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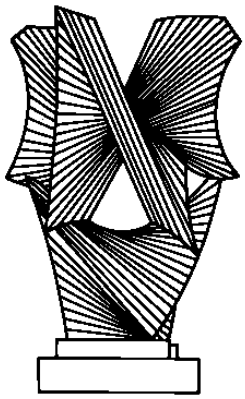

ADDRESSING MINORITY VOTE DILUTION THROUGH STATE VOTING RIGHTS ACTS

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I. Introduction

Passed largely to address the problem of vote dilution and racially polarized voting, the Voting Rights Act of 1965 (VRA) bans racial discrimination in voting practices by federal, state, and local governments. While the VRA has been successful in many respects, several large gaps remain. In an effort to narrow some of the gaps left by the federal VRA, four states have enacted or proposed individual state-VRAs or functional equivalents (herein referred to as individual state-VRAs).

In this paper, I seek to explore how these states have attempted to use individual VRAs—and how successful they have been—in closing the gaps in coverage existing under the federal VRA. For each of the four enacted or proposed VRAs, I explore the background of the legislation, followed by an analysis of how the legislation operates. For California, Illinois, and Florida—the three states with enacted individual state-VRAs—I then examine how successful the legislation has been in increasing minority representation, and how it can be strengthened to further the state's goals. Since Washington's VRA has yet to become law, I explore the background, followed by an analysis of the proposed legislation. I conclude by assessing which individual state-VRAs—or aspects thereof—are best suited to serve as models for the forty-six other states without such legislation.

I find that all four state-VRAs are ultimately successful insofar as they expand protection against minority vote dilution beyond that which is afforded to minority voters under the federal VRA. However, the level of success varies by state plan.

II. Federal Voting Rights Act (VRA)

Background and Doctrinal Standard under the VRA

Vote dilution and racially polarized voting have historically been—and continue to be—a major concern in the United States. Vote dilution is the practice of reducing the potential effectiveness of a group's voting strength by limiting the group's chances to translate voting strength into voting power.[1] Vote dilution occurs when a racial group's electoral choice becomes submerged due to the racial polarization of the vote, and where a traditional white majority precludes a minority group's choices from having any bearing or significant meaning in an election on par with white voters in the same election.[2] "The usual device for diluting the minority voting power is the manipulation of district lines by either fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them or 'packing' them into one or a small number of districts to minimize their influence in adjacent districts."[3] Racial polarization occurs when a majority of white voters and a majority of minority voters in a given jurisdiction are divided.[4] This division—or polarization—can be along preferences for candidates, propositions, referendums, or other measures at the polls.[5]

To "banish the blight of racial discrimination in voting" and to help ensure that no citizen's right to vote shall be "denied or abridged…on account of race or color," Congress passed the Voting Rights Act (VRA) in 1965.[6] The VRA bans racial discrimination in voting practices by the federal government, as well as by state and local governments.[7] Section 2 of the VRA creates a cause of action for plaintiffs who have been subjected to racial vote dilution or vote denial. Under Section 2 of the VRA, illegal vote dilution can be found where an electoral standard, practice, or procedure results in a denial or abridgement of the right to vote on account of race or color.[8] Section 5 of the VRA prohibits practices that have the purpose or effect of

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[1] *Shaw v. Reno*, 509 U.S. 630 (1993).
[2] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012).
[3] *In re Senate Joint Resolution of Legislative Apportionment*, 1176, 83 So. 3d 597 (Fla. 2012), quoting *Voinovich v. Quilter*, 507 U.S. 146 (1993).
[4] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)., citing Joseph Fishkin, *Equal Citizenship and The Individual Right to Vote*, 86 Ind. L.J. 1289, 1360, n. 43-45 (2011)
[5] Id, at 1.
[6] *In re Senate Joint Resolution of Legislative Apportionment*, 1176, 83 So. 3d 597 (Fla. 2012), citing *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), and *Voinovich v. Quilter*, 507 U.S. 146 (1993).
[7] Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* (Foundation, 2d. Ed. 2001)
[8] 42 U.S.C. 1973 (2006).

"denying or abridging the right to vote on account of race or color."[9] However, Section 5 only applies to jurisdictions covered under the "coverage formula" of Section 4.[10] By declaring the Section 4 coverage formula unconstitutional in *Shelby County v. Holder*, the Supreme Court effectively rendered Section 5 a "zombie provision," as it is no longer applicable to any jurisdictions.[11]

Section 2 remains in force nationwide. Amendments made to Section 2 in 1982 provide that a violation is to be determined by assessing, based on the "totality of circumstances," whether the challenged practice gives racial minorities "less opportunity to participate in the political process and to elect representatives of their choice."[12] However, Section 2 explicitly rejects the notion that an implied goal of the VRA is to create complete racialized proportional representation.[13]

The Supreme Court has set forth the doctrinal standard for claims of vote dilution under Section 2 of the VRA. To begin, a minority group challenging a jurisdiction's policy must comply with three preconditions that the Court laid out in *Thornburg v. Gingles*. First, a minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district.[14] Second, a minority group must be politically cohesive.[15] This means that members of a minority group must vote together and have shared political interests and preferences. Lastly, the white majority must vote sufficiently as a bloc to enable it to defeat the minority group's preferred candidate.[16] Once the threshold *Gingles* criteria are satisfied, the court examines the totality of circumstances to evaluate whether an electoral practice gives members of a minority group "less opportunity than other members of the electorate to elect representatives of their choice."[17] In amending Section 2 in 1982, the Senate outlined nine important factors to be considered in the totality of circumstances analysis.[18] Additionally, the court considers the proportionality of a minority group's current representation,[19] as well as the existence of a suitable benchmark for the challenged policy to be compared to.[20] Following the 1982 amendments to Section 2, it is clear that liability under Section 2 does not require proof of discriminatory purpose.[21] That is, discriminatory intent is sufficient for Section 2 liability.[22]

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[9] Id §1973c(a).
[10] Id; see also id §1973b(b) (setting forth Section 4 coverage formula)
[11] *Shelby Cty. V. Holder*, 133 S Ct 2612 (2013); see also Nicholas Stephanopoulos, *The South After Shelby County*, Chicago Public law and Legal Theory Working Paper No. 451 (2013)
[12] Tokaji, Daniel P. *Election Law in a Nutshell*, West Law School, 2013.
[13] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012), citing 42 U.S.C. §1973(b) (2006).
[14] *Thornburg v. Gingles*, 478 U.S. 30 (1986).
[15] Id.
[16] Id.
[17] 42 U.S.C. §1973(b) (2006)
[18] Id.
[19] *Johnson v. DeGrandy*, 512 U.S. 997 (1994).
[20] *Holder v. Hall*, 512 U.S. 874 (1994)
[21] Id.
[22] 42 U.S.C. §1973(b)

Over time, the Court has narrowed the scope of Section 2—particularly the first *Gingles* precondition.[23] In *Johnson v. DeGrandy*, the Court noted that the first *Gingles* precondition requires the possibility of creating more than the existing number of opportunity districts for minority candidates.[24] The Court has also held that Section 2 does not extend to districts that are bizarrely shaped.[25] Thus, the court has interpreted the first *Gingles* precondition to require geographic compactness for Section 2 liability to attach. The court has taken this even further to require cultural compactness, which means that districts may not combine over-dissimilar minority communities to avoid Section 2 liability.[26] Lastly, and perhaps most narrowing, the Court in *Bartlett v. Strickland* held that it must be possible to create an additional district in which minority members make up a majority (greater than fifty percent) of the population in order for Section 2 liability to attach.[27] As corollaries to the aforementioned decisions regarding Section 2 of the VRA, the court has also narrowed the remedies available under Section 2. For example, it is an impermissible remedy to a Section 2 violation to create districts that: are bizarrely shaped[28], combine overly dissimilar minority communities[29], or contain less than fifty percent of a minority group population[30]. These limitations significantly narrow the reach and impact of Section 2 of the VRA.

Gaps in the VRA

Despite the Court doctrinally narrowing the scope of Section 2 of the VRA, it has been successful in combating vote dilution in many ways. However, several additional gaps remain. First, the Court's decision in *Bartlett v. Strickland* precludes the possibility of extending Section 2 protection to crossover districts. A crossover district is one in which the minority population is potentially large enough to elect the candidate of its choice with help from voters who are members of the majority who cross over to support the minority's preferred candidate.[31] The Court also precluded the possibility of extending Section 2 protection to influence districts.[32] An influence district is one in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.[33] It currently remains unclear whether Section 2 extends to coalition districts. A coalition district is one in which two minority groups form a

[23] Nicholas Stephanopoulos, *The South After Shelby County*, Chicago Public law and Legal Theory Working Paper No. 451 (2013)
[24] *Johnson v. DeGrandy*, 512 U.S. at 1008 (1994).
[25] *Bush v. Vera*, 517 U.S. 952 (1996); see also *Shaw v. Hunt*, 517 U.S. 899 (1996).
[26] See *LULAC v. Perry*, 548 U.S. 399 (2006); see also Nicholas Stephanopoulos, *The South After Shelby County*, Chicago Public law and Legal Theory Working Paper No. 451 (2013), noting that after LULAC, the court noted that there is no liability under §2 when the relevant minority population is highly "spatially diverse" or "culturally non-compact"
[27] *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).
[28] *Bush v. Vera*, 517 U.S. 952 (1996)
[29] *LULAC v. Perry*, 548 U.S. 399 (2006)
[30] *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).
[31] Id at 1242.
[32] See *LULAC v. Perry*, 126 S. Ct. 2594 (2006), holding that Section 2 does not require the creation of influence districts
[33] Id.

coalition to elect the candidate of the coalition's choice.[34] While the court's insistence on the creation of majority-minority districts does enhance the potential for increased descriptive representation for minority candidates, it may come at the expense of increased substantive representation for minority groups (discussed, *infra*).[35]

Litigation under Section 2 can also be prohibitively costly to plaintiffs. While the DOJ has the authority to bring suit (and to intervene in existing suits) under Section 2, private parties are the most common plaintiffs in Section 2 actions.[36] To bring a Section 2 action, private parties must go through the formal litigation process—including discovery, trial, and possible appeal—which is often extraordinarily costly.[37] As a result, potential plaintiffs may be deterred from bringing Section 2 suits. Further, itself constrained by limited resources, the DOJ is less apt to step in to contest policies promulgated by local governments.[38] In light of these two factors, the difficulty of bringing Section 2 claims is greatest at the local level and in rural communities.[39]

Due to the weakening of the VRA post-*Shelby County* and the court's decisions constricting Section 2 coverage, state-level efforts to prevent and/or remedy minority vote dilution are increasingly important. Indeed, with Section 2 narrowed by the Court and Section 5 essentially nullified, the future of voting rights legislation may be at state-level. Recognizing this and in response to some of the gaps in the VRA, three states have enacted or proposed individual state Voting Rights Acts. A fourth state—Florida—has attempted to narrow the gaps left from the VRA via state Constitutional amendment. The aim of this paper is to explore the ways that these states have aimed to use their individual state-VRAs to close the gaps in coverage that exist under Section 2 of the federal VRA. For each of the four enacted or proposed VRAs, I will explore the background of the legislation, followed by an analysis of how the legislation operates. For California, Illinois, and Florida—the three states with enacted VRAs—I will then examine how successful the legislation has been in increasing minority representation, and how it can be strengthened to further the state's goals. Since Washington's VRA has yet to become law, I will explore the background, followed by an analysis of the proposed legislation. I will conclude by assessing which individual state-VRAs—or aspects thereof—are best suited to serve as models for the forty-six other states without such legislation.

II. Individual State-VRAs (and Functional Equivalents)

State Voting Rights Acts in California, Illinois, Washington, and (functionally) Florida have all been enacted or proposed with the goal of broadening protection for minority voters than that which is afforded under the federal VRA. While each was enacted to address problems and remedies unique to each respective state, all four aim to address the problem of minority vote dilution in the redistricting process.

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[34] Id.

[35] Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 889 (Foundation, 2d. Ed. 2001)

[36] Nicholas Stephanopoulos, *The South After Shelby County*, Chicago Public law and Legal Theory Working Paper No. 451 (2013)

[37] Id.

[38] Id.

[39] *Shelby Cty v. Holder*, 679 F3d at 872; see also Nicholas Stephanopoulos, *The South After Shelby County*, Chicago Public law and Legal Theory Working Paper No. 451 (2013)

Underlying the evaluation of each state's legislation—as well as the VRA—is the tension between descriptive and substantive minority representation. Descriptive representation refers to the election of representatives "who share salient qualities with the electorate they represent."[40] That is, descriptive representation is focused on electing representatives that "look like" their constituents.[41] Descriptive representation may be desirable for myriad reasons including, but not limited to, enhancing the legitimacy of political bodies within the community and fostering a greater sense of civic inclusion among political minorities.[42] Substantive representation, on the other hand, focuses on electing a legislative body most likely to support the substantive policy preferences of the given group of voters.[43] The tension between both types of representation raises questions as to whether more minorities in office translates into substantive representation that is more responsive to the minority community.[44] To the extent that there is a strong correlation between descriptive and substantive representation, the election of more minority representatives would be a desirable result under individual state-VRAs. To this point, academic studies have concluded that "verifiable, material changes in local government policy do occur when racial minorities begin to assume public office."[45] However, scholars continue to question whether the increased presence of minority-group representatives translates into tangible policy and other benefits for minority voters.[46] That is to say, a white representative may represent the policy-interests of minority groups just as effectively as a minority representative would—particularly where there exists a sizeable minority population. Thus, the creation of influence districts distinctly caters to the goal of increasing substantive representation for minority voters.

I will analyze the four state-VRAs based on the assumption that increased descriptive and substantive representation are both desirable goals in decreasing minority vote dilution. For the sake of analysis herein, I assume that increased descriptive representation leads to increased substantive representation as well.[47] This requires the belief that minority voters generally elect minority candidates to represent them and, therefore, increasing the number of minority officeholder goes hand-in-hand with enacting legislation that furthers the interests of the minority community.[48] To the extent that this is true and desired, the strongest individual state-

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[40] Samuel Issacharoff, Pamela S. Karlan & Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 889 (Foundation, 2d. Ed. 2001)
[41] Id.
[42] Id at 1198.
[43] Id at 889.
[44] Id at 1198.
[45] Id.
[46] Id.
[47] This is undoubtedly a large assumption that is subject to lengthy debate (see, e.g., below)
[48] Charles Cameron, David Epstein, and Sharyn O'Halloran, *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, The American Political Science Review, Vol. 90, No. 4 (Dec., 1996); NB: it is unclear that minority interests are always best served by the creation of minority-minority districts. In many instances a tradeoff between descriptive and substantive representation exists. That is, the creation of majority-minority districts may dilute minority influence in surrounding areas, which may then elect representatives unsympathetic to minority concerns. To illustrate this tradeoff, Cameron, Epstein, and O'Halloran find that in the South, minority substantive representation is maximized by districts with 47% minority population, whereas everywhere else optimal districting schemes

VRAs are those that result in increased descriptive representation. Individual state-VRAs that operate to primarily impact substantive representation are less strong, but still move closer toward the desired goal of decreasing minority vote dilution. I will also analyze the extent to which each of the individual state-VRAs address the specific gaps left by the VRA. In this sense, individual state-VRAs that most comprehensively seek to remedy gaps left by the VRA are the strongest. It is helpful to note at the outset, however, that none of the four state-VRAs address all of the gaps left by the VRA.

A. California Voting Rights Acts (CVRA)

Background

The California Voting Rights Act (CVRA), passed in 2001, seeks to address the problem of racially polarized voting.[49] The CVRA provides a cause of action to members of any racial or ethnic group that can establish that its members' votes are diluted through the combination of racially polarized voting and an at-large election system.[50] Responding to the reality in California that no racial group forms a majority of the state's population, the CVRA is race-neutral.[51] That is, it was designed to combat vote dilution experienced by *any* group, including whites.[52] The Assembly Judiciary Committee analysis noted the importance of ensuring that the state's electoral system is fair and open, in light of the fact that "we are all minorities."[53] However, the problem of racially polarized voting has historically been driven by the refusal of white voters to vote for minority candidates, which deprives minority voters of opportunities to elect candidates they wish in areas where minority voters do not constitute the majority.[54] Despite the current makeup of the state as a whole, racial polarization between a historically white majority and traditionally underrepresented minority groups persists in parts of California.[55] Accordingly, though nominally race-neutral, the CVRA was enacted primarily with the aim of protecting such minority groups from racially polarized voting.

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divide minority populations equally. It is worth noting, as Cameron, Epstein and O'Halloran do, that the overall efficacy of majority-minority districts remains unresolved. As such, for the sake of analysis herein, I have made the above assumptions.

[49] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)

[50] *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006).

[51] Id., holding that the CVRA is race-neutral and that all persons, regardless of race, have standing under the CVRA to sue for race-based vote dilution.

[52] Id.

[53] Id.

[54] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)

[55] Id, citing Matt Barreto, Christian R. Grose & Ana Henderson, *Redistricting: Coalition Districts and the Voting Rights Act*, Research Brief for the Chief Justice Earl Warren Institute on Law and Social Policy, University of California, Berkeley Law School, May 2011 at 3-8.

Another important aim of the CVRA is to provide a broader cause of action for vote dilution than was provided for by the VRA.[56] Specifically, the California Legislature wanted to remove the *Gingles* requirement that in order to establish liability for vote dilution, plaintiffs must show that a compact, concentrated majority-minority district is possible.[57] This will be analyzed in greater depth in the following section.

Analysis

The California Voting Rights Act closely mirrors the VRA in several ways. However, there are notable departures. As such, it is helpful to analyze the CVRA in terms of differences from and similarities to the VRA.

The first main difference between the CVRA and the VRA is that the CVRA eliminates the first *Gingles* precondition, which requires a minority group to be sufficiently large and geographically compact before Section 2 liability will attach.[58] Specifically, Section 14028(c) of the CVRA states: "the fact that members of a protected class are not geographically compact or concentrated may not preclude a finding of racially polarized voting."[59] Whereas Section 2 of the VRA protects only compact, concentrated minorities, this provision of the CVRA operates to afford protection to smaller, dispersed minority groups. Thus, this provision eliminates a major shortcoming of the VRA. Under the CVRA, geographic compactness and population concentration may still factor in at the remedy stage.[60] According to a bill analysis (on what ultimately became the CVRA) for the Assembly Committee on Judiciary,

> "[The CVRA] recognizes that geographical concentration is an appropriate question at the remedy stage. However, geographical compactness would not appear to be an important factor in assessing whether the voting rights of a minority group have been diluted or abridged by an at-large system. Thus, this bill puts the voting rights horse (the discrimination issue) back where it sensibly belongs in front of the cart (what type of remedy is appropriate once racially polarized voting has been shown.)"[61]

The effect of this construction makes it easier for a plaintiff to bring a vote dilution claim under the CVRA by eliminating geographic compactness and concentration as requirements, while simultaneously broadening the potential for relief by allowing—but not requiring—geographic compactness and concentration to be considered as remedies. That is, compact, majority-minority districts can, but need not, be drawn as remedies under the CVRA. Thus, by broadening the cause of action for vote dilution, the CVRA affords protection to a wider class of potential plaintiffs than does the VRA.

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[56] *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 669 (2006).
[57] Id.
[58] Id.
[59] Cal. Elec. Code §14028(c)
[60] Id.
[61] Assem. Com. on Judiciary, Analysis of Sen. Bill No. 976 (2001–2002 Reg. Sess.) as amended Apr.9, 2002, p. 3.

Second, the CVRA explicitly takes influence districts into account.[62] While the Court has interpreted the VRA as *not* to apply to influence districts,[63] the text of the CVRA states:

> "An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice *or its ability to influence the outcome of an election*, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class."[64]

Thus, a claim under the CVRA may result from elections where a small group can show that it has voted cohesively as a block to influence—yet not necessarily change—the outcome of an election.[65] While neither the federal nor California courts have delineated a precise standard defining "ability to influence," its mere textual inclusion suggests a broader standard applies than that which applies under the Court's interpretation of the VRA.[66]

Third, the CVRA places a higher probative value on prior evidence of discriminatory at-large systems.[67] Section 14028(a) explicitly states that "elections conducted prior to the filing of an action pursuant to Section 14027 and [14028] are more probative to establish the existence of racially polarized voting than elections conducted after the filing of the action."[68] The CVRA "thus treats post hoc cosmetic changes to a discriminatory at-large system as preliminarily suspect and not worthy of the same probative value as prior evidence."[69] Fourth, "other factors" (akin to the totality of circumstances inquiry of the VRA) which hinder a protected class's "ability to participate effectively in the political process, and the use of overt or subtle racial appeals in political campaigns are probative, but not necessary factors" to establish a CVRA violation.[70] Thus, in theory, a plaintiff's claim under the CVRA could prevail absent a showing of any of the Court's delineated "totality of circumstances" factors.

Lastly, the CVRA enlarges the potential options for relief upon a finding of vote dilution. Section 14029, which governs remedies for violation of Sections 14027 and 14028, is notably vague in terms of what specific remedies are required.[71] The section states: "upon a finding of a violation…the court shall implement appropriate remedies, including the imposition of district-

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[62] Cal. Elec. Code §14027
[63] *LULAC v. Perry*, 548 U.S. 399 (2006)
[64] Cal. Elec. Code §14027, emphasis added.
[65] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)
[66] Id, citing *Bartlett v. Strickland*, 129 S. Ct. at 1248 (2009).
[67] Cal. Elec. Code §14028(a)
[68] Id.
[69] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)
[70] Cal. Elec. Code §14028(e), including as "other factors": history of discrimination, the use of electoral devices or other voting practices or procedures that may enhance the dilutive effects of at-large elections, denial of access to those processes determining which groups of candidates will receive financial or other support in a given election, and the extent to which members of a protected class bear the effects of past discrimination in areas such as education, employment, and health
[71] Cal. Elec. Code §14029

based elections, that are tailored to remedy the violation."[72] This affords judges a large amount of discretion at the remedy stage, which opens the door to a variety of potential remedies, many of which are unavailable under the VRA.[73] By eliminating the requirement of sufficient minority population size under the VRA, a court could create crossover, coalition, or influence districts as remedies under the CVRA.[74] Additionally, a court is not limited to imposing district-based remedies.[75] A court could theoretically impose an alternative at-large voting system as a remedy under CVRA.[76] For example, a court could impose as a remedy a cumulative voting system, in which each voter has as many votes as there are seats.[77] Under such a system, a voter can choose to allocate all of his/her votes to one candidate or to distribute his/her votes evenly among several candidates.[78] With cumulative voting, a politically cohesive but geographically dispersed minority group could potentially elect a single candidate by giving all of its votes to that candidate.[79] This would be the case despite the fact that the same group may be unable to elect any candidates in a winner-take-all at-large system and could not form a majority in any feasible district in a district-based system.[80]

Two other alternative forms of at-large voting systems—limited voting and preferential voting—may also be available as remedies under the CVRA. Under a limited voting system, every voter has one vote, and the available seats are distributed between the top vote-getters.[81] For example, if a city council has five seats, each voter would get to vote for one candidate and the top five ranked candidates would be elected to the council. Under a system of preferential voting, voters get to rank candidates in their order of preference, and a candidate must receive a specific quota in order to be elected.[82] The result of a preferential voting system ends up being fairly similar to proportional representation. The court has yet to judicially draw a line limiting what remedies are available under the CVRA. As such, as the statute currently reads, it can undoubtedly be argued that any of these forms of potential relief—which are very rare under the VRA—are available under the CVRA.[83] Unless and until the court limits the language of Section 14029, the potential relief is vastly less narrow under the CVRA.

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[72] Id.
[73] See, e.g. *Bartlett v. Strickland*, 129 S. Ct. at 1248 (2009); *LULAC v. Perry*, 548 U.S. 399 (2006); *Bush v. Vera*, 517 U.S. 952 (1996).
[74] *Sanchez v. City of Modesto*, 145 Cal. App. 4th at 670 (2006).
[75] Cal. Elec. Code §14029
[76] *Sanchez v. City of Modesto*, 145 Cal. App. 4th at 670 (2006).
[77] Id.
[78] Id.
[79] Id.
[80] Id.
[81] Nicholas Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. Chi. L. Rev. 769 at 835 (Spring 2013).
[82] Id.
[83] Thus far, only district-based election systems have been utilized as CVRA remedies. There are two possibilities to explain this result. First, the CVRA explicitly provides that district-based elections are permissible as remedies. In addition to gaining certainty that district-based elections are permitted, it is possible that such systems are thus seen as the preferred method. Second, Section 4 of Article XI of the California Constitution requires "a governing body of 5 or more members to be elected (1) by district; (2) at large; or (3) at large, [with district residency

Despite these differences, the CVRA draws on the VRA in a variety of ways. First, the definition of "protected class" is "as referenced and defined in the federal Voting Rights Act."[84] CVRA Section 14028(b) outlines factors and circumstances to determine whether racially polarized voting has occurred.[85] Some of these factors and circumstances borrow from VRA case law. For example, the extent to which candidates preferred by voters of the protected class, who identify as members of the protected class, have been elected to the governing body of a local political subdivision may be considered in determining whether there has been a violation.[86] Additionally, the occurrence of racially polarized voting under the CVRA shall be determined from examining results of elections in which at least one candidate is a member of a protected class or elections involving ballot measures, or any other electoral choices that affect the rights and privileges of members of a protected class.[87] Finally, similar to the VRA, plaintiffs do not need to provide proof of discriminatory intent to bring a claim under the CVRA.[88]

By departing from the VRA in ways that afford broader protection to minority voters, while at the same time adopting some of the VRA's original provisions, the CVRA has ultimately widened the scope and remedies available for vote dilution claims.

Success of the CVRA

Since its enactment in 2001, the CVRA has contributed to advancements made in decreasing minority vote dilution and getting minority descriptive representation closer to levels that correspond to their representation in the state's population. The seminal CVRA case, *Sanchez v. City of Modesto*, attracted attention of minority voters in California that had experienced representational harms; many of whom lived in districts not covered by Section 4 of the VRA and thus realized that vote dilution claims were feasible.[89] To the extent that this attention has been held and maintained to present, this effect is particularly important for the handful of jurisdictions in California previously covered under Section 4, given the Court's recent decision dismantling Section 4 of the VRA.[90]

The CVRA has been particularly successful in responding to one of the main gaps in Section 2 of the VRA, namely the difficulty in bringing Section 2 claims at the local level and in rural communities. The success of the CVRA and CVRA litigation has produced distinct changes in descriptive representation, particularly for rural Latino communities.[91] This is one of the primary

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requirement]." These alternative forms are types of at-large systems and thus would likely be seen as consistent with Article XI, but jurisdictions (particularly those already on thin ice under the CVRA) may not want to push their luck.

[84] Cal. Elec. Code §14026(d)

[85] Cal. Elec. Code §14028(b)

[86] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)

[87] Cal. Elec. Code §14028(b); see also *LULAC v. Perry*, 548 U.S. 399 (2006)

[88] Cal. Elec. Code §14028(d)

[89] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)

[90] *Shelby Cty. V. Holder*, 133 S Ct 2612 (2013)

[91] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)

benefits to individual state-VRAs as a whole, but California has specifically seen this benefit play out.

The success of the CVRA and CVRA litigation has produced distinct changes in descriptive representation, particularly for rural Latino communities.[92] For example, in 2008, a Superior Court Judge ruled that an-large school board election in Madera, located in central California, violated the CVRA.[93] The suit, brought by the Lawyers Committee for Civil Rights against the Madera Unified School District, complained that 82% of the district's students are Latino but only one Latino sits on the seven-member school board.[94] The plaintiffs presented evidence that Latinos have run in school board races eight times in the past twelve years, but have been defeated in all but one case.[95] The legal director for the Lawyers Committee for Civil Rights attributed the Latino vote dilution in Madera to "Anglo bloc voting."[96] In the twenty-five years preceding the suit, only one Latino had ever served on the school board.[97] The Judge tossed out the results of the at-large election, and required that the three school board seats be replaced by district-based elections. Today, the District has a Latino Superintendent and three Latinos sit on the Madera Unified School District school board.[98]

Most recently, a Superior court Judge in Palmdale held that the city's at-large elections violate the CVRA and ordered new, district-based elections.[99] In his decision, the judge ordered the entire Palmdale City Council removed from office by July 2014 and called a special election to give minorities a fair chance to elect their candidates of choice.[100] Several minorities filed suit in this action, claiming that at-large elections undercut their opportunity to elect candidates of their choice.[101] About two-thirds of Palmdale residents are minorities, but only two minorities have been elected to the city's Council since 1962.[102] The Judge's ruling would create four districts in Palmdale: two of which would be majority-Latino and one would have a "substantial numbers of Black and Latino residents."[103] While the City has appealed this decision, the current decision as it stands may have strong precedential value for other cities and school districts that have been sued for holding at-large elections under the CVRA.[104] If the decision is upheld,

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[92] Id.
[93] "Judge: Madera School Election Violated Law." *Associated Press* 25 Sept. 2008
[94] Id.
[95] Id.
[96] Id.
[97] Id.
[98] Joanna E. Cuevas Ingram, *The Color of Change: Voting Rights in the 21st Century and the California Voting Rights Act*, 15 Harv. Latino L. Rev. 183 (2012)
[99] Merl, Jean. "Palmdale Appeals Court Decision, Says It Won't Hold New Election" *L.A. Times*. L.A. Times, 9 Jan. 2014. Web. 13 Jan. 2014
[100] "Judge Kicks out Palmdale City Council, Orders Special Election." *Dailynews.com*. N.p., 2 Dec. 2013. Web. 7 Jan. 2014.
[101] Merl, Jean. "Palmdale Appeals Court Decision, Says It Won't Hold New Election" *L.A. Times*. L.A. Times, 9 Jan. 2014. Web. 13 Jan. 2014
[102] Id.
[103] Merl, Jean. "Palmdale Ordered to Hold By-District Election for City Council Posts" *L.A. Times*. L.A. Times, 2 Dec. 2013. Web. 7 Jan. 2014
[104] "Judge Kicks out Palmdale City Council, Orders Special Election." *Dailynews.com*. N.p., 2 Dec. 2013. Web. 7 Jan. 2014.

Madera's school board may serve as strong anecdotal evidence that Palmdale's new district-based elections will result in increased descriptive representation for minority candidates.

Due in part to the aforementioned success of CVRA litigation thus far, several jurisdictions in California with at-large voting systems and significant minority populations, but few or no minority elected officials, have voluntarily switched to by-district elections to avoid or settle lawsuits.[105] Most notably, this includes the City of Modesto, the fourth-largest city in California to hold at-large elections.[106] This settlement came on the heels of the Fifth District Court of Appeals ruling in *Sanchez v. Modesto*, upholding the constitutionality of the CVRA.[107] The court's decision and settlement arguably strengthened the force of the CVRA, as they "send a message that the at-large election system is susceptible to challenge, and that [at-large systems] will be costly to defend."[108] Most recently, the city of Anaheim settled a CVRA suit brought by the ACLU on behalf of Anaheim minority voters.[109] The Settlement Agreement requires the City Council to place a resolution calling an election in November 2014 for voters to change from an at-large electoral system to a single member district system.[110] A third city, Whittier, has also been sued over its at-large elections and plans to put the decision to change to district-based elections to voters in June.[111]

Relative to the status quo under Section 2 of the VRA, it remains to be seen how successful the CVRA has been in increasing substantive minority representation. The recent Palmdale ruling provides some indication that substantive representation can be increased via the CVRA (namely, through the creation of crossover, coalition, or influence districts that would not otherwise exist.)[112] The impact of the CVRA on substantive representation largely depends on how districts are drawn in municipalities with voluntarily adopted district-based systems. The CVRA has also been particularly successful in responding to one of the main gaps in Section 2 of the VRA; namely, the difficulty in bringing Section 2 claims at the local level and in rural communities. The existence of an individual state-VRA on its own does work to remedy this issue, but the CVRA has proven effective in its ability to reach local, rural communities.[113]

Gaps In and Potential Ways to Strengthen the CVRA

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[105] Merl, Jean. "Palmdale Appeals Court Decision, Says It Won't Hold New Election" *L.A. Times*. L.A. Times, 9 Jan. 2014. Web. 13 Jan. 2014

[106] Ashton, Adam. "Settlement in Latino Voting Case Will Set Modesto Back $3 Million." *The Modesto Bee*. N.p., 6 June 2008. Web. 13 Jan. 2014.

[107] *Sanchez v. City of Modesto*, 145 Cal. App. 4th at 670 (2006).

[108] Ashton, Adam. "Settlement in Latino Voting Case Will Set Modesto Back $3 Million." *The Modesto Bee*, 6 June 2008. Web. 13 Jan. 2014, noting that the city was required to pay $3 million in attorneys fees

[109] "City of Anaheim Announces Settlement in California Voting Rights Act Case." *City of Anaheim* Web. 14 Jan. 2014.

[110] Id.

[111] Merl, Jean. "Palmdale Appeals Court Decision, Says It Won't Hold New Election" *L.A. Times*. L.A. Times, 9 Jan. 2014. Web. 13 Jan. 2014

[112] Merl, Jean. "Palmdale Ordered to Hold By-District Election for City Council Posts" *L.A. Times*. L.A. Times, 2 Dec. 2013. Web. 7 Jan. 2014

[113] See, e.g., "Judge: Madera School Election Violated Law." *Associated Press* 25 Sept. 2008

Despite its noted success in many areas, gaps remain in the CVRA. First, CVRA litigation can be prohibitively costly. As with the VRA, the costs associated with normal litigation—including trial, discovery, and appeal—add up quite quickly. For example, the successful *Sanchez v. City of Modesto* litigation came with a steep price tag upward of $4.5 million.[114] Although the statute provides for the awarding of attorney's fees, such awards are available only to prevailing plaintiffs. [115] As such, the prospect of losing may deter potential plaintiffs with otherwise-strong CVRA claims from bringing suit in the first place. A potential solution—suggested by the proposed Washington legislation (discussed *infra*)—would be to allow jurisdictions a window to voluntarily remedy a challenged at-large system. This would promote settlement from the get-go, thereby greatly reducing the cost to both plaintiffs and jurisdictions challenged under the CVRA[116]. Despite the fact that litigation under the CVRA may still be costly, it could still be less costly as compared to litigation brought under the VRA.[117]

Courts in California have yet to address whether alternative at-large systems (such as cumulative, preferred, or limited voting) are valid remedies under the CVRA. Taken together, the language of Sections 14027 (what systems are prohibited) and 14029 (remedies) seem to suggest—at least from a textual standpoint—that alternative at-large systems may be considered as valid CVRA remedies. Requiring "appropriate remedies, including the imposition of district-based elections" as a violation of the CVRA strongly suggests that CVRA remedies are not limited to district-based systems.[118] If one believes that one of the main goals of the CVRA is to move toward representation that is more proportional to the size of a minority group's population in a given jurisdiction, such alternative at-large systems are entirely consistent with the CVRA. Additionally, the court has not explicitly ruled on precisely how population size and geographic compactness factor in to the remedy stage. Given the court's ruling in Palmdale, it is clear that majority-minority districts are not a required at the remedy stage under the CVRA.[119] However, it is unclear to what extent geographic compactness and majority-minority districts are desirable at the remedy stage. Thus, while coalition, crossover, and influence districts clearly seem to be *allowed* under the CVRA, it remains unclear to what extent such districts are desired, required, or implemented, and what shape such districts are required to take.

Relatedly, the CVRA does not appear to allow for vote dilution claims to be brought against jurisdictions with district-based election systems. Section 14027 merely prohibits an "at-large method of election" from being "applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result

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[114] Zabel, Kylee. "Washington Voting Rights Act Draws Contentious Testimony: Minority Representation versus At-large Elections." *Bainbridge Island Review*, 15 Feb. 2013. Web. 7 Jan. 2014.

[115] Cal. Elec. Code §14030

[116] Though this is similar to the ability to settle under a CVRA or VRA claim, such an "opt out" provision makes it easier to settle early-on, before litigation costs add up.

[117] This reduction in cost likely results from the elimination of proving "totality of circumstances" as a requirement for liability to attach, though such evidence is still considered probative of CVRA violation (see Cal. Elec. Code §14028(e))

[118] Cal. Elec. Code §14029

[119] Merl, Jean. "Palmdale Appeals Court Decision, Says It Won't Hold New Election" *L.A. Times*. L.A. Times, 9 Jan. 2014. Web. 13 Jan. 2014, noting that one remedial district was not a majority-minority district

of the dilution or abridgment of the rights of voters who are members of a protected class…"[120] It is clear, then, that Section 14027 prohibits the proscribed conduct as it relates to at-large—but not district-based—election systems. This can ultimately end up being a significant gap in the CVRA, as this limitation may ultimately nullify the CVRA. Ideally, at some time in the future, all jurisdictions will hold district-based (or alternative at-large) elections. Under the CVRA's current construction, its protections would cease to exist once there are no longer traditional at-large election systems operating in California. One might think this is not a big issue, as the CVRA would have done its job if no at-large systems remain. However, this is problematic because it is not hard to imagine a district-based system that falls ill to all of the proscribed conduct laid out in Section 14027. For example, a racial gerrymander that creates one large majority-minority district in a district-based system (that is, extreme geographic concentration) may still significantly dilute the minority group's vote. While this may be better than an at-large system where the minority group holds zero seats, such a system still has the potential to dilute minority group votes. This gap could be easily remedied by modifying the language of Section 14027 to include district-based systems as well, but it's unclear whether that would be a politically feasible option.

Lastly, the California courts have yet to address precisely what level of "influence" amounts to a violation of the CVRA under Section 14027. This Section prohibits "at-large methods of election imposed or applied in a manner that impairs the ability of a protected [class'] ability to influence the outcome of an election…"[121] This leaves open the question of whether a minority group consisting of, say, less than 5% of the population, would have a valid claim under the CVRA for its inability to influence the outcome of an election, and raises important questions as to where the line should be drawn.

There undoubtedly are changes that could be made to strengthen the ability of the CVRA to protect minority voters against vote dilution. However, it has been largely successful thus far, as compared to the status quo with respect to at-large elections, in achieving the goal of increasing descriptive minority representation and broadening the claims and relief available than those available under the VRA. It is also worth noting that, to date, California has the most comprehensive individual state-VRA in the country. Thus, there is no doubt that other states wishing to enact state-VRAs would be wise to use the CVRA as a starting-point.

B. Illinois Voting Rights Act (ILVRA)

Background

In 2011, Illinois governor Pat Quinn signed into law the Illinois Voting Rights Act (ILVRA). The passage of the ILVRA marked the first time in forty years that redistricting law in Illinois was changed.[122] Leaders in Chicago's Chinatown neighborhood were the driving force behind the bill, which sought to remedy situations similar to what happened there following the

[120] Cal. Elec. Code §14027
[121] Id.
[122] Wetterich, Chris. "Bill Would Give Public Bigger Say in Redistricting." *The State Journal Register* [Springfield, IL] 6 Dec. 2010

2000 Census.[123] Following the 2000 redistricting cycle, the Chinatown neighborhood was split up into three state Senate and four state House districts.[124] This had a serious impact on both the descriptive and substantive representation for the Chinese-American population there.[125] Additionally, with increasing Latino populations in the state, the ILVRA also aimed to guarantee commensurate representation for Latino voters as well.[126]

Analysis

Unlike the CVRA, the ILVRA is not structurally modeled on the federal VRA. The ILVRA, which applies to "any redistricting plan," is prospective.[127] That is, the ILVRA does not provide a cause of action for voters that have experienced vote dilution in previous elections. Instead, the ILVRA imposes requirements on the Illinois Legislature (the General Assembly) in creating future apportionment plans.[128] This means that voters that experience past vote dilution in Illinois (such as Chinese voters in the Chinatown neighborhood) can challenge future redistricting plans as violative of the ILVRA, as opposed to bringing a vote dilution claim under the ILVRA. However, plans first must expressly apply with the requirements of the federal VRA.[129] Illinois voters are thus still able to bring vote dilution claims for past dilution under the federal VRA. Additionally, the requirements under the ILVRA are subordinate to the Illinois Constitution, United States Constitution, and federal law (including the VRA).[130] The ILVRA takes over where some of the ambiguities in the VRA leave off. Once the state has complied with the VRA, which generally requires the drawing of a certain number of majority-minority districts, the ILVRA then requires the Illinois General Assembly to draw additional "crossover districts, coalition districts, or influence districts," where possible. [131] By requiring such districts to be drawn, the ILVRA answers the questions left open by the VRA post-*Bartlett* and *LULAC*, and specifically aims to protect the interests of minorities who may make up less than fifty percent of a district's population.[132] As such, the ILVRA is intended to "preserve a cluster of

[123] Id.
[124] "Democrats Release Legislative Redistricting Maps." *Clout Street*. Chicago Tribune, 19 May 2011. Web. 7 Jan. 2014.
[125] Southtown Star, quoting Theresa Mah, consultant for the Coalition for a Better Chinese American Community: "we have a really hard time trying to get our elected officials to pay attention to our needs because we're just small portions of all these different districts…" and, without an elected representative of their own, "constituents have to rally around several leaders to make sure their voice is heard on issues like funding for community programs and even choosing a new library site."
[126] "Illinois Redistricting Law: Quinn Signs Bill To Require Public Input, But Is It Enough?" *Huffington Post*, 7 Mar. 2011. Web. 14 Jan. 2014.
[127] 10 Ill. Comp. Stat. 120/5-5(a)
[128] See, e.g., 10 Ill. Comp. Stat. 120/5-5(a)
[129] 10 Ill. Comp. Stat. 120/5-5(a)
[130] Id.
[131] Id.
[132] Tareen, Sophia. "Quinn Signs Chinatown Redistricting Legislation." *Southtown Star*. Associated Press, 24 Sept. 2012. Web. 9 Jan. 2014.

minority voters within a given legislative district if they are of a size and cohesion that could exert collective electoral power."[133] While the requirement (and, thus, ability) to create crossover, coalition, and influence districts exists under the ILVRA, it is unclear how far this requirement extends.[134]

Like the CVRA, remedies under the ILVRA are extremely open-ended. Section 120/5-5(e) states: "in the event of a violation of this Act, the redistricting plan shall be drawn to the least extent necessary to remedy the violation."[135] This appears to allow judges a large amount of discretion in crafting possible remedies. It is also interesting to note that, since the ILVRA is primarily concerned with prospective line-drawing remedies in the first place, this provision seems to simply require more of what is already required under the statute. In addition to being subordinate to the VRA, the ILVRA borrows slightly from the VRA. For example, the defined class of protected voters receiving protection under the ILVRA is borrowed from the VRA.[136]

Success of the ILVRA

The ILVRA has only been in effect since 2011, so anecdotal and statistical data related to its success is limited to one redistricting cycle. The limited evidence, however, suggests that the ILVRA has been only somewhat successful in increasing descriptive minority representation. Following the 2011 redistricting process in Illinois, which complied with the ILVRA, the Coalition for a Better Chinese American Community was "deeply disappointed" with the Illinois Congressional map, which continued to divide the Chinatown community into three Congressional districts.[137] The state House and Senate maps, on the other hand, kept the Chinatown community intact.[138] Prior to the 2011 redistricting maps, there were no Legislative districts with greater than twenty percent Asian population.[139] Under the current map, there are two state House seats and one state Senate seats with greater than twenty percent Asian populations.[140] However, following the 2012 election cycle, there are no Asian-Americans represented in the Illinois General Assembly.[141] This suggests that—if anything—the ILVRA has been successful thus far only in increasing substantive, not descriptive, representation.

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[133] *Radogno v. Illinois State Bd. of Elections,* 2011 WL 5025251, 8 (N.D.Ill. Oct. 21, 2011)
[134] Discussed, *infra*.
[135] 10 Ill. Comp. Stat. 120/5-5(e)
[136] 10 Ill. Comp. Stat. 120/5-5(c)
[137] Strausberg, Chinta. "Chinese Leaders Statement on Disappointment with Illinois; Congressional Map's Impact on Chinatown." *Chicago Now*, 29 May 2011. Web. 13 Jan. 2014; see also "Democrats Release Legislative Redistricting Maps." *Clout Street*. Chicago Tribune, 19 May 2011. Web. 7 Jan. 2014.
[138] Strausberg, Chinta. "Chinese Leaders Statement on Disappointment with Illinois; Congressional Map's Impact on Chinatown." *Chicago Now*, 29 May 2011. Web. 13 Jan. 2014
[139] Leu, Melissa. "New Legislative Maps Unifies Chinatown, but Splits Others." *Illinois Statehouse News*, 26 May 2011. Web. 14 Jan. 2014.
[140] Id.
[141] "Illinois General Assembly Home Page." *Illinois General Assembly Home Page*. Web. 9 Jan. 2014.

The state's Latino population was also dissatisfied with the 2011 maps, asserting that the map "fractures Latino communities and weakens Latino voting strength."[142] According to the Mexican American Legal Defense and Education Fund (MALDEF), the 2011 redistricting map does not create a sufficient number of majority-Latino districts in the state.[143] Despite gaining three majority-Latino districts in the House and one in the Senate (bringing the total to eleven and five, respectively), MALDEF leaders argue that this is not enough to keep up with the growing number of Latino residents in Illinois. [144] The group prefers to have a majority of at least sixty-five percent, which exists in six House districts and no Senate districts.[145] This reaction strongly suggests that while increased substantive representation is a step in the right direction, it is not enough.

The ILVRA potentially remedies the cost-issue created under the VRA, as it effectively places the burden on the line-drawers to comply. However, unsatisfied groups that wish to bring a claim arguing that the ILVRA was not complied with will likely face the same cost-burdens as is typical for bringing suit. It is clear that the ILVRA has been helpful in increasing substantive representation for minority communities. To the extent that one believes that increased descriptive representation is the larger goal of state-VRAs, the ILVRA left something to be desired following the 2011 redistricting cycle (discussed, *supra*). However, to the extent that crossover and coalition districts are authorized under the ILVRA, it may ultimately contribute to an increase in descriptive representation.

Gaps In and Potential Ways to Strengthen the ILVRA

The requirements of the ILVRA (namely, the creation of crossover, coalition, and influence districts) are "in addition and subordinate to any requirements or obligations imposed by the United States Constitution, [any federal law (including the VRA)], and the Illinois Constitution.[146] Further, "nothing in [the Act] shall be construed, applied or implemented in a way that imposes any requirement or obligation that conflicts with the United States Constitution, [any federal law (including the VRA)], or the Illinois Constitution.[147] This seems entirely consistent with the VRA. For example, influence districts could easily be drawn in Illinois without conflicting with any of the statutory or judicial requirements of the VRA. However, Section 3 of Article 4 of the Illinois Constitution requires Legislative Districts to be compact and contiguous.[148] The courts have yet to address how the ILVRA, VRA, and Illinois Constitution interact. That is to say that the way the courts define "compactness" for the purposes of the ILVRA and Illinois Constitution can have a large impact on how the crossover, coalition, and influence districts are ultimately created. If the courts decide that "compact" districts are defined narrowly (a la *Shaw* or *LULAC*), this can significantly limit the reach of the

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[142] "Quinn Signs Legislative Redistricting Map Into Law." *NBC Chicago*. NBC Chicago, 3 June 2011. Web. 7 Jan. 2014.
[143] Flowers, Aricka. "Minority Groups: Illinois Redistricting Maps "Unfair"" *Progress Illinois*, 31 May 2011. Web. 7 Jan. 2014.
[144] Id.
[145] Id.
[146] 10 Ill. Comp. Stat. 120/5-5
[147] 10 Ill. Comp. Stat. 120/5-5(d)
[148] ILCS Const. Art. 4 §3

ILVRA in accomplishing its goals, particularly because the ILVRA is explicitly subordinate to the Illinois Constitution. The courts have yet to go this far, but this is undoubtedly a large potential gap in the ILVRA. Due in equal part to this lack of explicit interaction and the lack of case law interpreting the ILVRA, it is somewhat unclear whether the ILVRA is justiciable or whether it serves as advice and/or guidelines for line-drawers. That is, due to limited evidence, it is somewhat unclear whether a private plaintiff or an unsatisfied minority group can even bring suit under the ILVRA. It seems likely that an unsatisfied group could use the ILVRA as a mechanism to challenge a proposed redistricting plan (that is, to require a plan to be redrawn to comply), although this did not happen in the 2011 redistricting cycle.

Moreover, the ILVRA's requirement of creating "crossover, coalition, *or* influence districts" lacks force and clarity.[149] Influence districts are defined in the ILVRA as "[districts] where a racial minority or language minority can influence the outcome of an election even if its preferred candidate is not elected."[150] This is markedly vague, and may not end up providing all that much protection. This language suggests that a very small (less than 5%) minority population in a given district is okay, so long as said group can "influence the outcome" of an election. However, it is not clear how the ability to influence an election's outcome is defined, or how a group's inability to influence an election's outcome is shown. This open-endedness leaves considerable room for manipulation by line-drawers. As long as districts are at the very least influence districts, a map will comply with the ILVRA. While this allows substantive representation of minority groups to potentially increase, it may come at the expense of increased descriptive representation, as the Asian-American population experienced in Chinatown following the 2012 election cycle. This can be easily remedied by adding stronger, more definitive, bright-line language to the ILVRA. Ideally, this might include a sort of hierarchy of remedial districts, where coalition, crossover, and then influence districts are favored in that order. However, it is unclear whether amending the language of the ILVRA would be politically feasible.

The ILVRA only applies to redistricting plans involving the Illinois General Assembly.[151] This is a significant limitation, as it does not apply to Congressional districts or smaller, local plans. This means that, unlike the CVRA, the ILVRA cannot be used to dismantle local at-large election systems or any other local election systems that dilute the strength of minority votes. Again, this can easily be remedied by amending the ILVRA to extend it to local systems as well, but it is unclear whether such amendments would be politically feasible.

C. Washington Voting Rights Act (WVRA) – Proposed

Background

[149] 10 Ill. Comp. Stat. 120/5-5
[150] 10 Ill. Comp. Stat. 120/5-5(c)
[151] 10 Ill. Comp. Stat. 120/5-5(a)

The proposed Washington Voting Rights Act (WVRA) was introduced in the Washington House of Representatives in 2013.[152] The WVRA (House Bill 1413/Senate Bill 5473) "prohibits unfair elections in which members of a protected class (members of a racial, ethnic, or language minority) are unable to influence an election and/or receive adequate representation in local political subdivisions."[153] The WVRA passed in the 2013 session in the House, but failed on a party-line Republican vote in the Senate.[154] Because the Washington legislature operates on a two-year cycle, the bill will come up for a vote again in 2014.[155] To date, it remains uncertain whether the bill will pass through both chambers.

The WVRA is intended specifically to impact at-large voting systems utilized in local elections, though it is not textually limited to at-large elections.[156] The bill aims to increase minority representation in jurisdictions with large minority-populations, as Washington has one of the lowest levels of minority representation in the country.[157] For example, in the ten most populated Latino communities, where Latinos are a third of the population, they hold only four percent of elected offices.[158]

The WVRA is modeled strongly off of the CVRA. The WVRA would apply where voters from certain communities are being denied an equal opportunity to influence elections.[159] Members of a minority group must provide evidence that polarized voting has occurred, and that members of a protected class do not have an equal opportunity to influence election results.[160] Jurisdictions would have two potential options to remedy the situation under the WVRA: they can voluntarily switch from at-large systems to district-based systems within 45 days (dubbed the "opt-out" provision), or they can face litigation.

Analysis

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[152] "Washington Voting Rights Act Advances to State Senate." *Associated Press*. Oregon Live, 7 Mar. 2013. Web. 15 Jan. 2014.

[153] Zabel, Kylee. "Washington Voting Rights Act Draws Contentious Testimony: Minority Representation versus At-large Elections." *Bainbridge Island Review*, 15 Feb. 2013. Web. 7 Jan. 2014.

[154] Telephone Interview with Toby Guevin, Senior Policy & Civic Engagement Manager, OneAmerica (January 17, 2014)

[155] Id.

[156] Guevin, Toby, Shankar Narayan, Nick Federici, and Lonnie Johns-Brown. "Washington Voting Rights Act--Frequently Asked Questions." *Washington Voting Rights Act*, Web. 9 Jan. 2014, noting that statewide races are not included

[157] Jones, Liz. "Round Two for Washington Voting Rights Act." *Northwest Public Radio*, 2013. Web. 15 Jan. 2014.

[158] Id.

[159] Guevin, Toby, Shankar Narayan, Nick Federici, and Lonnie Johns-Brown. "Washington Voting Rights Act--Frequently Asked Questions." *Washington Voting Rights Act*, Web. 9 Jan. 2014

[160] Zabel, Kylee. "Washington Voting Rights Act Draws Contentious Testimony: Minority Representation versus At-large Elections." *Bainbridge Island Review*, 15 Feb. 2013. Web. 7 Jan. 2014.

Litigation under the WVRA would only be brought if a jurisdiction, approached about its WVRA violation, failed to take advantage of the "opt-opt" provision and voluntarily change to a district-based system within forty-five days.[161] By providing this "opt-out clause," WVRA has the potential to drastically reduce litigation costs for both plaintiffs and jurisdictions, as jurisdictions that voluntarily switch would not face any litigation costs.[162] The WVRA also allows local governments to take remedial actions before suit is brought.[163] Advocates of the bill note that the opt-out clause is intended to create "partnership between citizens and local government, not tension between the two."[164]

Like the CVRA, remedies under the WVRA may be broader than the VRA. In the event of a WVRA violation, district-based elections are not mandated as the only remedy.[165] This seems to suggest that alternative at-large election systems may also be judicially imposed, so long as they do not deny minority voters an equal opportunity to influence elections.[166] Moreover, claims can be brought under the WVRA for district-based elections that deny minority groups an equal opportunity to influence elections.[167]

Since the WVRA has yet to be enacted in to law, it is hard to say how strong an impact the law would have on increasing minority representation. Because the WVRA is so similar to the CVRA, it is possible that the bill would be similarly successful in increasing descriptive minority representation. Due to the anticipated lower overall cost of WVRA actions, plaintiffs may be more active in coming forward to challenge local election systems. Lastly, the ability to challenge district-based election systems—in addition to the ability to challenge at-large systems—would likely widen protection for minority voters under the WVRA.

D. State Constitutional Amendments: Florida Fair Districts Amendments

Background

In November 2010, Florida voters approved two state Constitutional amendments governing legislative apportionment.[168] The goal of the amendments was to require the

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[161] Id.
[162] Guevin, Toby, Shankar Narayan, Nick Federici, and Lonnie Johns-Brown. "Washington Voting Rights Act--Frequently Asked Questions." *Washington Voting Rights Act*, Web. 9 Jan. 2014
[163] Id.
[164] Zabel, Kylee. "Washington Voting Rights Act Draws Contentious Testimony: Minority Representation versus At-large Elections." *Bainbridge Island Review*, 15 Feb. 2013. Web. 7 Jan. 2014.
[165] Guevin, Toby, Shankar Narayan, Nick Federici, and Lonnie Johns-Brown. "Washington Voting Rights Act--Frequently Asked Questions." *Washington Voting Rights Act*, Web. 9 Jan. 2014
[166] Id.
[167] Id.
[168] *In re Senate Joint Resolution of Legislative Apportionment 2–B,* 89 So.3d 872, 893 (Fla. 2012)

Legislature to "redistrict in a manner that prohibits favoritism or discrimination, while respecting geographic considerations, as well as to require legislative districts to follow existing community lines so that districts are logically drawn, and bizarrely shaped districts are avoided."[169] The Florida Fair Districts Amendments imposed more stringent requirements on the Legislature in the redistricting process. Amongst other requirements, the new Sections 20 and 21 impose on Congressional and Florida Legislative districts (respectively) a minority voting protection provision. Specifically, the amendments require that "districts shall not be drawn with the intent or result of denying or abridging the equal opportunity of racial or language minorities to participate in the political process or to diminish their ability to elect representatives of their choice.[170] The requirements that districts be equal in population, compact, and utilize existing political and geographical boundaries are specifically subordinate to the minority voting protection provision.[171] This means that under certain circumstances, compactness may be compromised to avoid retrogression or vote dilution.[172]

The Fair Districts Amendments impose two requirements that serve to protect racial and language minority voters in Florida.[173] The first is the prevention of impermissible vote dilution, while the second is the prevention of impermissible diminishment of a minority group's ability to elect a candidate of its choice.[174] The court has noted that these two provisions mirror "almost verbatim" the requirements established by Section 2 and Section 5 of the VRA, respectively.[175] It has also been noted that in addition to the letter, the Florida Fair Districts Amendments are consistent with the intent behind and principles of the VRA.[176] However, the Florida Constitutional Amendments do not explicitly reference the VRA.[177] While the Florida Supreme Court has looked to the United States Supreme Court for guidance as to how both Sections 2 and 5 have been interpreted, it has honored its constitution obligation to interpret the Florida Amendments independently of the VRA.[178] Thus, despite overarching similarities between the Florida Amendments and the VRA, there are several interpretational differences (discussed *infra*).

Analysis

Both the Section 2 and Section 5 counterparts within the Florida Constitution depart from the VRA on procedural grounds. After the Florida Legislature draws apportionment plans, the Supreme Court of Florida is required to review those plans to ensure compliance with the Florida

[169] Id.
[170] Art. III, §20, Fla. Const.
[171] *In re Senate Joint Resolution of Legislative Apportionment 2–B,* 89 So.3d 872 at 879, 893 (Fla. 2012)
[172] *In re Senate Joint Resolution of Legislative Apportionment*, 1176, 83 So. 3d 597 at 626 (Fla. 2012)
[173] Id.
[174] Id.
[175] Id.
[176] Id.
[177] Id.
[178] Id.

Constitution.[179] Thus, for the Section 2 counterpart of the Florida Fair Districts Amendments, this is a procedural departure from the VRA, where private plaintiffs bring claims.[180] Additionally, Florida's Section 5 counterpart applies to the entire state.[181] This is a large departure from Section 5 of the VRA, which applied only to covered jurisdictions that were obligated to obtain preclearance before the plan could go into effect. Until *Shelby County*, Section 5 of the VRA prohibited retrogression in jurisdictions covered under the Section 4 coverage formula. In *Shelby County*, the Court declared the coverage formula unconstitutional, thus rendering Section 5 a "zombie provision" with no real force or effect.[182] The Florida Amendments thus have extraordinary implications post-*Shelby County*, as they breathe life back in to the protections guaranteed by Section 5 throughout the entire state of Florida. As such, the Florida Constitution prohibits plans with "retrogressive effects."[183]

The Florida Supreme Court has concluded that, by adopting language identical to the 2006 VRA amendment to Section 5, the Legislature cannot eliminate majority-minority districts or weaken other historically performing minority districts where doing so would actually diminish a minority group's ability to elect its preferred candidates.[184] This means that in addition to majority-minority district, coalition or crossover districts that previously provided minority groups with the ability to elect a preferred candidate under the benchmark plan must also be recognized.[185] However, the Supreme Court of Florida noted that a "slight change in percentage of [a] minority group's population in a given district does not necessarily have a cognizable effect on a minority group's ability to elect its preferred candidate of choice."[186] Instead, the retrogression inquiry requires evaluation of whether a district is likely to perform for minority candidates of choice.[187] Dubbed a "functional analysis," this requires consideration of minority population in the districts, minority voting age population in the districts, political data, and how a minority population group has voted historically.[188]

As previously discussed, the Florida Supreme Court has the duty of evaluating whether an apportionment plan dilutes minority votes. The Florida Supreme Court has noted that, by adopting identical language, the Amendments codify Section 2 of the VRA.[189] However, the Florida Supreme Court has yet to address whether there would be a violation of Florida's minority protection provision with respect to vote dilution if the plan could be drawn to create

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[179] Id.
[180] Id.
[181] Id.
[182] Nicholas Stephanopoulos, *The South After Shelby County*, Chicago Public law and Legal Theory Working Paper No. 451 (2013).
[183] *In re Senate Joint Resolution of Legislative Apportionment*, 1176, 83 So. 3d 597 (Fla. 2012), defining "retrogressive effect" as a plan that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise
[184] Id.
[185] Id, defining the benchmark plan as the existing plan of a jurisdiction.
[186] Id, at 625.
[187] Id.
[188] Id, noting that this data includes: (1) voting-age populations; (2) voting-registration data; (3) voting registration of actual voters; (4) election results history
[189] Id at 623.

crossover or influence districts.[190] In other words, the question of whether the Court's interpretation of Section 2 sets a floor and/or a ceiling for the interpretation of the Florida Amendments remains open.[191] The Florida Supreme Court, however, has explicitly left open the potential for a violation of the Florida minority voting protection provision to be established by a pattern of over-packing minorities into districts where other coalition or influence districts could be created.[192] This implies that the Florida Supreme Court would be willing to broaden the amendments to extend further than judicial construction of Section 2 of the VRA does.

Success of the Florida Fair Districts Amendments

As the Florida Fair Districts Amendments have only been in place for one redistricting and election cycle, there is limited data regarding the Amendments' success in increasing minority representation. In evaluating proposed apportionment plans in 2012, the Florida Supreme Court concluded that neither the state Senate nor House plan facially diluted minority voting strength as a whole under the Florida Constitution.[193] This was so despite the fact that the House plan arguably over-packed black voters in order to dilute their vote elsewhere.[194] In rejecting this argument, the court notes that none of the black majority-minority districts are "super-majorities" that require "un-packing".[195] However, the Court did note that several Hispanic districts did contain such "super-majorities," but chalked this up to the community's dense population in Miami-Dade County.[196]

In analyzing retrogression in both state Senate and House apportionment plans, the Florida Supreme Court declared that, like Section 5 of the VRA, districts that increase minority voting strength when compared to the benchmark statewide are sufficient to pass muster.[197] The Florida Supreme Court noted that the loss of one Hispanic influence district in the Senate was sufficiently offset by two additional Hispanic majority-minority districts.[198] Likewise, the Florida Supreme Court held that the loss of one black crossover district in the House was offset by one additional black majority-minority district that emerged from a previously existing crossover district.[199] Additionally, several Hispanic majority-minority districts have emerged from previously existing influence or crossover districts in the House.[200] Facially, this would seem to suggest that minority descriptive representation has largely increased in the State. However,

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[190] Id.
[191] Id.
[192] Id at 655.
[193] Id.
[194] Id at 645.
[195] Id.
[196] Id.
[197] Id.
[198] Id, noting that because "three new Hispanic majority-minority districts have emerged from previously existing influence or crossover districts, the Hispanic influence in the remaining number of districts has shifted. No challenger has established or alleged that this change has affected the Hispanic voters' ability to elect a person of their choice in the respective districts."
[199] Id.
[200] Id.

based on the tradeoff between majority-minority districts and influence/crossover districts, this may come at the expense of increased substantive representation. It is important to note, however, that the ability to conduct a retrogression analysis in the Courts is a major success (albeit perhaps an unintended one) of the Florida Fair Districts Amendments in light of the Court's ruling in *Shelby County*.

Gaps in and Ways to Strengthen the Fair Districts Amendments

Consistent with additional Florida constitutional apportionment requirements, the Florida Supreme Court automatically is tasked with analyzing whether plans comply with the minority protection provisions. This limits the ability of private plaintiffs to bring suit under the Fair Districts Amendments. However, well-organized groups seem to be able to oppose apportionment plans and bring such challenges in court. For example, the League of Women Voters of Florida, National Council of La Raza, and the NAACP were all named as opponents in the Court's *In re Senate Joint Resolution of Legislative Apportionment* decision. Additionally, as compared with the VRA, CVRA, and ILVRA, this aspect of the amendments may substantially reduce the overall cost of vote dilution claims, as it puts the proverbial ball in the Florida Legislature's court.

Much of the force of the Fair Districts Amendments hinge on how far the Florida Supreme Court extends the Section 2 counterpart beyond what the federal VRA requires. The Court has strongly implied that it would be willing to base a violation off of lack of coalition or influence districts, which would notably expand protection against vote dilution. However, this is not an option until the court explicitly decides that question under the Amendments.

The Florida Fair Districts Amendments only apply to apportionment plans involving the Florida Legislature and Congressional apportionment plans.[201] Like the ILVRA, this is a significant limitation, as it does not apply to smaller, local plans. As such, local, at-large election systems or any other local election systems that dilute the strength of minority votes cannot be challenged under the Amendments. This can be remedied by further amendments allowing protection to extend to local systems, but it is unclear whether such amendments would be politically feasible. It is also unclear as to whether alternative at-large voting systems (i.e. cumulative, limited, or preferential voting) would be allowed as remedies under the Amendments.

III. Conclusion

All four state-VRAs are ultimately successful insofar as they expand protection against minority vote dilution beyond that which is afforded to minority voters under the federal VRA. The level of success varies by state plan. To date, the CVRA has the most active state-VRA. As seen from the results thus far under the CVRA, this model has been largely successful in increasing descriptive representation at the local level throughout the state. Insofar as it has increased descriptive representation and has actively litigated since its enactment, the CVRA is a fairly strong state-VRA. By eliminating the first *Gingles* requirement as found under the VRA,

[201] 10 Ill. Comp. Stat. 120/5-5(a)

the CVRA greatly expands protection for minority voters. The CVRA also has the potential to greatly expand available remedies than those available under the VRA, however it is limited insofar as it only currently applies to at-large election systems. If enacted, the WVRA would likely provide similar protections and remedies. The WVRA, however, would go a step further. The WVRA's "opt out" provision could operate to greatly reduce the cost of vote dilution claims both for plaintiffs and jurisdictions. Additionally, the ability to challenge district-based election systems in addition to at-large election systems expands the scope of protection for minority voters. The WVRA would lower litigation costs, allow challenges to district-based plans, and potentially would allow influence districts and alternative at-large systems as remedies. As such, if it passes, the WVRA would likely be the strongest state-VRA.

The Florida Fair Districts Amendments are the next strongest model for decreasing minority vote dilution. While closely analogous to the federal VRA, the Florida Supreme Court has suggested that it would be willing hold districts liable for lack of coalition or influence districts, which would notably expand protection. It remains to be seen whether this will be done. More importantly, by applying the state's Section 5 counterpart statewide, the Fair Districts Amendments revive protections under Section 5 of the VRA. This allows for the retrogression analysis to be applied to apportionment plans statewide, thus increasing descriptive representation in the State. This has large implications in the wake of *Shelby County*, and other states may be well served by following suit. However, the states previously covered by Section 4 (that is, the states to which Section 5 previously applied) are the least likely to pass a state Constitutional amendment re-instating Section 5 requirements. In fact, many such states have responded in the opposite way, by passing laws that surely would not have been granted preclearance under the federal Section 5 regime.[202] It is worth noting, however, that it is not out of the realm of possibility for such amendments to pass by voter-referendum, as occurred in Florida. Of the eighteen states that allow amendment of the state's constitution via a voter-initiated process, two were wholly covered under Section 5, and three had specific counties or townships covered under Section 5.[203] Additionally, three had jurisdictions previously covered by Section 4 that have since bailed out.[204] Particularly for the states that were previously wholly covered, following Florida's Fair Districts Amendments may be a clever way for voters to reinstate Section 5 of the VRA if they so choose.

The Illinois VRA has been the least successful of the state models. While it expands the remedies available to jurisdictions by requiring the creation of crossover, coalition, or influence districts, this has resulted only in increased substantive representation for minority voters. In terms of benchmarking, this is ultimately better for minority voters in the State. However, as is clear from the CVRA and Florida Fair Districts Amendments, stronger legislation is possible. It is also possible that, over time, the ILVRA will be interpreted to be stronger than it currently appears.

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[202] See, e.g., Reilly, Ryan J. "Harsh Texas Voter ID Law 'Immediately' Takes Effect After Voting Rights Act Ruling." *Huffington Post*. Huffington Post, 25 June 2013. Web. 13 Feb. 2014.; see also Pike, Alan G. "Voting Rights and Southern Legislatures Post-Shelby County v. Holder." Web log post. *Southern Spaces*, 10 July 2013. Web. 13 Feb. 2014.

[203] "Section 5 Covered Jurisdictions." *Civil Rights Division Home Page*, Web. 12 Feb. 2014, based on the Section 4 coverage formula

[204] Id.

Based on the largely successful results of independent state-VRAs, the other forty-six states would be wise to follow suit. The California (and potentially Washington model) appears to be the most active thus far, and may be the best starting-point for other states wishing to enact similar legislation. Florida's voter-initiated model also has strong implications for reviving Section 5-style protections in the wake of *Shelby County*. However, any state that wishes to expand protection beyond that afforded to its minority voters by the VRA would be wise to consult any of the four independent state VRAs for guidance. The increases in both descriptive and substantive representation seen in California, Illinois, and Florida since the enactment of these policies should speak volumes to the wisdom of independent state VRAs for the rest of the United States.

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