39.2% of 209 at-large seats as compared to only 29.6% of seats in single-winner districts.<sup>15</sup> The contrast is most revealing when comparing cities where women hold the most city council seats with cities where women do most poorly in council seats. Women hold a majority of council seats in nine cities. All but one of these cities has at least some at-large seats, and 36% of their seats overall are elected at-large. Women hold nearly three-quarters (72%) of these cities’ at-large seats, as opposed to just over half (53%) of these cities’ district seats. In contrast, women hold just three seats in the eight worst cities for women representation – including Buffalo, Los Angeles, Miami, and Milwaukee – and 73 of these cities’ 76 council seats are elected in single-winner districts.

In single-winner districts, politically active leaders may be more hesitant to support a female candidate in a close or competitive race because the candidate’s gender may be seen as a liability. In multi-winner districts, “[p]arty elites may exercise a kind of affirmative action, slating women or providing more campaign resources to women in [multi-winner districts]”.<sup>16</sup> More generally, we suspect they are less likely to recruit women candidates and women

candidates are less likely to step forward, as under-representation of women is less obvious when each winner represents a separate district.

Additionally, under single-winner districts, voters may be less likely to vote for a woman based on a mere stereotype that women are less equipped to lead in elected office. On the contrary, “[t]hose with reservations about women’s qualifications for political office may cast one of their ballots for a woman in [a multi-winner district] and reserve their other votes for male candidates.”<sup>17</sup> Importantly, “campaigns in [multi-winner districts] often highlight the characteristics and accomplishments of individual candidates rather than their party affiliations, a campaigning style many women find preferable.”<sup>18</sup>

Finally, campaigns in multi-winner elections are generally less negative than single-winner elections. In particular, single-winner districts “typically see head-to-head battles between a Republican and Democrat, [while multi-winner district] campaigns are often free-for-alls where each candidate emphasizes his or her own strengths rather than his or her opponent’s weaknesses.” Multi-winner elections provide a more favorable climate for women.

#### *D. Effects on female representation of moving away from multi-winner elections*

Utilizing the most common Section 2 remedy, moving at-large districts to single-winner districts, could have an unintentional, harmful impact on women’s representation. In various situations where states moved from multi-winner districts to single-winner districts, the representation of women suffered.

For example, in 1992, a Wyoming federal court decision led to multi-winner districts being replaced with single-winner districts.<sup>19</sup> In 1992, there had been 22 out of 90 women in the state legislature. Since the change to single-winner districts, the number of women in Wyoming’s state legislature has never been greater than 22. Wyoming was ranked 11th in representation of women in 1992, but now ranks 44<sup>th</sup>. The same relative decrease of representation of women occurred in Alaska and Georgia after replacing multi-winner with single-winner districts.<sup>20</sup>

Although comprehensive research evaluating the impact of judicial remedies imposing single-winner districts in place of at-large voting systems on the election of female candidates has not yet been conducted, anecdotal examples of judicial remedies leading to a decrease in women’s representation exist.

For example, the city council elections in Morgan City, Louisiana had previously held at-large elections. In 2000, the Department of Justice brought a Section 2 claim against the city’s voting system and the judge entered a consent decree that imposed five single-winner city council districts throughout the city.<sup>21</sup> While not admitting that the at-large voting system violated Section 2, the city agreed to the proposed reform.<sup>22</sup>

In the two prior city council elections before the consent decree took effect – 1992 and 1996 – the city council election produced a city council that included 20 percent female membership.<sup>23</sup> Although the elections in 2000 and 2002 immediately following the change to single-winner districts retained this 20 percent female membership, the past three election cycles under single-

winner districts in 2004, 2008, and 2012 have resulted in zero percent female representation on the city council.<sup>24</sup> While in the 1990s every voter had at least one representative, only one in five did so for four years, and none have for the last decade.

In anticipation of learning more about the impact of moving from at-large elections in cities to single-winner elections, FairVote expects to conduct a major study this year on reflective representation of women and people of color in counties around the nation, and expects to learn more about the impact of moving from at-large elections to single-winner elections and vice versa. If representation of female candidates indeed has generally suffered in changes to single-winner districts in local elections – especially in jurisdictions where Section 2 cases have resulted in the change – we believe that the case for considering women’s representation in Section 2 remedies will be even more compelling.

### **III. How judges could take into account women's representation in fashioning a remedy**

As discussed above, when judges are remedying discrimination in voting systems under Section 2 of the Voting Rights Act (VRA), it is critical that they consider women’s representation in formulating the appropriate remedy. When crafting remedies, resorting to the common approach of imposing single-winner districts in place of at-large voting systems is not the only permissible approach.

#### *A. Many VRA cases can be resolved with multi-winner remedies*

Redrawing district lines is an unenviable task. Requiring courts to do so is worse, with one district court judge noting that “[j]udicial redistricting is not ideal,” and that this “unwelcome obligation” can force courts to be drawn into “making ‘otherwise standardless decisions.’”<sup>25</sup> In designing such remedies, we want legislators and courts to be guided by clear principles. Retaining at-large voting systems while curing *all* discriminatory deficiencies is an achievable goal. This can include reviewing the historical underrepresentation of women.

At-large and multi-winner districts are problematic when used with winner-take-all plurality voting.<sup>26</sup> In these instances, bloc voting allows the largest voting group to elect every candidate. Pairing at-large or multi-winner districts with different voting methods, such as ranked choice voting or cumulative voting, results in fair voting methods that negate the winner-take-all effects of bloc voting and promote the representation of women and minority groups.

Fair voting methods allow a majority group to elect a majority of seats while also allowing a minority to obtain its fair share. With fair voting, any candidate receiving above a certain share of the vote, the “threshold of election,” is guaranteed election. In a three-seat election, for instance, candidates receiving more than 25% of the vote are elected. Under some election methods, candidates may win an election with a much lower percent. As a result of this lower threshold, minority candidates are able to elect a proportionate number of candidates of choice, rather than being drowned out by a larger voting bloc.

Fair voting methods have been used successfully in numerous jurisdictions to remedy vote dilution claims. Studies of those jurisdictions show that fair voting methods used in multi-winner districts increased voter turnout, minority representation, minority candidate participation, and voters' perceived effectiveness.<sup>27</sup> As a result, fair voting methods allow for the continued use of at-large and multi-winner districts and increased minority representation.

B. *A legal standard for judges taking women into account*

Although the Voting Rights Act does not mention women's representation explicitly, there is precedent for judges preferring remedies that comport with good judicial policy. For example, judges routinely defer to a defendant jurisdiction's choice of remedy. The Voting Rights Act does not actually command this; judges do it because of a policy preference for jurisdictions crafting their own election schemes.

There are several bases for finding a similar preference for remedies that promote women's representation over those that inhibit it. As one example, judges are public actors, and should note that the equal protection clause of the Fourteenth Amendment as well as any federal statute prohibiting state discrimination against women protects women from discrimination. Granted, remedying a Voting Rights Act case is not purposeful discrimination, and it is facially neutral. However, when a judge faces two equally effective remedies, one which has a discriminatory impact and one which does not, the judge may lack a reasonable basis for preferring the former over the latter.

Moreover, as the Senate Report makes clear, one of the factors judges can weigh in determining whether a specific voting system violates Section 2 is to consider "whether there is a lack of responsiveness on the part of elected officials to the particularized needs of minority group members."<sup>28</sup> This point in the legislative history directly relates to the use of fair voting remedies. Such remedies would typically more than double the number of racial minority voters who have a representative of their choice and the number of voters with a female representative. This may also provide evidence that these representatives will be more responsive to racial minority voters in general and female racial minority voters in particular.

Using fair voting methods, like ranked choice or cumulative voting, instead of single-winner districts function effectively as Voting Rights Act remedies. Given the growing evidence that women will be better represented under fair voting, there is a strong legal case to be made that judges should prefer fair voting remedies – as should plaintiffs and even defendant jurisdictions. This is because they can not only cure the discrimination that compelled the Section 2 challenge, but also promote, or at least not discourage, representation of female candidates. This result can be an ideal remedy in cases brought under Section 2 of the Voting Rights Act.

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<sup>2</sup> U.S. Dep't of Justice, *Introduction to Federal Voting Rights Laws*, available at <http://www.justice.gov/crt/about/vot/intro/intro.php> (last visited April 17, 2015).

<sup>3</sup> 42 U.S.C. § 1973(b).

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<sup>4</sup> “Fair representation voting” describes voting methods that involve voting directly for candidates in multi-winner districts and not deciding outcomes by a winner-take-all rule: like-minded voters representing a third of the voters should have the voting power to elect one of three seats. Examples of fair representation voting systems used in the United States include ranked choice voting (“single transferable vote”), cumulative voting and the single vote (“limited voting”).

<sup>5</sup> Dan Tokaji, *The New Vote Denial, Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689, 691-92 (2006).

<sup>6</sup> Rob Richie, Drew Spencer, Choice Voting, 47 U. OF RICHMOND L. REV. 959, 968 (2013).

<sup>7</sup> Darren Rosenblum, *Parity/Disparity: Electoral Gender Inequality on the Tightrope of Liberal Constitutional Traditions*, 39 U.C. DAVIS L. REV. 1119, 1132 (2006).

<sup>8</sup> Volden, C., Wiseman, A. E. and Wittmer, D. E., *When Are Women More Effective Lawmakers Than Men?*, 57 AM. J. OF POL. SCI. 326 (2013); Sheryl Gay Stolberg, *Proof That Women Are the Better Dealmakers in the Senate*, N.Y. TIMES (Feb. 19, 2015), available at <http://www.nytimes.com/politics/first-draft/2015/02/19/in-the-senate-women-are-better-dealmakers-than-men-heres-proof/>; Jay Newton-Small, *Women Are the Only Adults Left in Washington*, TIME (Oct. 16, 2013), available at <http://swampland.time.com/2013/10/16/women-are-the-only-adults-left-in-washington/>.

<sup>9</sup> Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent “Yes”*, 61 THE JOURNAL OF POLITICS 628, 641 (1999).

<sup>10</sup> U.S. Dep’t of Justice, *Section 2 of the Voting Rights Act*, available at [http://www.justice.gov/crt/about/vot/sec\\_2/about\\_sec2.php](http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php) (last visited April 20, 2015).

<sup>11</sup> S. Rep. No. 97-417, 97th Cong., 2d Sess. (1982), pages 28-29.

<sup>12</sup> James D. King, *Single-Member Districts and the Representation of Women in American State Legislatures: The Effects of Electoral System Change*, 2 STATE POLITICS AND POLICY QUARTERLY, No. 2 161, 161 (Summer 2002).

<sup>13</sup> *Id.*

<sup>14</sup> *Fair Elections: How Single Member District Hold Women Back*, in REPRESENTATION 2020’S STATE OF WOMEN’S REPRESENTATION 2013-2014 (Sept. 26, 2014), available at

[http://www.representation2020.com/uploads/9/2/2/7/9227685/fair\\_election\\_structure.pdf](http://www.representation2020.com/uploads/9/2/2/7/9227685/fair_election_structure.pdf).

<sup>15</sup> See Rob Richie, *Election of Women in our 100 Largest Cities: Disadvantaged by Districts*, in REPRESENTATION 2020’S STATE OF WOMEN’S REPRESENTATION 2013-2014 (Sept. 26, 2014), available at <http://www.representation2020.com/our-blog/election-of-women-in-our-100-largest-cities-disadvantaged-by-districts>.

<sup>16</sup> See supra n. 12 at 163.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.*

<sup>19</sup> Gorin v. Karpan, 775 F.Supp. 1430 (D. Wyo. 1991).

<sup>20</sup> See supra n. 12 at 168.

<sup>21</sup> Consent Decree, United States v. Morgan City, LA, No. 00-1541 (W.D. LA., August 17, 2000), available at [http://www.justice.gov/crt/about/vot/sec\\_2/morgancity\\_cd.pdf](http://www.justice.gov/crt/about/vot/sec_2/morgancity_cd.pdf).

<sup>22</sup> *Id.*

<sup>23</sup> These figures were determined by reviewing Morgan City, Louisiana city council election returns over a two year period, from 1992 to 2012. See *Louisiana Secretary of State*, available at <http://staticresults.sos.la.gov/> (last visited April 17, 2015).

<sup>24</sup> *Id.*

<sup>25</sup> See Ga. State Conf. of the NAACP v. Fayette County Bd. Of Comm’rs, 950 F. Supp. 2d 1294 (N.D. GA. 2013); 996 F. Supp. 2d 1353 (N.D. GA. 2014).

<sup>26</sup> Thornburg v. Gingles, 478 U.S. 30, 48 (1986) (“The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters.”).

<sup>27</sup> See MINORITY REPRESENTATION IN ELECTORAL DEMOCRACY: AN INTRODUCTION TO TRADITIONAL AND ALTERNATIVE VOTING SYSTEMS, available at <http://www.fairvote.org/assets/Racial-Minority-Representation-Booklet.pdf>.

<sup>28</sup> Supra n. 11.