

# Cumulative Voting and the Voting Rights Act

## *Amicus Curiae* in a Maryland Voting Rights Case

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*Following are excerpts from an **amicus curiae** prepared by Edward Still and Pamela Karlan for The Center for Voting and Democracy in **Cane v. Worcester County**, a voting rights case concerning county commission elections in Maryland described in Deborah Jeon's article.*

*It is important to stress that the Center's position is that cumulative voting's advantages are even more valid for choice voting (preference voting); the Center also filed an **amicus** brief in a Massachusetts case touching on this comparison. For full copies of either brief and footnotes (some of which are incorporated in the text), contact the Center.*

### **I. Cumulative Voting Retains Many of the Valuable Features of At Large Elections While Curing Their Exclusionary, Winner-Take-All Tendencies**

Cumulative voting preserves many of the distinctive and valuable features of at-large elections. For example, in a cumulative voting jurisdiction, candidates can live anywhere and voters can vote for any candidate who is running, rather than being restricted to voting for a candidate from a designated district. Thus, candidates retain the incentive to compete for support throughout the county and, after election, continue to represent the entire county rather than a geographic subdivision.

The sole significant difference between cumulative voting and traditional at-large voting is that in a cumulative voting system voters can "cumulate" their votes, that is, cast more than one vote for a candidate about whom they feel strongly. So, for example, in Worcester County, a voter who strongly supported Candidate Jones, could cast all five of her votes for Jones. A voter remains free, of course, to cast one vote for each of five candidates, precisely as she would in a traditional at-large system.

The suggestion that cumulative voting is confusing to voters is baseless. A study of a recently-adopted cumulative voting plan shows that nearly all the voters understood the proper way to cast a ballot and only a small minority found the system more complex than other election rules. 95% of the voters knew they could cast all three votes for one candidate; a mere 13% found the cumulative voting plan "more difficult to understand" than other local elections in which they had voted.

The ability of voters to "plump" their votes behind a candidate (or behind a few candidates) dampens the winner-take-all tendency of traditional at-large systems which enable a bloc-voting majority to capture all the seats even when substantial numbers of voters prefer other candidates. As Judge Young explained in his opinion, **all** election

systems have a "threshold of exclusion": that is, under any voting system it is possible to describe how large a group must be to avoid being shut out of electing its preferred candidates.

In a traditional at-large system, the threshold of exclusion is 50%; unless a group in fact constitutes a **majority** of the electorate, the remainder of the electorate, by voting strategically, can shut the group out completely. Similarly, within each single-member district in a districted system, the threshold of exclusion is again 50%: only the group that constitutes the majority of the electorate within the district can elect its preferred candidate (assuming that all voters are voting strategically -- that is, that every group of voters is trying to maximize its share of seats).

By contrast, the threshold of exclusion in a cumulative system can be described by the equation  $1/(S+1)$ , where S equals the number of seats to be filled. In the case of Worcester County, the threshold of exclusion using cumulative voting is 16.67%. Any politically cohesive group of voters within the county, regardless of who its members are or where they live, can with certainty, by plumping its votes behind a single candidate, elect the candidate of its choice.

Thus, cumulative voting modifies traditional at-large systems to give minority groups a real opportunity to elect the candidates of their choice: "minority" in the sense of any group that is less than a majority of the relevant voting population, such as Republicans, black voters and people who feel strongly about an issue related to where a county puts the next landfill site.

But cumulative at-large voting does *not* guarantee proportional representation in the sense of setting aside any seats for particular groups. Rather, it simply gives a greater number of groups the *chance* to elect the candidates they prefer.

Cumulative voting is not "proportional representation." Cumulative voting is sometimes called a semi-proportional system. A recent book advocating the adoption of proportional representation in the United States (Douglas Amy's *Real Choices, New Voices*) had this to say about cumulative voting and limited voting:

Both systems are designed to make it more difficult for one party to elect all the representatives in an election, and both *may* produce more proportional results than single-member or at-large plurality elections. But full proportional representation is not guaranteed.... That is why these are called *semi*-proportional and why most proponents of PR [proportional representation] considered them crude systems inferior to true PR elections.

Contrary to suggestions in the appellants' brief, cumulative at-large voting is not a novel system. Corporations, for example, often use cumulative voting (see the ABA Model Business Corporation Act) and an increasing number of jurisdictions have switched to cumulative voting as part of the remedy for Voting Rights Act violations.

## **II. Cumulative Voting Can More Fully Attain the Goal of Civic Inclusion Reflected in the Supreme Court's Case Law and the Voting Rights Act**

Cumulative voting does an excellent job of fostering the notion of civic inclusion, as defined by Pam Karlan in her 1989 article in the *Harvard Law Review*, "Maps and Misreadings":

[The Supreme Court's longstanding] emphasis on equal political access for all voters ... rests on a belief in the distinctive values that inclusion in governmental decision-making brings: a sense of connectedness to the community and of greater political dignity; greater readiness to acquiesce in governmental decision and hence broader consent and legitimacy; and more informed, equitable and intelligent governmental decision-making.

[Civic inclusion] accepts the bedrock diversity of modern America and seeks to bring diverse groups into the governing circle because, quite simply, the best way to ensure that all points of view are taken into account is to create decision-making bodies in which all points of view are represented by people who embody them. It is not enough that there are people who can only imagine what minority interests might require.

Modifying an at-large system to provide for cumulative voting can often meet the goals of civic inclusion better than single-member districts. First, empirical studies of recent cumulative voting elections show that they fully cure Voting Rights Act violations by enabling members of traditionally excluded racial minorities to elect candidates of their choice.

At the same time, cumulative voting avoids the necessity for deliberately drawing districts along racial lines, with the attendant problems that can cause. Cumulative voting retains the at-large system and allows *voters*, rather than governments, to form involuntary districts with like-minded voters. Moreover, unlike districting schemes, which are imposed on voters by an outside group (the legislature, the city council, a court) and usually last for a decade or more, cumulative voting elections allow voters to make their grouping decisions for themselves at each election.

Geographic districting plans are based on the implicit assumption that voters have an identity of interest with their geographical neighbors. While neighbors may have a common interest in whether the city repaves the street in front of their houses or rezones the lot on the corner for use as a fraternity house, on other issues voters may in fact have more in common with residents of other neighborhoods throughout the county than with people who just happen to live down the street.

Districting relies on geographical proximity, while cumulative voting allows the voters themselves to decide whether, and when, geography is more important than other connections. Under a modified at-large cumulative voting plan, a like-minded group of

voters enjoys a chance to elect its preferred commissioners regardless of where its members live.

The rule of *Connor v. Johnson* requiring courts to adopt single-member districts is not applicable to this case. *Connor* dealt with a particular situation in which the district court was mixing single-member districts and multi-member districts in a State legislative plan and was faced with strong evidence that multi-member districts were dilutive of black voting strength.

By adopting single-member districts as the presumptive standard, the Court was following a trend in American politics: on the eve of *Baker v. Carr* [in the early 1960s], a survey indicated a close division of state legislators elected from single-member districts (3,179) and multi-member districts (2,074), but most state senators were elected from single-member districts and the reapportionment revolution created by *Baker* enhanced the pressure for single-member districts.

The Court also was insulating federal district judges from the charge that, since a multi-member district allows the majority to defeat the minority on all fronts (*Kilgarin v. Hill*, 1967) it allows the federal judge to pick the eventual majority party or group in the legislature.

In this case, Worcester County has used a county-wide election system for a number of years and has expressed its preference for the continued use of the county-wide plan. The district court should give deference to the local jurisdiction's policy choices and make only such changes as are necessary to eradicate any discriminatory features of the election plan.

### **III. Cumulative Voting May Avoid Some of the Undesirable Side Effects of District-Based Remedies for Voting Rights Act Violations Raised By the Supreme Court's Decisions in *Thornburg v. Gingles* and *Shaw v. Reno*.**

In *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986), the Supreme Court stated that plaintiffs in a racial vote dilution cases must *usually* show that "the minority group ... is sufficiently large and geographically compact to constitute a majority in a single-member district."

The "geographically compact" requirement (which is not found in the statute) makes sense if plaintiffs' sole claim is that the use of at-large elections rather than single-member district elections dilutes their voting strength. But as both the Supreme Court and Congress have recognized, a group's voting strength can be diluted by other practices as well. For example, majority-vote requirements and numbered-post provisions can dilute a group's voting power.

Sometimes, it is the voting rules *within* an at-large system, rather than the at-large nature of the constituency, that dilutes the minority's voting strength. When this is true, modifying the winner-take-all rules, by switching, for example, to cumulative voting, can

offer a complete remedy. And it can provide equal electoral opportunity while retaining the legitimate interests served by at-large elections.

Any election plan that depends on districts is subject to gerrymandering and dilution (and sometimes inflation) of a minority group's voting power. Moreover, race-conscious districting sometimes can send an unfortunate message to voters about the salience of race in the political process. Finally, when a court is called upon to make the decisions about how to draw districts (because, as in this case, a defendant jurisdiction has defaulted on its obligation to provide a remedy to pre-existing dilution), the court is plunged into a political thicket.

Far from accentuating racially polarized voting, cumulative voting ameliorates its effects. The use of cumulative voting in the British Empire bears this out, as explained in *Voting in Democracies*, a 1955 book by Enid Lakeman and James Lambert:

The name "cumulative vote" appears for the first time in 1853, but three years earlier the system was recommended by a committee of the Privy Council for preventing the monopoly of colonial Legislative Councils by one party and was applied in the Cape Colony. It continued to be used there for the election of the Legislative Council until that Council disappeared under the new constitution of the Union of South Africa in 1909, and Lord Milner contrasted its effects most favorably with those of the majority system used to elect the House of Assembly (Lower House).

In the Assembly, the division between Dutch and British stock was accentuated, for one part of the Colony returned only Boer representatives, the other party only non-Boers; in the Legislative Council, on the contrary, the minority in each region had representation.

The principal purpose of Section 2 of Voting Rights Act is to ameliorate the effects of discriminatory actions, without requiring a discriminatory voter to change the way he or she votes. As T. Alexander Aleinikoff and Samuel Issacharoff explain in a 1993 *Michigan Law Review* article:

By contrast [to other anti-discrimination statutes], the Voting Rights Act seeks to alter the consequences of racial bloc voting patterns without governing the way individual voters cast their ballots; the primary conduct -- the racial patterns in voting -- is unaffected.

Thus, while the employment discrimination laws tell employers not to make choices on the basis of race, religion, etc., the Voting Rights Act allows the voter to make discriminatory *decisions* but tries to prevent all the discriminatory *effects* those decisions might otherwise engender.

*Shaw* held, "Put differently, we believe that reapportionment is one area in which appearances do matter." With such a holding, courts and legislatures are going to be constrained in the shapes of permissible districts they may draw. If the only remedy for

racially polarized voting in districts, and if the only district which provides a reasonable chance for black voters to elect a candidate of their choice is one with a "bizarre" appearance, then blacks will be left without an effective remedy to cure a proven violation of the Voting Rights Act. If the Court is not to gut the Voting Rights Act of all meaning and power, the answer is that there must be a way to create a remedy which does not balkanize the population. Cumulative voting is such a system.

Cumulative voting avoids the need for race-conscious district drawing. Individual voters decide whether, and to what extent, to be race-conscious. Nor does cumulative voting freeze existing race-consciousness into place. It does not institutionalize the divisions in society by drawing a "black district," a "Latino district" and a "white district." Nor does it leave voters who are in the numerical minority in a given district feeling as if their votes do not count.

In a district which is 65% or more black and in which there is racially polarized voting, the white minority is likely to feel as closed out of the political process as blacks felt when they were the minority in the multi-member at-large plan. Single-member districts shift the burden of the election plan from a minority group in a multi-member district to the new minorities in each of the single-member districts or subdistricts. As explained in the 1981 Yale Law Journal article "Affirmative Action and Electoral Reform," the members of the county-wide majority who are minorities in their own districts may harbor a resentment at the "affirmative action" that has placed them in a powerless minority.

By contrast, cumulative voting allows *all* voters to vote for the candidates of their choice, and makes it quite likely that *most* voters will cast at least some of their votes for a candidate who is actually elected, thereby increasing their sense of making a difference in the political process.

Finally, modifying at-large elections to permit cumulative voting allows biracial coalitions to form. Racially homogenous single-member districts tend to freeze the racial divisions of society by making it unnecessary for candidates to appeal to any group other than their own and requiring all compromises (if any) to take place in the legislative arena, rather than among the public (as pointed out in Justice William Brennan's opinion in *United Jewish Organizations v. Carey* in 1977). University of Pennsylvania law school professor Lani Guinier has a stinging criticism of single-member districts in a 1991 article in the *University of Virginia Law Review*:

[T]he districting strategy excludes the possibility of representation for those whose interests are not defined by, or consistent with, those in the geographically defined district. Subdistricting simply assumes a linkage between interest and residence that is not necessarily as fixed as racial segregation patterns might otherwise suggest....

[D]istricting decisions may simply reflect the arbitrary preferences of incumbent politicians who prefer packed, safe districts to ensure their reelection. Indeed, districting battles are often pitched between incumbents

fighting to retain their seats, without regard to issues of voter representation. Because the choice of districts is so arbitrary, incumbents enjoy extraordinary leverage in self-perpetuation through gerrymandering.

Thus, districting strategies often promote noncompetitive election contests, which further reduce voter participation and interest.

By contrast, in a cumulative system, candidates of all races have the incentive to appeal to all voters.

Cumulative voting is not prohibited by the so-called anti-proportional representation disclaimer of Section 2 of the Voting Rights Act. That disclaimer provides:

The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

Since cumulative voting allows the racial minority the same power to elect candidates of their choice as the racial majority, but does not guarantee the racial makeup of the governmental body, there is no violation of the proviso. The proviso was added to the text of the bill to counter any tendency to establish a quota system in elections—that is, that an election was invalid if there were not a certain percentage of blacks elected. As the Senate Committee noted:

This disclaimer is entirely consistent with the above mentioned Supreme Court and Court of Appeals precedents, which contain similar statements regarding the absence of any right to proportional representation. It puts to rest any concerns that have been voiced about racial quotas.

As noted above, cumulative voting does not guarantee who will win; black voters may form a coalition with another group and choose a non-black; or black voters may split into warring ideological camps. In either case, cumulative voting allows them more opportunity to elect a candidate of their choice than does a winner-take-all system such as the present (or proposed) at-large plan or a single-member district plan.

## **Conclusion**

Cumulative voting is a promising alternative to both traditional at-large elections, with their tendency to exclude minority groups from the political process, and single-member district systems, with their fragmentation of the electorate and requirement that courts or politicians allocate voters among constituencies. The district court's decision in this case to decree a cumulative voting system in Worcester County reflects an appropriate balancing of the interests of the plaintiffs in fully remedying racial vote dilution and of the county in retaining the benefits of at-large elections.

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### **Voting Rights Forum Highlights PR**

*On September 9, 1994, the **American University Law Review** and the Law and Government Program of the Washington College of Law co-hosted a conference addressing voting rights.*

*The final panel was entitled "Future Civil Rights Strategies and Alternative Voting Systems." Each participant in the panel expressed support or openness to adoption of proportional voting systems.*

*Throughout this chapter of **Voting and Democracy Report: 1995** are excerpts from the discussion. The **American University Law Review** published a full transcript of the conference in its October 1994 issue, copies of which are available from the Center for Voting and Democracy.*

**ĭ Edward Still:** If you look at democracies around the world, you will find that we, the Canadians, the Australians and the English are the ones who are left with single-member districts -- even the New Zealanders have adopted PR....There is a world of things out there for us to look at, and we should not be restricted only to looking at single-member districts because the Supreme Court happened to say that single-member districts are to be preferred when federal courts have to draw remedies.

**ĭ Richard Pildes:** I think one of the things that we need to appreciate about territorial districting is that it is precisely meant *not* to be a proportional system. The very idea of territorial districting with majority rule is that a 51% majority gets one hundred percent of the control. If 51% of the voters vote Republican, a Republican controls the seat.

So, to evaluate territorial districting systems in terms of whether they produce proportional representation is, in a sense, to fail to understand the basic idea behind the very system. And I think one of the problems that we face in the voting rights area now is that we are trying to wedge into this territorial districting system concerns for proportional representation or fair representation of various interests, and the system is being stretched to the breaking point because it simply isn't designed to accommodate that.... I think cumulative voting is an attractive option for dealing with some of the issues that the Voting Rights Act addresses.

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