Appendix 3 – Research Documents Provided to the Commission

The following documents were provided to the Commission during fact-finding and are included in this attachment in alphabetical order by author.

1. Blankenship, L. Vaughn and Thompson James, *Modernizing Lake County Action Plan*, December 2000
2. Choi, Euirim; "How a Law School Professor is Helping SCOTUS Rethink Gerrymandering;" *The Chicago Maroon*, June 24, 2017.
3. Greenwood, Ruth; "Fair Representation in Local Government"; *Indiana Journal of Law and Social Equity*, Indiana University Maurer School of Law, Volume 5, Issue 1, Winter 3-6-2017.
4. Stephanopoulos, Nicholas O. and Eric M. McGhee; "Partisan Gerrymandering and the Efficiency Gap;" *University of Chicago Law Review*, 831, 2015.

Modernizing Lake County Government

ACTION PLAN

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December 2000

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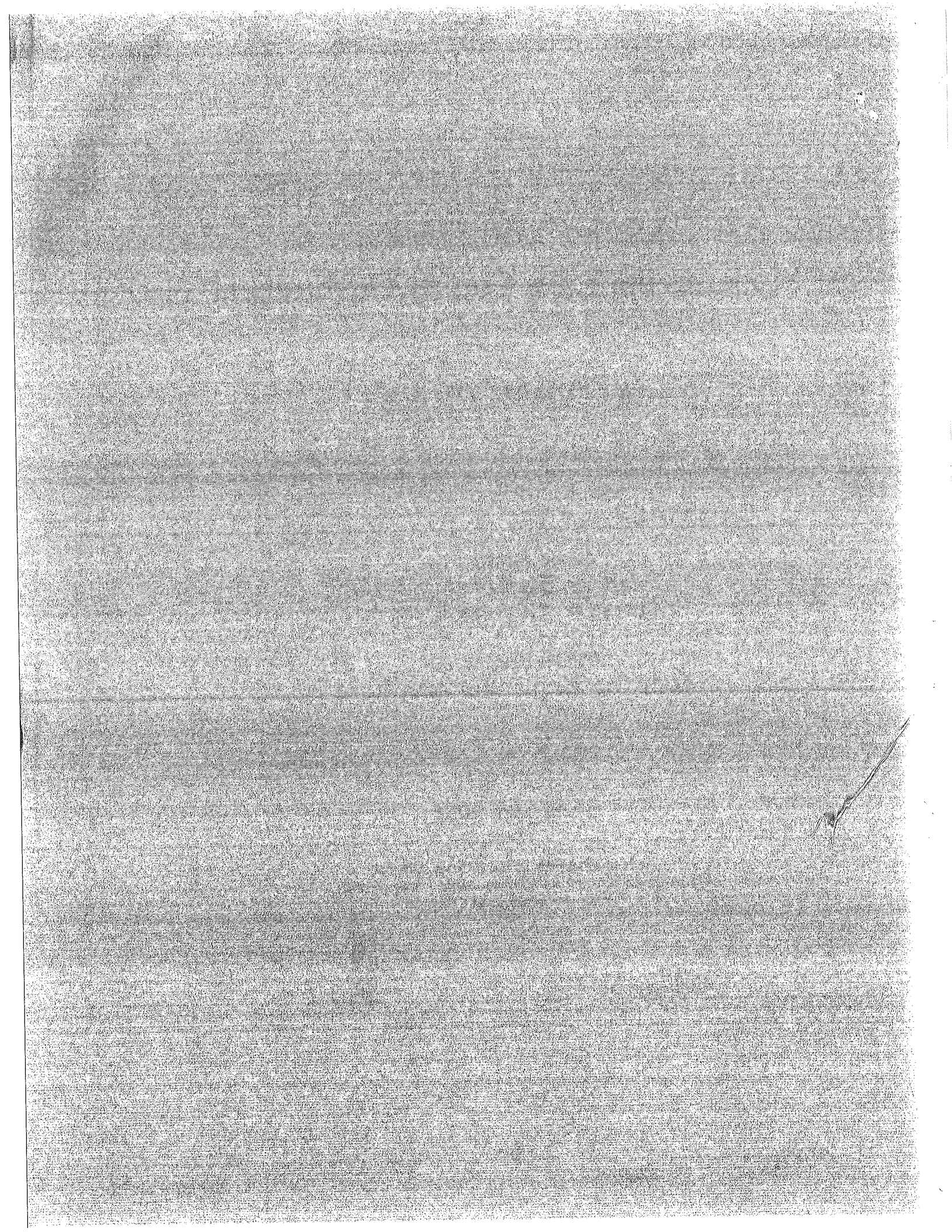

Modernizing Lake County Government

Executive Summary

There are many reasons for Lake County residents to be satisfied with their county government. First, elected and appointed officials support a professional approach to the conduct of county business. There is a virtual absence of patronage practices and sweetheart deals. Second, the county is in good financial shape with large reserves and a triple-A bond rating. Third, members of the county board take their policymaking responsibilities seriously and work hard on behalf of county residents. They are able, conscientious and many put in long hours to keep up with their legislative and constituent obligations. Fourth, the county has retained top-flight administrative talent. This is apparent in the administrator's office as well as at the departmental level.

Despite these strengths however, county government also evidences some weaknesses. One is that the current structure has not been conducive to the resolution of long-standing, high-profile, and controversial issues such as highway funding, Route 53, and affordable housing. In significant part, we attribute this outcome to the fact that it is very difficult to exercise leadership in the present configuration.

Power in Lake County is extremely diffuse. Legislative powers are shared by 23 board members with key policymaking roles played by the heads of eight separate committees. Administrative powers are shared by the board, the county administrator and department heads. The existence of eight, separately-elected department heads further fragments power and accountability as does the existence of over thirty separate boards and commissions, six of which have important policymaking responsibilities.

Unlike many other counties of similar size and stature around the country, Lake County does not have at the head of its government an official elected by all county residents to serve as a focus of both action and accountability. While the board chair is titular head of county government, s/he is elected from a single district, representing 1/23 of all county residents. Further, few significant powers are delegated to that position by the board. As a result, it is very difficult for the board chair to exercise policy and political leadership 1) in putting forth proposals that can gain widespread support and heal divisions among residents, 2) in securing support for county initiatives at the state and federal levels, and 3) in garnering the support of local officials in addressing issues of common concern.

We believe that structural changes are in order. One is that the board chair be elected on a county-wide basis. We believe that such a change, in conjunction with a reduction in the size of the board and enhanced administrative authority for the county administrator would significantly improve the prospects of effectively dealing with the intractable problems relating to growth which now beset the county. Those problems are severe and promise only to get worse.

In a recent poll conducted by the Forest Preserve, traffic congestion was identified as the single most important issue facing the county, yet for ten years, the county has been unable to secure an additional source of funding to meet highway construction needs. Positions are polarized over whether or not Route 53, which some tout as a potential solution to the congestion problem, should be constructed. The affordable housing issue has also led to deep, geographically-based divisions. Notable in each instance is the absence of an official positioned to bring together those with opposing viewpoints in developing solutions that could work to the benefit of all county residents.

Many board members with whom we talked expressed reservations about prospects for the electing a board chair county-wide. Foremost among their concerns was that only those with access to large amounts of financial resources would be able to mount an effective campaign for such a position. However, others pointed out that Lake County has become more and more competitive politically, both within and between parties. Further, a campaign for board chair would inevitably gain extensive media coverage effectively dampening the monetary advantage enjoyed by any one political faction. A political campaign would serve the important purpose of stimulating debate and vetting important county issues in a manner that facilitates public involvement and engagement. There is currently no alternative venue suitable for the discussion of issues which cut across municipal, county and state jurisdictional lines.

Another key step which we believe would improve the effectiveness of county government is to reduce the size of the board to 12 members, excluding the chair. We believe that expanding the constituencies of the board members in this fashion will make it more likely they will take a broad, county-wide perspective on issues and less likely that members will engage in inappropriate levels of involvement in predominantly administrative activities. Compared to counties in other states similar to Lake, twelve is still a large number. However, it is important that districts be of a size that board members can still be responsive to constituent needs. It is further important that the county board reflect the diversity of the county's population.

We further recommend that the progression which began over twenty years ago, whereby the board has delegated more and more authority over administrative matters to the county administrator, continue. We believe that the capacity of the county administrator to enforce the board's policy direction will improve to the extent that the administrator is given clear authority over departments. Present arrangements contribute to a high level of ambiguity as to the respective roles of committee chairs, department heads and the administrator such that the administrator is at times unable to adequately perform the essential function of ensuring that administrative units abide by board priorities. Present arrangements further lend themselves to domination of individual policy areas by committee chairs. As experience with the budget process has demonstrated, the most effective means of ensuring that all board

members have equivalent access and influence in different policy areas is to accord an intermediary role to the county administrator.

Consistent with our concerns about the highly diffuse nature of power in the present system, we recommend that both the Coroner and Recorder of Deeds positions be made appointed. These positions are substantially administrative in nature and have minimal policymaking responsibilities. The incumbents of both these positions are, by all accounts, performing well. In recognition of this, the board might wish to time any referendum changing the status of these positions to correspond with the departure of the current incumbents.

Finally, we recommend that the board undertake a systematic review of the various county boards and commissions with policymaking and/or administrative responsibilities to examine where efficiencies can be gained and how program effectiveness can be improved through consolidation. The proliferation of these boards deters unified direction of policy and impedes the uniform application of administrative practices.

Appendix B lists these and other recommendations according to the specific charges given the authors by the county.

Table of Contents

Modernizing Lake County Government

I. Introduction

By July 1, 2001, the County Board of Lake County, Illinois, is required by statute to reapportion itself based on the results of the 2000 U.S. census.[1] With this act, fundamental to a democratic society, the board will put in place a significant part of the basic governmental and political framework by which the citizens of Lake County will govern themselves during the first decade of the 21st century.

This act also presents a unique opportunity to assess other parts of the county's basic governmental and political framework in light of demographic, economic, social, and technological developments occurring since the last census. Are the parts working well? Are they effectively and efficiently performing their expected roles? Do they require incremental adjustment or significant change to enhance their performance or to make them mesh better with each other as well as with the county board? Under the state constitution and the laws of the State of Illinois, county boards are given a substantial degree of latitude and authority for periodically considering and acting on such matters to facilitate needed change.

The Lake County Board took advantage of the opportunity presented by the censuses of 1980 and 1990 to examine a range of issues related to various parts of the county's governmental structure. In early 1976, it appointed a Governmental Study Commission consisting of citizens, a selection of board members and others to "analyze the functions and roles of the County Board and its related departments."[2] The results of their work appeared in two reports, the first issued in April of 1977, the second a year later. A second Governmental Study Commission, similarly composed, was appointed in early 1989 to undertake an analysis of some of the same issues along with new ones.[3]

The board made a number of changes in the county governmental structure based on the work of these two commissions. The most significant were:

- Establishment of the position of **County Administrator** charged with responsibilities, among others, to recommend an annual budget, receive reports of departmental activities, and direct administrative services, among others (the ordinance creating the position of county administrator is included as Appendix C).
- Abolition of the county-wide, elected position of **County Auditor** by referendum in November,

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[1] Pursuant to Chapter 55 Illinois Compiled Statutes, 5/2-3002.
[2] *Lake County Governmental Study Commission First Year Report*, p. 1, April 12, 1977.
[3] *Final Report of the Lake County Governmental Study Commission II*, p. 1, Transmittal Letter, July 1, 1990.

1978

- The decision in 1990 to go **from multi-member to single member districts** for election to the county board

Equally notable was the failure to adopt, either by subsequent board action or a successful referendum, some of the other commission recommendations in one or both reports including:

- **Reduction in the size** of the county board from 25 to 15 during the 1980 reapportionment and from 24 to 15 during the 1990 reapportionment
- Electing the **chairman of the county board at-large** rather than through election by the board itself
- Changing the status of the **Recorder of Deeds**, the **Coroner**, and the **Circuit Court Clerk** from county-wide, elected positions to appointed positions.

I. A. Reapportionment 2000: Laying the Groundwork

In the spring of 2000, in preparation for its consideration of reapportionment following the census, the board decided to follow a different path from that pursued in conjunction with the two preceding censuses. In early July, 2000, an agreement between Lake County and the University of Illinois-Chicago (UIC) was executed to have Professors Vaughn Blankenship and James Thompson of the Graduate Program in Public Administration (see Appendix A) conduct a study of the structure of Lake County government. The results of the analysis were to be available by December in time for their consideration by the newly-formed county board. As outlined in the UIC study proposal to the county administrator, the agreed upon issues to be addressed were:

1. The appropriate size and manner of electing the county board;
2. The appropriate manner of selecting a county board chair;
3. The scope of county board functions and the restructuring and/or altering of existing jurisdictional responsibilities;
4. The internal governance of the county board, including its committee structure and the role of the county board in policy development and administration;
5. The pros and cons of home rule for Lake County with or without a county executive; and
6. The current status of county offices as elected vs. appointed officials.

Several of these issues, namely numbers 1,2,5, and 6, were almost identical to those considered in one or the other or both of the previous study commission reports. That they were still on the agenda for analysis pointed up two important things. First, significant change in county governmental structures ***can***

occur as the elimination of the elected auditor position, the establishment of the county administrator role, and the shift to single-member electoral districts demonstrated. On the other hand, the continued presence of the remaining four issues demonstrated that change can be slow, incremental, and politically challenging, ***if and when it occurs***. During the last two and a half decades, Lake is and has been a growing, and changing county. In such circumstances, difficult issues like these remain viable and need periodic reexamination, even if the basic "facts" of the their case don't change very much. ***Timing***, ***changing public priorities and concerns***, ***consensus building*** and, above all, ***leadership*** are always critical to their ultimate outcome.

It was equally clear that issues 3 and 4 were new to the list or at least had a different 'flavor' to them. While the others dealt with more structural, 'constitutional' matters, these two were more related to the board's role in governing, it's operational structure for carrying out that role, and the relationships among the board, the county administrator and the administrative department heads. Their emphasis on 'policy and management' matters indicated much about the incremental but positive progress that had been made in the evolution of Lake County government since the 1970's. On the other hand, it was recognized immediately that they were nested in the resolution of the broader issues.

Significant changes in the size of the County Board, or the county-wide election of the board chair and/or a county executive, for example, would have a highly significant bearing on the 'conduct of business' and the relationships among the various parties in county government. Alternately, the choice to remain with the 2000 *status quo* on these larger questions would mean a continuation of the strategy of 'fine tuning' on the 'policy and management' matters. In the data collection and subsequent analysis for the study, each of the six questions were examined independently. But the study began with the realization that they were, in practice, ***highly interdependent*** both in terms of implementation and results. Constitutional structures are the framework within which day-to-day policies, relationships, and processes work themselves out. (More detail on the approach used by the authors in conducting the study and in preparing the recommendations is included in Appendix D.)

II. The Context for the Study

Consistent with our premise that issues such as those we are investigating cannot be understood or analyzed apart from their context, we present below an overview of those elements of the national and Lake County environments that we regard as most relevant to the issues we are addressing.

II. A. Setting the Context: County Government in the U.S.

The structure of county governments in the United States has long been somewhat of an anomaly. State governments and many city governments have long featured a separation between the executive and legislative functions similar to that which exists at the Federal level. This division provides for checks and balances of power between the branches while facilitating unified and energetic direction of the administrative apparatus of government. Having experienced the severe limitations of a system in which the executive was **elected annually by the Continental Congress**, the Founding Fathers opted for a unitary executive elected every four years by the people as a whole. This model was generally followed by states and many municipalities during the various constitutional reforms of the 19th and early 20th centuries.

At the federal level executive power is lodged with the president and at the state level with the governor. They have traditionally played leadership roles within their respective jurisdictions and have served as sources of energy and innovation. At the federal level and in many states, the chief executive appoints and dismisses department heads, prepares an annual budget, and can veto legislative acts subject to being overridden by an extraordinary majority.

County government in the United States emerged from a different tradition, that of English county government. In that inherited tradition, there was a blending of legislative, executive, and even judicial powers with little regard for the separation of powers doctrine. Similarly, there was a tradition of dividing the executive among separately-elected county officers. This practice was exacerbated in the United States during the early 19th century when a wave of Jacksonian, 'frontier democracy' increased the number of independently-elected county officers further fragmenting executive power.

During and immediately after the colonial period, cities and towns had been the principal local government units in the states of New York and New Jersey. When counties were constituted in these states, the unit of electoral representation was based on cities and towns. This pattern was later adopted by several Midwest states, including Illinois. This tradition accounts for the large number of board members in those Illinois counties with the township form. Finally, the county, in English law, was an administrative arm of the state rather than a local government unit delivering services to citizens. Reverberations of this past still affect county government generally today.

The International City/County Management Association has identified three prevalent county government structures: the "commission" form, the "council-administrator" form, and the "council-elected executive" form (for a breakdown of the numbers of each type as of 1988, see Appendix E). In the "commission" form, commissioners not only serve as legislators but each oversees one or more county departments. In contrast, the "council-elected executive" form provides for a chief executive elected at-large with a more distinct separation of executive and legislative powers similar to the state and federal models. In this model, the executive generally appoints department heads and has veto authority over council actions. The "council-administrator" form of government represents something of a hybrid between the "commission" and "council-elected executive" models with an appointed administrator performing executive functions under the direction of the legislative body.

There are variations on the "council-administrator" model based on the degree of authority vested in the county administrator. In some jurisdictions, the administrator serves basically as an administrative assistant assigned to follow up on matters on the county board's behalf but not permitted to take any initiative on his/her own. In other jurisdictions, in contrast, the county administrator is granted broad authority over administrative matters including the authority to appoint and dismiss department heads.

The strong tradition of the 'plural executive' also continues as a unique feature of county government in many states with popular elections replacing appointments by governors or other higher level officials to positions such as sheriff, county clerk, assessor, treasurer, and recorder of deeds. This was intended to facilitate attempts by ordinary citizens to obtain and hold office. Selection by popular election rather than appointment also presumed that no special qualifications were required to hold and perform these offices, in keeping with the Jacksonian tradition.

In 1868, Justice John Dillon of the Iowa Supreme Court in the case of *Merriam v. Moody's Executors*, wrote that local governments only had the powers expressly delegated to them by the legislature or those powers which were absolutely necessary and incident to the discharge of those express powers. 'Dillon's Rule,' as this came to be known and accepted, was in keeping with the previous position that counties were arms of the state. They had to have specific enabling state legislation in order to function as units of local government and to have the flexibility to respond to the changing needs of their citizens.

The major reforms of government during the Progressive Era (1890-1920) were aimed primarily at states and municipalities. However, reformers did pay some attention to counties, urging the appointment rather than election of officials as part of the larger movement to upgrade and professionalize government, reduce opportunities for graft and corruption, and sharpen the distinction

between 'policy making' and 'administration.' In addition, they advocated that state legislatures grant counties 'home rule' powers and the flexibility to act more independently as local governing units.

In order to ascertain how other counties have coped with this historical legacy, the authors investigated how seven other large, metropolitan counties have structured their governments. The seven, two of which are in Illinois, are listed in Table 2. A review of the governments of these counties was helpful for the purpose of identifying alternative configurations available to Lake County.

Table 1

Comparison Counties

	Overall Population--1997	% Change in Pop. Between '90 & '97	Median Household Income '93	% White--1996	Metropolitan Area	% persons 25 years and over high school grads., 1990	% persons 25 years and over college grads., 1990
Non-Illinois Counties							
Johnson County, Kansas	*429,563*	*18.0%*	*$50,174*	*95.4%*	*Kansas City*	*92.9%*	40.5%
Fairfax County, Virginia	*914,259*	*12.0%*	*$62,607*	*80.6%*	*Washington DC*	*91.4%*	*49.0%*
Multnomah County, Oregon	*624,619*	*7.0%*	*$29,759*	*86.2%*	*Portland*	*82.9%*	*23.7%*
Montgomery County, Maryland	*826,766*	*8.5%*	*$55,604*	*75.0%*	*Wash. DC/Baltimore*	*90.6%*	*49.9%*
Oakland County, Michigan	*1,166,512*	*7.7%*	*$48,367*	*88.7%*	*Detroit*	*84.6%*	*30.2%*
Illinois Counties							
DuPage	*870,378*	*11.3%*	*$52,917*	*91.2%*	*Chicago*	*88.6%*	*36.0%*
Will	*444,469*	*24.4%*	*$46,096*	*86.4%*	*Chicago*	*80.4%*	*18.0%*
Lake	***594,799***	***15.2%***	***$52,266***	***89.5%***	***Chicago***	***84.7%***	***32.0%***

II. B. Focusing the Context: County Government in Illinois

Each county in the United States has its own particular variant of the general government structure described above. Illinois State law provides for three types of county governments: the commission form, the township form and the county executive form.[4] Under the commission form, which is in place in 17 counties in the southern part of the state, three commissioners elected at-large perform both legislative and administrative functions. The other 83 counties (except Cook and Will) have a township form of government. Prior to 1970, county boards in these counties consisted of the supervisor and deputy supervisor of each township.

Since 1970 and pursuant to Supreme Court apportionment rulings, in most township counties board members are now elected from either single- or multi-member districts. However, the legacy of a large number of board members characteristic of the pre-1970 arrangements lives on in most township counties in the state.

[4] The "commission" form referenced in the context of Illinois law is different from the "commission" form reference by ICMA. The Illinois "commission" form includes both the ICMA "commission" and "council-administrator" forms.

Under the Illinois constitution, home rule is available only to counties with an elected chief executive. At present, two counties have a chief executive elected at-large, Will and Cook. Will County voters however, opted not to have home rule so that only Cook of Illinois' 102 counties currently has home rule.

Illinois law also provides counties the option of electing the board chair at-large. Of the twelve largest counties in Illinois, DuPage, Kane, St. Clair and Winnebago all have board chairs elected at-large. The board chairs for Lake, Madison, McHenry, Sangamon, Peoria, and Champaign counties are elected by the board. As noted above Will and Cook have elected chief executives (see Appendix F for a summary of the structure of the 12 largest Illinois counties).

Responding to the complaints of many suburban homeowners in the rapidly growing collar counties about double-digit increases in property taxes, the state passed the Property Tax Extension Limitation Law (PTELL) in 1991. The new law limited the annual increase in property tax extensions to the lesser of 5 percent or the increase in the CPI, plus allowances for new construction and voter approved increases. The existence of the property tax cap has had policy and structural implications for rapidly growing counties. It has limited the extent to which such counties can take on and fund new programs and it has fostered a search for other non-property tax funding arrangements.

The plural executive tradition is still strong in Illinois. The state constitution provides that the sheriff, the county clerk and the treasurer be elected by the voters of each county. Pursuant to the state constitution, the General Assembly has determined that circuit court clerks should be elected by the voters rather than appointed by the judges of the circuit court in each county. The constitution provides that the positions of auditor, coroner, and recorder of deeds can be eliminated or the method of selection changed from elected to appointed with the approval of the voters in a countywide referendum.[5] A series of so-called "internal control statutes"[6] provide these elected officials with an additional source of independence. These statutes give them the latitude to determine how best to control the inner workings of their offices, subject only to the county board's control of the purse strings. Efforts by boards to achieve such things as uniformity of pay and benefits and other policies throughout a county can be frustrated by the fact that they do not control these conditions in offices run by these elected officials.[7]

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[5] We did not address the position of Superintendent of Schools in this study.

[6] Auditor: 55 ILCS 5/3-1004; Coroner: 55 ILCS 5/3-3003; County Clerk: 55 ILCS 5/3-2003.2; Recorder: 55 ILCS 5/3-5005.2; Sheriff: 55 ILCS 5/3-6018; State's Attorney: 55 ILCS 5/3-9006; and Treasurer: 55 ILCS 5/3-10005.1. The Circuit Court Clerk derives similar authority by virtue of several provisions in the statutes applicable to that position.

[7] It should be noted that the elected officials in Lake County have in general, voluntarily agreed to abide by county-wide policies relating to personnel, purchasing, and budgeting.

Only the knowledge that they might have to account for their actions the next time that they appear before the board to justify their budget request serves, potentially, to dampen their total independence.[8]

II. C. Focusing the Context Further: Lake County

The population of Lake County increased by 17% between 1980 and 1990 and at a 15% rate between 1990 and 1997 based on an estimated 1997 population of 595,000. There are 52 municipalities in Lake County containing approximately 84% of the population. Approximately 60% of Lake County's 471 square miles are incorporated. Lake County residents are highly educated; thirty-two percent of those over the age of 25 are college graduates. The median household income of $52,266 is one of the highest in the country.

Rapid growth and the suburbanization of previously rural counties since the 1950's has had a significant impact on county government across the United States.[9] New populations arriving from more urban areas expected the types of services they were used to in the cities. Faced with demands for new services and different types of citizens with different expectations, county governments began to realize the need to change, both in what they did as well as how they did it. These changes were often difficult. They lacked some of the structural tools available to cities and suffered from the traditional uncertainties about the proper role and purpose of county governments described earlier. And there were the inevitable tensions to deal with between the 'good old boys' of a more settled rural past where township government loomed large, and the newer residents with their newer ideas and concerns.

The 1970 Illinois Constitution provided for a new electoral form of county government in Lake County and in 1972 the previous system of a county board consisting of township and deputy township supervisors was replaced by 25 elected members, with 5 coming from each of 5 districts. Three important practices did, however, continue. First, the board chair was elected every two years from among the board membership. Secondly, executive and legislative functions were "blended" in a series of standing committees which oversaw the operations of different county agencies. Finally, there were eight county-wide elected officials exercising some degree of executive authority independently of the county board.

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[8] See, for example, Pat Lord, "The nonending power struggle: County board vs. elected officers," *Local Government Law*, June 1999, v. 35, No. 9. Illinois State Bar Association Publication. A recent court case, *Pucinski v. Co. of Cook*, July 6, 2000, draws some boundaries around this independence.

[9] For example, Lawrence L. Martin, "American County Government: An Historical Perspective," Ch. 1, in David R. Berman, *County Governments in an Era of Change*,(Westport, CT; Greenwood Press, 1993), esp. pp. 11-12.

In 1975, following a Lake County Management Improvement Training Program, the board recognized the need to begin working to change the *status quo* in light of the dual pressures of growth and urbanization. In a very prescient introduction to its Summary of Findings, the report of the first governmental study commission, described earlier, observed that:

> The County now finds itself involved in issues related to health care, solid waste disposal, law enforcement, open space development...all of which have major impact on the future character of the county...To deal effectively with all of these...the County Board must be freed from some of its present involvement in operational details and given increased time and staff support for long-range planning and innovative program implementation and evaluation. [p.6]

It went on to recommend such things as the establishment of the position of county administrator as a way to carry out and provide consistency in board policies between meetings of the functional standing committees. It followed with a number of other recommendations intended to "modernize" Lake County government, make it more efficient and effective. Finally, and clearly it observed that:

> The standing committee system must begin to function more effectively. Specifically, more emphasis should be placed on policy-making and long-range planning and less committee activity dedicated to routine operational matters. [p. 7]

As was already noted earlier, in its first and second reports, the 1977-78 study commission went on to recommend specific structural and procedural changes intended to advance the "modernization" of Lake County government and its ability to operate more effectively in its changing environment. Also as noted earlier, some of the same structural and procedural questions appeared on the list of issues posed for this study almost 25 years later.

Under the state law,[10] the county board also serves as the Board of Commissioners of the Lake County Forest Preserve. The Forest Preserve is an independently organized governmental unit and taxing entity with its own mission, staff and administrative structure, budget, and facilities. Likewise, the board of commissioners is separately organized with its own president, vice president, treasurer and assistant treasurer, standing committees and board operating procedures. While county board members receive an annual salary, commissioners receive only a per diem for their Forest Preserve services. As commissioners of the Forest Preserve, they have been extraordinarily successful during the past decade in supporting successful referenda to increase property taxes for purchasing additional property, opening and improving hiking, biking and preserve trails, and restoring wetlands, lakes, rivers, forests and prairie areas.

Though the Forest Preserve *per se* was not a focus for this study, this dual role of county board members engendered a significant amount of comment in the course of some of our interviews. At their

heart was the issue of 'conflict of interest', both at the level of individual board members as well as at the institutional level between the two different entities. Several of those interviewed asserted that at least ***some*** county board members were really interested primarily in their role as a Commissioner of the Forest Preserve. Concerns were also expressed about how conflicts that occasionally occur between the Forest Preserve and the county are resolved.

[10] 70 ILCS 805/3a.

III. Modernizing Lake County Government: Strategic Analysis

The framework often used in strategic planning is useful for organizing and presenting an analysis of Lake County government in 2000. It calls on those undertaking a strategic planning exercise to begin by identifying the perceived *internal* strengths and weakness of the unit under consideration in relation to the *external* threats and opportunities it faces. Our extensive interviews, reviews of relevant documentation, and observations of board activities have provided us with a rich skein of data and observations on Lake County and its government. Presenting it in this manner creates the contextually rich pictures within which our recommendations for the future can be nested, developed and explained. It also underlines the fact, as explained earlier, that the answers to the ***six "independent" questions we were asked to address*** in this study are in fact ***highly interdependent in both their analysis and, especially, their implementation.***

III. A. Strengths

III. A. 1. Dedicated Officials

Lake County is well-served by the dedication and commitment board members give their jobs. From our interviews as well as from board activities we've observed, it is apparent that board members take their responsibilities seriously and work hard on behalf of residents. For modest remuneration, many of these officials put in long hours; several estimated that they spend 30 hours or more per week in meeting their legislative and constituent responsibilities. Board members whose districts include significant amounts of unincorporated land seem to maintain the heaviest workloads. They serve in a dual capacity, performing the same functions as municipal officials do in incorporated areas while attending to county legislative and administrative matters. Most board members also serve as representatives on one or more of the approximately 30 different county boards and commissions (see Appendix G for a list of county boards and commissions).

III. A. 2. Goal Setting

Board members generally regard the goal-setting process instituted in recent years as a positive development. The process centers around a two-day workshop at which they have an opportunity to identify and prioritize the most important issues facing the county. The primary outcome is a list of policy objectives which has served to guide both board activities and budget policy. It points a way for the board to begin focusing on policy rather than on administrative matters. How information is structured, how it is used to structure things like budget presentations, evaluate performance, organize the board's legislative agenda for the year, and, perhaps most importantly, structure it's own internal committee processes is crucial to changing this focus. The existence of this list is a major step forward.

The *2000 Lake County Legislative Program* for the first time **relates legislative requests to county priorities**. The recasting of the legislative program moves it from being a disaggregated 'wish list' to having some policy organization and conveying a sense of real priorities. It also communicates a much clearer sense of why particular recommended actions are important in the larger scheme of county objectives. The structure of the budget document for FY 2001 moved things in the same direction, shifting from a 'line item' focus with a functionally-oriented committee structure towards a more goal-oriented structure.

These are very positive steps in the right direction. Over time they will help link long-term goals to resource allocation and the pursuit of strategic objectives through the legislative agenda. They are important steps in shifting from a focus on administrative details to more of a policy focus and in providing a framework for program evaluation each year: **How much and what kind of progress have we made in accomplishing our longer term objectives?**

III. A. 3. Professionalism

An important strength of Lake County government is the strong commitment to professional administration on the part of both board members and administrators. One of the first steps which the board took towards 'modernization' was the creation of the position of county administrator. The first person to occupy this position was a long-time county employee with a deep understanding of the people, governmental structures, politics and 'sociology' of Lake County. By all reports he also had the management style and skills necessary to ease the transition towards a different way of conducting county business.

Upon this individual's retirement, the board undertook a national search for his replacement, selecting an individual from outside the county with a long and distinguished record as a professional city and county administrator. This commitment to professionalism is further demonstrated by the qualifications of many subordinate administrative officials and department heads with a virtual absence, according to all accounts, of any patronage activity.

III. A. 4. Budget

In interviews, the current budget process was widely praised by board members as well as by department heads. The process is an open one with all parties afforded ample opportunity for input and comment. There has been an attempt in the past few years to integrate the policy priorities expressed by the board at its annual goal-setting session into the budget process. Members of the board, including those not currently part of the majority, say that there is adequate opportunity to argue for and secure funding for their priorities.

The budget process serves as a primary means by which the board and the county administrator are able to exercise influence over both elected and appointed department heads as well as over county-funded boards and commissions. The budget thus serves as a critical policy and management integrating mechanism in a structure where power and authority are highly diffused. The positive attitude toward the process by which the county budget has been developed in recent years appears attributable to two factors, 1) the general deference accorded the administrator as a result of the authority delegated by the board, and 2) the constructive relationship maintained by the board chair with the administrator.

III. A. 5. Human Resource Management

The human resource management function of the county has been centralized for a number of years. In practice, however, progress towards an integrated human resources management system for the county has been slowed by the fragmentation of responsibility for personnel particularly among the elected officials, some of whom had held their positions for many years. In such an environment, success has depended on the professionalism of the administrators responsible for this function as well as on their ability to convince semi-autonomous department heads and elected officials of the value of a more rationalized, standardized system of classification, pay scales, leave policies, workmen's compensation policies, and the like. These objectives have been largely realized in recent years. Elected officials have, in general, voluntarily complied with county policies and the county has been able to carry out a very successful early retirement system program.

III. B. Weaknesses

III. B. 1. Diffusion of Power

The most glaring deficiency in the current structure of county government is the extent to which authority is diffused among multiple officials. A consequence is that it is very difficult to mobilize the critical mass of support that is generally required for major policy initiatives. We have identified multiple dimensions along which power is diffused as follows:

- Legislative power is diffused within the board among committee chairs. The board is characterized by what several interviewees described as a "strong committee" system in which committee chairs exert a high degree of influence in the policy areas for which they are responsible. In some instances, the chair directly oversees the activities of departments within his/her jurisdiction.
- Executive power is diffused between the board, department heads, and the administrator. The administrator wields authority primarily with regard to the budget process and with regard to administrative policy in areas such as personnel and procurement. Personnel decisions below the

department head level as well as routine decisions regarding county programs are handled by department heads. Departmental matters with policy implications or that affect other departments are addressed by some mix of the department head, the relevant committee chair, and the county administrator. Other members of the board have the opportunity to express their preferences on any items which require board approval.

- The large number of departments headed by elected officials further diffuses executive power. Due to state laws which provide these officials with substantial internal autonomy, the administrator and board have limited ability to affect administrative practices in these units. The board and the administrator are able to exercise a degree of oversight by virtue of the fact that the budgets for these offices have to be approved by the board. But compliance here, as in matters of personnel policy, depends a good deal on persuasion, some degree of mutual self-interest, and the continued willingness of each party to avoid direct confrontations over policies and practices. The elected officials have in general, voluntarily complied with county administrative policies.
- Executive and legislative power is further diffused by the presence of multiple boards and commissions each of which exercises authority in a particular policy area. Six boards are particularly relevant in this regard: the Board of Health, the Stormwater Management Commission (SMC), the Solid Waste Agency of Lake County (SWALCO), the Veterans Assistance Commission (VAC), the Public Building Commission (PBC), and the Tuberculosis Sanitarium Board (TSB). The county has taken action to integrate PBC operations with those of the county and has gained the compliance of both the Board of Health and SMC with county administrative policies. The status of the Board of Health, TSB, SWALCO, and VAC is governed by state law however, limiting the extent to which the board and administrator can exercise oversight or enforce administrative integration. Finally, the court system with its own executive director operates as still another autonomous administrative function.

III. B. 2. Leadership

While the board chair is titular head of Lake County government, the limited authority and stature accorded that position impedes authoritative representation of the county's interests at the Federal, state, and local levels. In other jurisdictions and at other levels of government, such representation has been accomplished through a unitary executive office—a president, a governor, or a mayor. Different presidents, governors and mayors have used these offices more or less effectively, more or less wisely. And different times require different measures; different leadership styles. However, the institutional powers of the executive are flexible and available when the times and public opinion require them to be exercised energetically. And, as presidents as different as Andrew Jackson and Theodore Roosevelt

understood, they also provide a platform from which the executive can mobilize that opinion and build consensus.

The governing imagery which several board members called up during our interviews was that of a 'cabinet' government. A majority of the board get together and elect, from among their own members and sometimes only after many ballots and considerable horse trading of committee assignments, a chair who then 'leads'. But only for two years until the next election when a 'new' government needs to be formed.

In a classical 'parliamentary system' with 'cabinet' government like that in Great Britain, the 'government' is determined by the number of seats which a party wins. The key leadership of each party is known at the time of the election. The prime minister is 'first among equals' and the 'government' rules by virtue of its control of the political party. Elections are held at least every five years or at the call of the governing party. Though individual electors vote in their district for their MP, they are usually fully aware of the connection between their individual representative and the leadership and policies they are voting for. This is because of the strong organizing role of political parties in England.

Such a structure bears only a superficial resemblance to the 'cabinet system' in Lake County government. The chair is certainly not the leader of a party nor is there a 'shadow government' in the wings, whose leadership and policy positions on key issues is widely known to the electorate at the time of the election. Through the internal bargaining which goes on every two years, he or she ***may*** be able to put together a majority coalition and even to keep it together over a period of time. Indeed this seems to have happened during in the first part of the 90's, partly in reaction to what several of those interviewed referred to as a 'tumultuous' two year period at the end of the 80's.

For the present at least, the experience of the first part of the 90's is fresh in many memories and seems to have 'poisoned the well' for a number of current board members making them leery of even the ***appearance*** of 'strong' leadership in **their** 'cabinet system'. They perceived themselves as having been shut out and, as some members described their committee assignments, "sent to Siberia" and don't want it to happen again! And even ***with*** this temporary stability in the early 90's, it doesn't appear to have been particularly effective, externally, in moving the county towards resolving some large and contentious issues such as traffic congestion/highway funding, Route 53, and, more recently, affordable housing.

Failure to Resolve High-profile Issues. The leadership deficiency is particularly apparent with regard to the general difficulties encountered by the county board in attempting to resolve long-standing, controversial issues such as highway funding, Route 53, and affordable housing. Both highway funding

and Route 53 have been on the agenda for over a decade. Little, if any progress toward a resolution of either is apparent (see Appendices H, I and J for timelines on these issues).

The highway funding issue has been particularly nettlesome. According to a recent poll, a high proportion of county residents regard traffic congestion as the single most important problem facing Lake County.[11] The *Transportation Action Plan for Congestion Mitigation* prepared in 1999 by the Lake County Division of Transportation projects that the problem will get worse absent a major investment in the county and state road networks. The report identifies a need for approximately $131 million for "congestion mitigation improvements" including lane additions, intersection improvements and road extensions.[12]

Among the options being investigated as potential sources of funding for this improvement program are a gas tax and a sales tax. Ten years ago, Lake County missed an opportunity to obtain the authority to levy a gas tax for purposes of road county improvements. At that time, it was left out of a state law authorizing the other "collar" counties including DuPage, Kane, and McHenry to levy a tax for road improvement purposes. With benefit of hindsight, many now consider this a "mistake." The people came anyway to Lake County, they observe, and the congestion has just become worse.

In 2000, Lake County joined with other counties to seek authority from the state to levy a ¼% sales tax instead of a gas tax to support county highway funding. That proposal failed to secure state approval. Various explanations were offered for this failure; that the timing was bad in terms of other things going on in the General Assembly; that tax increases of ***any*** kind, with or without a referendum, have become the 'third rail' of politics in Illinois; that the legislative delegation and the county board were 'playing chicken' hoping to get the other party to take the lead on a tax increase. The Lake County Board has recently authorized a survey of county residents to ascertain the extent of support for a tax increase dedicated to road construction. Presumably, if the survey shows that such support exists, that will be presented to the state legislative delegation for purposes of convincing them to allow the county this authority. That Lake and the other counties are required to obtain state approval to levy a tax which affects only their own residents and which would, in Lake County, address the county's single most pressing problem, highlights the subordinate role of non-home rule counties under current Illinois law.

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[11] As noted above, sixty-one percent of respondents to the poll conducted by the Forest Preserve in July identified traffic congestion as the "most important issue or problem facing Lake County." See "An Attitude & Interest Study of Lake County Residents for the Lake County Forest Preserve District," prepared by Richard Day Research, Inc., April 17, 1998.

[12] *Transportation Action Plan for Congestion Mitigation*, Lake County Division of Transportation, 1999.

The proposed extension of Route 53, a state highway, into Lake County has also been part of the debate over traffic congestion. The project has been under study for over thirty years and under active consideration for about ten years. Three options have been identified to date: the status quo; building Route 53 as planned; or improving a network of other state roads including routes 83, 12, and 45. The debate has been contentious with no option obtaining broad support. Absent from the discussion thus far has been a party accountable to groups on all sides of the debate and with sufficient clout to begin to move those groups toward a possible solution.

A third issue on which there is deadlock is affordable housing. According to some interviewees, a suitable policy in this regard would contribute in a significant way to a positive economic climate in the county. Since April when the county board created a task force to make recommendations on the issue, the matter has bounced between the Affordable Housing Task Force, the board and the Zoning Board of Appeals (ZBA). Recent action by the board to amend the Unified Development Ordinance to require that at least 10 percent of all new residential developments in unincorporated areas be affordable housing stock may resolve the issue. However, concerns have already been raised about the workability of this proposal and hearings by the ZBA are pending. The issue is particularly important for the opportunity it presents the county to play a leadership role by developing a policy which municipalities could emulate.

III. B. 3. Board involvement in administrative matters

Although it is impossible to make a strict demarcation between policy and administrative matters, in recent years the board appears to have drifted toward involvement in more and more matters that are appropriately left to the administration. From our review of the committee minutes for the period December 1999 to August 2000, a disproportionate amount of time is spent on relatively minor matters (a summary of the analysis of committee minutes is presented in Appendix K). One board member commented that;

> We get overly involved in a lot of tedious and laborious types of things which are better left to the staff. What happens is the board tries to run the day-to-day operations of the county and they should not, but they want to show that, "I'm in charge and I'm running it."

A contrary opinion by another board member was that, "asking a question is not micromanaging." Legislators can and should probe on selected issues of particular concern or interest. However, when such probing becomes the norm, problems arise. As committee meetings are prolonged by protracted discussion, the time commitments of board members escalate and it becomes more and more difficult for individuals who cannot devote full time to serving as a board member to serve. The more time spent on small issues, the less that is available to deliberate over the large issues. Further, as the decisions of those at lower administrative levels are questioned and as their judgment is second-guessed, there is tendency

for these officials to gradually cede more and more decision making authority to the board. There is a potential for the professionalism of the decision making process to be compromised for the board to be inundated with minutia.

We touched earlier on some of the steps which have been taken to refocus the board's attention on broader policy matters: the goal-setting meeting at which the board discusses its objectives and strategies for the year; the recasting of the most recent legislative program document in that language and the introduction of a more policy-focused budget structure for the FY 2001 budget. These are all very positive moves in the right direction. They are also difficult to implement and will take time and concerted effort before they 'take'.

A shift to more of a policy orientation has important implications for the budget process. Since the early part of the 20th century, budget reformers have been attempting to move decisions makers away from the traditional 'line item' focus. It is a traditional tool of micro-management by legislative bodies trying to exert their control over resources as well as over their administration and use. Unfortunately, it does ***not*** indicate what the expenditures have ***produced*** by way of outcomes let alone how well you have ***accomplished your objectives***. Nor does it tell you how ***efficiently*** those resources have been used relative to other ways of accomplishing objectives. But none of these things are grasped as easily as the simple cost of a tree or a road improvement or a police car which is why most jurisdictions are still struggling with this different way of looking at and assessing things.

III. C. Opportunities

III. C. 1. Reapportionment

Over the past twenty-five years, the Lake County Board has taken advantage of the opportunity presented by the state requirement that it "..reapportion its county so that each member of the county board represents the same number of inhabitants" and, in so doing, "..shall first determine the size of the.. board," to undertake a 'mini-constitutional' review of the many facets of county government. The present study is intended to support that review for the third time.

Important changes have been initiated in the past and continue to affect the present. The population, economic, social and demographic trends that have shaped the present will, in all likelihood, continue over the next decade, exacerbating present needs and creating new ones. They will also bring new human, social, and economic resources to the county for helping to meet those needs. The decennial reapportionment opens a window of opportunity to accelerate the modernization of county government, better positioning it to be a leader in organizing these new resources to meet those needs.

III. C. 2. The County Role in Controlling Growth

The General Assembly created the Illinois Growth Task Force in 1999 and shortly thereafter it adopted a mission statement to guide its deliberations and activities:[13]

- To begin a public discussion in Illinois leading to a set of land use, housing, and transportation goals;
- To promote balanced land use, housing and transportation policies;
- To encourage orderly development that preserves farmland and natural areas, and increases housing options and transportation alternatives; and
- To propose possible legislation to reach these goals.

The problems of sprawl and congestion may have reached a point where officeholders at the state and local levels may be willing to reconsider the appropriate role of the county in addressing matters of land use and growth. Students of local government have long noted that by virtue of their size, counties are well positioned to play a larger role in solving area-wide problems.

The Report of the Working Group on Land Use and Transportation of the Illinois Growth Task Force recommends expanded county authority in matters of development and growth. It points out that, "inconsistency among municipal and county-level plans often results in lengthy, costly delays for developers and inefficient land use patterns," and envisions "county-level coordination of municipal land use plans to ensure that municipal land use plans are compatible and consistent with each other as well as with the county plan."[14] The report further proposes that counties be permitted to levy impact fees that would allow full recovery from developers of the cost of providing services and infrastructure.

Obtaining and exercising such authorities for purposes of controlling growth and sprawl is likely to take a concerted educational and lobbying effort. Lake County has been a leader statewide with regard to the preservation of open space and stormwater regulation. With its combination of large size, high degree of professionalism, and a well-educated and sophisticated populous, Lake County is well positioned to provide leadership on other growth-related matters at the state level. At present however, no one official nor office is well-positioned to lead such an effort.

III. C. 3. Evolution in the Role of the County Administrator

A number of the board members we interviewed commented on the contrasting styles of the current and prior county administrators. To a considerable extent, management practices in Lake County evolved in manner suited to the abilities and style of the previous administrator. That individual had long

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[13] *Economic Strength Through Balanced Growth: A report of the Working Group on Land Use and Transportation Submitted to the Illinois Growth Task Force*, September 1, 2000.
[14] Ibid.

tenure in the job and extensive familiarity with county personnel as well as close relationships with prior board chairs. Hence, he could exercise considerable control over operating units without explicit authorization from the board. With a new administrator who lacks the advantage of such long-standing personal relationships, it is appropriate for the board to rethink old rules and policies. If the current incumbent as well as his successors are to effectively serve the function of ensuring that board priorities and policies are enforced, the board needs to consider according that position additional authorities. Particularly important are the authority to hire and fire department heads, to appraise the performance of department heads, and to control the flow of items from administrative units to the board.

III. D. Threats

III. D. 1. Land Use Regulation

Perhaps the greatest threat to the high quality of life in Lake County is that nothing is done to affect the trends that have led to the present predicament. Projections are that the population of Lake County will increase by approximately an additional 200,000 people by 2020, exacerbating the already serious problems regarding overcrowded schools, high taxes, and congested roads. Under current law, the county has limited ability to take a leading role in addressing these problems. Thus land use decisions in incorporated areas which represent about 60% of the land area of the county and 84% of the population are made by the municipalities. Annexation laws exacerbate the problems of growth by permitting developers to play one jurisdiction off against another to obtain the highest density development possible. It appears that only through some sort of coordinated effort involving both the county and the municipalities is there a prospect for other than a reactive approach to the problems that accompany growth. Leadership will be required at both the state and local levels if progress is to be made in this regard.

III. D. 2. Intra-county Divisions

A second threat to the welfare of the county are the divisions that have developed between different groups and areas. These divisions are apparent with regard to a number of important issues such as affordable housing, Route 53, and economic development. At the same time that jurisdictions in central Lake County are struggling to accommodate growth pressures, those along the northern shoreline are seeking investment that can enhance the industrial and commercial base and provide jobs for residents. Whereas proposals to make housing more affordable in central and western portions of the county have encountered resistance, housing costs in Waukegan and Zion remain reasonable. Whereas there is resistance to Route 53 in jurisdictions through which it would run, in other areas it is perceived as part of a solution to congestion problems. In each instance, effective leadership could serve to bring

together opposing factions or help identify win-win solutions of benefit to the county as a whole. The current governance structure provides no obvious point from which such leadership could be provided.

III. D. 3. Economic cycles

The high level of both national and local prosperity obscures to a degree concerns about jobs that will surface should there be an economic downturn. In the case of such a downturn, traffic and housing problems are likely to deter businesses from locating and expanding in the county. It is important that the county take a long-term perspective to see that an appropriate balance is achieved between concerns for jobs and quality of life but it is not clear where in county government that responsibility is assigned.

The county currently benefits from the additional tax revenues that accompany the expansion in assessed value associated with high rates of growth. Those revenues have helped the county address current priorities without having to make painful trade-offs among programs. With a slowing of growth, the trade-offs will become more difficult. Additional demands for funds such as that for a new jail have already surfaced. The preeminent role afforded the county administrator in the budget process and the support provided by the board and the board chair have helped ensure a satisfactory resolution of budget issues in the past. As money gets tight, these processes are likely to undergo strain. It is important in that instance that the roles of both the administrator and the board chair be protected. One means of doing so would be to grant the administrator, working with the board chair, additional authority on personnel matters as recommended below.

III. E. Political Risks of Change

The county's ability to meet these and other challenges hinges, in part, on three interrelated things: continuing the drive to 'modernize' and stabilize its governmental structure, processes, goals and policies; developing and implementing long range strategies to work effectively with municipalities, the state and other counties to implement needed changes in state statutes for these goals to be accomplished; and providing a focal point of vision, energy and leadership to bring various groups in the county together in pursuit of their shared interests while helping to reconcile them in their differences.

There are risks in all of this. Nobody likes change when personal interests or deeply held philosophical points of view might suffer. As the saying goes, 'better to go with devil you know' or to 'muddle through' than to risk the unknown. Significant changes in the board's size or in the manner of electing the chair, for example, goes to the heart of the matter. Each threatens personal as well as political interests.

Though present working relationships with the state legislative delegation or with municipalities seem "okay", for example, the real successes appear to have been somewhat limited. And each party to

the relationship can and does point, anecdotally, to opportunities which, by their own accounting, were not taken or even "failed" because of something the other party did or didn't do. These experiences and the feelings they engender build on each other over time and, in doing so, may make it even harder to move ahead.

There is no guarantee that far sightedness and 'doing the right thing' will even be recognized let alone rewarded. But the need to reapportion is a chance to put political mettle to the test for the benefit of the future and the county as a whole. People, in a democracy, always have their own views on what the 'right thing' is, as frustrating, even angering as that can be for those of a different persuasion. And what is 'right' has a way of becoming clear only in hindsight. ***So who wants to take all those risks by taking the first step? What in it for them?***

IV. Recommendations for Change

The effectiveness of Lake County government is compromised by antiquated structural features many of which derive from practices put in place many decades ago. That structure may work in small rural counties but is of doubtful effectiveness in a modern, urbanized, and growing county of 620,000. Our recommendations for changes are categorized according to those that can enhance legislative capacity, administrative capacity, and political capacity. Some changes are politically complex and likely to be longer term while others could be implemented more quickly.

IV. A. Building Legislative Capacity

A first step toward enhancing the policy making capacity of the county board would be to more clearly distinguish between those matters which are primarily administrative in nature and hence appropriately handled by staff those which require board involvement. Clearly board members will, on occasion, have an interest in a particular issue that warrants in-depth involvement. However, when such involvement becomes the norm, the board's policymaking capacity is diminished. The energy, attention and time of board members are limited. To the extent those resources are expended on secondary matters the board's effectiveness on the large issues is compromised. Three such issues discussed below are affordable housing, highway funding, and Route 53. Others mentioned during the course of our interviews included the lack of a comprehensive plan for the Lake Michigan waterfront, the large number of residents without health insurance and the need for programs to accommodate the rapidly-growing minority populations in the county. In citing these issues we do not intend to diminish the board's accomplishments on other matters such as University Center and revision of the Unified Development Ordinance. Our primary point is that the county would be well served by an enhanced level of attention to the major policy issues by the board.

In the present structure, the board should be the focal point of political and budgetary responsibility and policy making for the county. Consistent with the approach endorsed by political and management theorists and widely applied in the business world, the board should set goals and policy parameters and monitor compliance with them by the administrative staff. Where board policy or intent is not fully adhered to, additional explanation and refinement may be in order. When board members reverse or second guess decisions made at subsidiary levels however, minor matters escalate to policy status.

There are many suitable means of monitoring administrative activity. In addition to normal processes of questioning and requesting reports, the board could set up a system of measures providing it with important indicators of performance. Many counties including Fairfax County, Virginia,

Mecklenburg County, North Carolina and Multnomah County, Oregon employ this technique. Measures would enable the board to effectively monitor administrative activity without intense supervision of officials. For example the Department of Transportation might be asked to routinely report on the number of lane miles of street resurfaced or reconstructed, the lane miles of county road in excellent, good, fair and poor condition, and the number of intersection improvements completed. Coupled with measures of citizen satisfaction and cost data of various types, the board could better target its transportation priorities and evaluate their accomplishment.

Units with direct contact with the public such as building permits could be required to develop measures of customer satisfaction, wait time, and/ or customer complaints. The administrator and department heads would be accountable to the board for variations in the level of performance as determined by such measures. Ideally, the measures would be incorporated in the budget document and process (an example of the kinds of measures utilized by Fairfax County, Virginia Department of Planning and Zoning is included as Appendix L). The Urban Institute, among others, have developed and helped implement such indicators in jurisdictions across the United States.

IV. A. 1. Board Size, Structure and Functioning

One of the most effective changes which the board could make would be to reduce its own size. The present size is undoubtedly a hold over from the days when it was made up of township supervisors and deputy supervisors. Chapter 55 of the Illinois State Code imposes an upper limit of 29 and a lower limit of 5 members on the size of the board, giving the board considerable discretion in actually choosing the limit. Following the 1980 census, the board reduced the number of members to 24 from 25, then reduced it one more to 23 after the 1990 census. This, we were told, was to reduce the likelihood of a tie vote, especially in the selection of the chair.

There are a several factors which favor a ***significantly*** smaller Board with larger electoral districts. Among them, four in particular stand out:

- They tend to be less faction ridden and somewhat more cohesive. In reflecting on the county's previous experience with large, multi-member districts, one board member commented, "it was large enough to have enough of a diversity where it kept you from getting too far out there. It tended to bring you more toward the center." This is because of the underlying electoral dynamics. Smaller single districts can be more easily dominated by a small 'single issue' interest group or socio-economic perspective. Because interest and turnout is often ***very*** low in local elections they are the committed few who can be mobilized to vote. Larger districts contain more diverse constituencies and successful candidates have to be able to appeal to this diversity and are thus less likely to be beholden to a 'single issue' group. Under such circumstances, the

potentiality is there for greater policy flexibility and easier compromise among conflicting view points.

- It facilitates a change in the orientation, role and visibility of board members. The job becomes more professional, more attractive in its own right. The stature, public visibility, and attractiveness of the position is enhanced.
- Most importantly, it facilitates a shift in attention to longer term policy objectives and away from micro-level administrative details. This occurs more or less naturally because of the demands on time, energy and attention which such a change entails. The board should become more effective as a legislative body because of its increased focus on major issues.
- It deters parochialism. One interviewee commented, "the more segmented to make the county, the more parochial the interest. The more parochial the interest, the less likely they are to handle the big issues." Many interviewees referred to an "aldermanic" mentality on the part of some board members who tend to focus on districts needs to the substantial exclusion of larger concerns.

What is the 'right' size for a board in a county like Lake? State law, as noted earlier, gives the county board wide latitude in making this judgment so long as the resulting electoral districts meet certain criteria. However, after January 2, 2001, counties with a population between 800,000 and 3,000,000 are to have no more than 18 members on the board.

In our review of the governance structures of other counties we found wide variation in the size and make-up of county boards, commissions, and councils (see Appendix M). Multnomah County (Portland), Oregon, with a population similar to that of Lake has five commissioners, four elected from districts and one at-large. Montgomery County, Maryland, with a population of 840,000 has a nine-member board with five members elected by district and four at-large. As noted earlier, Illinois counties tend to have larger boards as a result of the legacy of the township form. Thus, the Will County Board has 27 members, Kane County has 26 members plus a board chair elected at-large, and Winnebago County has 28 members plus a board chair elected at-large.

The Lake County Board has gradually declined in size since 1972 and though it is not out of line with other Illinois counties, it is on the upper end of the range of similar counties that we identified around the country. Cook County's board has 17 members. DuPage County, closer to Lake in size and demographics, will reduce the size of its board from 24 to 18 in 2002. Prior Lake County Government Study Commissions twice recommended a total of 15 members.

In the final analysis, our recommendation regarding the size of the board is intimately tied to a later recommendation regarding the position of county board chair and its functions in county

government. With this in mind and after examining these alternatives and weighing the many advantages of a significantly smaller board, we recommend a total of 12 members excluding the board chair. While this is ***still*** large by the national standards of comparable counties, it should move Lake County government further towards realizing the legislative, political and policy benefits of a smaller body while still ensuring that diverse perspectives will be brought to bear on county issues.

Associated with the issue of size, of course, is that of how members should be elected. Many counties elect part or all of the county board at-large. In the past Lake County has had multi-member districts. If the board size is reduced, there is less justification for either reestablishing multi-member districts or, with one exception to be developed later, electing a portion of the board at large. There is a strong sense on the part of those interviewed that single-member districts have promoted accountability and responsiveness on the part of board members to their constituents. Single-member districts will also enhance the prospect that the board will be diverse geographically as well as ethnically and, we believe, should be continued.

A smaller board implies larger districts and hence more time on constituent matters by board members. The vast majority of those interviewed believe that the position of board member should remain part-time. Many expressed apprehension about the prospect of a board dominated by "professional politicians." It is apparent that the tradition of the citizen-legislator is well engrained in Lake County. It is a valuable tradition and should be retained. However, with many board members already spending 20-30 hours per week on their duties, it is apparent that larger districts will have to be accompanied by an expanded staff. The intent would be that this staff perform primarily a support function, assisting board members in handling complaints and communicating with constituents. Apparent from the experience of other jurisdictions is the danger of legislative staff being utilized for political purposes. To guard against such an eventuality, we recommend that staff be centrally supervised. It would be further appropriate that additional staff resources be allocated to members whose districts include large unincorporated areas.

In conjunction with a positive decision to substantially reduce the size of the board, we would strongly recommend that the board undertake a careful review of its practices and policies relative to the delegation of responsibility to the county administrator, department heads and other administrative staff. We explicitly address this issue in the following section. Such a review might even constitute a significant part of the annual board retreat along with a review of the paper flow to and among board committees. Consonant with its responsibility to maintain oversight of administrative activities and to set broad policies, the board should consider producing a clear policy on the delegation of administrative responsibilities to the county administrator, department heads, and administrative staff. Paper flow

should be reduced to essential legal documents requiring board approval and those necessary to help it formulate policies and evaluate their implementation

At present, the committee structure of the board tends to parallel functional and administrative domains. Several board members interviewed thought a reduction in the number of committees was possible and suggested that one or more of the committees with relatively low levels of legislative activity be abolished. This would have the advantage of reducing time demands on board members. However it is also the case that the number of committees is not out of line with those of other similar jurisdictions. We are not recommending any specific changes to the current structure but we believe that in general, a smaller number of committees would be conducive to a more efficient and effective policymaking process.

An innovative alternative that the board should consider and one that would help reinforce a more policy-oriented legislative role would be to structure committees according to the long-range strategic goals that have been identified. Such a change, together with the recommended reduction in board size and the adoption of new guidelines and policies regarding administrative delegation and paper flow reduction, should greatly enhance the legislative and policy capabilities of the county board.

We are also sympathetic to a suggestion made by some that board members be provided training on matters relating to county government and to board operations. While recognizing the extreme time demands already placed on board members, we nevertheless believe that such training would be valuable. Topics covered could include issues relating to growth and planning, as well as economic development and environmental protection. The training could include an investigation of how counties in other parts of the state and the country address such problems such as those confronting Lake County. In order to minimize the time demands on board members, new "distance education" tools including teleconferencing and internet technologies could be utilized.

Table 1

Action Plan – Building Legislative Capacity

	Time Dimension			Type of Action	
	short	medium	long	Local Action*	State Action**
1 Encourage a policy focus on the part of board members	x			x	
2 Adopt performance measures to hold administrators accountable.		x		x	
3 Reduce the number of board members (excluding the board chair) to 12	x			x	
4 Provide board members with support staff		x		x	
6 Retain single-member districts.	x			x	
7 Organize committees according to key policy objectives.		x		x	
8 Make available to board members training on county issues	x			x	

* an ordinance, resolution or procedural change
** change in state law or the state constitution

IV. B. Building Administrative Capacity

The position of county administrator was established in 1980. That was a major transition, at least formally, from the past. The recruitment and hiring of a professional administrator from outside Lake County was another major step forward in the 'modernization' of county administration. As detailed earlier in this report, a number of additional positive steps have been taken since then to continue this advance. It is our belief, supported by experiences elsewhere in both government and private industry, that ***improvements in the governing and policy-making capacity of legislative bodies and governing boards*** go hand-in-hand with ***strengthening and professionalizing the administration and implementation of that policy.***.

One of the more immediate changes the board could undertake would be to provide the county administrator with the authority necessary to ensure that the board's priorities prevail at the department level. As pointed out in the earlier strategic analysis, administrative authority is extremely diffuse. While the county administrator plays a key role with regard to budget matters, the authority of that position has not been extended to other executive functions. For example, final decisions on the hiring and firing of department heads and on appraising the performance of department heads are now made by the board. It is impossible for the administrator to exert the authority necessary to adequately oversee departmental activities on behalf of the board without more direct lines of accountability.

Similarly, the county administrator should be the primary conduit for communication between the board and departments on policy matters. The call for items to be transmitted to the board and its committees for their information, review, and/or action should ***come from the county administrator's***

office. That office would then be responsible for deciding what is ***on*** the agenda as well as what is ***not*** in consultation with the committee chairs, and then be responsible for following up on items with departments as well as with the board. At present, agendas for some committees are prepared by the department head in consultation with the committee chair. The proposed change would avoid some of the problems which have arisen under this practice and, most importantly, enhance the board's own policy effectiveness in line with the recommendations in the preceding section.

With delegation by the board to the county administrator of the authority to, 1) hire and fire department heads, 2) appraise the performance of department heads, and 3) control the flow of administrative items to the board, the county administrator could better ensure that programs are executed according to the board's priorities. If the board desires to hold the administrator accountable for policy and program execution, it needs to accord that position the authority necessary to perform that role. The present structure greatly limits the extent to which the county administrator can intervene at the departmental level to insure that policy execution occurs according to the board's wishes.

The departure of a previous high-ranking official is symptomatic of the kinds of problems that can arise where administrative authority is not sufficiently centralized. One board member commented that this individual "got in trouble" because, "he felt that he reported directly to the board and not to Karl." Another board member said that this individual "was getting mixed signals" from the board and as a result, "couldn't decide what he needed to do first." Apparent from the experience is that the situation was allowed to deteriorate to a point that a majority of the board felt a need to intervene, even though he was a relatively recent hire. Had there been a more direct line of accountability between the county administrator and the unit for which this individual was responsible, remedial action might have been taken much sooner. Where administrative officials believe that their primary point of accountability is the chair of the committee to which they report, a circumstance created by the policy that only the board can dismiss department heads, the administrator is inhibited from exercising needed oversight.

Although a memo was issued by the board chair in 1999 advising department heads that they report to the county administrator, apparent from our discussion with several department heads was that this memo muddled rather than clarified reporting relationships. One department head commented that the memo,

> really created a kind of gray area that county board members even today don't quite understand because I get a mixed message. My county board committee chairman saying, "we ought to do this," and Karl saying, "I think we ought to do that," and I'm going, now, okay guys, these don't mesh and it creates some uncertainty once in a while.

The long tenure of some department heads is both a strength and a weakness of the present system. A strength is that these individuals are uniformly able and well-regarded. The evidence suggests that each runs a professional organization. However, it is also apparent that these officials resent intrusion on their spheres of influence. Each had substantial autonomy under the prior county administrator but, according to those we interviewed, there was no ambiguity about who was ultimately in charge because of the close relationship maintained by the prior administrator with previous board chairs. With a new administrator, a new board majority, and a new board chair, those relationships no longer hold. Department heads now exercise an even greater degree of autonomy than previously. The ambiguity about reporting relationships contributes to this dynamic.

There is no evidence that any of the current department heads have abused that autonomy. Problems that are presented however, are 1) in a situation such as that cited above, the administrator is inhibited from taking appropriate steps to keep a bad situation from getting worse, 2) as current department heads retire, their replacements will not have equivalent levels of experience to operate in this system, 3) as the board undertakes initiatives which cut across departmental lines, for example should the board implement a comprehensive system of performance measures across the government, the county administrator will need additional authority to ensure that the program is implemented according to the board's wishes.

An additional problem with the present system is that committee chairs sometimes develop an attitude of ownership towards a particular department. Department heads contribute to that attitude by consulting with their respective committee chairs on key issues and on committee agendas. Such a dynamic impedes the ability of other board members to have an equal say on policy matters. Where the county administrator serves as the primary point of accountability for department heads, all board members can be insured of equal access and equal influence. Thus the budget process, which is regarded favorably by virtually all the board members interviewed, is substantially managed by the county administrator in close cooperation with the board chair.

It is particularly important that the administrator have the exclusive authority to dismiss department heads. Those decisions are currently made by the board based on recommendations from the board chair and relevant committee chairs. This arrangement contributes to a perception by department heads that they are accountable primarily to the chair of the committee with jurisdiction over their department. In these circumstances, there is little incentive for department heads to keep the

administrator and his staff apprised on departmental matters even on issues that may affect county policy more broadly. Board members can and should have access to department heads for purposes of obtaining information about departmental operations and for purposes of resolving constituent complaints. However, for purposes of coordinating administrative activities across departments and ensuring program execution according to board priorities, the ambiguity in reporting relationships that current arrangements promote should be removed.

Some board members expressed skepticism about the desirability of centralizing authority in the position of county administrator. The assignment of authorities such as those described above does not necessarily imply a diminished board role in these activities however. Appointments should take effect only with the board's consent. It is further appropriate for the administrator to consult with board members about their preferences on matters of pay, promotion and dismissal. In fact it would be self-defeating for the administrator to act unilaterally on such matters. One board member commented,

> I would not be bothered if Karl had the authority to hire and fire department heads, but I would not be comfortable unless we had policies and procedures so that we were sure that he went out and did a search and that he used the committee where it made sense.

Such considerations need to be accommodated and could be incorporated by the board in any formal delegation of responsibility. However, the final decisions on matters of pay, promotion, and dismissal should be those of the administrator and the administrator should expect to be held accountable for them.

The delegation of this authority to the county administrator is consistent with practices in other counties we investigated such as Fairfax County, Virginia and Johnson County, Kansas. It would also be consistent with the National Civic Review in its *Model County Charter*. That document includes the following language;

> The county manager shall appoint and, when necessary for the good of the service, suspend or remove all county employees and appointive administrative officers provided for by or under this charter, except as otherwise provided by law, this charter, or personnel rules adopted pursuant to this charter (p. 28).

The delegation of removal authority to the county administrator is further consistent with the guidelines of the International City/County Management Association's "Criteria and Guidelines for Recognition." According to those guidelines, a council-manager position is recognized as such only if, "The manager shall have authority by legislation for the appointment and removal of at least most of the heads of the principal departments and functions of the local government."[15]

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[15] International City/County Management Association, *Who's Who in Local Government Management*, 2000.

Lake County government has a long tradition of professionalism both at the departmental and corporate levels. Those at the department level are charged with overseeing particular functional areas. Those at the corporate level are charged with making sure that policies are integrated across departments, that competing perspectives are taken into account, that resources are allocated efficiently. They also have to make tactical decisions about how overall ends can best be served. Where department heads perceive that their primary point of accountability is the chair of the relevant committee, the capacity of the county administrator to perform that corporate level function is compromised.

IV. B. 1. Elected Officials

At present, there are eight county-wide elected officials, a tradition which has deep roots in the history of county government in the U.S.[16] Unfortunately, as pointed out earlier, this represents a substantial diffusion of executive power and limits the ability of the board to set and evaluate policies and administrative practices in these units except through the annual budget process.

The status of four of these positions--- State's Attorney, Sheriff, County Clerk and Treasurer—is rooted in the Illinois constitution. The appointed status of the Circuit Court Clerk is determined by state law. The other three may be changed from elected to appointed status through a referendum. In 1978, the position of Auditor was changed in this way. A similar referendum was held on two more of these offices, Coroner and Recorder of Deeds in the fall of 1990 following a recommendation of the second Governmental Study Commission. Neither proposal was approved.

It is still the case that both administrative capacity and the legislative capacity of the board would be strengthened by making these two offices—Coroner and Recorder of Deeds—appointed rather than elected. The incumbents seem, in general, to be well regarded. However, the positions are primarily professional and administrative rather than policymaking in nature and should therefore be consolidated under the authority of the county administrator. Further, it is difficult for the public to know enough about the operation of these offices to make educated decisions regarding the qualifications of those heading them or the quality of their performance. With consolidation of these administrative operations, the board will be able to provide more unified policy direction and the leadership of county government will be considerably less fragmented than it is at present. Abolition of the Coroner position should be accompanied by the creation of an appointed position of Medical Examiner.

The kind of problems that can arise from having these positions independent are apparent from the experience with a previous Recorder of Deeds. According to those interviewed, this individual bought a new information system without adequate review of the contract by either the State's Attorney

or Management Services. The county ended up with a system which was isolated and not compatible with other county systems. Due to the efforts of the current Recorder and the vendor, the situation is being rectified. However, the incident demonstrates the liability from the county's perspective of having multiple, autonomous department heads.

Other counties that we have researched have made similar attempts to curtail the number of separately elected positions. For example, Johnson County, Kansas recently converted the offices of County Clerk, Registrar of Deeds, and Treasurer from elected to appointed status. Multnomah County, Oregon similarly did away with the elected District Court Clerk, County Clerk, and County Assessor. These actions are consistent with the recommendations of the Winter Commission on State and Local Public Service, which recommended that, "executive authority" be "strengthened," "by reducing the number of independently elected cabinet officials." The Commission adds, "The Commission believes that the public is best served when they can identify a single elected or appointed executive at the top of government who is responsible for what government does."[17]

At present, the state constitution precludes the county from changing the status of the positions of County Clerk and Treasurer. It is our position that these functions eventually should be made appointive rather than elective, fully recognizing that this will not be easy or, most likely, popular.

The Illinois state constitution requires a referendum every 20 years regarding the calling of a new constitutional convention. The next window of opportunity for the citizens of the state will be 2010. If approved, it will present highly urbanized counties like Lake County with their most important opportunity since the 1970 convention to shape the future of county government in the state. This will require two important things: a strong, state-level association of county governments, ideally in conjunction with NACO and associations representing cities like the International City/County Managers Association and the National League of Cities and, secondly, long range planning, energy and effective leadership to establish such a coalition in order to make full use of this constitutional opportunity.

As described earlier, county government historically, has lagged far behind cities in the modernization of their structures and professionalization of their management. In this regard, it is telling that there presently is no state level professional association representing county government per se. There was certainly no such association at the time that the 1970 constitution was adopted. We therefore recommend that Lake County, in cooperation with other appropriate counties and county associations

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[16] There are eight county-wide elected officials including the Superintendent of Schools which was not part of this study.

[17] *Hard Truths/Tough Choices: An Agenda for State and Local Reform. The First Report of the National Commission on the State and Local Public Service.* 1993, p. 16-17.

initiate the creation of a state-wide association of counties. While a number of constitutional issues should be addressed on behalf of counties, two are particularly relevant to the present analysis: the flexibility, under state law, to determine the status of officials that are currently elected, and the flexibility to decide on home rule status ***with or without*** an elected County Executive.

IV. B. 2. Boards and Commissions

The organizational structure of the county is characterized by a large number of autonomous or semi-autonomous boards and commissions. There are a variety of justifications for these boards. Some such as the Board of Health were created to protect against politicization. Others such as Stormwater Management were created as a means of inducing cooperation between the county and municipalities. The Public Building Commission was created in part as a means of coping with tax and debt limitations on county governments.

The presence of so many autonomous and semi-autonomous units creates problems of both coordination and accountability. Recent disclosures about a separation payment to a former employee by the Public Building Commission make apparent the importance of ensuring direct accountability of commissions responsible for the expenditure of public funds to elected officials and through them to the electorate.

The capacity of the county board to effectuate changes in the status of these boards is contingent on the legal status of each. Some, such as the Board of Health and the Veterans Assistance Commission are mandated by state law. Others such as the Stormwater Management Commission and the Tuberculosis Sanatorium Board were created at the county's option but operate according to state law. Still others, such as SWALCO are created pursuant to an intergovernmental agreement between the county and the municipalities.

In general it will serve purposes of accountability, efficiency and policy coordination to limit the proliferation of these boards. The functions of some boards such as the Board of Health and the Tuberculosis Sanitarium Board should be combined as a means of enhancing coordination among subordinate units. This recommendation was made by the First Governmental Study Commission in 1978 but has yet to occur. The county has already moved toward operational consolidation of the Public Buildings Commission with the county and has prevailed on the Stormwater Management Commission and the Board of Health to abide by county administrative procedures. We believe that the county would be well served by a review of the legal status and original purpose of each such board as well as by a review of the extent to which administrative consolidation is desirable and feasible.

IV. B. 3. Forest Preserve

Recent history has made apparent the extent to which the Forest Preserve and the county are linked both governmentally and politically. Current arrangements whereby board members also serve as Forest Preserve commissioners provide some degree of policy integration. Any comprehensive land use planning, economic development policy, or transportation policy by the county must include the mission and programs of the Forest Preserve. Despite such board-level integration and policy interdependence, however, various points of conflict between the county and the Forest Preserve seem to have arisen in the last decade or so in matters relating to sewers, roads, and development.

While we did not begin this study with an intent to address the Forest Preserve, it quickly was brought to our attention in the course of interviews with board members and others. A number of issues were raised in this regard:

- The fact that a unit whose operating budget and staff, compared with other units of county government, is quite small yet it has its own 23 member board.
- Concern over the potential for 'conflict of interest' at both the individual and the institutional level because of the dual roles county board members play.
- The belief that some board members run for office primarily because of their desire to play an important role in the Forest Preserve.

In following up these and other observations, we asked a number of our interviewees to consider three possibilities: (a) continuing the present arrangement, hopefully with a substantially smaller board; (b) separating the two bodies as was done recently in DuPage County again resulting in a much smaller Forest Preserve board; or (c) making the Forest Preserve another department of county government and abolishing its status as an autonomous entity.

Responses to these options were mixed. More than one board member indicated that if the two were split, they would opt to remain with the Forest Preserve. Others were satisfied with the present arrangement though recognizing some of the difficulties with it. And not many had really considered the Forest Preserve as part of county government, a common arrangement in many other municipalities and counties across the country. Clearly, that seemed the most 'radical' possibility to most. Yet that option offers some advantages, including a reduction in administrative redundancies and the associated operating costs. Given the constraints of Illinois law, it appears that such consolidation would have to occur through an intergovernmental agreement whereby the Forest Preserve was operationally consolidated with the county but retained separate legal status.

It was pointed out one interviewee that the Forest Preserve has a tremendous impact on land use patterns but that there is little integration between the county and Forest Preserve planning units.

Consolidate along the lines we have suggested would allow such integration to occur. Greater integration might also facilitate the expansion of active recreational uses on Forest Preserve properties. We fully recognize how uneasy this is likely to make some but it should be given careful consideration. As a first step, the fiscal and legal issues associated with such a change need to be investigated. In the long term we feel that such a change holds potential as a 'win-win' situation for all parties as well as the people of Lake County.

Table 2

Action Plan – Building Administrative Capacity

	Time Dimension			Type of Action	
	short	medium	long	Local Action*	State Action**
1 Provide the county administrator with the authority to hire department heads with the consent of the Board.	x			x	
2 Provide the county administrator with the authority to fire department heads.	x			x	
3 Provide the county administrator with authority over the flow of administrative items to the board.	x			x	
4 Provide the county administrator with the authority to appraise the performance of department heads in conjunction with annual decisions about pay increases.	x			x	
5 Immediately or upon retirement of the incumbents, provide for a referendum on whether the positions of Coroner and Recorder of Deeds should be appointed rather than elected. Abolition of the position of Coroner should be accompanied by the creation of an appointed position of Medical Examiner.		x		x	
6 Work with other Illinois counties toward changes in state law and the state constitution to make the offices of Circuit Court Clerk, Treasurer, and County Clerk appointed rather than elected.			x	x	x
7 Work with other Illinois counties to create a state-wide association of counties to lobby on common issues.		x		x	
8 Initiate a study of all county boards and commissions to ascertain which can and should be restructured, abolished and/or consolidated		x		x	
9 Initiate a study of possible consolidation of the Forest Preserve with the county.		x		x	

* an ordinance, resolution or procedural change
** change in state law or the state constitution

IV. C. Building Political Capacity and Leadership

IV. C. 1. Chair of the County Board

At present, the position of board chair is a weak one though obviously different individuals have brought different talents, abilities, and energy to it in performing their responsibilities over the years. Still, the board chair is elected biennially by his/her peers. There has been a relatively high rate of turnover with four different board chairs in the past ten years. It is difficult for an incumbent to provide

leadership on county-wide issues with the short tenure and relative lack of authority that accompanies the position. More than one board member characterized the role more in terms of 'facilitating' and 'coordinating' than in terms of 'leadership', even when describing the "governmental system" as a "cabinet" government.

Although the chair is the only position which represents county government as a whole, ultimately he/she is accountable only to the residents of his/her electoral district and to the other board members, or at least the majority who elected him/her. Under such circumstances, it is difficult for the board chair to leverage that position into one which can serve as a catalyst for the resolution of major issues and serve as a strong spokesperson for the county at other levels of government. And if the county administrator's authority is enhanced as recommended previously, the position of board chair, serving as liaison between the administrator and the board, would gain in importance as the primary vehicle of communication and policy direction from the board to the administrator.

Views such as these, articulated by a number of the individuals we interviewed including present and past board members, lead us to recommend that the chair of the board be elected at-large. This gives the public the opportunity to select the individual who would fill this position and who would speak authoritatively for the county as a whole before other local, state and national officials and agencies. While the board chair would be just one of 13 board members, under the proposed downsizing of the board recommended earlier, election at-large would, we believe, confer particular status on the incumbent enabling him/her to broker solutions to problems that the county has been unable to resolve otherwise, especially as the change would require the incumbent to perform the responsibilities of the office on a full-time basis.

The appropriate role of the board chair is described in the National Civic League's *Model County Charter* as follows,

> The chairman fills three facilitative roles that offer enormous leadership opportunities. First, the chairman can coordinate the activities of other officials by providing liaison between the manager and the [Board], fostering a sense of cohesion among [Board members] and educating the public about the needs and prospects of the county. Second, the chairman can provide policy guidance through setting goals for the [Board] and advocating the adoption of policies that address the county's problems. Third, the chairman is an ambassador who promotes the county and represents it in dealing with other governments as well as the public.[18]

The election of the board chair at-large would strengthen the "cabinet" system that has developed within the county board. As the only non-departmental official who can speak for the people of Lake County as

[18] National Civic League, *Model County Charter*, p. 21, 1990.

a whole, the board chair would play a unique representational and ceremonial role and would also be well positioned to "facilitate" a policy focus on the part of the board.

A number of those we interviewed were uneasy about, and some expressed outright opposition to, having the board chair elected at-large. Three general considerations underlay their position; 1) the cost of a county-wide campaign for board chair would increase significantly, changing the kind of person who would/could afford to run for it and, most importantly, opening the way for the candidate of 'big money' to gain the upper hand, 2) dependence on the 'majority coalition' which characterizes the present arrangement maximizes the ability of those in the coalition to influence events and policies, 3) present arrangements keep the position from becoming a 'career' and the incumbent from using it as a stepping stone to a higher level political position.

On the other hand, we also heard from those who lamented the current lack of leadership. One official commented that a board chair elected at-large,

> would be able to govern more fairly because he would not or she would not be obligated to any faction of the board regardless of their party affiliation. Some people feel that all the big money interests will control wealth. They don't now. If you've got a good candidate, they can win.

Another individual from outside county government noted, "without an elected official speaking for the county, I think you're lacking decisive leadership to go out there and lead the county forward." This individual added, "with the county board chairman, the county board members can take him out of there. You should let your citizens choose who they want to play that role."

Several other Illinois counties have decided to have their board chair elected at-large. While DuPage has long had such a position Kane and Winnebago counties have moved to such a system in just the past few years. Such an electorally-strong position would provide leadership for the board in its political and policy-formulation roles. In addition, the chair would be a spokesperson who can speak for and energetically pursue the county's interests externally would provide a focal point of leadership for the solution of the pressing short and longer-term problems facing the county as it continues to grow. With such a position, Lake County would be able to retain the county administrator as chief executive, preserving the tradition of professionalism in that position. Pursuant to state law, the powers of the board chair elected at-large would be set by local ordinance.

IV. C. 2. Home Rule and the Elected County Executive

Home Rule is one of several legal/constitutional mechanisms adopted by state governments across the country to give their local governments the opportunity to enjoy greater flexibility and autonomy in making their decisions and running their affairs. It is intended, in theory at least, to reduce

their dependence on state legislative action and to curb the necessity to turn to the state capital to get the authority to address some particular problem, including raising revenue from a range of sources.

Under the Illinois constitution and county government statutes, home rule power would allow the county to act within broad limits on matters pertaining to its government and affairs without further explicit statutory authorization. With home rule, Lake County would not be beholden to the state for a revenue source dedicated to highway improvements. In the words of the 1978 Lake County Governmental Study Commission, which was the first to recommend home rule, "home rule can offer distinct advantages to our county government in the form of more discretionary authority to solve local problems with greater latitude to respond to the demands, wishes, and desires of our citizens."

It is not coincidental that home rule has failed previously in Lake County and in other counties that have put it on the agenda for adoption. Based largely on the Cook County experience, home rule is associated with higher taxes as well as new types of taxes.[19] That experience has been utilized by opponents of home rule to argue that if home rule were granted, taxes would go up more than they otherwise would. To date however, there is no evidence to support this contention. A 1985 study of the tax and borrowing practices of all Illinois cities and villages over 10,000 indicate that home rule governments do not have higher property taxes than comparable non-home rule cities and villages.[20] Although many of the home rule municipalities have used their power to levy taxes not available to non-home rule governments, many of these taxes such as hotel-motel and sales taxes shift the burden away from local residents.[21]

It is anomalous for Lake County itself not to have home rule power when eleven municipalities within the county already have home rule power including relatively small jurisdictions such as Lake Barrington (population – 4,500), Park City (population – 5,500), and Mettawa (est. population – 380)(a list of all Lake County municipalities showing those with home rule is included as Appendix N). One official from outside county government observed that, "we've got many municipalities that have home rule right here in Lake County. People have the option to take it away and it's never been done in Lake

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[19] Using home rule powers, Cook county imposed a retail sales tax on the sale of new motor vehicles, levied a wheel tax on motor vehicles registered in unincorporated areas, imposed local taxes on the sale of alcoholic beverages, added a local gasoline tax, and established a special tax on mobile homes. However, as pointed out in the Report of the Lake County Governmental Study Commission in 1978, Cook County also utilized those powers to replace the Coroner with a Medical Examiner, implement modern budgetary procedures, and provide the Auditor with the power to audit special districts to which the Board President made appointments.

[20] James Banovetz and Thomas Kelty, "Home Rule, Part 3 – Debt, Taxes and Home Rule," *Illinois Issues*, December 1985.

County. Another official commented, "that a county of 600,000 people doesn't have home rule cuts at the very heart of democracy."

It is the case that with home rule the county would no longer have to abide by the state's property tax cap.[22] As a means of reassuring taxpayers however, the county could, with home rule power, adopt its own property tax limit. Cook County has imposed such a limit as has Montgomery County, Maryland. Montgomery County allows the limit to be exceeded by an extraordinary majority of the county council in the event of an emergency.

In moving to a system where the board chair is elected at large, the county would not thereby gain option of also deciding on whether or not it wished to adopt home rule and the potential advantages which it entailed. That option only comes ***with*** the county executive form, though the voters ***can*** bypass home rule if they so chose while adopting the county executive form. We've taken a careful look at this option, as a part of our study, both in Illinois and elsewhere and raised the possibilities in a number of our interviews.

There is clearly a certain appeal to the idea of an elected county executive. He/she would act much as does the president at the national level or the governor at the state level. Elected at large, they would serve as head of the executive branch of government with the powers to appoint (with board consent) and dismiss administrative officials, to prepare an annual budget, and to veto ordinances subject to being overridden by a 3/5 vote of the board. Like the elected board chair, the position would serve as titular head of the county government. Unlike the elected board chair, the executive would have formal authority to oversee county administrative units, authority which would enhance the executive's capacity to take a leadership role on the large issues facing the county.

An executive position would not preclude the retention of a professional county administrator to oversee the day-to-day operation of the executive branch although the administrator would be subject to direction by the executive. Will County, the only Illinois county to have adopted the county executive form (which opted to do so without home rule) has a county administrator as does Montgomery County, Maryland. With the resources of the executive branch at his/her disposal and with political incentives to appear activist, the county executive position, similar to the president and governor, would be the a likely source for policy innovation of the type needed to resolve the complex problems facing the county.

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[21] Shelley Fulla, The Financial Impact of Home Rule on Municipalities, unpublished manuscript, Graduate Program in Public Administration, University of Illinois – Chicago, 2000.

[22] Even with home rule, the county would have to comply with provisions of the Property Tax Limitation and Extension Law which require a public hearing when proposed tax increases exceed statutory guidelines.

There are other trade-offs in any such change. Many of those interviewed expressed more apprehension about the prospect of a county-wide, elected executive than they did about a county-elected board chair. These concerns included that the administrative function would be politicized, that only those with access to large amounts of financial resources could run, and that it would provide too much power to a single individual.

If we were unconstrained by present Illinois law, we would recommend that home rule be adopted by the county. This reflects both our willingness to trust in the political system and the ability of people, generally, to make decisions about their own future. While recognizing some of the political and financial risks in such a choice, we place a high value on reducing the need to secure state approval in order to make decisions about revenue levels and sources or find the solutions to their own local problems. At the same time, the most pressing issues of growth, development, land use, and safety require both a cooperative relationship with the state and other local governments and a strong energetic voice capable of representing county government views and working to find solutions to these issues.

While there are good reasons for Lake County to consider implementing a county executive form of government we cannot recommend such a structure at this time. One reason is that Illinois law currently provides that a county executive preside over board meetings and vote on board matters in cases of a tie. We believe that this provision blurs the line between appropriate executive and legislative responsibilities. Should the board at some point decide that the county executive form is desirable, it would be appropriate to have this section of the law changed so as to allow a more traditional separation of executive and legislative powers such as is found at the federal and state levels.

It may well be that in the future, there will be a clearer need for a county executive in Lake County. For the present, we believe that the other changes we have recommended, especially a serious reduction in the size of the county board, the county-wide election of the county board chair, strengthening the authority of the county administrator over county operations, and taking serious steps towards consolidating administrative and budgetary accountability by replacing as many as possible of the elected officials with officials appointed on the basis of their professional qualifications will continue the progress towards the 'modernization' of Lake County government begun in the '70's.

Table 3

Action Plan – Building Political Capacity

	Time Dimension			Type of Action	
	short	medium	long	Local Action*	State Action**
1 Provide for election of the board chair at-large.	x			x	
2 Lobby for changes in state law/constitution to 1) allow counties home rule without a county executive, 2) to provide for a clear separation of executive and legislative responsibilities under the county executive form.			x		x
3 Initiate a study of how home rule powers could be utilized by the county to address growth-related problems		x		x	

* an ordinance, resolution or procedural change
** change in state law or the state constitution

V. Summary

The difficult situation currently facing Lake County is in part attributable to features of the broader system in place at the state level of which the county is part. Those features include 1) the proliferation of units of government, many of which have substantial autonomy, 2) municipal control over land use matters and corresponding limits on the county's ability to influence land-use patterns, 3) a heavy reliance on the property tax as a means for funding government service which creates incentives for municipalities to seek new development, and 4) annexation laws which leave the county at a disadvantage relative to municipalities. The net effect of these rules, in conjunction with the attractiveness of Lake County as a place to live and the strong economy, is that development pressures are extreme while the unit of government best suited to address the adverse consequences of growth has limited authority to intervene.

While the county government is to some extent hostage to larger forces however, it labors under the additional burden of an antiquated structure. It is within the power of the county board, in conjunction with the electorate, to change that structure to one better suited for the challenges of the 21st century. A key is to create a structure which facilitates the exercise of leadership that appears requisite to meeting those challenges.

List of Appendices

Appendix A

Curriculum Vitae of L. Vaughn Blankenship and James R. Thompson

Lloyd Vaughn Blankenship

Graduate Program in Public Administration
College of Urban Planning and Public Affairs
University of Illinois - Chicago

EDUCATION/DEGREES RECEIVED

Ph.D., Cornell University, Graduate School of Business and Public Administration, Ithaca, N.Y., 1962

B.A. (*Honors*), Political Science. University of California, Riverside, 1956.

ACADEMIC POSITIONS

Professor of Public Administration and Director, Doctoral Program, College of Urban Planning and Public Affairs, University of Illinois – Chicago, 1996-present

Professor of Political Science and Research Professor, Institute of Government and Public Affairs, University of Illinois at Chicago, 1991-1995.

Associate Chancellor for Planning & Resources Management and Professor of Political Science and Management, University of Illinois at Chicago, 1984-1991.

Professor of Political Science, State University of New York, Buffalo, 1972-1975.

Associate Professor and Chairman, Department of Political Science, State University of New York, Buffalo, 1968-1969.

Associate Professor and Vice-Chairman, Department of Political Science, State University of New York, Buffalo, 1968-1969.

Visiting Associate Professor of Business Administration, University of California, Berkeley, Summer 1968.

Associate Professor of Political Science and Management, and Chair, Department of Management, School of Business Administration, State University of New York, Buffalo, 1967-1968.

Assistant Professor of Business Administration and Assistant Research Economist, School of Business Administration and Space Sciences Laboratory, University of California, Berkeley, 1962-1967.

Lecturer in Administration, Graduate School of Business and Public Administration, Cornell University, Ithaca, N.Y, 1960-1962.

SELECTED PUBLICATIONS

The National Bureau of Standards: A Review of its Organization and Operations, A study prepared for the Subcommittee on Science, Research and Technology of the Committee on Science and Technology, U.S. House of Representatives, 97th Congress, 1st ses. (Committee Print). U.S.G.P.O., Washington, D.C., 1981.

"University Research Centers: A Comparison of the NASA and RANN Experiences," reprinted in U.S. House of Representatives, Committee on Science and Technology, H.R. 6910 National Technology Foundation Act of 1980, Hearings, September, 1980. U.S.G.P.O., Washington, D.C., 1980.

"Allocating R&D Resources in the Public Sector," (with Betz, et. al.,) in *Studies in Management Science, V. 15, Management of Research and Innovation*, Dean and Goldhar, eds., (Amsterdam; North-Holland Publ. Co., 1980), pp. 235-252.

"Public Policy Issues and Societal Information Structures," in *Communication and Control in Society*, Klaus Krippendorf, ed., (London; Gordon and Breach, 1979).

"Science Information and Governmental Decision Making: The Case of the National Science Foundation," (with Barry Bozeman), *Public Administration Review*, v. 39, 1979, pp. 53-57.

"The Social Context of Science," in Nicosia and Wind, eds., *Behavioral Models for Market Analysis: Foundations for Marketing Action*, (Hinsdale, Ill.; The Dryden Press, 1977), pp. 9-24.

"Management, Politics and Science: A Non-separable System," *Research Policy*, December, 1974, pp. 244-257.

"The Scientist as 'Apolitical' Man," *British Journal of Sociology*, v. 24, Sept. 1973, pp. 269-287.

"On the Methodology of the Holistic Experiment: An Approach to the Conceptualization of Large-Scale Social Experiments," (with Ian Mitroff) *Technological Forecasting and Social Change*, v. 4, 1973, pp. 339-353.

"Public Administration and the Challenge to Reason," in *Public Administration in a Time of Turbulence*, Dwight Waldo, ed., (San Francisco; Chandler Publishing, 1971).

Administering Health Systems, edited with Mary Arnold and John Hess, (Chicago; Aldine, Atherton, 1971).

"Organizational Decision-Making," in *Administering Health Systems*.

"Organizational Leadership, Satisfaction, and Productivity: A Comparative Analysis," (with Karlene Roberts and Ray Miles), *Journal of the Academy of Management*, Dec., 1968.

"Organization Structure and Management Decision-Making," (with Ray Miles), Administrative Science Quarterly, June, 1968. Reprinted in *Readings in Industrial and Organizational Psychology*, Ken Wexley and Gary Yusl, eds., (N.Y.; Oxford Univ. Press, 1971).

"Theory and Research as an Act of Faith," *Public Administration Review*, Sept., 1967.

"Power Structure and Organizational Effectiveness," in *Men at the Top: A Study in Community Power*, Robert V. Presthus, (N.Y.; Oxford Univ. Press, 1964).

PROFESSIONAL POSITIONS

LEGIS Fellow, Science Policy Research Division, Congressional Research Service, Library of Congress, 1980-1981.

L. Vaughn Blankenship

Director, Division of Applied Research, National Science Foundation.
1977-1981.

Head, Office of Planning and Policy Analysis, National Science Foundation, 1975-1977.

Senior Program Analyst, U.S. Office of Management and Budget, Natural Resources, Energy and Science Division, 1974-1975.

Program Manager, Division of Social Systems and Human Resources, RANN, National Science Foundation, 1973-1974.

James R. Thompson

Graduate Program in Public Administration
College of Urban Planning and Public Affairs
University of Illinois - Chicago

EDUCATION/DEGREES RECEIVED

Ph.D. in Public Administration, Maxwell School of Citizenship and Public Affairs, Syracuse University, 1996

Masters in Public Administration, State University of New York at Albany, 1976

B.A. History, Swarthmore College, 1973

ACADEMIC POSITIONS

Assistant Professor of Public Administration
University of Illinois-Chicago, 1996 - present

SELECTED PUBLICATIONS

"Reinvention as Reform: Assessing the National Performance Review." *Public Administration Review*, Vol. 60, No. 6 (November/December 2000).

"The Dual Potentialities of Performance Measurement: The Case of the Social Security Administration." *Public Productivity and Management Review*, Vol. 23, No. 3 (March 2000).

"The Reinvention Laboratories: Strategic Change by Indirection." *The American Review of Public Administration*, Vol. 30, No. 1 (March 2000).

"Skill-based Pay as an Organizational Innovation." (with Charles LeHew). *Review of Public Personnel Administration*, Vol. 20, No. 1 (Winter 2000).

"Devising Administrative Reform That Works: The Example of the Reinvention Lab Program." *Public Administration Review*, Vol. 59, No. 4 (July/August 1999).

"Strategies for Reinventing Federal Agencies: Gardening vs. Engineering." (with Ronald Sanders) *Public Productivity and Management Review*, Vol. 21, No. 2 (December 1997).

"The Reinvention Game." (with Patricia Ingraham) *Public Administration Review*, Vol. 56, No. 3 (May/June 1996).

"Political Management Strategies and Political/Career Relationships: Where Are We Now in the Federal Government?" (with Patricia Ingraham and Elliot Eisenberg) *Public Administration Review*, Vol. 55, No. 3 (May/June 1995).

"Reinventing the Federal Government: The Role of Theory in Reform Implementation." (with Vernon D. Jones) *The American Review of Public Administration*, Vol. 25, No. 2 (June 1995).

"Quasi Markets and Strategic Change in Public Organizations." *Advancing Public Management: New Developments in Theory, Methods, and Practice.* (Jeffrey Brudney, Laurence O'Toole, Hal Rainey, eds.) Washington: Georgetown University Press. 2000.

"Human Resource Flexibilities in the United States." (with Raymond Cachares). *Human Resources Flexibilities in the Public Services: International Perspectives.* (David Farnham and Sylvia Horton, eds.) London: MacMillan Press LTD. 2000.

Coeditor (with Patricia Ingraham, Ronald Sanders and Associates) of *Transforming Management/Managing Transformation: The Realities of Managing Change in Public Organizations.* Jossey-Bass Publishers. 1998.

PROFESSIONAL POSITIONS

Assistant to the County Executive, Monroe County, N.Y., 1988-1991

Clerk of the Legislature/Chief of Staff, Monroe County Legislature, 1981-1987

Administrative Analyst, Senior Administrative Analyst, Office of Management and Budget, City of Rochester, N.Y. 1977-1980.

Legislative Assistant, Congressman Floyd V. Hicks, U.S. House of Representatives, 1973-1975.

TRAINING

Instructor, "The Promise and Challenges of Performance Measurement." Session for State of Illinois officials sponsored by the Office of Governor George Ryan. April 1999.

Instructor, Illinois Municipal League, Leadership Enhancement and Development Program. 1997, 1998, 1999, 2000.

Appendix B

Recommendations By Charge

The appropriate size and manner of electing the county board

- Reduce the number of board members (excluding the board chair) to 12..
- Retain single-member districts.

The appropriate manner of selecting a county board chair

- Provide for election of the board chair at-large.

The scope of county board functions and the restructuring and/or altering of existing jurisdictional responsibilities

- Encourage a policy focus on the part of board members.
- Provide the county administrator with the authority to hire department heads with the consent of the board.
- Provide the county administrator with the authority to fire department heads.
- Provide the county administrator with authority over the flow of administrative items to the board.
- Provide the county administrator with the authority to appraise the performance of department heads in conjunction with annual decisions about pay increases.
- Initiate a study of all county boards and commissions to ascertain which can and should be restructured, abolished and/or consolidated.
- Initiate a study of possible consolidation of the Forest Preserve with the county.

The internal governance of the county board, including its committee structure and the role of the county board in policy development and administration

- Encourage a policy focus on the part of board members.
- Organize committees according to key policy objectives.
- Adopt a system of performance measures to hold administrators accountable.
- Provide the county administrator with the authority to hire department heads with the consent of the board.
- Provide the county administrator with the authority to fire department heads.
- Provide the county administrator with the authority to appraise the performance of department heads in conjunction with annual decisions about pay increases.
- Provide board members with support staff.
- Make available to board members training on county issues.

The pros and cons of home rule for Lake County with or without a county executive; and

- Work with other Illinois counties to create a state-wide association of counties to lobby on common issues.
- Lobby for changes in state law/constitution to 1) allow counties home rule without a county executive, 2) to provide for a clear separation of executive and legislative responsibilities under the county executive form, 3) to have the positions of County Clerk, Circuit Court Clerk, and Treasurer made appointed rather than elected.
- Initiate a study of how home rule powers could be utilized by the county to address growth-related problems.

The current status of county offices as elected vs. appointed officials

- Immediately or upon retirement of the incumbents, provide for a referendum on whether the positions of Coroner and Recorder of Deeds should be appointed rather than elected. Abolition of the position of Coroner should be accompanied by the creation of an appointed position of Medical Examiner.
- Lobby for changes in state law/constitution to 1) allow counties home rule without a county executive, 2) to provide for a clear separation of executive and legislative responsibilities under the county executive form, 3) to have the positions of County Clerk, Circuit Court Clerk, and Treasurer made appointed rather than elected..
- Work with other Illinois counties to create a state-wide association of counties to lobby on common issues.

Appendix C

Ordinance Creating the Position of Lake County Administrator

AN ORDINANCE CREATING A POSITION TO BE KNOWN AS CHIEF ADMINISTRATIVE OFFICER PRESCRIBING THE POWERS AND DUTIES THEREOF AND ALSO PRESCRIBING THE DUTIES AND PROCEDURES OF OTHER OFFICERS, COMMITTEES, SERVICES, INSTITUTIONS AND DEPARTMENTS IN RELATION TO SAID CHIEF ADMINISTRATIVE OFFICER.

SECTION 1. There is herewith created, under the Classification and compensation Ordinances of the County of Lake, the position which shall be known and designated as "Chief Administrative Officer," Said Chief Administrative Officer shall be appointed by the Chairman of the Board with the approval of the Lake County Board, hereinafter referred to as the Board, in accordance with the Lake County Board Rules.

SECTION 2. The Chief Administrative Officer shall be a person having demonstrated administrative and executive ability as shown by at least five years of experience in private or public employment in a responsible or executive position requiring the planning and execution of work programs of administrative operations, the budgeting and control of expenditures, and the coordination of varied activities, and who shall conform substantially to the requirements of a description to be established under the auspices of the Lake County Personnel System.

SECTION 3. The Chief Administrative Officer shall serve at the pleasure of the Board, provided that he or she may not be removed except after at least ten (10) days, and not more than thirty (30) days written notice, and if he or she requests in writing, not until after a public hearing at a regular meeting of the Board, in accordance with such procedures as are prescribed by the Board.

SECTION 4. The Chief Administrative Officer shall generally advise, assist, act as an agent for and be responsible to the Board for the proper and efficient administration of such affairs of the County as are placed in his or her charge by the Board. He or she shall be responsible for the enforcement of ordinances, orders, or regulations as directed by the Board. All appointed Department Heads under the jurisdiction of the Board shalt report to the Chief Administrative Officer.

SECTION 5. In order to serve effectively, the Chief Administrative Officer Shall:

- Recommend an annual County budget and exercise continuous budgetary supervision in conjunction with the Director of the Budget;

- Confer with and assist all Department Heads and receive reports of the activities of such departments under the jurisdiction of the Board;
- Recommend improved or standardized forms and procedures;
- Assist in the coordination of the functions and work of all officers, committees, institutions, and departments of the County, and devise ways and means whereby, efficiency and economy may be secured in the operation of all offices, institutions, departments and their functions;
- Conduct continuous research in administrative practices;
- Represent the County of Lake in its intergovernmental relationships as directed by the Board;
- Recommend long-term plans of capital improvement with accompanying financial plans;
- Direct such administrative services as may be found desirable by the Board to be rendered centrally;
- Direct the enforcement of personnel policies and practices through a central Personnel Department;
- Examine regularly at periods fixed by the Board the accounts, records, and operations of every commission, department, office, and agency under control of the Board and report these findings to the Board. On a regular basis he or she shall make recommendations to the Board for action to be taken relative to the efficient operation of the County, the betterment of public service, and the future needs of Lake County;
- Direct the purchase of all property, equipment, supplies, services and related contracts and the enforcement of the Purchasing Ordinance through the centralized Purchasing Department;
- Develop financial plans in which revenues and expenditures are projected against anticipated County Growth;
- Make recommendations to the Board on new and revised state statues which he or she considers desirable and worthy of endorsement by the Board. The Chief Administrative Officer shall also recommend to the Board the adoption of new and revised ordinances, orders, and resolutions when in his or her judgement these actions will promote improved County services and operations and are in the public interest; and;
- Have, a respect to the management of County-owned property and facilities, such responsibility as the Board may from time-to-time direct.

SECTION 6. The Chief Administrative Officer may employ assistants as the Board may authorize.

SECTION 7. No provisions of the Ordinance is intended to vest in the Chief Administrative Officer any duty or grant to him or her any authority which is vested by general law or County ordinance in or on any other County Officer or employee. No provision of this Ordinance shall be construed to delegate to the Chief Administrative Officer any authority required to be performed by the Board, nor shall the Chief Administrative Officer have the power to bind, obligate, nor commit the County of Lake in any manner, except as provided herein or by the express grant of authority by the Board. It is the intention of the Board in adopting this Ordinance only to create a position to which may be delegated certain administrative duties to be performed in and under its direction.

SECTION 8. The Board herewith declares that it would have passed this ordinance and each section, subsection, paragraph, sentence, clause and phrase thereof, irrespective of the fact that one or more of such sections, subsections, paragraphs, sentences, clauses or phrases might be declared invalid, unconstitutional, or void. Should any section, subsection, paragraph, sentence, clause or phrase of the ordinance be declared invalid, such declaration shall not affect the validity of any other section, subsection, paragraph, sentence, clause or phrase.

SECTION 9. This Ordinance shall take effect and be in full force on December 1, 1977. Within thirty (30) days after the date of its passage, this ordinance shall be published in the newspaper of widest public circulation in the County of Lake.

DATED, in WAUKEGAN, LAKE COUNTY, ILLINOIS. on this 11th day of October, A.D., 1977.

Appendix D

Structuring and Collecting the Information

Studies on issues like those posed in the preceding section require collecting and organizing information related to three questions:

1. What **is** being done now? Why?
2. What **can** be done? How?
3. What **should** be done? Why?

What is being done now? Why? There is a need to determine what is being done at the present and to assess the reasons for it. This provides the "base" information on governing processes and structures in Lake County, the "realities" from which any recommended change or adjustment will have to begin. It also provides an historical and behavioral context for "understanding" a good deal about how things got the way they are and suggests some of the political and institutional factors which may shape the ***possibility*** for change as well as the likely ***direction*** and ***degree*** of any change.

The study relied on two primary sources of information regarding the present status of governing structures and processes: ***semi-structured interviews*** and ***observation*** of County Board meetings and meetings of Board committees. At the beginning of the study, we identified three sets of individuals with whom we wished to conduct our interviews: (1) county board members; (2) county-wide elected officials; and (3) administrators, key staff and department heads. A 'strategic sample' of board members was selected for interviews to reflect different experiences, perspectives, and roles on the Board in recent years. All but one of the county-wide elected officials were interviewed along with all of the key Administrators and Department heads.[23]

In each case, we began with a list of questions intended to elicit information about and evaluations of existing structures, relationships and practices as well as some historical detail on their evolution. Clearly there had been some important changes, e.g., from multi-member to single member electoral districts, and we wanted to understand their origins as well as perceived benefits and costs. On average the interviews lasted about an hour and a half and were generally conducted by two members of the research team. They were recorded and subsequently transcribed for later reference. The interviewees were promised anonymity in their responses.

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[23] A list of interviewees is included as Appendix O.

The list of interviewees was subsequently expanded beyond this core group for two primary reasons. There was a clear need to get different perspectives on these same issues from key, informed individuals in roles which interacted in important ways with county government and the County Board. Among others, this included members of the State legislative delegation from Lake County as well as some village mayors. In addition, we wanted to get additional perspectives and/or historical details on certain key issues which have been at the center of attention in the county over the last few years. It was our feeling that an understanding of some of the dynamics of such issues, like transportation or affordable housing, provided a snap shot of the 'County Board in action'.

Our opportunity to observe the meetings of board committees and the county board as a whole in action was, of course, limited by the time period of our study. Again, however, at least two members of the research team were usually present so that they could discuss and compare notes after sitting through meetings. In addition, the dynamics of relationships are especially well displayed during the early fall of the year. This is when board committee hearings on the proposed budget for the upcoming fiscal year are held. The budget itself has been developed during the preceding months according to board policy and broad financial guidelines and involves intensive work by the staff and interactions among all key elected and appointed administrative officials.[24]

The hearings over a period of weeks present a public opportunity for the various board program committees, meeting jointly with the board Finance & Administration Committee, to examine, question, and react to the results produced by the earlier budget process. No other single action of government, federal, state, or local, reveals the interactions among the 'parts' of government and their respective roles, behaviors, and values like the budget process. This is as true in Lake County as it is in any other governmental entity in the United States.

In addition to these direct observations, we obtained a set of board committee agendas and minutes for the period December 1999 through September 2000. After some discussion with board staff, the research team did a rough 'content analysis' of the minutes, classifying items by level of priority according to those requiring committee action only (informational items, action items and "business items") and those requiring action by the full board. The results, reviewed and discussed further with board staff, provided another important source of information regarding board proceedings and relationships with administrative staff, county-wide elected officials and others.

What can be done? How? Unlike federal and state governments which have separate constitutional status, local governments are creatures of state governments, shaped by their constitutional

[24] A budget timetable is included as Appendix P.

provisions and statutes as well as by court decisions. The famous 'Dillon rule' of strict construction of local government powers, i.e., that local governments can exercise ***only*** those powers granted by the state in *express words* or those *necessarily or fairly implied* or *incident* to the powers expressly granted or *essential* to the accomplishment of their purposes, has been widely accepted as the standard since the late 19th Century.[25] Thus one answer to the questions requires attention to Article VII of the Illinois Constitution of 1970 as well as to Illinois Statutes and court cases related to county government.

In so far as possible within the time available, we examined the relevant statutes and court cases applying to local government in Illinois consulting in several instances with legal experts on the subject in Lake County and elsewhere. Previous studies on certain relevant topics were somewhat uneven in their coverage and a bit dated though local government law is generally not an area that changes very rapidly. We also consulted directly with several other well known students of Illinois local government to check on some of our interpretations and conclusions regarding home rule and related issues like the election of a county executive.[26]

Another approach to the question of what ***can*** be done is to examine what other county governments in Illinois and elsewhere in the United States have ***attempted*** to do as well have actually ***done.*** Of course each situation is different even within the same state and certainly across states. Still such information, properly selected and assessed, goes beyond the legal and constitutional parameters of governing structure and form to the issue of the ***feasibility*** and ***sensibility*** of change in a particular direction. If it's possible in ***other*** counties that are similar to Lake County in significant ways, ***why is or isn't it feasible in Lake County if it makes political and institutional sense?*** In short, such comparative data helps to point out alternative possibilities and stimulate focused discussions about local opportunities as well as constraints.

We consulted a number of references on county governments in the United States and had several conversations with staff people at the National Association of Counties (NACO) as we developed our comparative research strategy and data base. We wanted some counties in Illinois and in the Middle West. We also wanted counties that were similar to Lake in certain important population, demographic, economic and governmental aspects. Finally, we wanted to select some counties that had a national reputation for being innovative and well governed. The results are summarized in Table 2.

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[25] Dillon, John, Municipal Corporations, V. 1, p. 448, as cited in Frug, Gerald E., Local Government Law, 2nd Ed, (West Publishing Co; St. Paul, Minn., 1994), p. 53.

[26] We talked with Sam Gove, former director of the Institute of Government and Public Affairs of the University of Illinois and John Wenum of Illinois Wesleyan University.

Two of our case studies, Will and DuPage counties, are in Illinois and a third, Oakland, is in Michigan. The others are from outside the Midwest: Johnson County, Kansas; Fairfax County, Virginia; Montgomery County, Maryland; and Multnomah County, Oregon. All are suburban in character but near to a large city like Chicago. Four, like Lake County, have experienced substantial increases in population during the 90's and the other three have experienced significant growth in this same period. In 1996, seventy-five percent or more of their population in 1996 was White. Only Multnomah County had a median household income just below $30,000 in 1993. The others, including Lake County, ranged between a high of $62,607 for Fairfax County to a low of $46,096 for Will County. Four of these counties enjoyed a national reputation for governmental excellence.

We were able to draw on other recent national survey's of county government in the United States to supplement these case studies and to provide additional comparative information on the range of governmental possibilities which exist.[27] Together these provide us with a reasonable understanding of what ***can*** be done.

What should to be done? Why? The answers to what ***is*** being done at present and what ***can*** be done in the future provides the context for ***addressing*** the third question. But it is also necessary to set forth, as explicitly as possible, the ***criteria*** to be used in answering the "should" question. For the present study, we have chosen three:

- The ***cost effectiveness*** of an alternative;
- The ***equity*** in the results of selecting a particular alternative; and
- The political and institutional ***feasibility*** of realizing it.

Lake County government, like other governments, is appropriately concerned about achieving their mission--- representing the interests of their constituents and delivering their services in terms of those interests at an acceptable level--- at a the least possible cost. If, for example, it can be shown that a better result can be produced with the same or less expenditure of resources, it is to be preferred over the present situation. It is said to be more ***cost effective*** than the alternative. Crudely put, you 'get more bang for the buck'.

However, in a democracy, government should be concerned about more than just "efficiency" or "cost effectiveness". It is also concerned about equity, the distribution of the ***results*** of an alternative. Who benefits from its adoption? And, conversely, who looses? How are the "costs" distributed? Do the overall results meet some test of 'fairness' and 'reasonableness'? These are extraordinarily difficult questions to answer. While "facts" and technical issues are important, just as they are in describing what

[27] Legislative Research Unit, Illinois General Assembly, Illinois County Data Book, 1998;

is currently being done, and in identifying what ***can*** be done, reasonably informed judgment plays a significantly larger role in evaluating these questions of efficiency, effectiveness and equity.

In our society, it is the 'political market place' at different levels of government, which ultimately makes these judgments through a process of discussion, negotiation and compromise. The 'best' alternative as to what ***should*** be done from some "ideal", reasoned perspective, may not be acceptable from a political perspective. It is not ***politically feasible*** as recommended or even acceptable after extensive discussion. Occasionally a crisis--- a natural disaster like a flood, the threatened loss of a major employer in a jurisdiction, a major political scandal, a severe recession--- will produce a sudden consensus, and majority coalition, on the need for immediate action and change.

More typically, however, unresolved issues are put on the back burner; resurrected again; and again postponed, 'sent to Siberia', or else changed just enough to put the matter to rest for awhile. Alternately, they occasionally can produce short, abrupt changes in basic policy, only to swing in another direction with a change in the governing coalition and then back in another still another direction with another marginal change in the majority group. Eventually some may lose their cogency all together or be surpassed by other more pressing problems. A few become settled policy or permanent structural change.. There is some evidence all of these things have occurred in Lake County in the recent past. "Democracy," several of our interviewees told us, "is a messy business!"

In any event, the ***political feasibility*** of what ***should*** be done needs to be considered in arriving at any recommendation for action--- or inaction! Is it likely to be acted upon positively? Should we be "realistic" in our recommendations and only put forth the position likely to be accepted or do we put forth the one that is "best" according to other criteria? The research team has had these particular questions in mind from the beginning to the end of this study!

Appendix E

County Form of Government

(Excluding Those Counties That Did Not Report Form of Government)

Classification	No. of counties reporting a form of government (A)	Form of Government: Commission % of (A)	Council-administrator % of (A)	Council-elected executive % of (A)
Total, all counties	772	40.0	40.4	19.6
Population group				
Over 1,000,000	9	11.1	33.3	55.6
500,000-1,000,000	15	6.7	80.0	13.3
250,000-499,999	39	10.3	69.2	20.5
100,000-249,999	75	20.0	70.7	9.3
50,000-99,999	104	26.9	54.8	18.3
25,000-49,999	137	30.7	51.1	18.2
10,000-24,999	215	46.5	31.6	21.9
5,000-9,999	101	56.4	14.9	28.7
2,500-4,999	45	84.5	4.4	11.1
Under 2,500	32	71.9	15.6	12.5
Geographic region				
Northeast	39	25.6	51.3	23.1
North Central	254	52.0	25.6	22.4
South	322	27.6	51.3	21.1
West	157	49.7	39.5	10.8

Source: ICMA, Special Data Issue

Appendix F

Comparison of the Structural Features of the Largest Illinois Counties

	# of Board Members	Term of Board Members	# of Districts	# of Members/ District	Forest Preserve Dist.?	Home Rule?	County Exec.?	How is Chairman chosen?	County Appointed Admin?
Cook	17	4 years	17	1	Yes*	Yes	President	Elected At Large (4-year term)	Yes
DuPage	24 + Chair	4 years	6	4	Yes*	No	No	Elected At Large (4-year term)	Yes
Lake	23	2 years	23	1	Yes*	No	No	Elected by Board (every 2 years)	Yes
Will	27	2,3, or 4 year term; done by lot	9	3	Yes*	No	Yes	Chairman of Executive Committee is Chair of Board	Yes
Kane	26 + Chair	4 years	26	1	Yes*	No	No	Elected At Large (4-year term)	No
Winnebago	28 + Chair	4 years	14	2	Yes*	No	No	Elected At Large (4-year term)	Yes
St. Clair	29 + Chair	4 years	29	1	No	No	No	Elected At Large (4-year term)	Yes
Madison	29	2 or 4 years (they draw for their term)	29	1	No	No	No	Elected by Board (every 2 years)	Yes
McHenry	24	2 or 4 years (depending on year they run)	6	4	No**	No	No	Elected by Board (every 2 years)	Yes
Sangamon	29	2 or 4 years (depending on lottery)	1	1	No	No	No	Elected by Board (every 2 years)	Yes
Champaign	27	2 or 4 years (depending on year they run)	9	3	Yes***	No	No	Elected by Board (every 2 years)	Yes
McLean	20	4 years	10	2	It appears No	No	No	Elected by Board (every 2 years)	Yes
Peoria	18	4 years	18	1	No****	No	No	Elected by Board (every 2 years)	Yes

* All Members of the County Board also serve as Forest Preserve Commissioners,

**There is a McHenry County Conservation District which is governed by 7 trustees who are appointed by the McHenry County Board and have the authority to levy taxes.

***The Champaign County Forest Preserve District is governed by a non-partisan, unpaid, five-member Board of Commissioners appointed by the County Board for staggered five-year terms.

****It appears that the Department of Planning and Zoning and the various committees (Land Use for example) under its umbrella handle all land and development issues in Peoria County.

Appendix G

Lake County Boards, Commissions, Agencies and Districts

Commisions/Committees		Boards
Affordable Housing Commission		Board of Health
Community Development Commission		Board of Review
Community Health Partnership		Emergency Telephone Safety Board for the Lake County 9-1-1 Service Area
Route 53 Corridor Planning Council		Tuberculosis Sanitorium Board
Lake County Partnership for Economic Development		Waukegan Port District Board
Emergency Planning Committee		Zoning Board of Appeals
Farmland Asessment Committee		
Housing Authority		
Industrial Revenue Bond Allocation Advisory Committee		Districts
Liquor Control Commission		Drainage Districts
Sheriff's Office Merit Commission		Fire Protection Districts
Minority Affairs Committee		Lake Bluff Mosquito Abatement District
Northeastern Illinois Planning Commission		Southlake Mosquito Abatement District
Northwest Regional Sewer System Advisory Committee		Cary Area Public Library District
Public Aid Committee		Public Water District
Public Building Commission		Sanitary Districts
Regional Planning Commission		
Stormwater Management Commission		
Agencies/Associations		
Central Lake County Joint Action Water Agency		
Fox Waterway Agency Advisory Committee		
Solid Waste Agency of Lake County (SWALCO)		
Lakeside Cemetary Association		

Appendix H

Highway Funding/Gas Tax Timeline

02/12/1988 → *Boost in Gas Tax Tops on Mayors' List:* A group of northwest and north suburban mayors revives a 2-year-old proposal to levy a 3-cent tax on each gallon of gasoline sold in the six-county metropolitan area to help pay for road and mass transit projects. The Northwest Municipal Conference, an organization of 31 north and northwest suburbs and 7 townships, votes to include the gas-tax proposal in its package of legislation that it wants the General Assembly to consider this year.

06/24/1988 → *State Senate Oks DuPage Gas Tax*: Legislation giving DuPage the option of levying a 4-cent-a-gallon county motor-fuel tax passes the Illinois Senate and is sent to the House for concurrence.

06/30/1989 → *Legislature Grants Gas-Tax: As* part of a major effort to finance transportation, the Illinois legislature gives the county boards in Du Page, Kane and McHenry Counties the authority to levy a local motor fuel tax of up to four cents. Lake County is not given authority to levy this tax.

10/11/1989 → *DuPage County Becomes First to Approves Gas Tax.*

04/10/1991 → *Kane County Approves 2-Cent Gas Tax; 4-Cent the Following Year:*

06/19/1991 → *McHenry County Approves 2-Cent Gas Tax.*

02/27/1992 → *Lake County Committee Proposes 4-cents-a-gallon Gas Tax:* A Lake County Committee proposes a gas tax, although the tax needs authorization by the General Assembly.

09/18/1992 → *Lake County Gas Tax Given No Chance in Legislature:* A proposed 4 cents-a-gallon gasoline tax for Lake County does not have the support of the county's state legislators and will not be debated until next year if at all, thus casting doubt on the future of the county's ambitious $300 million road improvement program.

11/12/1992 → *Lake May Join Drive for Gas-Tax Legislation:* Lake County Board Chairman Robert Depke says that imposing his proposed 4-cent-a-gallon gas tax is the only solution to providing new or upgraded roads.

02/11/1993 → *Lake County Betting on Impact Fees to Help Roads:* Lake County officials present a wish list to local legislators, an agenda that includes a call for help for the county's road system, but does not ask for the state's permission to impose their discussed 4-cents-a-gallon gasoline tax.

05/19/1994 → *The Illinois Supreme Court Upholds a 1989 State Law That Permitted DuPage, Kane and McHenry Counties to Impose Gasoline Taxes.*

6/01/1995 → *Lake County is Still Holding Out for License to Pump Up Gas Price*: Illinois legislature takes no formal action this spring session on a proposal that would have opened the door for the Lake County Board to impose a much-sought-after 4-cent gas tax.

6/29/1995 → *Lake County Unveils $86.6 Million Road Work Plan*

07/27/1996 → *Depke Stresses Need for Gas Tax as 5-Year Road Plan is Disclosed:* Lake County Board Chairman Robert W. Depke renews his call for a 4-cent local gas tax as county highway officials unveil a five-year, $86.6 million road program.

01/14/1999 → *Lake County Tries to Press State for Gas-Tax Revenue:* Members of the Lake County Board take a new approach when they ask the General Assembly for more money for county roads. Despite the pleas of county officials, State Sen. Adeline Geo-Karis and other state lawmakers from Lake County consistently balk at the request for the 4-cent gas tax, saying it is an issue that should be decided by in a referendum rather than by state lawmakers.

02/23/1999 → *Lake County Board Ponders Raising Sales Tax Instead of Gas Tax:* The county board committee that crafts Lake County's legislative agenda eliminates the gas tax from the list of issues to pursue in Springfield and replaces it with the sales tax.

03/10/1999 → *Proposal to Double Sales Tax Shelved in Lake:* A proposal to double Lake County's sales tax to help pay for road improvements runs out of gas when the County Board formally removes it from the agenda of its regular monthly meeting.

05/23/1999 → *Lake County Reps Target Roads in Lobby Efforts:* A contingent of Lake County Board members and staff go to Springfield on a mission to push for the board's No.1 goal—local road improvements. Funding sources for a list of $131 million improvements remain unclear. One option is the implementation of a new ¼ cent sales tax to finance local road improvements and other county projects. Lake County is one of several counties seeking authority from the Legislature to implement such a tax through referendum.

05/26/1999 → *Senate Buries Lake County Sales Tax in Committee:* State Sen. Adeline Geo-Karis, who sponsored the bill giving Lake authority to hold a referendum for a quarter-cent sales tax increase, said Senate leaders, including Senate President James "Pate" Philip, refused to bring the bill out of the Senate Rules Committee this session. Geo-Karis said that concerns over additional taxation were the main reason.

01/05/2000 → *Lawmakers Urge Lake to go Home Rule:* Illinois lawmakers ask county officials to help make some of the proposals on *their* wish list come true, like adopting Home Rule. With Home Rule, Lake County can adopt a Gas Tax without having to get approval from the Legislature.

06/10/2000 → *Lake County to Plumb Gas Tax Support:* Lake County officials plan to formally canvass residents to see if support exists for some form of tax to help finance needed improvements to county roads. County Board Chairman, Jim LaBelle, said that Richard Day Research would be retained to do the survey work at a cost not to exceed $25,000.

Appendix I

Route 53 Timeline

1962 → *The Idea for Route 53 is Put Into a Chicago Area Transportation Study*: This study includes a vision not only for Route 53, but for other Northwest Highways as well.

1963 through the late 1960's → *Engineering for Route 53 is Started*: Illinois Department of Transportation (IDOT) tries to minimize environmental impacts of the roadway.

Late 1960's → *National Environmental Policy Act is adopted by Congress.*

Early 1970's → *IDOT Works on Environmental Impact Statement; is Forced to Change Some of Its Plan in Order to Comply with the Act:* A draft impact statement is not formally circulated for public comment, nor is a public hearing held however, due to a change in priorities (not due to IDOT not being able to meet the Environmental Policy Act requirements). The priority in Lake County becomes the Lakefront Freeway.

Early 1970's through 1988 → *Route 53 becomes a dormant issue in Lake County.*

01/17/1989 → *Issue Resurfaces Due to Anticipation There Will be Tremendous Growth in Central Lake County- Freeway's Foes Form Coalition:* Members of the open space faction that controls the Lake County Board join with citizens groups and municipal officials to form powerful opposition to a proposed Route 53 expressway.

04/26/1990 → *5-Year State Road Plan Is On the Way – Includes Environmental Work on Route 53.*

05/25/1990 → *Interchanges Planned Along A Longer Version of Route 53 – Estimated Cost of Extension is $300 to $350 Million.*

06/27/1990 → *Route 53 Tollway Bill Is Sidelined by Gov. James Thompson and State Tollway Officials Until Autumn Due to Pressure from Lake County Residents and Politicians Who Oppose the Tollway.*

07/12/1990 → *State Buys More Land for Illinois Route 53 Project in Mundelein subdivision.*

12/06/1990 → *State Holds Public Meetings On Route 53 Extension; IDOT Officials Discuss the Possible Schedule, Scope and Route of the Highway and Receive Public Views.*

01/25/1991 → *Lake County Communities Form First Intergovernmental Group Called Corridor Planning Council for Central Lake County.*

~~**03/13/1991** → *Lake County Board Narrowly Votes to Include Extension of Route 53 in Its Long-Range Transportation Plan.*~~

08/30/1991 → *IDOT Announces Agreement Giving the Corridor Planning Council of Central Lake County a Big Role in Drafting an Environmental Impact Statement for Route 53.*

01/28/1992 → *Route 53 Environmental Report Delayed A Year; Due in Late 1994.*

06/30/1993 → *Budget Deal Between Gov. Edgar and Illinois' Four Legislative Leaders Includes Approval of Route 53 Extension.*

07/22/1993 → *General Assembly Takes Route 53 Out of Jurisdiction of IDOT and Gives it to Illinois State Toll Highway Authority (ISTHA).*

08/28/1993 → *Tollway Agency, IDOT Announce They Will Work as "Equal Partners" to Plan Route 53-expressway extension through Lake County.*

08/02/1994 → *Group of State, Local Officials Reach an Agreement Outlining Design and Construction Standards for the Controversial Extension of Route 53.*

02/24/1995 → *With Avoiding Wetlands as Their Priority, State Highway Engineers Lay Out What They Believe is the Best Routing for Route 53. .*

09/29/1995 → *Extension Plans Get Specific: ISTHA Leaning Towards Only One Toll Plaza in an Industrial Area on the Northern Edge of Mundelein.*

12/09/1995 → *State Has Backup For Illinois 53 Plan:* If the state backs away from its controversial plans to extend Route 53, transportation officials have an alternative plan that calls for multilane expansion of Lake County roads, including U.S. Highway 41, IL Highway 60 and Lake Cook Road.

05/14/1996 → *The Environmental Law and Policy Center Contends Extension Would More Than Double the Number of Vehicles on Some Traffic-Plagued Main Roads.*

10/25/1996 → *The Corridor Planning Council of Central Lake County (CPC) votes unanimously to approve adoption of construction standards for the extension of Route 53.*

03/21/1998 → *IDOT and ISTHA Announce Lake County Transportation Improvement Project.* The joint venture project, given a $7.8 million budget, will study mobility alternatives, and be in charge of all studies pertaining to improving transportation in Lake.

03/27/1999 → *Illinois Toll Highway Authority Releases Poll That Shows a Majority of Lake County Respondents Prefer Alternatives to Proposed Route 53 Extension.*

06/30/1999 → *Lake County Transportation Improvement Project Announces Its First Proposals to Upgrade the Road System, Including Proposals to Extend Route 53.*

05/17/2000 → *Latest Route 53 Study Narrows Options:* Either extend Route 53 north or improve existing roads, including Route 83 and 12. Cost estimates for Route 53 extension are $830 million, while local road improvements are pegged at $1.1 billion.

6/21/2000 → *Nearly Half of the Lake County Board Signed a Letter Last Month Presented to Gov. George Ryan Opposing the Extension of Route 53.*

07/06/2000 → *Sentiment from Recent Public Hearings Favors Route 53 Extension.*

08/07/2000 → *Route 53 Plan Could Stall Without a Consensus:* "If there is no support, I don't see anything moving forward," says Chris Synder, deputy director of the Lake County Transportation Improvement Project. The Lake County Board, which supported the extension in a 1991 resolution, has since taken on an environmentally conservative tone.

11/03/2000 → *Lake County Still Divided On Highway Proposals:* Despite months of exposure to the pros and cons of two competing roadway projects proposed for Lake County, consensus seems no closer as the long fact-finding process moves into its final stages.

Appendix J

Affordable Housing Timeline

07/04/1997 → *Lake County Board Puts a Plan in the Works to Expand Housing Opportunities for the Poor.*

12/09/1997 → *Board Members Release the First Complete Draft of A Proposed Unified Development Ordinance (UDO).*

09/22/1998 → *Lake County Officials Release Draft of UDO to Public*

01/19/1999 → *Board Members React to Predictions That the Process Would Take Until 2000, and Insist That the Proposed UDO be Adopted This year.*

08/03/1999 → *Mixed-Housing Plan Comes Under Attack:* A three-year push by some Lake County officials favoring development of mixed housing while preserving open spaces comes under attack at a meeting of the county's Planning, Building and Zoning Committee.

10/27/1999 → *County Board Displays Maps Of Proposed Zoning Districts:* The new UDO is expected to take effect April 1st after approval by the Lake County Board.

11/04/1999 → *Lake Struggles To Balance Housing Needs, Space Preservation:* Lake County officials approve setting aside $300,000 to develop affordable-housing strategies, a move that triggered a debate over whether the county's goal of preserving open space conflicts with affordable-housing goals. The proposed UDO encourages large lots in developments as a way to preserve green space.

01/06/2000 → *Affordable Housing Seen As Endangered:* Within the next five years, it will be almost impossible to find a house for less than $220,000 in townships such as Libertyville, Fremont and Warren. In Cuba and Vernon townships, homes selling for less than $350,000 are expected to be scarce.

02/01/2000 → *Voluntary Density Bonuses, Offered to Builders Who Leave Green Space in Their Housing Developments or Create Affordable Housing, Are Proving to be the Final Hurdle in Adopting Lake County's Proposed UDO.*

03/02/2000 → *Unity Over the Proposed UDO Crumbles*: Lake County officials question whether they can preserve open space while providing more housing, especially affordable housing, for a growing population. The rift could derail attempts to adopt on March 14 the proposed ordinance. Officials have been working on the ordinance for five years.

04/04/2000 → *Panel Backs Unified Development Ordinance:* A Lake County Board committee adopts a resolution that recommends that the board adopt the Unified Development Ordinance at the next County Board Meeting without the Affordable Housing Section.

04/11/2000 → *A Streamlined UDO That Will Guide Future Development in Unincorporated Lake County is Adopted, 18-3, After Teetering on the Brink of Oblivion Because of Complaints That the Document Lacks a Section on Affordable Housing.*

04/27/2000 → *Affordable-Housing Task Force Will Try to Break Deadlock Over Drafting Language on Low-Income Housing That Hopefully will be Added to the Newly Adopted Lake County UDO.*

06/02/2000 → *Affordable Housing Is Tied To Rail, Bus Lines:* Affordable housing task force recommends so-called Transit Oriented Developments clustered within a mile of transit lines in municipalities and unincorporated Lake County to promote affordable housing and mixed-use developments.

06/20/2000 → *Two Lake County Board Committees Adopt a Proposed Affordable-Housing Section, Containing Transit-Oriented Developments, for the New UDO.*

07/27/2000 → *Affordable Housing Hearings On Hold:* The affordable-housing section of Lake County's UDO is back in limbo, with the Zoning Board of Appeals deciding to send the controversial issue back to the County Board for clarification.

08/02/2000 → *New Affordable Housing Plan Targets Where Jobs Are:* A new twist on affordable housing calls for building housing units costing $160,000 or less near access to public transportation and near large employment centers.

08/09/2000 → *Affordable Housing Part of UDO Bounced Back to Zoning Board for the Second Time:* The County Board directed the Zoning Board of Appeals to conduct public hearings on a proposed affordable housing section for the UDO.

08/31/2000 → *Chairman LaBelle Floats Ideas on Affordable Homes:* LaBelle's proposals call for property owners adjacent to proposed affordable housing developments be notified of plans, that a proposal to build affordable housing near the College of Lake County bus stop be dropped and that space slated for affordable housing be less than a mile from bus or train stations.

11/03/2000 → *Affordable Housing Plan Gets Rejected:* Proposed measures to encourage affordable housing in Lake County are overwhelmingly rejected by County Board members due to concerns that density incentives could negatively affect crowded schools and neighboring areas. The proposed language, which would be incorporated into the county's Unified Development Ordinance, was struck down 7-1 by the Planning, Building and Zoning Committee. The lone vote in favor of the proposal came from County Board Chairman Jim LaBelle. Committee Chairman Larry Leafblad said the proposal will not be forwarded for consideration to the full County Board. Instead, the staff will be directed to try again.

11/11/2000 → *New Affordable Housing Plan Reviewed:* Less than a week after the last proposal failed, board members announce a simple and workable solution. It requires all residential developments of more than 10 units in unincorporated areas to provide at least 10% of what the county defines as affordable housing. The resolution urges formal adoption of the amendment as soon as the state's attorney has signed off on the legalities of it.

11/15/2000 → *Affordable Housing Plan Hits Snag:* Board members send the new proposal back to Zoning Board of Appeals for another hearing. The proposal was made available to the public a week ago, but had not been open to public scrutiny. As a result, the state's attorney's office advises that a new public hearing is required because the proposal is substantially different from the earlier version.

Appendix K

Summary of Committee Activity – December 1999 Through August 2000

Committee	Informational Items	Action Items	Business Items	Board Items
Community & Economic Development Committee	27	12	9	9
Public Works & Transportation Committee	65	52	13	105
Law & Judicial Committee	29	3	5	62
Health & Human Services Committee	22	1	7	20
Taxation, Election & Records Committee	6	3	0	17
Legislative & Intergovernmental Affairs Committee	19	0	0	4
Financial & Administrative Committee	53	23	37	232
Planning, Building & Zoning Committee	65	75	17	16

Key

For the purposes of this analysis, we divided all committee agenda items into four categories as follows;

Information items: Those items which were on the agenda exclusively for informational purposes and with regard to which no formal action was taken by the committee

Action items: Items on which a formal motion was made and (in most cases) a vote taken but which did go to the full board for action

Business Items: Those items on which committees took formal action on behalf of the board.

Board Items: Items which, upon committee approval, were forwarded to the full board for action.

We utilized these categories to ascertain 1) the distribution of the workload among committees and 2) the breakdown of items on the committee agendas according to relative importance with board items the most important, and informational items the least important.

Appendix L

Performance Measures – Department of Planning and Zoning, Fairfax County, Virginia

Indicator	Prior Year Actuals			Current Estimate	Future Estimate
	FY 1977 Actual	FY 1988 Actual	FY 1999 Estimate/Actual	FY 2000	FY 2001
Output:					
Zoning compliance letter requests processed	207	314	275 / 357	275	375
Permits (excluding sign permits) processed	36,049	37,603	38,000 / 43,742	38,000	44,520
Sign permits processed	1,133	1,174	1,200 / 1,110	1,200	1,100
Zoning Complaints resolved	3,109	2,588	2,500 / 1,981	2,500	2,000
Applications reviewed for submission compliance (all types)	NA	650	650 / 649	650	650
Written responses to inquiries	NA	643	645 / 606	625	625
RZ applications to be scheduled	NA	173	165 / 235	235	235
SE applications to be scheduled	NA	121	120 / 85	85	85
Efficiency:					
Staff hours per zoning compliance letter	NA	NA	5.0 / 5.0	5.0	5.0
Staff hours per permit request (excluding sign permits)	0.32	0.28	0.30 / 0.22	0.30	0.30
Staff hours per sign permit application	1.07	1.03	1.50 / 1.32	1.50	1.50
Staff hours per zoning complaint filed	7.52	8.40	8.00 / 12.10	12.00	12.00
Average staff hours to determine application submission compliance	NA	5	5 / 5	5	5
Average staff hours per written response	NA	12.0	12.0 / 8.5	10.0	10.0
Service Quality:					
Percentage of Zoning Compliance letters processed within 10 days[1]	69%	73%	80% / 51%	65%	65%
Percentage of permits (excluding sign permits) processed in time	99%	99%	98% / 98%	98%	98%
Customers satisfied with sign permitting services[2]	NA	NA	95% / 100%	95%	95%
Percentage of sign permits processed within 5 days	81%	86%	90% / 94%	90%	90%
Percentage of complaints resolved within 60 days[3]	NA	66%	66% / 71%	70%	70%
Percentage of zoning applications reviewed within 5 working days	NA	50%	75% / 62%	75%	75%
Percentage of zoning applications reviewed within 10 working days	NA	85%	100% / 97%	100%	100%
Percentage of responses within 30 working days	NA	76%	90% /70%	90%	90%
Percentage of RZ applications scheduled within 5 months	NA	81%	90% / 83%	90%	90%
Percentage of SE applications scheduled within 4 months	NA	58%	90% / 53%	90%	90%
Outcome:					
Percentage point change in zoning compliance letters processed within 10 days	NA	4	7 / (22)	0	14
Percentage point change in permits (excludes sign permits) processed correctly within time frame	NA	0	(1) / 0	0	0
Percentage point change in sign permits processed within 5 days	NA	5	4 / 8	0	0
Percentage point change in complaints resolved within 60 days	NA	0	0 / 5	0	0
Percentage point change of zoning applications reviewed within 5 days	NA	NA	25 / 12	0	0
Percentage point change of zoning applications reviewed within 10 days	NA	NA	15 / 12	3	0
Percentage point change of written responses within 30 days	NA	NA	14 / (6)	20	0
Percentage point change of residential zoning applications scheduled within 5 months	NA	NA	9 / 2	7	0
Percentage point change of SE applications scheduled within 4 months	NA	NA	32 / (5)	37	0

[1] The agency is developing an additional measure relative to capturing the number of letters that require reissue which will be included in subsequent years.

Appendix M

Summary of Structural Features of Counties Similar to Lake

County	# of Board Members	Term of Board Members	# of Districts	# of Members/ District	Forest Preserve Dist.?	Home Rule?	County Exec.?	How is Chairman chosen?	County Appointed Admin?
Fairfax	9	4 years	9	1	Park Authority[1]	No	No	Elected at Large	Yes
Johnson	6 + Chair	4 years	6	1	Parks & Recreation[2]	Yes	No	Chairman elected at large	Yes
Montgomery	9	4 years	5 (the other four members are elected at large)	1	Maryland-National Capital Park and Planning Commission (M-NCPPC)[3]	Yes	Yes	Elected by Council Members every year	Yes
Multnomah	4 + Chair	4 years (limited to 2 terms)	4	1	Planning Commission[4]	Yes	No	Elected at Large	No
Oakland	25	2 years	25	1	Dept. of Parks & Rec.[5]	No	Yes	Elected by Board Members every year	No (but there are two appointed Dep. County Executives)

[1]The Park Authority maintains and operates the public parks and recreational facilities located in the County. The Board of Supervisors appoints the Park Authority's governing board, and the County provides funding for the Park Authority's general fund and one of its capital projects funds.

[2]Parks & Recreation is one of five Governing Boards in Johnson County (all 5 of these Boards do not fall under the County Administrator's control). The membership of these Boards is appointed by the Board, but they are completely autonomous; they have their own policies and procedures that they follow.

[3]The Maryland-National Capital Park and Planning Commission is comprised of ten commissioners -- five appointed by each County as the Montgomery County Planning Board and the Prince George's County Planning Board.

[4]The Planning Commission is designated as the Land Use Planning Advisory Body to the County Board. The commission consists of nine members, who are appointed pursuant to law and the charter of Multnomah County. Members serve four-year terms and receive no compensation. The commission elects and installs a chairperson and vice-chairperson.

[5]In Oakland County, the Department of Parks and Recreation stands separate and apart from the County Executive's control; the Department reports to the Board of Commissioners. The Parks and Recreation Commission consists of 10 members.

Appendix N

Lake County Municipalities

Name	Home Rule	1980 Pop.	1990 Pop.	Current Pop.	Form of Government	Tax Rate Per $100 A V (7/98)
Antioch	No	4,419	7,093	7,923	Administrator/Mayor	6.334 - 6.914
Bannockburn	No	unk.	1,388	1,342	Administrator/President	5.286 - 6.522
Barrington[1]	No	9,029	9,538	10,554	Manager/Council	5.135 - 5.971
Barrington Hills[2]	No	3,631	4,202	unk.	Administrator/President	5.625 - 5.950
Beach Park	No	9,000	9,513	10,500	President/Trustees	6.043 - 7.754
Buffalo Grove[1]	Yes	22,230	36,427	43,146	Manager/Trustees	5.896 - 12.746
Deer Park	No	1,368	2,887	3,253	Administrator/President	4.779 - 5.474
Deerfield[1]	Yes	17,430	17,327	18,002	Manager/Council	5.971 - 7.224
Fox Lake[3]	No	6,831	7,430	9,500	Mayor/Board/Village	7.002 - 7.789
Fox River Grove[3]	No	2,515	3,674	4,257	President/Trustees	unk.
Fox River Valley Gardens[3]	No	520	665	unk.	President	5.438 - 6.882
Grayslake	No	5,260	7,388	16,967	Mayor/Council	6.829 - 9.047
Green Oaks	No	1,415	3,024	2,964	Administrator/President	5.218 - 7.041
Gurnee	Yes	7,179	13,701	25,862	Trustee	6.425 - 7.729
Hainesville	No	187	996	2,000	Administrator/President	7.618 - 8.945
Hawthorne Woods	No	1,658	4,602	5,817	Administrator/President	5.857 - 7.186
Highland Park	Yes	30,611	30,575	unk.	Manager/Council	4.124 - 9.095
Highwood	No	5,452	5,331	5,130	Mayor/Aldermen	3.760 - 6.498
Indian Creek	No	236	247	246	President	6.629 - 7.576
Island Lake[3]	No	2,293	4,459	7,611	Trustee	6.970 - 7.536
Kildeer	No	1,609	2,633	2,967	Administrator/President	5.601 - 6.749
Lake Barrington	Yes	2,320	3,855	4,514	Administrator/President	4.7 - 8.892
Lake Bluff	No	4,434	5,486	5,613	Admin./President/Trustees	5.664 - 7.971
Lake Forest	No	15,245	17,269	18,606	Mayor/Council	4.223 - 7.094
Lake Villa	No	1,462	2,857	5,000	Trustee	6.765 - 8.456
Lake Zurich	No	8,225	14,927	17,591	Administrator/Trustees	6.155 - 7.3
Lakemoor[3]	No	723	1,787	unk.	President/Trustees	6.688 - 7.162
Libertyville	No	16,520	19,174	19,174	Board/Village	5.418 - 7.329
Lincolnshire	Yes	4,151	5,898	6,139	Mayor/Trustees	5.217 - 9.193
Lindenhurst	No	6,525	8,038	12,000	President/Board	6.743 - 10.856
Long Grove	No	2,013	4,747	5,500	Manager/Trustees	6.361 - 7.352
Mettawa	Yes	330	348	380	President	5.398 - 7.710
Mundelein	Yes	17,053	21,215	28,012	President/Trustees	7.034 - 8.637
North Barrington	No	1,475	2,547	2,370	President	5.070 - 5.385
North Chicago	Yes	38,774	34,978	42,435	Mayor/Aldermen	6.082 - 8.622
Old Mill Creek	No	84	73	70	President	unk.
Park City	Yes	3,673	4,677	5,537	Mayor	6.477 - 7.663
Riverwoods	No	2,804	3,862	3,760	Mayor	4.889 - 7.573
Round Lake	No	3,175	3,550	4,750	Trustee	7.746 - 10.458
Round Lake Beach	No	12,921	22,211	28,000	Administrator/Board	7.391 - 9.550
Round Lake Heights	No	1,192	1,251	1,366	Trustee	7.6 - 8.578
Round Lake Park	No	4,032	4,045	5,246	Mayor/Trustees	8.044 - 10.432
Third Lake	No	222	1,248	1,498	President	6.593 - 8.252
Tower Lakes	No	1,177	1,333	1,335	President	5.779 - 5.801
Vernon Hills	No	9,827	18,500	21,000	Manager/Board	5.648 - 9.494
Volo	No	unk.	193	220	President	6.176 - 6.650
Wadsworth	No	1,104	3,082	2,419	President	6.207 - 7.951
Wauconda	No	5,488	8,229	8,759	Administrator/President	6.932 - 7.465
Waukegan	Yes	67,653	69,392	77,324	Mayor/Aldermen	6.478 - 8.713
Winthrop Harbor	No	5,438	6,240	7,200	Trustee	6.947 - 7.891
Zion	No	17,861	19,775	20,792	Commission/Town	7.248 - 8.499

[1] Also Cook County

[2] Also Cook, McHenry & Kane Counties

[3] Also McHenry County

Appendix O

List of Interviewees

	Board Members	Administrative Officials	Elected Officials	State and Local	Other
Pam Newton	x				
Carol Spielman	x				
Bob Buhai	x				
Suzi Schmidt	x				
Carol Calabresa	x				
Steve Mountsier	x				
Angelo Kyle	x				
Martha Marks	x				
Bonnie Carter	x				
Jim LaBelle	x				
Sandy Cole	x				
Karl Nollenberger		County Administrator			
Patrick Urich		Dep. County Administrator			
Gary Gibson		Dep. County Administrator			
Mark Danaj		Human Resources			
Randy Murphy		Management Services			
Martin Galantha		Public Works			
Martin Buehler		Transportation			
Dale Galassie		Health			
Phil Rovang		Planning			
Mitch Hoffman		State's Attorney's office			
Michael Waller			State's Attorney		
Willard Helander			County Clerk		
Mary Ellen Vanderventer			Recorder of Deeds		
Sally Coffelt			Circuit Court Clerk		
Barbara Richardson			Coroner		
Bob Skidmore			Treasurer		
Adeline Geo-Karis				State Senator	
Terry Link				State Senator	
William Peterson				State Senator	
Andrea Moore				State Representative	
Dick Welton				Mayor, Gurnee	
Ken Marabella				Village Manager, Mundelein	
Joanne Eckman				former Mayor, Libertyville	
Bob Churchill				former State Representative	
Ike Magalis					former county administrator

Appendix P

Lake County Budget Calendar – Fiscal Year 2001

May 3, 2000 -Wednesday @ 1:00 P.M.
Review of FY 2001 Budget Policies by Financial & Administrative Committee

May 5, 2000 – Friday @ 9:00 A.M.
Review of FY 2001 Budget Policies at the Committee of the Whole Meeting

May 9, 2000 – Tuesday @ 9:00 A.M.
Adoption of FY 2001 Budget Policies

May 12, 2000 – Friday
Distribution of Budget Packages to Departments

June 30, 2000 – Friday
Completed Budgets due in County Administrator's Office (CAO)

July 19 through August 4, 2000
Budget Reviews with Individual Departments

August 7 through 11, 2000
New Program Review by CAO

September 1, 2000
Recommended Book to Printers

September 8, 2000 – Friday @ 9:00 A.M.
Presentation of the Budget at the Committee of the Whole meeting

September 15, 2000 – Friday immediately following the forest Preserve Meeting
Review of process for development of FY 2001 budget at Financial & Administrative Committee

September 25-27, 2000 – Committee Review

October 2, 3, and 4, 2000 – Regular Committee Schedule – Agenda Week
Additional Joint Committee meetings if necessary.

October 25, 2000 – Wednesday @ 1:00 P.M.
Truth in Taxation (if needed) – Finance and Administrative Committee

November 3, 2000 – Wednesday @ 1:00 P.M.
Final recommended actions to County Board by Financial & Administrative Committee (if needed)

November 10, 2000 – Friday @ 8:00 A.M.; Agenda Review Meeting
Review by Committee of the Whole

November 14, 2000 – Tuesday @ 9:00 A.M. Regular County Board Meeting
For the purpose of adopting the Budget, Appropriation, and Levy Ordinances

June 24, 2017

How a Law School Professor is Helping SCOTUS Rethink Gerrymandering

University of Chicago Law School Assistant Professor Nicholas Stephanopoulos.

Courtesy of The New York Times

By Euirim Choi

A University of Chicago professor's research and litigation helped convince the Supreme Court to announce on Monday that it will take up a potentially landmark electoral redistricting case that could dramatically transform American politics.

Law School assistant professor Nicholas Stephanopoulos developed a redistricting model that has led justices to reconsider whether it is impossible to measure partisan gerrymandering. Stephanopoulos has been working with the plaintiff in *Gill v. Whitford* to argue that the Court does have the ability to measure and declare partisan gerrymandering constitutionally limited.

While the Supreme Court has ruled that racial gerrymandering is prohibited under the 1965 Voting Rights Act, the widespread and bipartisan practice of drawing electoral districts to weaken the power of unfriendly voters, known as partisan gerrymandering, has resisted legal challenges.

In the 2004 case *Vieth v. Jubelirer*, the Court, in a plurality decision by its conservative wing, held that challenges to partisan gerrymandering were a political question beyond the competency of the courts as it was impossible to create a standard or legal test that could be used to assess the extent of politically motivated redistricting.

While concurring with the ruling in *Vieth*, Reagan-appointee Justice Anthony Kennedy refused to rule out the possibility that a legal standard for partisan gerrymandering could be created in the future. Kennedy's apparent openness to considering limiting partisan redistricting if a discernible standard for adjudicating politically motivated gerrymandering was proposed sparked renewed interest in creating such a standard in academia.

Stephanopoulos and Public Policy Institute of California research fellow Eric McGhee suggested a solution in a widely circulated 2014 paper. Their metric—which played an important role in the litigation now appearing before the Supreme Court—known as the *efficiency gap*, is a measure of how equitably a party's share of the vote translates into legislative seats, known as partisan symmetry.

The efficiency gap metric is calculated by taking the difference in the number of wasted votes of each party and dividing by the the total number of votes cast. The authors considered "wasted" votes to be either those that were cast for a losing candidate or for a winning candidate in excess of what was required for victory. If this was true of more than 7 percent of voters, they argued that it would constitute as excessive partisan gerrymandering.

For example, suppose a district is composed of 10 voters, where seven voted for a candidate from party A and three voted for party B's equivalent. Party B, as the losing party, has three "wasted" votes. Since only five votes (50 percent) were required to draw the race, any votes in excess of this threshold is considered as "wasted." Thus, party A has two "wasted" votes. Ultimately, the "wasted" votes of party A and B in all districts in a state are used to then calculate the efficiency gap metric.

The efficiency gap metric quickly transitioned from theory to practice when Stephanopoulos became a litigator in *Gill*. He was part of a team that argued on behalf of the plaintiff in the U.S. District Court of the Western District of Wisconsin that a 2011

Wisconsin state assembly district map drawn by Republican legislators was unconstitutional under the 14th Amendment's equal protection clause and the First Amendment's freedom of association because, as shown by the efficiency gap metric, it discriminated against Democratic voters.

The special three-judge federal panel of the District Court ultimately sided in a 2–1 decision with the plaintiff, accepting Stephanopoulos and McGhee's efficiency gap metric as a possible standard for measuring partisan gerrymandering. The state consequently appealed the decision to the Supreme Court.

With the decision to hear this appeal announced Monday, many observers are hopeful that the Court will be receptive to concretely limiting partisan gerrymandering using measures of partisan symmetry. Perhaps motivated by the fact that justices Stephen Breyer and Ruth Bader Ginsburg said that they were enthusiastic about measures of partisan symmetry as a whole in *Vieth* and that Sonia Sotomayor and Elena Kagan, the other justices of the Court's liberal wing, are expected to share this enthusiasm, Stephanopoulos told *The Maroon* that his side will not exclusively rely on the efficiency gap metric.

"Even though we think the efficiency gap is the best of [partisan symmetry] metrics, we're advocating a *set* of them to the Court. There's no need to choose between them here since they all point in the same direction (namely, that the Wisconsin plan is an extreme outlier)."

But the conservative wing of the Court is unlikely to label partisan gerrymandering as unconstitutional and may even reject constitutional limits on the practice. Justices Kennedy and Samuel Alito as well as Chief Justice John Roberts stated in their partial dissent in *Cooper v. Harris*—where the Court ruled in a 5–3 decision earlier this year that the North Carolina legislature engaged in racial gerrymandering when redrawing congressional districts—that states have the right to engage in political gerrymandering.

Justices Clarence Thomas and Neil Gorsuch are expected to agree with their fellow conservatives. While Thomas joined the liberal wing of the Court in concurring with the ruling, he did so because *Cooper v. Harris* mainly addressed racial and not partisan gerrymandering, the latter which he believed was impossible to limit in *Vieth v. Jubelirer*. Gorsuch, who did not take part in deciding the case as he was not yet a justice when it was argued, could also be sympathetic to the idea that limiting partisan redistricting would violate states' rights.

Partisan gerrymandering opponents are hopeful, however, that they can sway skeptical justices. “I wouldn't necessarily read too much into *Harris* since it was a racial gerrymandering case that only addressed partisan gerrymandering in passing,” Stephanopoulos told *The Maroon*. “And even the dissent in *Harris* didn't say outright that partisan gerrymandering is always constitutional.”

Kennedy appears to be the conservative justice that is most likely to side with the Court’s liberal wing. Kennedy stated in *Vieth* that partisan symmetry may not be a sufficient test to adjudicate politically motivated redistricting, but he seemed, according to Stephanopoulos and McGhee, open to being convinced.

Kennedy may therefore only require that Stephanopoulos’s efficiency gap standard, or some other measure of partisan symmetry, be compelling to side with the Court’s liberal wing in *Gill*, especially as the plaintiff’s attorneys already chose to argue that partisan redistricting violates the First Amendment’s freedom of association, which Kennedy believes is the strongest approach to examining the constitutionality of political gerrymandering.

While Stephanopoulos said he does not expect to argue the case, which will be done by appellate specialist Paul Smith, he does anticipate being heavily involved in drafting his side’s brief. If his efforts help convince the Court that partisan gerrymandering is constitutionally limited, he would play a role in reshaping the American political landscape for the foreseeable future, with Democrats likely to benefit electorally from an end to a mostly, at least recently, Republican practice.

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Fair Representation in Local Government

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Fair Representation in Local Government

Ruth Greenwood*

ABSTRACT

This Article focuses on my work in Illinois to use the Voting Rights Act[1] (VRA) to improve minority representation at the local level, but the themes and findings are applicable across the country because many states have growing minority populations in the suburbs just outside of large city centers.[2] These minority populations tend to be much less segregated than the minority communities in the cities,[3] and so it is more difficult to use Section 2 of the VRA[4] ("Section 2") to ensure both descriptive and substantive representation. I recommend the use of fair representation systems like ranked choice and cumulative voting (with multi-member districts) to improve minority representation in these decreasingly segregated areas. I introduce three case studies from Illinois to highlight the numerous burdens facing those that seek to reform their local government redistricting systems. I finish with some thoughts on how litigation and legislative advocacy may be used to promote fair representation systems in local government.

INTRODUCTION

"It is an essential part of democracy that minorities should be . . . represented. No real democracy, nothing but a false show of democracy, is possible without it."[5]

John Stuart, Mill 1862

Representation in a democracy is "a substitute for the meeting of citizens in person."[6] Federal, state, and local governments could not function if all of the millions of citizens with a stake in the decisions of government were involved in every decision. Americans long ago decided that they did not want a single leader to determine issues

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* Ruth Greenwood is the Deputy Director of Redistricting for the Campaign Legal Center and an Adjunct Professor at Loyola University Chicago School of Law. This Article adapts and expands the research I did for a report while at the Chicago Lawyers' Committee for Civil Rights Under Law, *The Color of Representation*, CHICAGO LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, INC. (Apr. 2015) http://www.votingrightsillinois.org/color-of-representation. I would like to thank Annabelle Harless, Devin Race, J. Cunyon Gordon, George Cheung, Jorge Sanchez, Nicholas Stephanopoulos, Maria Aracelia Rosas Urbano, Mark and Kathy Kuehner, and Willie Scott for their inspiration and assistance in this important work.

1 52 U.S.C.A. §§ 10301–14 (West 2016).

2 William H. Frey, *Melting Pot Cities and Suburbs: Racial and Ethnic Change in Metro America in the 2000s,* METROPOLITAN POL'Y PROGRAMS AT BROOKINGS, 9–11 (May 2011), https://www.brookings.edu/wp-content/uploads/2016/06/0504_census_ethnicity_frey.pdf.

3 *See* Nicholas O. Stephanopoulos, *Civil Rights in a Desegregating America*, 83 U. CHI. L. REV. 1329, 1343–48 (2016).

4 52 U.S.C.A. § 10301.

5 John Stuart Mill, *Representative Government*, *in* THREE ESSAYS BY JOHN STUART MILL 143, 252 (Oxford 1960).

6 HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 191 (Univ. of Cal. Press 1967) (quoting Alexander Hamilton, James Madison & John Jay, THE FEDERALIST NO.52, *in* THE FEDERALIST 269, 270 (Max Beloff ed. 1948)).

of the commonwealth. Thus, governmental systems were chosen whereby some people represent others to determine the rules by which we live.

To be represented has four relevant meanings in the context of voting rights.[7] One can be said to be represented if:[8]

1. she can register, vote, and have that vote count;
2. she can join with her community to elect candidates of their choice;
3. people with the same demographic or social characteristics are part of a governmental decision making body (I will refer to this as descriptive representation); and
4. there is a congruence between the actions and behavior of a representative and one's policy preferences (I will refer to this as substantive representation).

The first form of representation is not a focus of this Article but has been a focus of recent successful litigation efforts across the country.[9] It is the latter three types of representation that this Article discusses.

Recognizing that representation is required in a democracy is only the first step. A community must then decide how it will choose its representatives. What mechanism is chosen will depend on a community's conception of democracy and of representation. Is democracy served by a purely majoritarian representative body whereby representatives do only what those they represent want and the decision made in each case is by majority rule (majoritarianism)?[10] Is it served by a representative body where the most talented members of society are trusted to deliberate and act in favor of the national interest, even if it involves unpopular choices (trusteeship)?[11] Is it served by a representative body that is a vibrant marketplace of ideas, where every demographic and interest group is represented, and decision makers form different coalitions come to different compromises depending on the issue (pluralism)?[12] Perhaps a little of each of these drove the decisions of the Founders to establish the decision-making structures of federal government.

The federal government structure is laid out in our almost-unamendable Constitution,[13] but the structure of a local government is, in many states, relatively

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7 For a full discussion of definitions of representation, *see* PITKIN, *supra* note 6, at 1–11.

8 Adapted from PITKIN, *supra* note 6, at 38–59.

9 Successful litigation on this form of representation has occurred in Wisconsin, *One Wisconsin Inst., Inc. v. Thomsen*, No. 15-cv-324-jpd, 2016 WL 4059222 (W.D. Wis. July 29, 2016), Texas, *Veasey v. Abbott*, 830 F.3d 216 (5th Cir. 2016), North Carolina, *North Carolina State Conference of the NAACP v. McCroy*, No. 1:13CV861, 2016 WL 1650774 (M.D.N.C. April 25, 2016), and Kansas, *Fish v. Kobach*, No. 16-2105-JAR-JPO, 2016 WL 2866195, May 17, 2016 (D.C. Kan).

10 *See* PITKIN, *supra* note 6, at 30.

11 *Id.* at 181.

12 *Id.* at 191.

13 Eric Posner, *The U.S. Constitution Is Impossible to Amend*, SLATE (May 5, 2014, 4:22 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2014/05/amending_the_constitution_is_much_too_hard_blame_the_founders.html.

easily amended. For example, in Illinois, home rule jurisdictions[14] can change their system of government (that is, their county, town, or school board) by majority vote at a general election after collecting a relatively small number of signatures to place the question on the ballot.[15]

At the local level then, we are all potential founders.

In a world of relatively infinite choice, what system of democracy suits local government? And, therefore, what system of representation is preferable? Some guidance can be drawn from Hanna Pitkin's seminal 1967 book, *The Concept of Representation*. Pitkin found that political decisions are "questions about action, about what should be done; consequently they involve both facts and value commitments."[16] While decisions based on facts may be delegated to experts, decisions based on value commitments—like the decisions of what rules a community wants to live by—require diverse representation.

Not every type of diversity will be relevant for representation. For example, it is hard to think of a reason why blue-eyed people need specific representation that they could not get from brown-or green-eyed people. Additionally, in some communities, different religions or ages need not be represented, but in others, religion or age may be a key cleavage in a community, and so establishing a system that ensures diverse representation with respect to religion or age will be necessary. In every community in America one thing is for certain: race and ethnicity will be an issue that requires diverse representation.[17]

This Article proceeds as follows: It starts by defining minority representation and outlining the normative and practical case for promoting minority representation, highlights the importance of focusing on local government representation, discusses the legal routes currently available to improve minority representation, goes through two case studies of work I have done at the local level to try to improve minority representation (in Joliet and Blue Island), and concludes with thoughts for the strategies that can be used going forward to advocate and litigate for local government structures that will better protect and promote minority representation.

I. MINORITY REPRESENTATION

If the goal of democracy is majority rule, why is pluralism or an explicit protection of racial justice needed? This question strikes at the basic paradox of

14 *See* ILL. CONST. art. VII, § 6.

15 *See* 10 ILL. COMP. STAT. 5/28-7 (2016) (the number of signatures required is equal to 8% of total vote of that jurisdiction in most recent gubernatorial election).

16 PITKIN, *supra* note 6, at 212.

17 *See* Ian F. Haney Lopez, *Post-Race Racialism: Racial Stratification and Mass Incarceration in the Age of Obama*, 98 CALIF. L. REV. 1023 (2010); Mario L. Barnes, *Reflections on a Dream World: Race, Post-Race and the Question of Making It Over*, 11 BERKELEY J. AFR.-AM. L. & POL'Y 6 (2009); Eduardo Bonilla-Silva, RACISM WITHOUT RACISTS: COLORBLIND RACISM AND THE PERSISTENCE OF RACIAL INEQUALITY IN THE UNITED STATES (2d ed. 2006); *see also* JOHN D. GRIFFIN & BRIAN NEWMAN, MINORITY REPORT 196 (2008) (citing Kinder and Sanders 1996, and Sniderman and Carmines 1997 as examples of how race continues to divide American society and politics).

democracy—can a society be equally committed to majority rule and minority protection?[18] Because it conflicts with government by the majority, the commitment to minority protection must be grounded in some other value. A commitment to minority representation can be grounded in pluralism and/or a commitment to racial justice. Failing to focus on minority representation is not a choice in favor of race neutrality, but instead a de facto vote against racial justice.

For minority representation to exist, all four types of representation outlined above should be present. That is, minority communities must be able to register and vote, to elect candidates of their choice, and to be both descriptively and substantively represented in federal, state, and local government. These types of representation stand in contrast to various kinds of disenfranchisement and political disempowerment minorities have experienced in America's history.

A. The Voting Rights Act

It wasn't until the Voting Rights Act (VRA) in 1965 that part of the promise of the Fifteenth Amendment was codified by Congress.[19] Though passed in direct response to the violence in Selma, Alabama, on Bloody Sunday, March 7, 1965, the aims of the VRA were broader than simply allowing Black people to register to vote without fear of losing their lives. Dr. Martin Luther King Jr.'s views on the topic were summarized by Lani Guinier in 1991: "King advocated full political participation by an enlightened electorate to elect blacks to key political positions, to liberalize the political climate in the United States and to influence the allocation of resources."[20] Guinier also notes that Roy Wilkins, Executive Director of the NAACP and Chairman Lawyers' Committee for Civil Rights (LCCR), advocated for the VRA before the House Committee on the Judiciary, on the grounds that eliminating voting restrictions would mean that elected officials "will become responsive to the will of all the people."[21]

Provisions protecting language minority communities (Latinos, Asian Americans, American Indians, and Native Alaskans and Hawaiians) were not

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18 *See* Alexis de Tocqueville, *Tyranny of the Majority*, *in* DEMOCRACY IN AMERICA 306 (Schocken Books 1961); *see also* JAQUES DERRIDA, ROGUES: TWO ESSAYS ON REASON 31–36 (Pascale-Anne Brault & Michael Naas trans., Stanford Univ. Press 2005).

19 There are other statutes that indirectly protect minority voting rights by protecting voting rights of particular communities that include people of color, *e.g.*, the National Voter Registration Act (NVRA), 42 U.S.C. §§ 1973gg–10 (1993); the Uniformed and Overseas Citizens Act (UOCAVA), 42 U.S.C. § 1973ff-7 (1998); the Help America Vote Act (HAVA), 42 U.S.C. §§ 15301–545 (2002); and the Military and Overseas Voter Empowerment Act (MOVE Act), 42 U.S.C. § 1973ff-7 (2009).

20 Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and The Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1084 n.26 (1991) (citing MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 166 (1963)).

21 *Id.* at 1077 n.26 (citing *Voting Rights: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong. 377–80 (1965) (statement of Roy Wilkins).

included in the VRA until 1975.[22] These were added to help non-English-speaking voters to "cast an effective ballot . . . ."[23]

The definition of minority political participation used during the 1975 debates included registering, voting, running for office, and holding office as civic participation goals.[24] The 1975 Act's added protections were written to apply to "language minority groups," defined as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage."[25]

B. Promoting Minority Representation

i. Registering, Voting, and Having that Vote Count Today

The removal of practices that directly prevented minority voters from registering and voting (for example, literacy tests, and some of the practices prevented through Section 5 preclearance, such as not opening voter registration opportunities when Black citizens appeared at the relevant office to register) supported the most basic type of minority representation: allowing people of color to register, vote, and have that vote count.

There are still laws that disproportionately disenfranchise voters of color, such as felon disenfranchisement laws, photo ID laws, citizenship requirements, and restrictions on early voting that are either currently on the books or are being advanced in legislatures or through ballot initiatives.[26] Advocates for minority representation are using Section 2 of the VRA somewhat effectively[27] where previous litigation under the Fourteenth Amendment has not been successful.[28]

ii. Electing Candidates of the Minority Community's Choice

The VRA, though originally interpreted by the Supreme Court to protect against only intentional discrimination with respect to the right to vote, was clarified by Congress in 1982 such that today it prohibits systems of election that prevent minority communities from electing candidates of their choice.[29] The classic example of such a system is a town council that elects all of its representatives at large, meaning that every voter chooses someone for each of, say, seven positions. The result

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22 The expansion was both through the coverage formula in Section 4 of the Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6 (1965), and the addition of Section 203 that required election materials to be printed in multiple languages in areas where there was a significant community with a common language that also spoke English less than well.

23 *Voting Rights Act: Ten Years After*, U.S. COMM. ON CIVIL RIGHTS 1, 117 (1975).

24 *Id.* at 39–58.

25 *Section 4 of the Voting Rights Act*, U.S. DEPT. OF JUSTICE, https://www.justice.gov/crt/section-4-voting-rights-act (last updated August 8, 2015).

26 For a full list of restrictive voting laws introduced and passed in 2015, *see Voting Laws Roundup 2015*, BRENNAN CTR. FOR JUST. (June 3, 2015), https://www.brennancenter.org/analysis/voting-laws-roundup-2015#Restrictive.

27 *See supra* text accompanying note 9.

28 *See generally* Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008).

29 52 U.S.C.A. § 10301(b).

of at-large systems is that the majority white population, if there is racial polarization in voting, will elect all seven members, and the minority community will never be able to elect a candidate to the local office. In places where it is possible to divide the jurisdiction into single-member districts (SMDs) such that one or more will have a majority of minority citizens, Section 2 of the VRA has been interpreted to require that SMDs (or another remedy) be implemented.[30]

iii. Descriptive Representation

The VRA says nothing explicitly about descriptive representation, but the Senate, in passing the amendments to Section 2 in 1982, added in a list of factors that a court must consider as part of the "totality of the circumstances" test. [31] Factor seven, in particular, is concerned with descriptive representation: "the extent to which members of the minority group have been elected to public office in the jurisdiction."

In many cases, the VRA's protection of communities electing candidates of their choice has resulted in a protection of descriptive representation because people of color have largely been the choice of the minority community and white people have largely been the choice of the white community. For example, at the congressional level in elections from 1966–96 (the thirty years after the VRA was passed) only 35 of the 6,667 elections in white majority districts provided Black winners (that is 0.005%).[32] There are more white winners in majority Black or Latino districts than this low rate, but not a sufficient amount to threaten the ability of representatives of color to be elected at the local, state, and national level.

iv. Substantive Representation

Substantive representation can have both an individual representative component and a whole legislature/policy outcomes component. With respect to individual representatives, the VRA protection of communities of color's ability to elect candidates of their choice should protect substantive representation (if the community votes in its self-interest and is able to hold the legislator to account). In addition, the Senate factors in the Section 2 amendments to the VRA outline the issues that a court should consider as part of the "totality of the circumstances" test required by the section. One of the Senate factors requires a court to look at whether the relevant minority group bears the effects of discrimination in areas such as education, employment, and health.

Additionally, political scientists have found strong evidence that substantive representation follows directly from descriptive representation. For example, Kerry L. Haynie finds, in analyzing agenda-setting behavior, that "a legislator's race tends

30 *See* Thornburg v. Gingles, 478 U.S. 30 (1986); *see also* Bartlett v. Strickland, 556 U.S. 1 (2009).
31 *See* S. Rep. No. 97-417, 97TH CONG., 2D SESS., at 28–29 (1982).
32 DAVID T. CANON, RACE, REDISTRICTING, AND REPRESENTATION 12 (1999).

to have a stronger effect on substantive representation than does a legislator's party membership." [33]

With respect to whole legislature/policy outcomes, the story is somewhat different due to the nature of winner-take-all district elections. Whether substantive policy outcomes are promoted by the VRA depends on the size and distribution of the minority communities and the level of racially polarized voting.

The need to divide minority representation into a substantive and descriptive component reveals how differently the political world is experienced by whites and people of color (and hence why it is important to approach the political world with an appreciation of racial difference). Since ninety percent of elected officials are white (and sixty-five percent are white men),[34] a white person will almost never need to worry about whether the candidate who will substantively represent him will also descriptively represent him.

C. The Benefits of Minority Representation

> Q: Now why would you come from Crittenden County to participate in a fundraiser for a county race that was basically a local race to Philips County?
>
> A: Well, the reason I would come, first of all, there are no blacks elected to a county position in eastern Arkansas and no blacks serving in the House of Representatives in eastern Arkansas and no blacks elected to anything other than school boards in districts that are predominantly black. And I feel like blacks should be elected to public office because they should have a chance to serve.
>
> And I want to help get blacks elected so little black children can see them serving and I want to dispell (sic) the myth that some white kids might have that blacks can't serve or shouldn't be serving at the courthouse. And when my little girl goes to the courthouse or when other little girls go to the courthouse, I want them to be able to see black people working up there.
>
> And if we can get some blacks elected at the local level, eventually we can—blacks will have the expertise and we can groom them to the point where they can run for the state legislature and other positions . . . .

Ben McGee, 1988[35]

i. Black Americans

Though the Black community is not homogenous, and Black community groups will differ in their support for various policies and laws, it is possible to find a large

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33 KERRY L. HAYNIE, AFRICAN AMERICAN LEGISLATORS IN THE AMERICAN STATES 25, 30 (2001). Haynie justifies assessing agenda-setting behavior as a method of assessing substantive representation by relying on R. Douglas Arnold's finding that "analyzing legislator's bill introductions is often superior to a reliance on roll-call votes for attempting to establish a linkage between constituency interests or preferences and the legislative behavior of representatives." *Id.* at 25.

34 *Do America's Elected Officials Reflect Our Population?*, WHO LEADS US, http://wholeads.us/electedofficials/ (last visited Oct. 10, 2016).

35 LANI GUINIER, TYRANNY OF THE MAJORITY 54 (1994) (citing Whitfield v. Democratic Party, 686 F.Supp. 1365 (E.D. Ark. 1988), *aff'd by an equally divided court,* 890 F.2d 1423 (8th Cir. 1989) (en banc) (trial transcript at 654–55)).

body of common ground between black citizens on questions of public policy, ideology, and candidate choice, and therefore to define "Black interests," for the purpose of studying whether these interests are furthered by an increased presence of black legislators, by greater seniority of black legislators, or other practices aimed at promoting minority representation. Kerry L. Haynie finds that Black citizens "have been the most cohesive and consistent political subgroup in U.S. politics."[36]

This coherence has made it easier for researchers to draw conclusions as to whether white or Black representatives are better able to represent the views of the Black community. Canon researched thousands of Congressional representatives over a thirty-year period and found that

> white representatives from districts that are 30–40 percent Black *can* largely ignore their Black constituents, and many do. Black representatives from districts that are 30–40 percent white cannot ignore their white constituents *because they are operating in an institution that is about 86 percent white and a nation that is 82.5 percent white.*[37]

He concludes that there is "very little support" for the claim that "whites are just as able to represent black interests as blacks."[38]

Additionally, Haynie, in analyzing state legislatures, found that Black members did not need to be in positions of power (for example, on legislative committees) to exert an influence over substantive outcomes, instead "the mere presence of African Americans in state legislatures . . . was sufficient to yield significant institutional and governmental responsiveness to black interests."[39] Haynie also examined the introduction of bills by state legislatures and found that "the race of the representative has a powerful and statistically significant effect on the introduction of traditional civil rights legislation."[40]

A corollary of the Canon and Haynie findings is that "districts with a majority black population had no significant impact on whether legislators representing such districts introduced black interest legislation."[41] That means that majority-Black districts without a Black elected official are not likely to see Black-interest legislation introduced on their behalf, even though the minority community voted that representative into office. Thus, the candidate of choice of a minority community will best represent them substantively if—and only if—that candidate also descriptively represents them. There are of course exceptions to this statistical finding: there have been and are a small number of majority Black communities that elect white candidates to represent them, and those candidates provide substantive representation for their communities. Those exceptions do not undercut the link between descriptive and substantive representation, but rather should give us hope

36 HAYNIE, *supra* note 33, at 19.
37 CANON, *supra* note 32, at 13.
38 *Id.* at 12.
39 HAYNIE, *supra* note 33, at 90.
40 *Id.* at 30.
41 *Id.*

that in a future time it will be possible for *all* white candidates to represent *all* of their constituents, not just the white ones.

ii. Latinos

The Latino community is not as politically cohesive as the Black community, largely because of group differences by country of origin, e.g., Mexico, Puerto Rico, and Cuba.[42] This makes it difficult to assess whether on the whole, the Latino community is able to get "what it wants" because there is no "it."

However, it is possible to assess whether Latinos are more likely to get the outcomes they desire than white Americans. It has been shown that, in Congress, Latinos, like Black Americans, are less likely to have policies implemented that they care about when their representatives are white, with the exception of districts that are over fifty percent Latino and represented by white members.[43] In the latter case, Latinos are as likely to have their policies represented by their congressional members as the whites in that district.[44] Thus, having a Latino representative generally leads to substantive representation for Latinos.

For Latinos (as well as Blacks), the substantive representation that results from descriptive representation also goes beyond just being more generally liberal. An analysis of voting patterns in several Congresses shows that "rather than simply greater intensity on a liberal-conservative spectrum, which generally emphasizes economic/class cleavages, minority representatives see a second, racial dimension of policies as highly salient."[45] This finding also tends to discredit those who say that substantive representation for minorities can be achieved by simply increasing the number of liberal representatives in office. White representatives—even liberal ones—do not have the "sense of racially 'linked fate'" or "personal experience with discrimination" to draw upon, which shows up in how they vote.[46]

iii. Asian Americans

Though the Asian American community does not share a common history, language, or country of origin, political scientists conclude that an "Asian American identity does exist and frequently works as a collective group."[47] Unlike Black

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42 *See* JOHN D. GRIFFIN & BRIAN NEWMAN, MINORITY REPORT 51 (2008).

43 *See id.* at 197.

44 *See id.*

45 Robert R. Preuhs & Rodney E. Hero, *A Different Kind of Representation: Black and Latino Descriptive Representation and the Role of Ideological Cuing*, 64 POL. RES. Q. 157, 157–71 (2011).

46 *See id.* at 158, 160. Preuhs and Hero used a measure of how liberal a representative was (the DW NOMINATE score) along with scores on race issues from the NAACP (for Blacks) and NHLA (National Hispanic Leadership Council) to analyze voting patterns. They found that for white liberals, the DW NOMINATE score was highly explanatory of voting patterns whereas for Black and Latino representatives, the scores from NAACP and NHLA indicating how sensitive a candidate is to minority issues were far more predictive of representatives votes on certain issues. *Id.*

47 Neilan Chaturvedi, *Responding to Silence: Asian American Representation through Bill Sponsorship and Co-Sponsorship* (2011 Annual Meeting Paper), AM. POL. SCI. ASS'N 5–6 (last revised Aug. 5, 2011), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1902228.

Americans and Latinos, Asian Americans, though exhibiting a reasonable level of political cohesion, largely do not exhibit party loyalty.[48]

An example of Asian political cohesion is the fight to keep an Asian neighborhood together during a redistricting process in New York in the 1990s. Latinos challenged the Twelfth Congressional District in New York, and a group of Asian Americans intervened to argue that the redrawn district should not split up their community.[49] The community was defined by common neighborhoods, language, level of education, employment in similar industries, use of public transport, and immigration status.[50] The Court found this argument compelling, and the first constitutionally permissible Asian-influence district was formed. The district remains a multi-racial opportunity district (with 40% Latino and 20% Asian American population).[51]

When there are common interests amongst Asian American groups,[52] it is possible to study whether Asian American legislators effectively represent those interests, and it has been found that they do, indeed, further such interests. [53]

iv. Minority Representatives as Role Models

Guinier explains role model theory as Black representatives "who convey the message 'We Have Overcome' and inspire those not yet overcoming. Thus, in general, Black role models are powerful symbolic reference points for those worried about the continued legacy of past discrimination."[54]

The most prominent example of a candidate of color inspiring others is, of course, President Obama. The ability of a Black man to be elected to the highest office in the land conveys the message to Black children everywhere that they too can do great things even though they may experience racism along the way. Similarly, Senator Daniel Inouye served as a role model to a generation of Japanese Americans,[55] as did Mayor Villaraigosa, Senator Rubio, and Congressman Castro for Latinos.

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48 *See* Glenn D. Magpantay, *Asian American Voting Rights and Representation: A Perspective from the Northeast*, 28 FORDHAM URB. L. J. 739, 764 n.163 (2001) ("Political cohesion around candidates can be discerned, but party loyalty is largely absent.").

49 *Id.* at 766–67.

50 *See id.* at 766–67.

51 New York's 12th Congressional District in the 1990s is now the 7th District, and is still represented by Nydia Velásquez. The District is 43% Latino and 19% Asian according to the 2013 American Community Survey estimates. *See* U.S. CENSUS BUREAU, *2013 American Community Survey* (2013), http://factfinder.census.gov/faces/nav/jsf/pages/index.xhtml.

52 *See* Magpantay, *supra* note 48, at 768 (explaining that communities of interest can be identified within the Asian American community).

53 *See* Chaturvedi, *supra* note 47, at 20 ("Asian American legislators represent Asian Americans well.").

54 GUINIER, *supra* note 35, at 57.

55 *See* Paul Watanabe, *Remembrance: Daniel Inouye Was My Role Model*, COGNOSCENTI (Dec. 20, 2012), http://cognoscenti.wbur.org/2012/12/20/daniel-inouye-paul-watanabe.

v. Improved Civic Participation by People of Color

In 1965, Black voter registration rates were as low as 6.7% in some states.[56] This was the intended outcome of the white power structure in place. Following the adoption of the VRA, voter registration rates increased. Voter turnout also largely followed a similar trajectory. Guinier theorized in 1994 that this is because there is a key role that "group identity plays in mobilizing political participation and influencing legislative policy."[57] She noted also that: "blacks can be encouraged to participate in the political process, the possibility of electing a 'first' Black tends to increase election day turnout. Indeed, the courts and commentators have recognized that the inability to elect Black candidates depresses black political participation."[58]

Studies of each of the minority groups under consideration bear out this hypothesis. For Blacks, this effect was dramatically illustrated in the 2008 election where black turnout eclipsed that of white turnout for the first time,[59] likely because Black voters wanted to elect the first black President. Additionally, political scientists have found a link between the election of black mayors and greater Black political participation.[60]

For Latinos, a study of Southern California over five years shows that Latino voter turnout increases when Latino voters have a chance to elect their candidate of choice out of a majority-minority district.[61] That boost to turnout increases with each additional overlapping district where electing a Latino is possible: the highest turnout came from Latino voters who lived in overlapping majority-minority districts for State Assembly, State Senate, and U.S. House of Representatives.[62]

For Asian Americans, Taofang Huang finds that Asian Americans are more likely to vote when an Asian American is a candidate, particularly when the candidate's ties to a specific Asian country are a prominent part of his or her presentation during a campaign.[63]

It seems likely that, beyond mayoral races, increased minority representation at the local level will drive minority civic participation. For example, each additional Latino majority-minority district increases turnout by the Latino community. Thus, descriptive representation should increase substantive representation on both ends; the elected official is more likely to take the interests of the minority community

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56 *Introduction to Federal Voting Rights Laws*, U.S. DEP'T OF JUST., https://epic.org/privacy/voting/register/intro_c.html (last visited Nov. 16, 2016).

57 GUINIER, *supra* note 35, at 57.

58 *Id.* at 58.

59 *See* Thom File, *The Diversifying Electorate—Voting Rates by Race and Hispanic Origin in 2012 (and Other Recent Elections),* U.S. CENSUS BUREAU (May 2013), http://census.gov/content/dam/Census/library/publications/2013/demo/p20-568.pdf.

60 *See* ZOLTAN L. HAJNAL, CHANGING WHITE ATTITUDES TOWARD BLACK POLITICAL LEADERSHIP 1 (2007).

61 Matt A. Barreto, Gary M. Segura & Nathan D. Woods, *The Mobilizing Effect of Majority—Minority Districts on Latino Turnout*, 98 AM. POL. SCI. REV. 65, 74 (2004).

62 *Id.*

63 *See* Taofang Huang, *Electing One of Our Own: Descriptive Representation of Asian Americans* (2010 Annual Meeting Paper), W. POL. SCI. ASS'N 2, 21, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1580953 (last revised Mar. 31, 2010).

seriously and the community will become more engaged, mobilized, and better able to hold that representative accountable.

vi. Confidence in Government

Jane Mansbridge explains the connection between increased descriptive representation, legitimacy, and confidence in government:

> Seeing proportional numbers of members of their group exercising the responsibility of ruling with full status in the legislature can enhance de facto legitimacy by making citizens, and particularly members of historically underrepresented groups, feel as if they themselves were present in the deliberations.[64]

Haynie and Guinier accept this argument, but they clarify that they believe descriptive representatives will only contribute a basic level of trust in political institutions if the minority members actually speak for the communities from which they come.[65]

The benefit of an increased confidence in government will not necessarily only be felt by members of the relevant minority community but may also increase the confidence of elected officials that they have made decisions based on the views of the entire community, rather than just the white majority. There is also a possibility that this confidence could flow over to white voters themselves if they believe that all community members are having their voices heard on local decision-making bodies.

vii. Changing Attitudes to Minority Legislators and Minority Community Members

There is some evidence that Black political leadership can help to break down the "myth that some white kids might have that Blacks [and other minority candidates] can't serve or shouldn't be serving."[66] For example, Zoltan Hajnal shows that "the transition from white to Black leadership frequently leads to notable shifts in white attitudes and behavior."[67] Hajnal argues that this shift in behavior occurs where information about the Black political leadership is credible and widely disseminated such that the white community perceive their black leader to have real

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64 HAYNIE, *supra* note 33, at 114 (citing Jane Mansbridge, *Should Blacks Represent Blacks and Women Represent Women? A Contingent Yes*, 61 J. POL. 628, 650 (1999)).

65 HAYNIE, *supra* note 33, at 114.

66 *Id.* at 63.

67 HAJNAL, *supra* note 60, at 7. Unfortunately, Hajanal finds exceptions to his rule, and Chicago is one of the notable exceptions: "Although Black representation in most cases leads to decreased racial tension and greater acceptance of Black incumbents, there are a select number of cities where racial tension remains high, voting continues to be highly racially polarized, and few new white voters begin to support Black leaders despite years under Black leadership . . . . Chicago represents perhaps the most famous case of ongoing white resistance." *Id.* at 123 (though Hajnal can explain the unique circumstances that set Chicago out from other cities).

control over outcomes and policies, and white community members are therefore more likely to reduce their negative attitudes to black leadership.

At the congressional level, some studies on white voting behavior following Black leadership support Hajnal's findings,[68] but some find the opposite result, with whites being eight to ten percent less likely to support Black incumbents than white incumbents.[69] Despite this finding, the number of Black congressional representatives that represent majority white districts has increased from zero in 1960 to six in 2000, representing sixteen percent of all Black representatives.[70] Though change in the level of racially polarized voting is slow, it seems change has indeed followed from increased examples of Black leadership (in both majority white and majority Black communities).

The number of Latino and Asian American representatives has only started to grow in the past three decades, but the data so far suggest that white voters respond to Latino and Asian American leadership positively. Hajnal finds "there does appear to be a pattern of changing white behavior in response to experience with Latino elected officials. The evidence is clearer for whites who experience Latino leadership than it is for whites who live under Asian American incumbents but in both cases there are signs that white Americans are learning."[71]

The effect of minority political leadership on white racial attitudes is therefore one of caution and hope. Though minority representation "cannot solve all or even most of America's racial ills . . . if it can begin to reduce racial divisions in the political arena, then it is a goal well worth pursuing."[72]

viii. Minority Representation and the Representation of Women

Focusing on minority representation gives us a chance to explore "the interaction and coalition formation that may occur between women and minority groups with corresponding interests" and to find ways to advance representation for both of these underrepresented groups of people.[73]

A finding that reveals corresponding interests is that the improvement in minority representation over the past few years has largely been driven by women of color. This is particularly true for black elected officials. For example, in 2001, the increase in Black elected officials in office was entirely due to the increase in Black women in office. Since 1998, the number of Black men has actually decreased, and overall (from 1970–2005) black female elected officials

68 *Id.* at 145.
69 *Id.*
70 *Id.* at 146.
71 ZOLTAN HAJNAL, AMERICA'S UNVEVEN DEMOCRACY 153 (2010).
72 *Id.* at 161.
73 Michael D. Minta, *Gender, Race, Ethnicity, and Political Representation in the United States*, 8 POL.& GENDER 541, 544 (2012).

increased twenty-fold while black male elected officials increased only four-fold.[74]

The fights for gender and racial/ethnic equality should be seen as connected because achieving minority representation is not just about narrowly satisfying the interests of some racial groups. Rather, it is grounded in a view of democracy that says that all of those who are historically or currently disempowered still deserve respect and recognition. This connection has been important in the advances of racial and gender justice: the civil rights movement of the 1960s was dominated by discussions of race, but coalition building allowed protections for gender to be included in the Civil Rights Act of 1964.[75]

II. MINORITY REPRESENTATION IN LOCAL GOVERNMENT

Now that we have set the boundaries for our discussion of what constitutes minority representation and why we may desire to increase it, let us turn our attention to local government representation in particular. The starkest recent example of the importance of local government in the fight for racial equality comes from Ferguson, Missouri.

Many will remember Ferguson only for the shooting and killing of an unarmed, Black teenager, Michael Brown, by a white police officer in 2014.[76] A large part of the blame for this terrible event was rightly attributed to the racially discriminatory culture within the Ferguson Police Department. [77] But there are deeper issues. Ferguson, along with St. Louis, is highly segregated not only in housing patterns, but also in the distribution of local power.[78] Although Ferguson's population is majority Black, it is run by a white mayor and a white police chief, with a police department known for brutality against Black[79] youth and racist conduct by police officers.

While Ferguson is over sixty-seven percent Black, its city council included only one Black member out of six seats.[80] In addition, seventy-seven percent of students

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74 Carol Hardy-Fanta et al., Race, Gender, and Descriptive Representation: An Exploratory View of Multicultural Elected Leadership in the United States 6 (Sep. 1, 2005) (unpublished manuscript) (on file with the American Political Science Association).

75 *See* Minta, *supra* note 73, at 544–45.

76 *See*, *e.g.*, Editorial, *The Death of Michael Brown: Racial History Behind the Ferguson Protests*, N.Y. TIMES (Aug. 12, 2014), http://www.nytimes.com/2014/08/13/opinion/racial-history-behind-the-ferguson-protests.html (last visited Aug. 2016).

77 *See* U.S. DEP'T. OF JUST. CIVIL RTS. DIV., *Investigation of the Ferguson Police Department*, (Mar. 4, 2015), http://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf.

78 *See The Death of Michael Brown*, *supra* note 76.

79 This report uses "Black" rather than African American to ensure that people without slave ancestry but who still hail from Africa are included in the analysis. The Census Bureau uses both terms in its work. This report capitalizes "Black" because the terms Latino and Asian are also usually capitalized.

80 Karen Shanton, *The Problem of African American Underrepresentation on Local Councils*, DEMOS.ORG, http://www.demos.org/publication/problem-african-american-underrepresentation-city-councils (last visited Mar. 12, 2015).

in the Ferguson-Florissant School District are Black,[81] yet only one school board member out of seven total was Black.[82] City councils, school boards, and other local government systems can influence city agencies and the allocation of resources in many important ways. For example, if Ferguson's city council looked like Ferguson itself, it could choose to ensure that the police force is racially diverse, better trained to understand racial justice issues, and held accountable for racially disparate treatment and racially discriminatory conduct.

The situation on the ground in Ferguson serves to highlight a truth about local governments across our country: they control many aspects of our daily lives, not just criminal law but also many other policy areas that are crucial for the civil rights agenda. Local government decisions can affect whether a community is integrated,[83] whether public employees include people of color,[84] whether police target people based on race,[85] whether schools disproportionately suspend and expel Black students,[86] whether food deserts exist,[87] whether minority-owned businesses can thrive,[88] whether people of color's right to vote is disproportionately burdened,[89]

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81 David Hunn, *ACLU Alleges Ferguson-Florissant School District Elections Favor White Candidates*, ST. LOUIS POST-DISPATCH (Dec. 18, 2014), http://www.stltoday.com/news/local/education/aclu-alleges-ferguson-florissant-school-district-elections-favor-white-candidates/article_f5e8a48f-c586-5593-9aed-440a353efd86.html.

82 Jessica Bock, *Suspension of Ferguson-Florissant Superintendent Questioned*, ST. LOUIS POST-DISPATCH (Nov. 9, 2013), http://www.stltoday.com/news/local/education/suspension-of-ferguson-florissant-superintendent-questioned/article_d26b81af-7010-55b1-8233-50b33a08bb09.html.

83 Policies that can influence the level of neighborhood integration including redlining (*see, e.g.*, Alexis C. Madrigal, *The Racist Housing Policy That Made Your Neighborhood*, THE ATLANTIC (May 22, 2014), http://www.theatlantic.com/business/archive/2014/05/the-racist-housing-policy-that-made-your-neighborhood/371439/), and by contrast, an explicit mission in a community to "achieve meaningful and lasting diversity throughout Oak Park and the region," *see About us,* THE OAK PARK REGIONAL HOUSING CTR., http://www.oprhc.org/news-media-releases-updates/ (last visited Mar. 12, 2015).

84 City policies about standards for hiring can affect diversity in public employees. *See, e.g.*, Lewis v. City of Chicago, 643 F.3d 201 (7th Cir. 2011).

85 See, for example, New York's "Stop and Frisk" laws that were found to have disparately impacted the Black community in New York. *See generally* Floyd v. City of New York, 959 F. Supp. 2d 540, 562 (S.D.N.Y. 2013).

86 *See, e.g.*, *School Discipline and Disparate Impact*, U.S. COMM'N ON CIVIL RIGHTS (2014), http://www.usccr.gov/pubs/School_Disciplineand_Disparate_Impact.pdf (last visited Mar. 12, 2015) (reporting on Fresno's disparate expulsion referrals for people of color).

87 Governor Pat Quinn appropriated $10 million to go to cities, towns, and villages across Illinois to address the problem of food deserts. City council members had to apply to receive that money, and some used the media in that lobbying effort. Landon Cassaman, *Rockford '"Food Desert" Seeks State Funding*, WIFR.COM (Aug. 3, 2012, 9:32 PM), http://www.wifr.com/home/headlines/Rockford-Food-Desert-Seeks-State-Funding-164970226.html.

88 For example, Chicago has a Minority and Women-Owned Business (e.g., (M/WBE)) Certification Program that provides contracting opportunities to M/WBE certified companies. *Businesses & Professionals*, CITY OF CHICAGO, http://www.cityofchicago.org/city/en/ofinterest/bus/mwdbe.html (last visited March 12, 2015).

89 For example, the Department of Justice was asked to investigate the placement of voting machines in Franklin County. The DOJ found that more registered voters were allocated to a single machine in predominantly Black precincts, and less registered voters per machine in predominantly white precincts (the amount of actual voters for each machine did not show a discriminatory impact). Dan Tokaji, *DOJ: No Discrimination in Ohio Election*, MORTIZ COLLEGE OF LAW: ELECTION LAW @ MORTIZ BLOG (July 5, 2005), http://moritzlaw.osu.edu/blogs/tokaji/2005/07/doj-no-discrimination-in-ohio-election.html. In addition, decisions on the allocation of voting machines and election judges can affect

whether first-time offenders are prosecuted for felonies under the criminal justice system,[90] and where for-profit detention centers will be located,[91] to name a few examples.

Local governments are often overlooked and understudied compared with federal or state governments when it comes to civil rights protections. Local governments contribute to whether we make our society a place where people can thrive economically, politically, and socially, regardless of their race or ethnicity, or whether people of color will face an uphill battle just to live, work, and be educated. Local governments are at the forefront of civil rights issues, and so it is at that level that we should be trying to ensure that minority communities are fairly represented.

Unlike Congress and state legislatures, which can contain many hundreds of legislators, local school boards and city councils are usually comprised of five to fifteen members. Adding even a single minority voice to the deliberations of a small body can help the rest of the members better understand issues from the perspective of the minority community, and that member can raise issues or introduce motions for a vote, without needing to have the support in a legislative committee. Thus, the introduction of one or more people of color to a local council has the potential to make a larger difference at the local level than at the state or congressional level.

A. Descriptive Representation at the Local Level May Increase Descriptive Representation at the National Level

Even if one's ultimate goal is to improve state or federal minority representation, local minority representation is still fundamentally important to that end. Local government representation by minority candidates can "build the bench" of candidates for higher office. Minority representatives at the federal level are more likely than their White peers to ascend through the political ranks by first serving as local elected officials.

An analysis of the background of the House members in the 114th Congress found that while twenty-two percent of White representatives started their political careers as elected representatives in local government, representatives of color were

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the length of lines in predominantly Black and white communities. In the 2012 election, Black and Latino voters waited in lines 2 and 1.5 times as long as white voters. Charles Stewart III & Stephen Ansolabehere, *Waiting in Line to Vote*, SUPPORT THE VOTER 11 (July 28, 2013), https://www.supportthevoter.gov/files/2013/08/Waiting-in-Line-to-Vote-White-Paper-Stewart-Ansolabehere.pdf (last visited Dec. 2, 2016).

90 The Cook County State's Attorney is an elected position in local government. In March 2011, the Cook County State's Attorney implemented a Deferred Prosecution Program to attempt to divert first time offenders from the justice system. *Deferred Prosecution Program*, TREATMENT ALTERNATIVES FOR SAFE COMMUNITIES, http://www2.tasc.org/program/deferred-prosecution-program (last visited Mar. 13, 2015).

91 The Corrections Corporation of America sought to build a for-profit immigration prison in Joliet in 2013. In order for that to go ahead, the Joliet City Council had to approve a special use permit. Ashlee Rezin, *Pressure Against Joliet's Proposed For-Profit Immigrant Detention Center Escalates*, PROGRESS ILL. (May 16, 2013, 7:11 PM), http://www.progressillinois.com/quick-hits/content/2013/05/16/pressure-against-joliets-proposed-profit-immigrant-detention-center-es.

much more likely to have started in local government: 29% percent of Asian American representatives, 38% of Black representatives (over 1.5 times as many as white representatives), and 44% of Latino representatives (double the number of white representatives) started their political careers as local government representatives.[92]

This disparity holds specifically for people of color: there is little difference by gender (twenty-five percent of male and female representatives started in local elected office) and party (twenty-one percent of white Republicans and twenty-four percent of white Democrats started in local elected office).

Therefore, improving local minority representation could create a cadre of trained representatives of color that are ready to go on to state and national office to represent the interests of their communities. In addition, the reluctance of white voters to vote for Black candidates breaks down (even if only to some extent) after experiencing Black leadership.[93] Thus, the opportunities for local Black candidates to get elected to higher office, even if the higher offices are not majority-minority communities, improves.

B. Descriptive Representation Improves Substantive Representation at the Local Level

Descriptive representation for people of color at the local level has the potential to significantly improve the lives of communities of color.

At the county level, a minority commissioner can influence whether services and administrative positions will be distributed equitably. For example, in Chilton County, Alabama, during the late 1980s, the county decided which roads got paved and re-paved (as many county boards do). Their system was ad-hoc and resulted in the all-white board of commissioners prioritizing white neighborhoods. Once Bobby Agee, the county's first Black commissioner, was elected in 1988, he was able to implement a systematic and objective way to determine which roads got paved.[94] As a result, Black communities had their roads paved (and the overall process was more responsive to community needs). The county board also has the power to suggest and appoint administrative personnel. After Bobby Agee was elected, Black representatives were appointed by the county board to administrative board positions.[95]

At the municipal level, descriptive representation for Black Americans has led to an improvement in police and social welfare policies for the Black community. Having a Black mayor is consistently associated with an increase in the number of Black officers on the police force.[96] A Black mayor also makes it more likely that there

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92 All research for this small study was conducted by the author.

93 *See* HAJNAL, *supra* note 60, at 160–63. ("[B]lack mayoral leadership [can] . . . change white voting behavior, [and] also [] alter white racial attitudes.").

94 LANI GUINIER, LIFT EVERY VOICE: TURNING A CIVIL RIGHTS SETBACK INTO A NEW VISION OF SOCIAL JUSTICE, 259–60 (1998).

95 *Id.*

96 *See* Daniel J. Hopkins & Katherine T. McCabe, *After It's Too Late: Estimating the Policy Impacts of Black Mayoralties in U.S. Cities*, 40 AM. POL. RES. 665, 665–700 (2012); *see also* Jihong Zhao, Ni He & Nicholas

are police department policies that aim to improve the relationship between police and the over-policed Black communities, such as citizen accountability boards.[97] Black descriptive representation also leads to better responsiveness of social service agencies to the needs of the Black community, particularly when the program managers and the representatives engage in community networking and learning.[98]

And, at the school board level, school boards that include Latino representatives are more likely to hire Latino school administrators, such as principals and superintendents, who, in turn, hire more Latino teachers. Qualitative[99] and quantitative[100] studies, including randomized experiments,[101] find that the academic achievement of Latinos, as well as non-Latinos, increases when a school has Latino teachers. In addition, a majority of Latinos would prefer for their children to have more Latino teachers.[102]

III. IMPROVING LOCAL MINORITY REPRESENTATION

If we accept that improving minority representation at the local level is a valid goal, then how are we to achieve this improvement? Perhaps everything appears to be able to be changed by litigation or legislative change if one is a lawyer (much like a hammer sees everything as a nail), but I believe that there are great strides to be made through these two methods. The third, complementary, and in many ways a *sine qua non* of legal change, method is to engage in community organizing. That is beyond the scope of my expertise though, so I will leave it to others to comment on the best ways to integrate community organizing into a fully-fledged litigation and legislative advocacy campaign.

A. Litigating over minority vote dilution

The difficulty with using litigation to develop solutions to a complex problem like minority representation is that an impact case will set a precedent based on a unique factual scenario and with a single or limited set of remedies. In the case of minority representation, *Thornburg v. Gingles* was a watershed for minority representation because it set the floor—a base level of representation of people of color in the halls of power—below which the country would not return.[103]

Lovrich, *Predicting the Employment of Minority Officers in U.S. Cities: OLS Fixed- Effect Panel Model Results for African American and Latino Officers for 1993, 1996, and 2000*, 33 J. CRIM. JUST. 377, 377–79 (2005), http://nuweb.neu.edu/nhe/race and police emp.pdf.

97 *See* Grace Hall Saltzstein, *Black Mayors and Police Policies*, 51 J. POL. 525, 525–44 (1989).

98 *See* Belinda Creel Davis, Michelle Livermore & Younghee Lim, *The Extended Reach of Minority Political Power: The Interaction of Descriptive Representation, Managerial Networking, and Race*, 73 J. POL. 494, 497 (2011).

99 David L. Leal, Valerie Martinez-Ebers & Kenneth J. Meier, *The Politics of Latino Education: The Biases of At-Large Elections*, 66 J. POL. 1224, 1229–30 (2004).

100 *Id.* at 1230–31.

101 *Id.* at 1230.

102 *Id.* at 1224.

103 478 U.S. 30 (1986).

Unfortunately, *Gingles* has also come to represent a ceiling. That ceiling prevents the adoption of an election system that would allow for fairer representation for people of color.

The concept of vote dilution was recognized as a constitutional harm in the "one person, one vote" (OPOV) Supreme Court cases of the 1960s.[104] The Court found that an individual's vote could be diluted if she was in an election district that had a huge disparity in population to another district for election to the same legislature. For example, in *Baker* v. *Carr*, districts for the state legislature in the urban centers of Tennessee had ten times the number of people as districts in rural areas.[105] This meant that a voter in an urban district had one-tenth the voting power of a voter in a rural area. The court labeled the requirement of rough population equality[106] a OPOV requirement:

> [A]ll who participate in the election are to have an equal vote—whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be . . . . The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications.[107]

The OPOV requirement recognizes that an individual's vote can be diluted by the size of election districts. Minority vote dilution operates in a similar, but more complex way than individual vote dilution, and it describes a group rather than an individual harm.[108] As Pamela S. Karlan explains, "[u]nlike the white suburban plaintiffs in *Reynolds* whose voting strength was diluted because of *where* they lived, the political power of Black citizens is diluted because of *who* they are."[109]

Thus, in 1971, in *Whitcomb v. Chavis,* a group of Black voters in Indiana argued that vote dilution could also occur based on race, rather than geography. [110] The plaintiffs argued that by electing multiple legislators in the Marion County area using at-large elections, the Black community was left with "almost no political force

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104 *See generally* Baker v. Carr, 369 U.S. 186 (1962); Gray v. Sanders, 372 U.S. 368 (1963); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964).

105 Baker v. Carr, 369 U.S. 186, 253–267 (1962) (Douglas, J., concurring).

106 The OPOV started as a rough population equality measure, but later was changed to require a population deviation of no more than one person for each congressional district (and at the state legislative and local level, the population requirement only allowed that the largest and smallest districts deviated by no more than 10%). *See* Karcher v. Daggett, 462 U.S. 725, 730–41 (1983) (regarding congressional districts); Larios v. Cox, 305 F. Supp. 2d. 1335, 1337 (2004), *aff'd*, 124 S. Ct. 2806 (2004) (citing Brown v. Thomson, 462 U.S. 835, 842–43 (1983) (regarding state legislative districts)).

107 *Gray*, 372 U.S. at 379–80.

108 The concept of minority vote dilution was first hinted at in *Fortson v. Dorsey*, 379 U.S. 433 (1965), but not relied upon by the appellees, and so it was only briefly addressed by Justice Brennan writing for the Court. *Id.* at 439 ("It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.").

109 Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. L. REV. 173, 174 (1989).

110 403 U.S. 124 (1971).

or control over legislators because the effect of their vote [was] cancelled out by other contrary interest groups."[111] The problem with winner-take-all, at-large elections (those where fifty-one percent of the community can elect one hundred percent of the representatives) is that "a slim majority of voters has the power to deny representation to all others."[112] The Court declined to find that there was in fact a constitutional violation caused by the use of at-large districts in Indiana, but it left open the question of whether, in the right factual scenario, the rights of minority voters might be diluted.

Shortly thereafter, plaintiffs from Texas, in *White v. Regester*, convinced the Supreme Court that there was invidious discrimination in the drawing of the Texas legislative redistricting plan in violation of the Equal Protection Clause of the Fourteenth Amendment. [113] The plaintiffs showed that "the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[114] The court analyzed a number of practices that prevent political participation by Black voters in Dallas County and Latino voters in Bexar County. These included party slating, poll taxes, cultural barriers, and the use of multi-member districts (MMDs) with at-large, winner-take-all plurality voting.

Another set of plaintiffs tried to build on the theory of minority vote dilution as caused by at-large voting in MMDs from *Regester* to argue that such dilution was occurring in the city of Mobile, Alabama. In *Mobile v. Bolden*, the plaintiffs alleged that the Fourteenth and Fifteenth Amendments, and Section 2 of the VRA, were violated by the City Commission's election system that elected the three-person Commission at-large, thereby denying the Black population (that constituted 35.4% of the total population) the ability to elect a single candidate. [115] The Court held that there was no difference between the Fifteenth Amendment and Section 2 of the VRA, and found that both the Fourteenth and Fifteenth Amendments were not violated because a showing of purposeful discrimination was required for each, and such a purpose was not shown.[116]

The holding in *Bolden* appeared to make it all but impossible for plaintiffs to overturn redistricting plans or election systems that diluted the minority vote. As Chandler Davidson describes, in the context of an attempted minority vote dilution case in the town of Taylor, Texas (where, despite high Latino turnouts in elections

111 *Id.* at 129.
112 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, FAIRVOTE, http://www.fairvote.org/assets/Racial-Minority-Representation-Booklet.pdf (last visited Mar. 14, 2015).
113 412 U.S. 755, 765–66 (1973).
114 *Id*. at 766.
115 446 U.S. 55, 58–59 (1980).
116 *Mobile*, 446 U.S. at 66–68 (citing Whitcomb v. Chavis, 403 U.S. 124, 149 (1971); Washington v. Davis, 426 U.S. 229 (1976)).

and Latino candidates running regularly for office between 1967 and 1974, no candidate that was the choice of the minority community was elected):

> The decision presented serious problems to the plaintiffs in Taylor, whose at-large system had been established in 1914. The files of the local newspaper only went back to the 1930s, and official city documents relating to the charter revision shed no light on the motives for the change. After much soul searching, the plaintiffs withdrew the suit, at the cost of three years of trial preparation, dashing the minorities lingering hopes that the U.S. Constitution might provide them relief.[117]

The difficulties *Bolden* created were foremost on the minds of legislators when they amended Section 2 of the VRA in 1982. Congress added paragraph (b) to Section 2 that explained that Section 2(a) could be violated if a "totality of circumstances" test was met, rather than the more stringent purposeful discrimination test of the Fourteenth and Fifteenth Amendments. The totality of the circumstances test means that plaintiffs can present evidence that an election system *in effect* dilutes the minority vote, along with examples of *other types of racial discrimination* that occur in the jurisdiction, rather than having to show that the particular election system was adopted with a racially discriminatory purpose.

The amended Section 2 was used effectively in litigation immediately after 1982, with the seminal case of *Thornburg v. Gingles* in 1986 establishing a three-part test that plaintiffs could meet in order to prove a Section 2 violation even if they could not prove that an election system was instituted for the purpose of discriminating with respect to voting on the basis of race. The *Gingles* test requires the racial, ethnic, or language minority group to prove that it is:

(1) sufficiently large and geographically compact to constitute a majority in a single-member district;
(2) politically cohesive; and
(3) in the absence of special circumstances, that bloc voting by the white majority usually defeats the minority's preferred candidate.[118]

The Court will also look at factors identified by the Senate in the 1982 amendment of Section 2. These factors clarify the "totality of circumstances" requirement in Section 2.[119] Modern legal strategies to overcome minority vote dilution must still operate within the *Gingles* framework. However, this does not mean that the remedy imposed in *Gingles* (majority-minority SMDs with winner-take-all plurality voting) must be applied wherever a Section 2 violation occurs. In addition, Section 2 litigation is not the only strategy that can be used to remove

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117 Chandler Davison, *Minority Vote Dilution: An Overview*, *in* MINORITY VOTE DILUTION 1, 2 (Chandler Davidson ed., 1984).

118 *Thornburg*, 478 U.S. at 49–51.

119 The list of Senate factors and a brief discussion of how they are used in litigation is available here: *Section 2 of the Voting Rights Act*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_2/about_sec2.php (last updated Aug. 8, 2015).

minority vote dilution. The remainder of this section compares the *Gingles* remedy to other election systems used in the United States to prevent minority vote dilution.

B. Remedying Minority Vote Dilution: The Problem of Majority-Minority SMDs

The benefits of the *Gingles* remedy are most clear where the fact scenario is similar to that in *Gingles*. That is, where an "at-large scheme consistently, systematically dilutes the voting strength of a geographically isolated racial or ethnic minority."[120] There are multiple reasons why this particular scenario is becoming less common, and therefore why systems other than majority-minority SMDs are more likely to protect the voting rights of racial and ethnic minorities. These reasons are discussed below.

i. Decreasing Residential Segregation

America is becoming less residentially segregated.[121]

The movement of people of color into relatively white suburban areas causes those suburbs to become more diverse (in that they include people of multiple races and ethnicities) but not necessarily residentially integrated.

Many of the areas that have new populations of color still have almost entirely white representation at the school board or local government level. In many cases this is because at-large districts are used to elect the local board. For example, the Hanover Park, Illinois, town council is all white, yet forty-four percent of the population is Black, Latino, or Asian American.

The consequence of reduced segregation is that majority-minority SMDs cannot be drawn to protect the voting rights of people of color. The *Gingles* remedy only protects geographically compact minority communities. As long as people of color do not make up a majority of new neighborhoods and racially polarized voting persists,[122] there will be no minority representation on local representative bodies.

ii. Irregular Town Boundaries

Unlike county boundaries, which are mostly square in Illinois, and school board boundaries, which are also fairly smooth, town boundaries are often uneven, winding in and out of communities, along some roads and not others, and very often including unincorporated areas within the town boundary. In order to keep SMDs as contiguous as possible (it may not be possible if the town itself is non-contiguous),

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120 Jim Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, *in* MINORITY VOTE DILUTION 203, 233 (Chandler Davidson ed., 1984).

121 Stephanopoulos, *supra* note 3, at 1343–48.

122 Racially polarized voting occurs when one racial or ethnic minority group prefers one candidate or set of candidates and a different racial or ethnic minority group prefers different candidates. For example in Alabama in 2012, white voters voted for President Obama at a rate of about eight percent, while Black voters voted for the President at a rate of around ninety-eight percent. This represents a huge polarity in voting preferences by race.

district boundaries can only be drawn in certain ways, which can prevent the drawing of majority-minority districts.

iii. Lack of Minority Voting Cohesion

There are a number of cities or school boards that have a combined minority population over fifty percent and yet, in at-large elections, all of the elected officials are white. It may be that minority voter turnout is lower than that of white voters. However, it could also be that the minority communities do not vote together to elect candidates of choice, so if the plurality of voters are white and vote cohesively, they will be able to elect all of the candidates for the local board.

iv. Low Turnout or Lack of Candidates

There are some city councils and school boards that are majority-minority or even plurality Black or Latino, and yet they continue to elect an all-white council or board. An explanation for this is lower voter turnout by the minority community. The Joint Center for Political and Economic Studies notes that minority turnout in local elections is worse than white turnout (this does not always hold for federal general elections).[123] As long as this situation continues, even with cumulative or ranked choice voting, it will be hard to improve minority representation.

v. The Problem of Prison-Based Gerrymandering

Prison-based gerrymandering occurs because prisoners are counted at their prison addresses by the U.S. Census Bureau, but they cannot actually vote. Thus, if a district is drawn to include a nearby prison, it will consist of far fewer actual eligible voters than a neighboring district (though they have the same total population). The most egregious example in the country is in the city of Anamosa, Iowa, where each City Council ward has around 1,370 people, but one ward has 1,321 prisoners and 58 non-prisoners. This means that 58 people have the voting power of 1,370 for the city council.[124]

In Illinois, the biggest distortion of prison gerrymandering occurs because sixty percent of the prison population comes from Cook County, yet ninety-nine percent of the population is housed and counted in districts outside of Cook County.[125] This leads to less comparative urban representation and greater rural representation.

vi. Growing Minority Populations

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123 KHALILAH BROWN-DEAN, ZOLTAN HAJNAL, CHRISTINA RIVERS & ISMAIL WHITE, JOINT CTR. FOR POL. & ECON. STUD., 50 YEARS OF THE VOTING RIGHTS ACT: THE STATE OF RACE IN POLITICS 12–14, http://jointcenter.org/sites/default/files/VRA%20report%2C%208.5.15%20%28540%20pm%29%28updated%29.pdf (last visited Mar. 14, 2015).

124 *See Prison Gerrymandering Project,* PRISON POL'Y INITIATIVE, http://www.prisonersofthecensus.org/impact.html (last visited Mar. 14, 2001).

125 *Id.*

The Census only occurs every ten years and it is usually accompanied by redistricting (except where at-large elections with winner-take-all voting is used), but throughout the decade people move, citizens turn eighteen, and residents are naturalized. If fair representation systems are used, then the election system can ensure that as soon as a minority community is large enough to elect a candidate of their choice, they can do so. If at-large systems are used, then the jurisdiction does not need to change to SMDs or move district boundaries until it is sued under Section 2 of the VRA or until the next census is released.

vii. Problems with Majority-Minority Districts for the Black Population

Many researchers have found that district-based elections increase Black representation when they replace winner-take-all at-large systems.[126] Despite this, there are three main criticisms leveled at majority-minority districts for the Black community. First, as a matter of substantive representation, packing Black voters, who are predominantly Democratic, into single districts can create districts in the surrounding areas that are more Republican, resulting in the election of more Republicans to the legislature, which may be less likely to support the interests of the Black community.[127] Cameron, Epstein, and O'Halloran found in 1996 that the 1990 round of congressional redistricting's focus on using majority-minority districts to ensure that communities of color could elect candidates of choice diluted the minority influence in surrounding areas and led to "an overall decrease in support for minority sponsored legislation."[128]

Cameron, Epstein, and O'Halloran believe that if SMDS are used, there is a tradeoff between increasing the number of minority officeholders and enacting legislation that furthers the interests of the minority community. Their finding held true in the South, where they determined the optimal minority population in any district to be forty-seven percent (rather than over fifty percent as has been imposed

126 *See* Richard Engstrom & Michael McDonald, *The Election of Blacks to City Councils: Clarifying the Impact of Electoral Arrangements on the Seats/Population Relationship*, 75 AM. POL. SCI. REV. 344, 344–54 (1981); Richard Engstrom & Michael McDonald, *The Underrepresentation of Blacks on City Councils*, 44 J. POL. 1088, 1089 (1982). *See also* Theodore Robinson & Thomas Dye, *Reformism and Black Representation on City Councils*, 59 SOC. SCI. Q. 133, 136–37 (1978); Joseph Stewart, Robert England & Kenneth Meier, *Black Representation in Urban School Districts: From School Board to Office Classroom*, 42 W. POL. Q. 287, 291(1989); ALBERT KARNIG & SUSAN WELCH, BLACK REPRESENTATION AND URBAN POLICY 134–49 (1980); *see generally* Richard Engstrom & Michael McDonald, *The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities, in* ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 203, 203–25 (G. Bernard & A Lijphart eds., 1986).

127 *See, e.g.*, Charles Cameron, David Epstein & Sharyn O'Halloran, *"Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 795 (1996) (finding a tradeoff "between maximizing the number of Black representatives in Congress and maximizing the number of votes in favor of minority-sponsored legislation"); David Epstein et al., *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J. L., ECON. & ORG. 499, 505–06 (2007); Christine L. Sharpe & James C. Garand, *Race, Roll Calls, and Redistricting: The Impact of Race-Based Redistricting on Congressional Roll-Call*, 54 POL. RES. Q. 31, 44 (2001).

128 Cameron et al., *supra* note 127, at 794.

by the Courts in Section 2 cases).[129] Outside of the South, they found that "substantive minority representation is best served by distributing Black voters equally among all districts."[130]

A second criticism of majority-minority districts, articulated, by Professor Abigail Thernstrom, is that a preoccupation with creating majority Black districts entrenches the racial segregation of minority voters. Thernstrom argues that "minority representation might actually be increased not by raising the number of black officeholders [elected from Black districts] but by increasing the number of officeholders, black or white, who have to appeal to blacks to win."[131]

A version of this argument has been made by Professor Lani Guinier, who argues that "single-member districts may aggravate the isolation of the black representative"[132] and possibly even lead to Black representatives being viewed as tokens that let the white majority feel that their role in the winning coalition has greater value.[133]

In addition to opposing the tokenism of minority representation, Guinier highlights that the purpose of the VRA was—and the purpose of civil rights activists should be—minority empowerment, not just minority legislative presence.[134] She has argued that the current interpretation of the VRA (to protect majority-minority districts seemingly at the expense of all other protections) has "'inescapably closed the door' on the real goal of the civil rights movement, which was to alter the material condition of the lives of America's subjugated minorities."[135] Whether the door is closed is debatable, but the research in *The Color of Representation* shows that remedies other than SMDs will need to be used with more frequency if we are to improve the substantive representation of communities of color.

A third criticism is leveled by the national organization FairVote, which has long argued that one of the main problems with majority-minority districts is that they "require the continuation of some degree of housing segregation that concentrates minority populations within easily drawn boundaries."[136] They elaborate:

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129 Bartlett v. Strickland, 556 U.S. 1, 17 (2009) ("We find support for the majority-minority requirement in the need for workable standards and sound judicial and legislative administration. The rule draws clear lines for courts and legislatures alike. The same cannot be said of a less exacting standard that would mandate crossover districts under § 2.").

130 Cameron et al., *supra* note 127, at 809.

131 ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 21 (1987); *Voting Rights Trap: The Resegregation of the Political Process*, NEW REPUBLIC, Sept. 1985.

132 GUINIER, *supra* note 35, at 81.

133 *Id.* at 64.

134 *Id.* at 55.

135 *Id.* at 54.

136 Robert Richie, Douglas Amy & Frederick McBride, *New Means for Political Empowerment: Proportional Voting*, POVERTY & RACE RES. ACTION COUNCIL, Nov.–Dec. 2000, at 1, 10, *as reprinted in How Proportional Representation Can Empower Minorities and the Poor*, PROPORTIONAL REPRESENTATION LIBR., https://www.mtholyoke.edu/acad/polit/damy/articles/empower.htm (last visited Mar. 14, 2015).

> [A SMD system] has been effective for racial minorities and has remedied thousands of minority vote dilution lawsuits and dramatically increased racial minority representation where it has been applied. However, the effectiveness of majority-minority districts as voting rights remedy is dependent upon the geographic concentration of racial minorities. Geographic dispersion can limit majority-minority districts to fewer seats than a given racial minority's share of population. Even where districts provide an effective remedy in the short-term, they may not adequately represent the jurisdiction's diversity after its demography changes. Finally, many racial minority voters will be unable to elect preferred candidates when not living in majority-minority districts.[137]

viii. Problems with Majority-Minority Districts for the Latino Population

SMDs do not increase descriptive representation for Latinos as much as they do for blacks and may actually decrease Latino descriptive representation.

Latinos are not as segregated from whites or from other minority groups as are Blacks.[138] This means that there are fewer places where it is even possible to draw a Latino majority-minority district. This is one of the major reasons why Latinos are more underrepresented than Blacks. Since the 1980s, Latinos have moved from more-segregated to less-segregated areas, becoming more integrated with both white and Black Americans.[139]

In addition, any attempt to enfranchise minority communities must take into account varying levels of citizenship and political incorporation.[140] Even in communities where there are a significant number of Latinos who are American citizens, they may be still new enough to the country that they lack the social networks and community knowledge to run a successful campaign[141] (and the community may be more resistant, especially in local races where candidates often run on a platform of how long they and their families have been in the community). In a city with low levels of citizenship and political incorporation, there may be one viable candidate and just enough Latino citizens across the city to elect that person, with a fair representation electoral system rather than SMDs with winner-take-all plurality voting system providing the only likelihood of that happening.

The scenario of the city with a high number of Latino noncitizens represents a particularly important case for minority representation. In a single-member-district system, each candidate may not have enough Latino citizens to ever be concerned with the interests of Latinos because they do not influence his or her chances for re-election. A system that allowed at least one Latino representative to be elected would then give that population some chance of having a voice.

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137 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, *supra* note 112.

138 Paru Shah, *Racing Toward Representation: A Hurdle Model of Latino Incorporation*, 38 AM. POL. RES. 84, 87. (2010).

139 *See* Stephanopoulos, supra note 3.

140 *Id.* at 88–89.

141 *Id.* at 90.

ix. Problems with Majority-Minority Districts for the Asian American Population

SMDs with winner-take-all plurality voting are even more problematic for the Asian American population, because their population is comparatively low throughout the country, making it hard to draw majority Asian American districts in most places.[142] New York City elections provide the clearest example of how SMDs have failed the Asian American population. The use of ranked choice voting in New York City school board elections from 1970 to 1999 led to descriptive representation of Asian Americans, "many with almost exclusive support from Asian American voters."[143] This result provided a "stark contrast" with the experiences of Asian American candidates in elections for other legislative bodies representing New York (that do not use ranked choice voting): in the late 1990s, "[e]ven with 800,000 Asian Americans, though there [we]re fifteen Asian American elected officials in the school boards, no Asian ha[d] been elected to the city council, state legislature, or Congress."[144]

C. Remedying Minority Vote Dilution: Fair Representation Systems

Given the myriad of potential problems with using SMDs to improve minority representation, I recommend the use of "fair representation systems" to overcome these boundaries. Fair representation systems used in the United States include cumulative and ranked choice voting (where used with MMDs). Overall, fair representation systems ensure that "a majority cannot control the outcome of every seat up for election. Instead, they ensure that the majority wins the most seats, but guarantee[s] access to representation for those in the minority."[145]

Cumulative voting was used to elect the Illinois House of Representatives for more than a century (1870–1980)[146] and was initially enacted to ensure that the minority party would have representation in a politically polarized state.[147] Cumulative voting is currently used in local elections in Alabama, California, Illinois,

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142 California's 49th state legislative district is the first majority Asian American state legislative district outside of Hawaii. *See* Daniela Gerson, *California's First Asian Majority Legislative District*, ALHAMBRA SOURCE (Aug. 17, 2011), http://www.alhambrasource.org/stories/californias-first-asian-majority-legislative-district.

143 Magpantay, *supra* note 48, at 739, 773. This history led to the Department of Justice, in 1999, denying preclearance to a state law seeking to replace ranked choice voting for the school boards. Ultimately, school boards were shifted to not being elected at all, which is why ranked choice voting is not used in the city today.

144 *Id.*

145 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, *supra* note 112.

146 *Black Representation Under Cumulative Voting in IL*, FAIRVOTE, http://archive.fairvote.org/?page=419 (last visited Mar. 14, 2015).

147 *Effectiveness of Fair Representation Voting Systems for Racial Minority Voters,* FAIRVOTE (Jan. 2015), https://d3n8a8pro7vhmx.cloudfront.net/fairvote/pages/127/attachments/original/1449690096/Fair-Representation-Systems-Voting-Rights.pdf?1449690096.

New York, South Dakota, and Texas,[148] and ranked choice voting was previously used at the local level in Ohio and New York and is currently used in California, Maine, Minnesota, and Massachusetts.[149] Overall, more than 100 jurisdictions in the United States currently use fair representation voting to elect their representatives.[150]

Fair representation systems not only improve many measures of minority representation, but they also lead to improved democratic outcomes generally.

i. Improved Minority Representation

First and foremost, for my purposes, the benefit of fair representation systems is that they allow people of color to elect candidates of their choice, where winner-take-all, at-large systems would, and SMD systems may, prevent them from doing so. As FairVote found, "in a study of 96 elections in 62 jurisdictions with cumulative voting or the single vote, black candidates were elected 96 percent of the time and Latino candidates 70 percent of the time when a black or Latino candidate ran."[151]

In New York:

> African Americans, [Latinos], and Asian Americans made up 37 to 47 percent of [the] City's population during the three decades in which it used [ranked choice] voting for its school board elections. The minority groups won 35 percent to 57 percent of these positions, compared to only 5 percent to 25 percent of seats on the city council, which were elected using single-member districts.[152]

During a period when the South elected zero Black representatives to Congress and State legislatures, Illinois's cumulative voting system meant that at all times from 1894 to 1980 there was at least one Black legislator in the Illinois House (and in most years there were many more than that) despite the Black population in the state averaging roughly fourteen percent throughout that period.[153]

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148 Nicholas O. Stephanopoulos, *Our Electoral Exceptionalism*, 80 U. CHI. L. REV. 769, 835 (2013); *Communities in America Currently Using Proportional Voting*, FAIRVOTE, http://archive.fairvote.org/?page=2101 (last visited Mar. 14, 2015).

149 *Id.* at 835.

149 *Fair Representation and the Voting Rights Act: Remedies for Racial Minority Vote Dilution Claims*, *supra* note 112. In addition, many corporations in the US (about ten percent of the S&P 500) use cumulative voting to elect their boards, including AON, Toys 'R' Us, Walgreen's, and Hewlett-Packard. *See also Cumulative Voting—A Commonly Used Proportional Representation Method*, FAIRVOTE, http://archive.fairvote.org/?page=226.

151 *Effectiveness of Fair Representation Voting Systems for Racial Minority Voters*, *supra* note 147. *See also* David Brockington et al., *Minority Representation Under Cumulative and Limited Voting*, 60 J. OF POL. 1108, 1115 (1998); Steven Hill & Rob Richie, *New Means for Political Empowerment in the Asian Pacific American Community*, 11 HARV. J. ASIAN AM. POL'Y REV. 335, 340 (2001) (citing election of Bobby Agee in Chilton County, AL despite being outspent twenty to one by the highest spending candidate).

152 Stephanopoulos, *supra* note 148, at 849 (citations omitted).

153 *See, e.g.*, Campbell Gibson & Kay Jung, *Historical Census Statistics on Population Totals by Race, 1790 to 1990, and by Hispanic Origin, 1970 to 1990, for Large Cities and Other Urban Places in the United States* 50–51 tbl. 14 (U.S. Census Bureau Population Div., Working Paper No. 76, 2005) (listing statistical population information by demographic for large cities in Illinois from 1840 to 1990); Kathryn M. Harris, *Generations of Pride: African American Timeline, A Selected Chronology*, ILL. HIST. PRESERVATION AGENCY, https://www.illinois.gov/ihpa/Research/Pages/GenPrideAfAm.aspx (last visited Nov. 2, 2016) (detailing the chronology of African American presence in Illinois).

Where fair representation systems have been implemented to remedy a Section 2 violation, the system has resulted in communities of color being able to elect their candidates of choice and has improved descriptive representation. This has been shown for the Black, Latino, and Native American communities.[154]

Ranked choice voting (RCV)) provides additional value for racial and ethnic minorities. Because it creates incentives for candidates to reach out to more voters, it tends to result in less racially polarized campaign tactics and more inclusion for racial minority voters. Even in single-winner, winner-take-all elections, ranked choice voting appears to have an impact. For example, the imposition of ranked choice voting in San Francisco and Oakland led to the first Asian American mayor being elected in San Francisco and to the first Asian American—and first female—mayor being elected in Oakland.[155] In San Francisco, of eighteen offices elected by RCV, sixteen are held by people of color—up from nine when RCV was first used in 2004.[156]

The ability of communities of color to elect candidates of their choice in fair representation systems is not limited to groups that are residentially segregated, which, as Nicholas Stephanopoulos has argued, is more equitable because "[s]patially dispersed groups are just as deserving of representation" as segregated ones.[157] This ability also means that all members of a community of color in a jurisdiction can have a say in who is elected to represent that community of color, rather than just those people of color that happen to live in the majority-minority district.

ii. Cross-Racial Coalition Building

As well as improving descriptive representation and allowing communities of color to elect candidates of their choice, fair representation systems have also been shown to foster the construction of cross-racial coalitions among both voters and legislators.[158] This is particularly true for RCV, given that voters have every incentive

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154 FairVote's Amicus Curiae Brief Regarding Proposed Remedial Plans at 17–18, Montes v. City of Yakima, 40 F. Supp. 3d 1377 (E.D. Wash. 2014) (No. 12-3108) (citing Richard Engstrom, Cumulative and Limited Voting: Minority Electoral Opportunities and More, 30 ST. LOUIS U. PUB. L. REV. 97, 125 (2010) (describing the first Latino representative)) (citing Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Texas Communities*, 78 SOC. SCI. Q. 973, 975 (1997) (describing the first Latino and Native American representatives)) (citing Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 272–73 (describing the first Black representative)).

155 *About the Mayor*, CITY & COUNTY OF S.F., http://sfmayor.org/about-mayor (last visited Nov. 18, 2016); Tina Trenkner, *Oakland, Calif. Elects First Female, Asian-American Mayor*, GOVERNING (Mar. 2011), http://www.governing.com/topics/politics/oakland-california-elects-first-female-asian-american-mayor.html. *But see* Troy M. Yoshino, *Still Keeping the Faith: Asian Pacific Americans, Ballot Initiatives, and the Lessons of Negotiated Rulemaking*, 6 ASIAN AM. L. J. 1, 19–20, 22 (1999). Yoshino discussing the fact that in many places the Asian American community will be too small to reach the threshold of exclusion. This is less relevant in Illinois because there are local jurisdictions with an Asian American population much greater than the three percent he writes of.

156 Richard DeLeon & Arend Lijphart, *In Defense of Ranked Choice Voting*, SFGATE (Jan. 22, 2013, 6:49 PM), http://www.sfgate.com/opinion/openforum/article/In-defense-of-ranked-choice-voting-4215299.php.

157 Stephanopoulos, *supra* note 148, at 847, n.3.

158 FairVote's Amicus Curiae Brief, *supra* note 154, at 16 (citing Steven J. Mulroy, *Alternative Ways Out: A Remedial Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L.

to rank candidates outside their own racial group (in addition to selecting their preferred candidate in the number one position). Even when voters in a racial minority are below the threshold of exclusion necessary to elect their most preferred candidate, their second choice vote will be sought after by multiple candidates, possibly from a variety of racial, ethnic, and political backgrounds.

iii. Increased Representation for All Political Minorities

Fair representation systems show huge benefits to racial minorities, but they may also "open up the political process for politically cohesive minorities, not just racial minorities."[159] In addition to the minority political party being able to gain representation, other demographic minorities can also have a better chance at being elected. For example, alternative election systems can lead to greater diversity by gender, age, religion, sexuality, or country of origin, depending on the communities of interest in the jurisdiction.

iv. Reduced Partisan Polarization

Cumulative voting in Illinois historically increased "the variance of the policy views held by both Democratic and Republican members of the state house."[160] This holds not just historically for Illinois but has also been suggested as a way to reduce polarization across the board in modern America: "[i]f one's greatest concern in a . . . legislature is partisan gridlock, multi-member districts could potentially ease the partisan feuding by making each party more ideologically diverse."[161]

v. Improved civic engagement

Fair representation systems can lead to improved civic engagement by communities of color. For example, a study of cumulative voting "found that their elections feature higher turnout, more active campaigning by candidates, greater mobilization by outside groups, and more contested races than either single-member districts or at-large regimes" and "voters worldwide in preferential systems [for example, ranked choice voting] exhibit greater satisfaction with democracy and are more likely to believe their elections are conducted fairly."[162]

REV. 1867, 1903 (1999)) (citing Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. CHI. LEGAL F. 241, 297 (1995)).

159 GUINIER, *supra* note 35, at 71.

160 Stephanopoulos, *supra* note 148, at 855.

161 *Id.* (quoting Greg D. Adams, *Legislative Effects of Single-Member Vs. Multi-Member Districts*, 40 AM. J. POL. SCI. 129, 141–42 (1996); *see also* Gary W. Cox, *Centripetal and Centrifugal Incentives in Electoral Systems*, 34 AM. J. POL. SCI. 903, 927 (1990) ("In multimember districts, cumulation promotes a dispersion of competitors across the ideological spectrum.").

162 Stephanopoulos, *supra* note 148, at 851–52.

vi. Removal of Race Conscious Districting

While many racial justice advocates do not accept that redistricting should avoid being race conscious, there are skeptics in the community and on the Supreme Court[163] of an over-zealous focus on race in redistricting[164] and in remedying past discrimination generally.[165] For these critics, fair representation systems may be more acceptable than SMD systems because they "do not compel any consideration of race in their design or operation. They promise levels of minority representation comparable to those produced by Section 2, but without any of the 'dividing' and 'segregating' that are sometimes linked to the provision."[166]

IV. APPLYING THE THEORY: THREE CASE STUDIES

Armed with the knowledge that I could help my community by improving minority representation, in particular through the use of fair representation systems, I set out to find communities to work with on these important issues.

The overwhelming lesson from these efforts was that creating change at the local level is tough but possible. Some of the constraints include that there are limited resources to support local organizing efforts; the central authorities are powerful and able to control, or even manipulate, the ballot initiative process, and litigation is costly and time consuming. In this section, I present three stories from communities that I have worked with on minority representation issues. None can be considered a complete success, but all show that there is some hope for positive change if attorneys and community members work hard together toward common goals.

A. Joliet…The Dice Were Loaded from the Start

Joliet is the fourth largest city in Illinois, with a population of almost one hundred and fifty thousand people.[167] The heart of Joliet is about an hour's train ride southwest of downtown Chicago. Joliet has seen a large increase in its minority population from 1990 to 2010. As of the 2010 Census, Joliet was approximately fifty-three percent white, twenty-eight percent Latino, sixteen percent Black, and two percent Asian American.[168] It had eight council members, of which two were Black,

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163 *See* Parents Involved in Cmty. Sch. v. Seattle Schs. Dist. No. 1, 551 U.S. 701, 748 (2007) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

164 *See* Shaw v. Hunt, 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996); Shaw v. Reno, 509 U.S. 630 (1993).

165 Fisher v. Univ. of Texas at Austin, 133 S. Ct. 2411 (2013).

166 Holder v. Hall, 512 U.S. 874, 908–12 (1994); Stephanopoulos, *supra* note 148, at 849.

167 *Quick Facts: Joliet City, Illinois*, U.S. CENSUS BUREAU, http://www.census.gov/quickfacts/table/PST045215/1738570 (last visited Nov. 18, 2016).

168 *Voting Age Population by Citizenship and Race (CVAP),* U.S. CENSUS BUREAU, https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html (last updated Feb. 10, 2016) (All numbers reported in this section are calculated using the following Census demographics: "white:" non-Hispanic white; "Latino:" Hispanic or Latino origin; "Black:" non-Hispanic Black plus non-Hispanic Black+White; "Asian American:" non-Hispanic Asian plus non-Hispanic

and six were non-Hispanic white. The city council was chosen from five single-member districts (of which two were majority-minority) and three council members were elected at-large. I have been privileged to work with the Concerned Citizens of Joliet (CCJ) and Jorge Sanchez of the Mexican American Legal Defense and Educational Fund. Jorge and I have attended multiple local meetings, discussions, education sessions, church events, and fairs to discuss redistricting with the local community. By 2014, Joliet was ready for change.

The CCJ is a multi-generational, multi-ethnic, multi-religious organization that focuses on helping all the people of Joliet—not just the wealthy elites. CCJ worked effectively as a diverse coalition to prevent a for-profit immigration detention prison from being erected in Joliet. High from their victory on this important issue, the group set out to tackle a new issue. The CCJ decided that they could not sufficiently hold their city council accountable for its policy positions and suspected that the redistricting system was to blame.

CCJ sensed that the redistricting system was unfair, with almost all of the city council members living in the tiny (and comparatively wealthy) "Cathedral District", leaving the south, east, and west sides all without a council member close to them. This resulted, they believed, in an unequal distribution of resources (trash and snow are quickly cleaned up in the center of town, but left for days on the outskirts; the center of town has its parks upgraded while the edge of town has chain link fences and broken playground equipment); and there was a lack of awareness of the concerns of the outlying areas, in particular those that pertain to the Black and Latino communities.

The CCJ developed a campaign "Joliet for 8 districts," seeking to place an initiative on the ballot asking the city to vote to have eight single-member districts. In 2016, the CCJ submitted their signatures for this proposition for the third time, and for a third time were blocked from the ballot. There have been a series of roadblocks to their community action, well beyond the usual struggles of a meagerly funded volunteer group seeking to create change.

One initial challenge I faced as a practitioner was that the CCJ had already decided that they wanted eight SMDs. I had wanted to articulate the benefits of ranked choice voting and MMDs (at least for the three already at-large seats), but the community found that option to be foreign to its experiences, and the community had already decided that having council members be geographically spread across the town was of prime importance to them. This experience led me to refine the ways I present ranked choice voting discussions to community groups and helped me to understand that there is more to representation than just descriptive and substantive issues—spatial patterns (of communities and candidates) are intertwined with our beliefs about effective representation.

Asian+White. Other races and ethnicities make up the remainder of the population, but are not reported in every case. American Community Survey 2010–14).

i. The Ballot Initiative Strategy

To place an initiative on the ballot in Illinois, a home rule county,[169] a group must gather the number of signatures equal to eight percent of the vote in that jurisdiction for governor in the most recent election. In 2014, when the CCJ first gathered signatures, the local authorities were not able to determine how many signatures they actually required because the gubernatorial vote is collected at the precinct and county level, and the city crosses two counties and splits some twenty precincts.

A local citizen—with connections to the incumbent council members—challenged the signatures gathered by the CCJ in 2014, resulting in the challenger, the CCJ (and Jorge and I with them), and the authorities holding a week of hearings and signature review sessions to determine whether the CCJ had met the statutory signature requirement. The most farcical, and quite possibly unconstitutional, aspect of the whole week was that the local review board (staffed, by Illinois statute, by the mayor, a current city council member, and the city attorney)[170] was informed that we would not be told how many signatures needed to be gathered until the number of signatures had been counted. Somewhat unsurprisingly, it turned out, a week later, that the number of signatures needed was just a few hundred more than those that had been validated. In addition to this, another questionable legal decision was made by the city council member on the local review board: he refused to recuse himself despite the fact he was elected from one of the three at-large positions and therefore subject to be removed if the ballot initiative went ahead and was approved.

Aside from the review board process, the room where signatures were validated quickly degenerated into a power play, as the county staff members claimed that people who had moved away from the address where they signed the petition could not be counted as a valid signature. The Illinois statutes are unclear on this point, so it was left to the local review board to decide how to interpret the law, resulting—again unsurprisingly—with those signatures being considered invalid.

One of the volunteer signature gatherers with the CCJ had toured a local short-term housing facility, Evergreen Terrace, to gather hundreds of signatures. Another CCJ member was a pastor to this community, and the residents there represent exactly the people that CCJ was trying to enfranchise (poor, predominantly minority, often sick and/or struggling with homelessness). Many of these residents of Evergreen Terrace had moved since signing the petition (the signature gathering had been going for around nine months by the time the signatures were reviewed). The review board decision meant that hundreds of signatures from these eligible voters were invalidated.

At the lowest ebb in the signature review week, I sat with one of the Latino leaders of the CCJ as she listened to the staff laugh at the "hard to pronounce names" of her neighbors, get confused as to whether someone was a duplicate signatory

169 ILL. CONST. art. VII § 6(a) (All towns over 25,000 are automatically home rule counties.).
170 10 ILCS § 10–9(3).

because the Latino "names were so similar," and joke about how they had not bothered to learn Spanish in school.

After this unfair and, frankly, humiliating process, the CCJ pulled themselves back together to try to put the issue on the next ballot, in the local elections for 2015, but with the bulk of signature gathering occurring during the freezing winter months, they were unable to reach the target number of signatures.

In August 2016, the CCJ again submitted nearly four thousand signatures. They still did not know exactly how many signatures were needed because one of the two counties that Joliet sits in refused to respond to multiple letters requesting the target number. The estimate in the previous hearing was around 2,800.

The current mayor of Joliet was previously a council member and he had signed the 2014 petition to place the question on the ballot—he believed the people should get to vote on the question. Somewhat unsurprisingly, the petition was challenged (this time by the county clerk herself), and despite excellent pro bono representation from a large Chicago firm, the CCJ again lost their bid to place the question on the ballot.

In response to the outcry over the third petition being rejected, the Mayor appointed a Latina to the City Council. The person has no connection to CCJ or the communities they represent, and so it remains to be seen whether this will be a step forward or backward for minority representation in Joliet.

ii. Litigation

The demographics have changed in Joliet since 2010. In particular, many of the Latino community has turned 18 or gained citizenship, such that even in 2015, there was a large enough Latino and Black citizen voting age population that if they continued to vote together to elect candidates of their choice, three majority-minority districts could be drawn. There is no doubt that with updated census data, this figure will rise.

It is likely that the CCJ will have a viable Section 2 case if the Latina that was appointed to the Council is not elected to her position (and in particular if she is not elected with evidence of racially polarized voting), but with VRA litigation being so complex, expensive, and time intensive, it is unlikely that the VRA will provide a change for the CCJ members before the next census is taken. The CCJ will need to get the resources for political science experts, discovery, and court fees to show that if the city were divided into eight districts, three would be majority-minority (without race predominating in the drawing of the districts).

It is quite possible that by the time the next full census results are released in 2021, Joliet will be majority-minority—perhaps even using the Citizen Voting Age Population (CVAP). This could result in a bizarre reversal of incentives by the majority white council members. For white voters to be represented at close to proportional level in a majority-minority town, the city council would favor removing the at-large seats. If it came to this, at least the CCJ would have their preference for council members who live closer to their constituents realized, even if it takes nefarious reasoning to get there.

B. An Accidental Win in Blue Island

Blue Island is a small city immediately south of the border of Chicago. It has a population of just over twenty-three thousand, of which twenty-one percent are white, forty-seven percent are Latino, and thirty percent are Black.[171] When CVAP is used, the white population grows to twenty-nine percent, the Black population grows to thirty-eight percent, while the Latino population drops to just thirty percent. Blue Island, like Chicago to its north, is still fairly segregated, particularly for the Black community.

i. Pushing for Public Hearings

In 2015, when we[172] met with the Citizens in Action Serving All (CASA) group in Blue Island, there were seven two-member districts constituting their council. Of the fourteen members, two were Latino and two Black. There was no majority Latino district and only two majority Black districts.

We spent a few weekends sitting down with local community members, showing them the mapping capabilities of Maptitude for Redistricting and discussing where they would prefer the district lines to be drawn. We had to consciously remind the excited rooms that it was not likely that we would be able to get the Council to adopt the plan we wanted, but that knowing what the districts are and could be would be helpful in itself.

As we suspected, we were able to draw a plan using the most recent CVAP data, with three majority Black districts and one majority Latino district. We then needed a way to convince the council (or a court) to adopt a new plan. Blue Island does not have home rule, so it was not possible to use a ballot initiative to create change. Strangely, Blue Island had not redrawn its city council districts since 1996, and as two census counts had come and gone, the districts were in violation of the one person, one vote (OPOV) requirement of the federal Constitution.[173] We were able to use this as leverage to ask the council to hold public hearings to redraw the seven districts, and the CASA group advocated for the plan with four majority-minority districts.

After two months of Council hearings and public hearings of the Council's Redistricting Subcommittee to discuss possible district plans, the City Council surprised no one by voting to adopt its own district plan. The major difference between the CASA plan and the city council plan was that the latter protected incumbents, while the former was drawn without regard for current council members. CASA opposed the protection of incumbents at the public hearings, but the council opted to protect its self-interest in its vote.

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171 *Voting Age Population by Citizenship and Race (CVAP)*, *supra* note 168. All numbers are reported for non-Hispanic white, Latino, non-Hispanic Black plus non-Hispanic Black+White. Other races and ethnicities make up the remainder of the population, but are not reported here. American Community Survey 2010–2014 https://www.census.gov/rdo/data/voting_age_population_by_citizenship_and_race_cvap.html.

172 My colleague Annabelle Harless and I worked with CASA together throughout the work in Blue Island.

173 Avery v. Midland Cty., 390 U.S. 474 (1968).

By good fortune (and the not-unexpected increase in the proportion of Blue Island that is Black or Latino), the new CVAP data (the 2011–15 estimates) was released by the Census Bureau a few days before the council's final vote. CASA was able to tell the council before their vote that even though they disliked that the plan protected incumbents, they were pleased that it too had three majority Black and one majority Latino district. The next election in Blue Island will now include four of seven districts with a majority of people of color. Hopefully the communities of color can respond to this good news by electing their preferred candidates across the city.

ii. Online Public Redistricting

Another notable aspect of our work in Blue Island was that we decided to use a free trial of a service called iRedistrict,[174] to make map drawing available to the community online. iRedistrict's main power as a piece of software is its ability to draw random simulations of districts. We were using it for a slightly different purpose: to allow the public to make changes to the old redistricting plan, or the CASA plan, or to create their own new plan, and to see the demographic effects of such changes in real time.

In addition to using iRedistrict, we placed Keyhole Markup Language (KMZ) files and descriptions of data onto the Google Maps Engine, and thereby made the statistics (and boundaries) of current, and various proposed plans, available to anyone with a network connection (we also displayed these tools at the Redistricting Committee Public Hearings).

The community was reluctant to embrace iRedistrict, likely because the editing aspect of the software had sufficient bugs as to make the map drawing process quite frustrating for the casual user. In total, we only had seven users sign up to use the online map drawing software.

To our surprise though, the Google Maps Engine districts and statistics were viewed over one thousand times and used by local media in their reporting of the case. Each public hearing had around thirty, and at times more than fifty, people in attendance (largely thanks to letter box pamphlets distributed by Mark and Kathy Kuehner of CASA). I believe we showed that there is an interest, even in a small community considering very local issues, in using online tools to better understand local government, and it is likely that this interest can be harnessed and enlarged through online organizing tools.

Overall, Blue Island was a success to the extent that CASA and the community will now have districts that are constitutional and will have the possibility of electing candidates of choice of the minority community to a majority of the council seats. Blue Island also showed the utility of online redistricting tools in community organizing

174 *See iRedistric®: Smart Redistricting Software for Territory Mapping with Powerful Optimization,* ZILLION INFO, http://zillioninfo.com/product/iRedistrict (last visited Nov. 18, 2016) (iRedistrict® is an award-winning redistricting software with powerful optimization algorithms, intuitive user controls, easy editing interface, and customizable reporting. It received two National Science Foundation (NSF) SBIR Awards in 2013 and 2014.).

around this issue. We were not able to prevent council members from focusing on their own self-interest in their vote for new districts, but very few jurisdictions are ever able to achieve such a feat.

C. Crete-Monee School Board Ten Years On

In our research into local redistricting in Illinois, we tried to find success stories—places where minority representation had increased and the community was in a better place because of it. We reviewed all the prior Section 2 cases from Illinois and thought that the Crete-Monee School District case looked particularly promising.

Crete-Monee School District had been sued in the late 1980s[175] over a possible Section 2 violation. By the mid-1990s, the case eventually resulted in a consent decree, and as a result the board started electing Black representatives to the school board.[176] As of March 2017, the school board has three Black and four white members, and the president is an African American.[177]

We set up a meeting with Dr. Hall, the president of the school board, to find out all the ways that the diverse board was helping the community. Dr. Hall agreed that the diverse board was better able to ensure racial equity in the school policies and procedures, and the district report card suggests the district is at or just below average on most statewide metrics,[178] but Dr. Hall lamented that the diverse board had not resulted in better racial relations in the community. In 2015, the district successfully defended against a challenge to part of the consent decree, and not-at-all subtle racial overtones were used in local school board election campaigns (one campaign sought to "change the face" of the school board).

V. THE ROAD AHEAD

As long as there are communities willing to push for change to local redistricting practices, we practitioners must make ourselves aware of the best possible strategies and tactics we can use to help communities seek better outcomes.

A. Federal Litigation

Federal Section 2 litigation can be pursued to remedy the most egregious cases of minority vote dilution, where the minority population in question is geographically concentrated.

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175 Palmer v. Bd. of Educ., 46 F.3d 682, 683 (7th Cir. 1995).

176 *Consent Decree – Agreed Order 08/13/1998*, CRETE-MONEE SCHOOL DISTRICT 201-U, http://www.cm201u.org/index.aspx?nid=4146.

177 *See Crete-Monee School District 201-U Board of Education*, CRETE-MONEE SCHOOL DISTRICT 201-U, http://www.cm201u.org/index.aspx?NID=139 (last visited March 6, 2017).

178 *See, e.g., Crete-Monee CUSD 201 U.* ILL. REPORT CARD (2015–2016), http://illinoisreportcard.com/District.aspx?districtId=56099201U26.

B. Section 2 Remedies

A jurisdiction found to violate Section 2 is able to choose how it will remedy the violation[179] and, with the approval of the court, can then implement the new system. In many cases, jurisdictions choose to adopt SMDs, but not in every case. Recently, a defendant in Port Chester, New York, was able to implement cumulative voting to remedy a Section 2 violation, over the objection of the plaintiff.[180] Many jurisdictions in Alabama that were forced to change from at-large elections after the long running *Dillard* litigation chose to adopt cumulative or single voting in the 1980s and 1990s.[181]

Thus far, no jurisdiction has chosen to adopt ranked choice voting in response to a Section 2 violation. However, it was requested (and approved by the court) as a remedy to a potential Military and Overseas Voter Empowerment Act (MOVE Act) violation in Alabama in 2013,[182] and it was used for overseas voters in a similar way in four additional states in 2014 (Arkansas, Louisiana, Mississippi, and South Carolina).[183]

Pam Karlan has argued since 1989 that Section 2 remedies can be innovative and non-traditional.[184] She explains:

> Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies . . . . Congress squarely stated that a court faced with a violation of Section 2 must 'exercise its traditional equitable powers so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.' A court faced with a violation 'cannot authorize a remedy . . . that will not with certitude completely remedy the Section 2 violation.'[185]

Courts have rejected remedies that have been proposed by defendants and explained how options provided by the plaintiff will remedy the section violation better,[186] but ultimately the defendant is able to determine the remedy for a Section 2 violation. The remedies in Alabama included not only cumulative voting but also an increase in the number of commissioners from four to seven and the institution of a system whereby the commission chairmanship would rotate between commissioners,

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179 Harper v. City of Chicago Heights, 223 F.3d 593, 599–600 (7th Cir. 2000).
180 United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 448–49 (S.D.N.Y. 2010).
181 Richard H. Pildes & Kristen A. Donoghue, *Cumulative Voting in the United States,* 1995 U. CHI. LEGAL F. 241, 263–66 (1995).
182 United States v. Alabama, 778 F.3d 926 (11th Cir. 2015).
183 Dania N. Korkor, *Overseas Voters from 5 States to Use Ranked Choice Voting Ballots in 2014 Congressional Election*, FAIRVOTE BLOG (Apr. 17, 2014), http://www.fairvote.org/research-and-analysis/blog/overseas-voters-from-5-states-to-use-ranked-choice-voting-ballots-in-2014-congressional-election/.
184 Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.- C.L. L. REV. 173, 218–19 (1989).
185 *Id.* at 219.
186 *See* Dillard v. Crenshaw Cty., 831 F.2d 246, 250–253 (11th Cir. 1987).

allowing a Black commissioner to occasionally be chairman, if one had been elected.[187] These provisions were implemented upon the recommendation of a "special master," a magistrate with the federal court. The Supreme Court's finding in *Holder v. Hall* has now limited the ability of a court to impose a remedy requiring an increase in the number of districts in an election jurisdiction in response to a Section 2 violation,[188] but there has been no limitation on the type of election system that can be used to remedy a Section 2 violation.

The most promising avenue to use to argue for fair representation systems comes from the myriad of cases that have dealt with the question of imposing a remedy to a statewide redistricting violation. In these cases, defendants have argued that particular proposed remedial plans do not fully remedy the constitutional or statutory error. The remedial phase of redistricting cases is within the court's equitable jurisdiction, and since 1972 the Supreme Court has recognized that the "scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies."[189] Though broad, "[t]he remedial powers of an equity court . . . are not unlimited."[190] It is the court's duty to navigate between seeking a remedy to an unconstitutional redistricting plan and minimizing the disturbance of legitimate state policies.[191]

There are cases where courts have explicitly overruled the imposition of remedies by the legislature, and these cases should be used to push for fair representation remedies. In one case, the reason the Court chose to draw its own plan was because the Court found that "[i]n its record of doggedly clinging to an obviously unconstitutional plan, the Legislature has left us no basis for believing that, given yet another chance, it would produce a constitutional plan."[192] In that case, the Court explained that it could not "turn a blind eye on the record of the Legislature."[193]

In addition to the difficulties at the remedies phase, additional difficulties of federal Section 2 litigation include:[194]

- "[v]oting rights suits are actually among the most time- and labor-intensive of all actions brought before the federal courts;"[195]
- attorneys' fees do not necessarily follow from a victory and the cost of litigating a Section 2 case is extremely high; and

187 Dillard v. Chilton Cty. Comm'n, 495 F.3d 1324, 1327 (11th Cir. 2007).
188 Holder v. Hall, 512 U.S. 874 (1994).
189 Sixty-Seventh Minn. State Senate v. Beens, 406 U.S. 187, 191 (1972) (citing Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971)).
190 *Id.* (citing Whitcomb v. Chavis, 403 U.S. 124, 199 (1971)).
191 *Id.* at 202.
192 Hays v. State of La., 936 F. Supp. 360, 372 (W.D. La. 1996).
193 *Id.*
194 *See* Paige Epstein, *Addressing Minority Vote Dilution Through State Voting Rights Acts* (U. Chi. Pub. Law & Legal Theory, Working Paper No. 474, 2014), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2422915; *see also* Nicholas O. Stephanopoulos, *The South After Shelby County*, 2013 SUP. CT. REV. 55 (2013).
195 Stephanopoulos, *supra* note 148, at 850.

- the defendant is allowed to choose how to remedy a violation and so can implement a new election system that meets a bare minimum requirement of representation of the minority population.

C. State Voting Rights Acts

Given the potential difficulties associated with federal Section 2 litigation, implementing a state voting rights act (and then suing in state courts) may be a better alternative in some states.

California has instituted a remedy to alleviate some of the problems of Section 2 litigation by enacting a California Voting Rights Act (CVRA) that makes it cheaper and easier to prove that a local government's election system impermissibly dilutes the votes of the minority community. The CVRA does not require fair representation remedies, but such systems could be imposed as a remedy in future state acts.[196]

An additional benefit of developing a state level jurisprudence on minority vote dilution is that it can fill the gaps left in the current Section 2 jurisprudence. For example, the *Gingles* criteria for Section 2 liability are based on the assumption that SMDs are the appropriate benchmark for minority vote dilution when, in fact, the SMD requirement effectively overlooks the dilution of non-compact minority populations. As a result, a place where a crossover district can be drawn (districts where a racial minority votes as a bloc with a small amount of support from the white majority, resulting in the candidate of choice of the racial minority being elected) will not establish liability under Section 2 and so cannot be required by federal law.

State Voting Rights Acts can be tailored to local needs, but in all cases if they include provisions that explicitly allow for fair representation systems to be imposed in response to a violation, and if they make the proving of a violation less burdensome than the federal VRA, then they will be a useful tool in the fight for improved minority representation in local government.

CONCLUSION

Striving for fair representation systems in local government is an important way to promote minority representation, and thereby fulfill the promise of our democracy. I encourage all practitioners to use the ideas and arguments in this paper to improve local government across the country.

196 For example, Santa Clarita chose to adopt cumulative voting as a settlement to a CVRA lawsuit. Drew Spencer, "California City of 180,000 to Provide Cumulative Voting Rights" FairVote Press Release (March 12, 2014), http://www.fairvote.org/newsletters-media/e-newsletters/california-city-of-180000-to-provide-cumulative-voting-rights-/ (last visited March 15, 2015). Note, though, that jurisdictions found liable under Section 2 VRA can also choose to adopt cumulative voting, but they cannot be required to do so.

Partisan Gerrymandering and the Efficiency Gap

Nicholas O. Stephanopoulos† *& Eric M. McGhee*††

The usual legal story about partisan gerrymandering is relentlessly pessimistic. The courts did not even recognize the cause of action until the 1980s; they have never struck down a district plan on this basis; and four sitting justices want to vacate the field altogether. The Supreme Court's most recent gerrymandering decision, however, is the most encouraging development in this area in a generation. Several justices expressed interest in the concept of partisan symmetry—the idea that a plan should treat the major parties symmetrically in terms of the conversion of votes to seats—and suggested that it could be shaped into a legal test.

In this Article, we take the justices at their word. First, we introduce a new measure of partisan symmetry: the efficiency gap. It represents the difference between the parties' respective wasted votes in an election, divided by the total number of votes cast. It captures, in a single tidy number, all of the packing and cracking decisions that go into a district plan. It also is superior to the metric of gerrymandering, partisan bias, that litigants and scholars have used until now. Partisan bias can be calculated only by shifting votes to simulate a hypothetical tied election. The efficiency gap eliminates the need for such counterfactual analysis.

Second, we compute the efficiency gap for congressional and state house plans between 1972 and 2012. Over this period as a whole, the typical plan was fairly balanced and neither party enjoyed a systematic advantage. But in recent years—and peaking in the 2012 election—plans have exhibited steadily larger and more pro-Republican gaps. In fact, the plans in effect today are the most extreme gerrymanders in modern history. And what is more, several are likely to remain *extreme for the remainder of the decade, as indicated by our sensitivity testing.*

Finally, we explain how the efficiency gap could be converted into doctrine. We propose setting thresholds above which plans would be presumptively unconstitutional: two seats for congressional plans and 8 percent for state house plans, but only if the plans probably will stay unbalanced for the remainder of the cycle. Plans with gaps above these thresholds would be unlawful unless states could show that the gaps either resulted from the consistent application of legitimate policies or were inevitable due to the states' political geography. This approach would

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This Article builds on our earlier legal and political science work on redistricting. It is part of a larger project aimed at grasping the consequences—and improving the law—of this important and intricate activity. For helpful comments, we are grateful to Bruce Cain, Jowei Chen, Chris Elmendorf, Andrew Gelman, Michael Gilbert, Ruth Greenwood, Bernie Grofman, Rick Hasen, Benjamin Highton, Simon Jackman, Vlad Kogan, Justin Levitt, and Rick Pildes. We are pleased as well to acknowledge the support of the Robert Helman Law and Public Policy Fund at The University of Chicago Law School.

neatly slice the Gordian knot the Court has tied for itself, explicitly replying to the Court's "unanswerable question" of "[h]ow much political . . . effect is too much."

INTRODUCTION

Professor Cass Sunstein once quipped that the nondelegation doctrine (which purports to limit congressional delegations of legislative authority to agencies) "has had one good year, and 211 bad ones."[1] According to the conventional wisdom, the cause of action for partisan gerrymandering[2] has not had even this one good year. The claim was not recognized until 1986, when the Supreme Court ruled that gerrymandering is justiciable but still upheld a pair of Indiana district plans that used every trick in the book to disadvantage the state's Democrats.[3] Since 1986, not

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1 Cass R. Sunstein, *Nondelegation Canons*, 67 U Chi L Rev 315, 322 (2000).

2 We note at the outset that, consistent with the metric we introduce in this Article, whenever we refer to "gerrymandering," we mean district plans whose electoral consequences are sufficiently asymmetric. We do *not* mean plans that were devised with partisan *intent*. Our conception of gerrymandering is strictly effects-based and (unlike other common conceptions) does not relate to plans' motivations or objectives. As we explain in Part I.B, the Court recently has created an opening for this sort of effects-based theory, while explicitly rejecting intent-based claims.

3 See *Davis v Bandemer*, 478 US 109, 115, 118–43 (1986) (upholding legislative plans that created single-, double-, and triple-member districts resulting in, for example,

a single plaintiff has managed to persuade a court to strike down a plan on this basis.[4] By our count, claimants' record over this generation-long period is roughly zero wins and fifty losses.[5] And adding insult to injury, a majority of the Court rejected almost every conceivable test for gerrymandering in 2004, and a plurality would have extricated the judiciary from this domain altogether.[6]

But the gloomy conventional wisdom is not quite right. In the Court's most recent gerrymandering case, *League of United Latin American Citizens v Perry*[7] ("LULAC"), several justices expressed surprising enthusiasm for the concept of "partisan symmetry"—the idea, that is, that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats. Justice John Paul Stevens raved that symmetry is "widely accepted by scholars as providing a measure of partisan fairness in electoral systems."[8] Justice David Souter noted that "[i]nterest in exploring this notion is evident."[9] And, most remarkably of all, Justice Anthony Kennedy declared that he did not "discount[ ] [symmetry's] utility in redistricting planning and litigation."[10] These comments, overlooked by almost all scholars and litigants in the aftermath of *LULAC*,[11] are the most

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Democrats receiving 51.9 percent of the vote but only 43 percent of the seats in Indiana's House of Representatives).

4 See *Vieth v Jubelirer*, 541 US 267, 279–80 (2004) (Scalia) (plurality) ("[I]n *all* of the cases we are aware of involving [redistricting], relief was denied."). See also Part I.C.

5 This count is different from the one we mention in Part III.C, because there we consider only challenges to the congressional and state house plans in our study.

6 See *Vieth*, 541 US at 277–306 (Scalia) (plurality).

7 548 US 399 (2006).

8 Id at 466 (Stevens concurring in part and dissenting in part).

9 Id at 483 (Souter concurring in part and dissenting in part).

10 Id at 420 (Kennedy) (plurality).

11 To our knowledge, only a handful of academics have seized on this language, most notably the political scientists, Professors Bernard Grofman and Gary King, who familiarized the Court with partisan symmetry in an important amicus brief in *LULAC*. See Brief of Amici Curiae Professors Gary King, Bernard Grofman, Andrew Gelman, and Jonathan N. Katz, in Support of Neither Party, *League of United Latin American Citizens v Perry*, No 05-204, *3–9 (US filed Jan 10, 2006) (available on Westlaw at 2006 WL 53994) ("King et al Brief"); Bernard Grofman and Gary King, *The Future of Partisan Symmetry as a Judicial Test for Partisan Gerrymandering after* LULAC v. Perry, 6 Election L J 1, 4 (2007) ("A majority of Justices now appear to endorse our view that the measurement of partisan symmetry can be used in . . . partisan gerrymandering claims."). See also Laughlin McDonald, *The Looming 2010 Census: A Proposed Judicially Manageable Standard and Other Reform Options for Partisan Gerrymandering*, 46 Harv J Legis 243, 265 (2009); Easha Anand, *Finding a Path through the Political Thicket: In Defense of Partisan Gerrymandering's Justiciability*, 102 Cal L Rev 917, 945–46 (2014). As we discuss

promising development in this area in decades. They provide the motivation for our effort, in this Article, to introduce a new measure of partisan symmetry and to show how it could be fashioned into a workable judicial standard.

We dub our new measure the "efficiency gap."[12] It represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail. Large numbers of votes commonly are cast for losing candidates as a result of the time-honored gerrymandering technique of "cracking." Likewise, excessive votes often are cast for winning candidates thanks to the equally age-old mechanism of "packing."[13] The efficiency gap essentially aggregates all of a district plan's cracking and packing choices into a single, tidy number.

An example should illustrate the intuitiveness of our measure. Take a state with 10 districts of 100 voters each, in which Party A wins 55 percent of the statewide vote (that is, 550 votes). Assume also that Party A wins 70 votes in districts 1–3, 54 votes in districts 4–8, and 35 votes in districts 9–10, and that the remaining votes are won by Party B. Then Party A wastes 20 votes in districts 1–3, 4 votes in districts 4–8, and 35 votes in districts 9–10. Similarly, Party B wastes 30 votes in districts 1–3, 46 votes in districts 4–8, and 15 votes in districts 9–10. In sum, Party A wastes 150 votes and Party B wastes 350 votes.[14] The difference between the parties' wasted votes is 200, which when divided by 1,000 total votes produces an efficiency gap of 20 percent. Algebraically, this means that Party A wins 20 percent (or 2) more seats than it would have had the parties wasted equal numbers of votes.

In our view, the efficiency gap is superior to the measure of partisan symmetry—*partisan bias*—that the Court considered in

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below, no plaintiffs since *LULAC* have argued for the adoption of a partisan symmetry test. See Part I.C.

12 In the political science article in which he previously discussed the efficiency gap, McGhee referred to it as "relative wasted votes." Eric McGhee, *Measuring Partisan Bias in Single-Member District Electoral Systems*, 39 Legis Stud Q 55, 68–69 (2014).

13 For a discussion of these terms, see *Vieth*, 541 US at 286 n 7 (2004).

14 All of these wasted vote figures are per district. For the sake of simplicity, we also assume that 50 votes are needed to win a district, not 51. Using 51 votes as the threshold instead, the efficiency gap is 20.6 percent in favor of Party A. See Part II.A (going through this calculation in greater detail in Figure 1).

LULAC.[15] (Partisan bias refers to the divergence in the share of seats that each party would win given the same share, typically 50 percent, of the statewide vote.[16]) The crucial problem with partisan bias is that it is calculated using a hypothetical election result rather than the actual election outcome. To determine how many seats a party would win if it received 50 percent of the statewide vote, the party's actual vote shares in each district are *shifted* by the difference between 50 percent and the party's actual statewide vote share. Above, for example, Party A's vote shares in each district would be reduced by 5 percent (since it won 55 percent of the statewide vote), while Party B's vote shares would be increased by 5 percent.

This shifting is troubling for several reasons. First, it relies on what is known as the "uniform swing assumption," the premise that vote switchers are present in equal numbers in each district.[17] Given the clustering that characterizes modern residential patterns,[18] this assumption is often inaccurate. Second, it is fanciful in many cases to consider what might happen if the parties' statewide vote shares were both 50 percent (let alone if they *flipped*, as another common formulation of partisan bias supposes).[19] In states like Massachusetts or Utah, shifts of this magnitude are so improbable that they yield useless results.[20] And third, even in more competitive states, shifting can give rise to odd conclusions. Above, for instance, Party A would lose 7 out of 10 districts if its vote share in each district swung uniformly downward by 5 percent. This means the plan has a partisan bias of 20 percent *against* Party A—even though Party A won 8 of the 10 districts in the election that actually occurred.

Turning from the abstract to the concrete, what efficiency gaps have current and historical district plans exhibited? We

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15 See *LULAC*, 548 US at 464–68 (Stevens concurring in part and dissenting in part) (discussing partisan bias).

16 See id at 466 (Stevens concurring in part and dissenting in part).

17 See Part II.C.

18 See Nicholas O. Stephanopoulos, *Spatial Diversity*, 125 Harv L Rev 1903, 1915 (2012) (discussing Tobler's Law, which states that clustering is an almost universal geographic phenomenon).

19 See Grofman and King, 6 Election L J at 8 (cited in note 11) ("[I]f a party is able to muster a certain fraction of votes, then it should get the same number of seats as the other party would if that party had received the same voter support.") (emphasis omitted).

20 Consider, for example, Boris Shor and Nolan McCarty, *The Ideological Mapping of American Legislatures*, 105 Am Polit Sci Rev 530, 544 (2011) (suggesting that ideologically polarized states may not be likely to have significant vote share shifts between election cycles).

computed the gaps for all states with at least eight congressional districts, and all state house plans for which results were available, for all elections from 1972 to 2012.[21] This represents the most comprehensive dataset ever assembled to study gerrymandering in the modern era.[22] We found, first, that both the congressional and the state house distributions had median efficiency gaps of close to zero and were roughly symmetric in shape. Contrary to claims that Republicans benefit from redistricting because of their more efficient spatial allocation,[23] the typical plan in recent decades has not been notably skewed in either party's favor. Second, however, we also documented an alarming rise in the efficiency gap in the 2012 election. At the congressional level, the average plan had an absolute gap of 0.94 seats in the 1970s and 1980s, 1.09 seats in the 1990s and 2000s, and *1.58* seats in 2012. At the state house level, the average plan had an absolute gap of 4.76 percent in the 1970s and 1980s, 5.10 percent in the 1990s and 2000s, and *6.07 percent* in 2012.[24] The severity of today's gerrymandering is therefore unprecedented in modern times.

Third, we decomposed the data into a series of charts showing, for each decade, each plan's *average* efficiency gap as well as how the gap varied from election to election. (For current plans, we illustrate how the gap would change given shifts in voter sentiment derived from historical data.) These charts confirm the account of the efficiency gap centering around zero overall but rising rapidly in recent years. They also reveal that many plans' gaps vary substantially over the plans' lifetimes. In many cases, in fact, a plan whose average gap favors one party will feature a gap favoring the *other* party at some point during the decade. Lastly, the charts make it possible, for the first time, to identify gerrymanders that are both severe *and* entrenched. In

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[21] We use "state house plans" to refer to plans for all lower houses of state legislatures.

[22] For noteworthy examples of works studying gerrymandering in earlier periods, see generally Gary W. Cox and Jonathan N. Katz, *Elbridge Gerry's Salamander: The Electoral Consequences of the Reapportionment Revolution* (Cambridge 2002); Andrew Gelman and Gary King, *Enhancing Democracy through Legislative Redistricting*, 88 Am Polit Sci Rev 541 (1994); Gary King and Robert X. Browning, *Democratic Representation and Partisan Bias in Congressional Elections*, 81 Am Polit Sci Rev 1251 (1987).

[23] See, for example, Jowei Chen and Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Q J Polit Sci 239, 241 (2013).

[24] These figures all are absolute values. We use raw seats for Congress and seat shares for state houses throughout the Article, for reasons detailed below. See Part III.A.

the current cycle, for example, the Florida, Ohio, Pennsylvania, and Virginia congressional plans have gaps of at least two seats that are unlikely to dissipate given plausible changes in voters' preferences. Likewise, the Idaho, Indiana, Kansas, Massachusetts, Michigan, Missouri, North Carolina, Ohio, Oklahoma, Rhode Island, Virginia, Wisconsin, and Wyoming state house plans have gaps of at least 8 percent that also are unlikely to fade away in future elections.

The efficiency gap, then, is both superior to partisan bias and easily calculable across states and over time. It also could be converted straightforwardly into doctrine. In *LULAC*, Justice Stevens suggested that the Court's approach to one person–one vote claims could serve as a template for a gerrymandering test.[25] This is a very auspicious analogy, in our view. First, just as in that domain there is a population deviation threshold (10 percent) above which plans are presumptively unlawful and below which they are presumptively valid,[26] so too could key levels be specified in the gerrymandering context. To take into account both the severity and the durability of gerrymanders, we recommend setting the bar at *two seats* for congressional plans and *8 percent* for state house plans[27]—with the added caveat that the plans not be expected, based on sensitivity testing, ever to have an efficiency gap of zero over their lifetimes. At present, these thresholds would result in the plans named above being deemed presumptively unconstitutional.[28]

Second, just as a state may *rebut* the presumption of unconstitutionality in a one person–one vote case,[29] so too should it have the chance to mount a defense in a gerrymandering dispute. In the former context, the presumption is rebutted if the state shows that its plan's population inequality resulted from the consistent application of a legitimate redistricting policy.[30]

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25 See *LULAC*, 548 US at 468 & n 9 (Stevens concurring in part and dissenting in part).

26 See *Brown v Thomson*, 462 US 835, 842 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations.").

27 See text accompanying notes 202–03.

28 That is, the Florida, Ohio, Pennsylvania, and Virginia congressional plans, and the Idaho, Indiana, Kansas, Michigan, Missouri, North Carolina, Ohio, Oklahoma, Rhode Island, Tennessee, Wisconsin, and Wyoming state house plans.

29 See, for example, *Brown*, 462 US at 842–43.

30 See, for example, *Mahan v Howell*, 410 US 315, 328 (1973) (upholding population deviations above 10 percent in a plan because they "advance[d] the rational state policy

The same sort of showing should suffice in the gerrymandering context, as should a demonstration that no plan with a smaller efficiency gap could have been drawn due to the state's underlying political geography. At this doctrinal stage, of course, cartographic evidence would be crucial. The state would try to prove that no map with a smaller gap was possible while still accomplishing its other objectives. The plaintiff, for its part, would strive to produce a map that attained the state's goals to the same extent but that featured a smaller gap. Success by the plaintiff would result in the presumption continuing to bind.

The Article proceeds as follows. Part I describes the doctrinal opportunity created by the Court's positive comments about partisan symmetry in *LULAC*. Interestingly, this opportunity remains unexplored nine years after the decision. Part II defines our new measure of partisan symmetry, the efficiency gap, and discusses some of its useful properties. It also compares the efficiency gap to partisan bias and identifies some of the gap's limitations. Part III presents empirical evidence about the efficiency gaps of congressional and state house plans over the 1972–2012 period. It highlights as well the gaps of plans that have given rise to gerrymandering litigation. Lastly, Part IV develops one option for incorporating the efficiency gap into a doctrinal test. In the first stage of the analysis, a plan's gap would be compared to the legal threshold; in the second stage, a state could argue that a gap above the threshold was unavoidable.

One final introductory point about this Article's timeliness: Though many plans continue to be fair, the problem of gerrymandering has never been worse in modern American history. The efficiency gaps of today's most egregious plans dwarf those of their predecessors in earlier cycles. We therefore find ourselves at a historical moment not unlike that confronted by the Court in the 1960s. Just as in that era population deviations had skyrocketed thanks to urbanization and district lines left untouched for decades, so too have today's efficiency gaps reached new heights thanks to technological advances and unbridled partisan aggression. Two generations ago, the Court moved decisively to end the scourge of malapportionment. In our view, the time has come for it to do the same with gerrymandering.

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of respecting the boundaries of political subdivisions"). For a discussion of the rebuttable presumption, see *Brown*, 462 US at 843.

I. THE DOCTRINAL OPPORTUNITY

Until recently, there would have been no reason for us to write this Article. Just about every potential partisan gerrymandering standard already had been proposed to—and rejected by—the Court. But in *LULAC*, for the first time in twenty years, five justices suggested they were open to adopting a gerrymandering standard. In particular, they wrote favorably about the concept of *partisan symmetry*, the idea that a district plan should treat the major parties symmetrically with respect to the conversion of votes to seats. Surprisingly, though, not a single gerrymandering plaintiff since *LULAC* has argued for the implementation of a partisan symmetry test. The doctrinal opportunity created by *LULAC* thus remains open and judicially uncharted.

In this Part, we define the contours of this opportunity. We first survey the Court's case law prior to *LULAC*, whose two highlights were the tentative embrace of a standard that no plaintiff could meet in *Davis v Bandemer*,[31] followed by the rejection of almost every conceivable test in *Vieth v Jubelirer*.[32] We next highlight the promising comments about partisan symmetry made by a majority of the Court in *LULAC*. But we also identify the concerns expressed about symmetry by Justice Kennedy—concerns we believe the standard we set forth in Part IV fully addresses. Lastly, we summarize the Sisyphean efforts of gerrymandering plaintiffs in the years since *LULAC*. We offer some speculation too as to why these plaintiffs may have failed to seize the opening presented by the Court.

A. Pre-*LULAC*

Although there were scattered hints in earlier Court decisions,[33] the 1983 case of *Karcher v Daggett*[34] marked the first time a justice wrote explicitly about partisan gerrymandering. A majority of the Court resolved the dispute purely on one person–one vote grounds, striking down New Jersey's congressional plan

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31 478 US 109 (1986).

32 541 US 267 (2004).

33 See, for example, *Gaffney v Cummings*, 412 US 735, 751 (1973); *Fortson v Dorsey*, 379 US 433, 439 (1965) (suggesting that a district plan might be invalid if it "would operate to minimize or cancel out the voting strength of racial *or political* elements of the voting population") (emphasis added).

34 462 US 725 (1983).

because of its total population deviation of 0.7 percent.[35] But in a concurrence, Justice Stevens contended that the plan actually should have been invalidated because it was a pro-Democratic gerrymander.[36] His proposed approach for identifying unlawful gerrymanders was to examine (1) "whether the plan has a significant adverse impact on an identifiable political group," (2) "whether the plan has objective indicia of irregularity," and (3) "whether the State is able to produce convincing evidence that the plan nevertheless serves neutral, legitimate interests of the community as a whole."[37]

Just three years after *Karcher*, the full Court turned its attention to gerrymandering in *Bandemer*.[38] Six justices agreed that gerrymandering was not a "political question" but rather a "justiciable controversy" fully amenable to resolution by the courts.[39] But the majority splintered with respect to the applicable standard as well as the fate of the Indiana state legislative plans before it. A plurality held that "unconstitutional discrimination occurs only when the electoral system . . . will consistently degrade . . . a group of voters' influence on the political process as a whole," and concluded that the Indiana plans did not meet this demanding standard.[40] In contrast, Justice Powell argued for a totality-of-the-circumstances test similar to the one advocated by Justice Stevens in *Karcher*.[41] District compactness, respect for political subdivisions, and the propriety of the redistricting process were the key factors to consider—and, in his view, they all revealed the Indiana plans' illegality.[42]

In the eighteen years between *Bandemer* and the justices' next foray into this doctrinal terrain, not a single plaintiff managed to convince a court to strike down a district plan on partisan gerrymandering grounds.[43] The trouble for claimants was twofold. First, *Bandemer*'s requirement that a plan "*consistently*

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35 See id at 731–44.

36 See id at 761–65 (Stevens concurring).

37 Id at 751 (Stevens concurring).

38 *Bandemer*, 478 US at 113 (White) (plurality).

39 Id at 118, 125–27 (White) (plurality).

40 Id at 132 (White) (plurality).

41 See id at 173 (Powell concurring in part and dissenting in part).

42 See *Bandemer*, 478 US at 173–74 (Powell concurring in part and dissenting in part).

43 See *Vieth*, 541 US at 279–80 (Scalia) (plurality) ("[I]n *all* of the cases we are aware of involving that most common form of political gerrymandering [that is, the drawing of district lines], relief was denied.").

degrade"[44] voters' influence meant that challenges brought prior to the first election under a plan, or even after one or two elections, universally failed. Courts simply could not be sure that a party's electoral disadvantage would be durable rather than transient.[45] Second, *Bandemer*'s reference to voters' influence "on the political process *as a whole*"[46] convinced many courts that electoral disadvantage alone was not enough to call a plan into question. Losses at the polls had to be combined with efforts to prevent a party's supporters from registering or voting—efforts that typically did not occur in this era.[47]

When the Court rejoined the fray in *Vieth*, a plurality invoked plaintiffs' dismal post-*Bandemer* record as a rationale for declaring all partisan gerrymandering to be nonjusticiable. "[*Bandemer*'s] application has almost invariably produced the same result . . . as would have obtained if the question were nonjusticiable: Judicial intervention has been refused."[48] The plurality (joined here by Justice Kennedy)[49] also rejected every putative standard suggested by the *Bandemer* Court, the appellants, and the dissenting justices. Both the *Bandemer* plurality's approach and that of Justice Powell were judicially unmanageable, in the *Vieth* plurality's view.[50] So too was the appellants' proposal of (1) predominant partisan intent, (2) systematic packing and cracking of a party's voters, and (3) a party's inability to translate a majority of votes into a majority of seats.[51] And so too were Justice Stevens's intent-based test,[52] Justice Souter's elaborate five-part framework focused on disregard for traditional

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44 *Bandemer*, 478 US at 132 (White) (plurality) (emphasis added).

45 See, for example, *La Porte County Republican Central Committee v Board of Commissioners of the County of La Porte*, 43 F3d 1126, 1128 (7th Cir 1994) ("Plaintiffs have not offered to prove that the districts in La Porte County have frustrated the will of a majority (or even a minority) of *voters*, for even one election."); *Legislative Redistricting Cases*, 629 A2d 646, 664 (Md 1993); *Pope v Blue*, 809 F Supp 392, 396 (WD NC 1992) (three-judge panel).

46 *Bandemer*, 478 US at 132 (White) (plurality) (emphasis added).

47 See, for example, *Martinez v Bush*, 234 F Supp 2d 1275, 1346 (SD Fla 2002) (three-judge panel); *Marylanders for Fair Representation, Inc v Schaefer*, 849 F Supp 1022, 1040 (D Md 1994) (three-judge panel); *Badham v March Fong Eu*, 694 F Supp 664, 670 (ND Cal 1988) (three-judge panel) ("[N]or are there allegations that anyone has ever interfered with Republican registration, organizing, voting, fund-raising, or campaigning.").

48 *Vieth*, 541 US at 279 (Scalia) (plurality).

49 See id at 308 (Kennedy concurring in the judgment) ("The plurality demonstrates the shortcomings of the other standards that have been considered to date.").

50 See id at 281–84, 290–91 (Scalia) (plurality).

51 See id at 284–90 (Scalia) (plurality).

52 See *Vieth*, 541 US at 292–95 (Scalia) (plurality).

districting principles,[53] and Justice Breyer's minority entrenchment standard.[54]

But *Vieth* did not close the door entirely on partisan gerrymandering claims. Justice Kennedy declined to join the plurality's justiciability holding, meaning that gerrymandering remains a viable cause of action even after the decision—albeit without any test for courts to apply. In his separate opinion, Justice Kennedy lamented that "the parties have not shown us, and I have not been able to discover . . . statements of principled, well-accepted rules of fairness that should govern districting."[55] The unspoken predicate is that *if* such rules were brought to his attention, he would be willing to consider adopting them.[56] Justice Kennedy also speculated that the First Amendment may prove a more fertile source for gerrymandering standards than the Equal Protection Clause.[57] And most importantly for our purposes, neither the plurality nor Justice Kennedy made any critical comments about the concept of partisan symmetry. (Though it was not, of course, before them in the case.)

B. *LULAC*

Partisan symmetry *was* before the Court when it next tackled gerrymandering, in *LULAC*, thanks to an amicus brief submitted by a group of political scientists.[58] And remarkably, given the pessimism in *Vieth* that any standard could be found, a majority of the justices (including Justice Kennedy) went out of their way to express their interest in the idea. We thus agree with two of the brief's authors, Professors Bernard Grofman and Gary King, that *LULAC* "marks a potential sea change in how the Supreme Court adjudicates partisan gerrymandering claims."[59] But we caution that Justice Kennedy also voiced a number of misgivings about symmetry. These misgivings must be addressed before symmetry can become the basis for judicial intervention in this area.

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53 See id at 295–98 (Scalia) (plurality).

54 See id at 299–301 (Scalia) (plurality).

55 Id at 308 (Kennedy concurring in the judgment).

56 See *Vieth*, 541 US at 312–13 (Kennedy concurring in the judgment) ("[N]ew technologies may produce new methods of analysis that make more evident the precise nature of the burdens gerrymanders impose on the representational rights of voters and parties.").

57 See id at 314–16 (Kennedy concurring in the judgment).

58 See King et al Brief at *9–11 (cited in note 11).

59 Grofman and King, 6 Election L J at 4 (cited in note 11).

Justice Stevens was by far the most avid advocate of partisan symmetry in *LULAC*.[60] He first defined the term as a "require[ment] that the electoral system treat similarly-situated parties equally."[61] This also is how we conceive of symmetry: it is satisfied when a district plan does not discriminate between the parties with respect to the conversion of votes to seats, and vice versa. Justice Stevens next observed that symmetry is "widely accepted by scholars as providing a measure of partisan fairness in electoral systems."[62] He then proceeded to apply one particular measure of partisan symmetry, *partisan bias*, to the Texas congressional plan at issue.[63] Partisan bias refers to the divergence in the share of seats that each party would win given the same share of the statewide vote.[64] Because Republicans likely would have won twenty of Texas's thirty-two seats (62.5 percent) if they had received 50 percent of the statewide vote, leaving only twelve seats for Democrats (37.5 percent), Texas's plan had a pro-Republican bias of 12.5 percent.[65] It "constitute[d] a significant departure from the symmetry standard" and, in Justice Stevens's view, should have been struck down for this reason.[66]

Justice Stevens also offered two suggestions for how the concept of symmetry could be converted into doctrine. First, the Court could hold that a sufficiently large deviation from symmetry (he floated 10 percent as a possibility) "create[s] a prima facie case of an unconstitutional gerrymander."[67] The burden then would shift to the state to present a legitimate justification for its highly asymmetric plan.[68] This two-step sequence, it bears noting, is nearly identical to the Court's framework for

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60 Of course, neither Justice Stevens nor Justice Souter, who also expressed interest in partisan symmetry in *LULAC*, is still on the Court. Their replacements' views on the subject are not yet known. But if the usual ideological lines hold, then it is likely that Justice Kennedy remains the swing vote on this issue.

61 *LULAC*, 548 US at 466 (Stevens concurring in part and dissenting in part), quoting King et al Brief at *4–5 (cited in note 11).

62 *LULAC*, 548 US at 466 (Stevens concurring in part and dissenting in part).

63 See id at 467–68 (Stevens concurring in part and dissenting in part).

64 See id at 466 (Stevens concurring in part and dissenting in part).

65 See id at 465–68 (Stevens concurring in part and dissenting in part).

66 *LULAC*, 548 US at 467 (Stevens concurring in part and dissenting in part). See also id at 466 (Stevens concurring in part and dissenting in part) (concluding that Texas's plan was "inconsistent with the symmetry standard, a measure social scientists use to assess partisan bias").

67 Id at 468 n 9 (Stevens concurring in part and dissenting in part).

68 See id at 468 (Stevens concurring in part and dissenting in part).

one person–one vote claims at the state legislative level.[69] Second, the Court could recognize a departure from symmetry as "one relevant factor in analyzing whether, under the totality of the circumstances, a districting plan is an unconstitutional partisan gerrymander."[70] This proposal is perhaps too close for comfort to some of the tests rejected in *Vieth*,[71] but it also bears some resemblance to the Court's methodology in vote dilution cases under the Voting Rights Act.[72]

The other members of the Court's left wing did not quite share Justice Stevens's excitement, but they all made positive comments about partisan symmetry too. Justice Souter (joined by Justice Ginsburg) noted the "utility of a criterion of symmetry as a test" and remarked that "[i]nterest in exploring this notion is evident."[73] He added, "Perhaps further attention could be devoted to the administrability of such a criterion at all levels of redistricting and its review."[74] Similarly, Justice Breyer joined portions of Justice Stevens's opinion[75] and referred favorably to the empirical evidence on symmetry that he marshaled.[76] Justice Breyer further observed, disapprovingly, that deviations from symmetry may cause a plan to "produce a majority of congressional representatives even if the favored party receives only a *minority* of popular votes."[77]

This leaves us, as we are often left, with the Court's swing voter, Justice Kennedy.[78] To the surprise of almost every observer, he expressed in *LULAC* at least some openness to the use of

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69 See id (Stevens concurring in part and dissenting in part), citing one person–one vote precedents such as *Brown v Thomson*, 462 US 835 (1983), and *Cox v Larios*, 542 US 947 (2004).

70 *LULAC*, 548 US at 468 n 9 (Stevens concurring in part and dissenting in part).

71 Not surprisingly, it is especially similar to Justice Powell's approach in *Bandemer*—which Justice Stevens endorsed, and which was based on Justice Stevens's own opinion in *Karcher*. See notes 41–42.

72 Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified as amended at 42 USC § 1971 et seq. The final stage of a vote dilution challenge is a multifactor totality-of-the-circumstances inquiry. See *Thornburg v Gingles*, 478 US 30, 79–80 (1986).

73 *LULAC*, 548 US at 483 (Souter concurring in part and dissenting in part).

74 Id at 484 (Souter concurring in part and dissenting in part). In some respects, this Article can be seen as a response to Justice Souter's call for further analysis of the administrability of partisan symmetry.

75 See id at 447 (Stevens concurring in part and dissenting in part).

76 See id at 491–92 (Breyer concurring in part and dissenting in part).

77 *LULAC*, 548 US at 492 (Breyer concurring in part and dissenting in part).

78 See Samuel Issacharoff, Pamela S. Karlan, and Richard H. Pildes, *The Law of Democracy: Legal Structure of the Political Process* 182 (Thomson Reuters 4th ed 2012) ("Justice Kennedy is the likely decisive vote for any future partisan gerrymandering claims.").

partisan symmetry as a test for gerrymandering. In the key sentence of his opinion, he wrote that he did not "altogether discount[ ] its utility in redistricting planning and litigation."[79] Other justices immediately seized on this language. Justice Stevens "appreciate[d] Justice Kennedy's leaving the door open to the use of the standard in future cases."[80] Likewise, Justice Souter cited this passage when he commented that "[i]nterest in exploring this notion is evident."[81]

But Justice Kennedy also raised several serious concerns about symmetry. First, he observed that "[t]he existence or degree of asymmetry may in large part depend on conjecture about where possible vote-switchers [ ] reside."[82] In other words, to determine how symmetric a plan is, at least using the partisan bias metric, it is necessary to estimate the results of a hypothetical election in which certain voters switch their ballots from one party to the other. This estimation requires assumptions to be made about where these vote switchers are located—assumptions that are controversial and often incorrect.[83] Second, Justice Kennedy was wary of invalidating a plan "based on unfair results that would occur in a hypothetical state of affairs."[84] His preference was to wait until an election actually had occurred and the asymmetry had become concrete rather than conjectural. As he wrote, "a challenge could be litigated if and when the feared inequity arose."[85]

Third, Justice Kennedy was unsure how to select an asymmetry threshold below which a plan would be upheld and above which a plan would be presumptively unlawful. Neither the parties nor the political scientists' amicus brief provided the Court

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79 *LULAC*, 548 US at 420 (Kennedy) (plurality).

80 Id at 468 n 9 (Stevens concurring in part and dissenting in part).

81 Id at 483 (Souter concurring in part and dissenting in part).

82 Id at 420 (Kennedy) (plurality). See also id (noting the existence of "different models of shifting voter preferences").

83 The specific assumption that typically is made to calculate partisan bias is "uniform partisan swing." The assumption stipulates that parties' district-specific vote shares change (or "swing") by the same margin as their statewide vote shares. For example, if Democrats received 45 percent of the vote in a state, and a researcher wanted to know how many seats they would have won if they had received 50 percent, the researcher simply would add 5 percentage points to the actual Democratic vote share in each district. The assumption often generates accurate seat share estimates, but still is considered "neither theoretically nor empirically satisfying" by political scientists. Simon Jackman, *Measuring Electoral Bias: Australia, 1949–93*, 24 Brit J Polit Sci 319, 335 (1994). We discuss the assumption in greater detail in Part II.C.

84 *LULAC*, 548 US at 420 (Kennedy) (plurality).

85 Id (Kennedy) (plurality).

with empirical data about the asymmetry of current or historical plans. In the absence of such data, he did not see how the Court could choose "a standard for deciding how much partisan dominance is too much."[86] Finally, Justice Kennedy did not believe that asymmetry should constitute the *entirety* of the Court's test for gerrymandering. Asymmetry can be produced by factors other than a desire to disadvantage one's political opponents, including the geographic distribution of the parties' supporters and compliance with traditional redistricting criteria such as compactness, respect for political subdivisions, and respect for communities of interest.[87] Therefore, "asymmetry *alone* is not a reliable measure of unconstitutional partisanship."[88]

C. Post-*LULAC*

In the wake of *LULAC*, one might have expected gerrymandering plaintiffs to pounce on the opportunity presented by the Court. As Grofman and King wrote shortly after the decision, "Now that members of the Supreme Court have singled out the deviation from partisan symmetry . . . we anticipate that there will be new partisan gerrymandering challenges brought."[89] But this prediction turned out to be incorrect. Plaintiffs did file multiple gerrymandering suits in the most recent cycle of redistricting litigation, but not one of them even referred to—much less argued for the adoption of—partisan symmetry as the relevant standard. Why not? The likely explanations are inattention to the Court's gerrymandering precedents, ignorance of quantitative political science methodology, and fatalism about the viability of this cause of action. But whatever the reason, the fact remains that, years after its creation, a sterling doctrinal opportunity is still unexplored by the courts and available for the taking.

By our count, plaintiffs in eight states brought partisan gerrymandering challenges against congressional or state legislative

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86 Id (Kennedy) (plurality). But see id at 468 n 9 (Stevens concurring in part and dissenting in part) (responding that "it is this Court, not proponents of the symmetry standard, that has the judicial obligation to answer the question of how much unfairness is too much").

87 See *Vieth*, 541 US at 309 (Kennedy concurring in the judgment) ("[I]f we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another.").

88 *LULAC*, 548 US at 420 (Kennedy) (plurality) (emphasis added).

89 Grofman and King, 6 Election L J at 33 (cited in note 11).

district plans during the 2010 cycle.[90] Some of these claimants suggested tests very similar to the ones the Court rejected in *Vieth*. For example, the Alabama Legislative Black Caucus argued that "[t]raditional or neutral districting principles may not be subordinated in a dominant fashion by . . . partisan interests"—a formulation essentially identical to Justice Stevens's.[91] Other groups, most notably the Illinois League of Women Voters, tried to convert Justice Kennedy's exposition on the First Amendment in *Vieth* into a workable standard. These efforts all failed for the simple reason that district plans "do[ ] not prevent any [party] member from engaging in any political speech."[92]

Still other plaintiffs, in particular the Illinois Republican Party, advocated oddly specific effects tests based on their states' unique political circumstances. Not surprisingly, the courts declined to constitutionalize inquiries such as whether a plan "keeps at least 10 percent more constituents of Democratic incumbents in the same district as their representative than it does constituents of Republican incumbents,"[93] or whether "[m]ore than two-thirds of incumbent pairings pit minority-party incumbents against each other."[94] A final set of claimants admitted their own befuddlement, made no proposals at all, and beseeched the courts to "treat partisan gerrymandering cases

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[90] See *Perez v Perry*, 26 F Supp 3d, 612, 622–24 (WD Tex 2014) (three-judge panel); *Alabama Legislative Black Caucus v Alabama*, 988 F Supp 2d 1285, 1289 (MD Ala 2013) (three-judge panel); *Baldus v Members of Wisconsin Government Accountability Board*, 849 F Supp 2d 840, 854 (ED Wis 2012) (three-judge panel); *Committee for a Fair and Balanced Map v Illinois State Board of Elections*, 835 F Supp 2d 563, 567–79 (ND Ill 2011) (three-judge panel); *Fletcher v Lamone*, 831 F Supp 2d 887, 903–04 (D Md 2011) (three-judge panel); *Radogno v Illinois State Board of Elections*, 2011 WL 5868225, *2–4 (ND Ill) ("Radogno II") (three-judge panel); *League of Women Voters v Quinn*, 2011 WL 5143044, *1–4 (ND Ill); *Radogno v Illinois State Board of Elections*, 2011 WL 5025251, *5–7 (ND Ill) ("Radogno I") (three-judge panel); *Perez v Texas*, 2011 WL 9160142, *10–11 (WD Tex); *Pearson v Koster*, 359 SW3d 35, 41–42 (Mo 2012); *Gonzalez v State Apportionment Commission*, 53 A3d 1230, 1254 (NJ Super App Div 2012); *State v Tennant*, 730 SE2d 368, 390 (W Va 2012).

[91] *Alabama Legislative Black Caucus*, 988 F Supp 2d at 1295 (quotation marks omitted). See also, for example, *Radogno II*, 2011 WL 5868225 at *4 (rejecting a proposed multifactor test that, like Justice Souter's approach in *Vieth*, focused on disregard for traditional districting principles).

[92] *League of Women Voters*, 2011 WL 5143044 at *4. See also, for example, *Radogno I*, 2011 WL 5025251 at *7 ("But what is the connection between the alleged burden imposed on Plaintiffs' ability to elect their preferred candidate and a restriction on their freedom of political expression? There is none.").

[93] *Committee for a Fair and Balanced Map*, 835 F Supp 2d at 576.

[94] *Radogno II*, 2011 WL 5868225 at *4. See also id ("Why the two-thirds requirement for incumbent pairings, as opposed to three-fifths or three-quarters?").

much like obscenity cases—courts will know one when they see one."[95] Predictably, the courts turned down this invitation.[96]

Why has no plaintiff since *LULAC* argued for a partisan symmetry test? We can only speculate, but several possibilities come to mind. First, many lawyers simply may not have noticed the favorable comments about symmetry in *LULAC*. The bulk of the decision dealt not with gerrymandering but with racial vote dilution,[97] and even the gerrymandering portions were more concerned with the mid-decade timing of Texas's redistricting than with the plan's asymmetry.[98] Moreover, Justice Kennedy did write that "asymmetry alone is not a reliable measure of unconstitutional partisanship."[99] We believe—consistent with Justice Stevens's and Justice Souter's comments[100]—that Justice Kennedy remains open to the adoption of a symmetry test, but this subtlety easily may have escaped less attentive (or obsessive) readers.

Second, the measure of partisan asymmetry applied by Justice Stevens in *LULAC*, partisan bias, is not particularly easy to compute. In its simplest form, the measure requires data about each party's vote share in each district in a plan, followed by use of the uniform swing assumption to determine each party's seat share at a hypothetical vote share point.[101] In the more sophisticated version recommended by Grofman and King, the uniform swing assumption is relaxed so that each district's shift is drawn from a random distribution, and multiple regressions are employed to predict district outcomes from historical electoral data.[102] None of this analysis is overly difficult for political scientists, but it is hardly intuitive for lawyers. Understandably,

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95 *Perez*, 2011 WL 9160142 at *11 (quotation marks and brackets omitted).

96 See, for example, *Baldus*, 849 F Supp 2d at 854; *Fletcher*, 831 F Supp 2d at 904 ("The plaintiffs here . . . offer no reliable standard by which to adjudicate their gerrymandering claim."); *Gonzalez*, 53 A3d at 1254 ("In sum, plaintiffs have not articulated any way in which the process or its results violated their rights under the Federal Constitution.").

97 See *LULAC*, 548 US at 423–47 (Kennedy) (plurality).

98 See id at 413–18, 421–23 (Kennedy) (plurality).

99 Id at 420 (Kennedy) (plurality).

100 See notes 80–81 and accompanying text.

101 See Grofman and King, 6 Election L J at 10–11 (cited in note 11). See also, for example, Nicholas O. Stephanopoulos, *The Consequences of Consequentialist Criteria*, 3 UC Irvine L Rev 669, 684 (2013) (calculating partisan bias in this way).

102 See Grofman and King, 6 Election L J at 11–14 (cited in note 11).

plaintiffs may have shied away from quantitative metrics they did not fully understand.[103]

Lastly, a cloud of defeatism hangs over the cause of action for partisan gerrymandering, perhaps prompting plaintiffs not to press such claims too vigorously. As noted earlier, not a single claimant was able to convince a court to strike down a district plan on gerrymandering grounds during the eighteen years between *Bandemer* and *Vieth*.[104] In the decade since *Vieth*, plaintiffs' record has been equally dismal: failure after failure with nary a single success.[105] Faced with such relentlessly negative precedent, aggrieved parties in the post-*LULAC* era may have *included* gerrymandering claims in their complaints, reasoning that they could do no harm, but then chosen not to *pursue* these claims with much enthusiasm. Other redistricting theories (such as unequal district population, racial vote dilution, and racial gerrymandering) have much higher success rates, and plaintiffs accordingly may have focused their energies on them.

Ultimately, the reason why plaintiffs have failed to argue for the adoption of a partisan symmetry test is immaterial for our purposes. The key facts are simply that a majority of the Court expressed interest in symmetry in *LULAC*, and that nothing has happened since *LULAC* to reduce the attractiveness of this doctrinal opportunity. In the next Part, we introduce a new measure of partisan symmetry, the *efficiency gap*, that we believe is superior to the partisan bias metric applied by Justice Stevens in *LULAC*. It addresses many of the concerns raised by Justice Kennedy, while more directly capturing the essence of the harm that is caused by gerrymandering. If and when plaintiffs recognize the opening presented to them by the Court, they should press for the efficiency gap, not partisan bias, to be used as the judicial test in this domain.

II. THE EFFICIENCY GAP

The key insight underlying the efficiency gap is that all elections in single-member districts produce large numbers of wasted votes. Some voters cast their ballots for losing candidates

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[103] See generally Arden Rowell and Jessica Bregant, *Numeracy and Legal Decision Making*, 46 Ariz St L J 191 (2014) (presenting an original empirical study suggesting that substantive legal decision-making varies with the "numeracy," or math skill, of the lawyer).

[104] See note 43 and accompanying text.

[105] See note 90.

(and so are "cracked"). Other voters cast their ballots for winning candidates but in excess of what the candidates needed to prevail (and so are "packed"). A gerrymander is simply a district plan that results in one party wasting many more votes than its adversary. And the efficiency gap indicates the magnitude of the divergence between the parties' respective wasted votes. It aggregates all of a plan's cracking and packing choices into a single number.

We begin this Part by defining the efficiency gap more formally and explaining how it is calculated. In brief, the difference between the parties' respective wasted votes is divided by the total number of votes cast, thus generating an easily interpretable percentage. Next, we explore some of the efficiency gap's interesting properties. Under typical conditions, the only figures needed to compute the gap are a party's vote margin and seat margin in an election. In addition, a gap of zero implies that a given increase in a party's vote share produces a twofold increase in the party's seat share. We then compare the efficiency gap to partisan bias. While the metrics converge in a tied election, the efficiency gap is superior in other circumstances because it does not require the results of hypothetical races to be estimated. Finally, we identify and address some of the gap's limitations. In particular, the lopsided elections that can give rise to odd conclusions are very rare, the gap's volatility can be taken into account through sensitivity testing, and uncontested seats can be addressed using certain reasonable assumptions.

A. Definition and Computation

Our analysis begins with the premise that the goal of a partisan gerrymander is to win as many *seats* as possible given a certain number of *votes*. To accomplish this aim, a party must ensure that its votes translate into seats more "efficiently" than do those of its opponent. In the plurality-rule, single-member-district (SMD) elections that are almost universal in American politics,[106] "inefficient" votes are those that do not directly

[106] SMD elections are ubiquitous at the congressional and state legislative levels, but not at lower levels of government. See Jeffrey A. Taylor, Paul S. Herrnson, and James M. Curry, *The Impact of Multimember Districts on Legislative Effort and Success* *1 (unpublished manuscript, Midwest Political Science Association, Apr 2014), archived at http://perma.cc/8SUY-XNBJ ("[T]en state legislatures, more than two-thirds of municipal governments, and a multitude of city councils . . . elect at least some members from multimember districts.").

contribute to victory. Thus, any vote for a losing candidate is wasted by definition, but so too is any vote beyond the 50 percent threshold needed (in a two-candidate race) to win a seat. If these supporters could be moved through redistricting to a different seat, they could help the party claim that seat as well without changing the outcome in the seat from which they were moved.

As a practical matter, there are always many inefficient votes in any SMD system. (In fact, exactly half the votes in each district are wasted in a two-candidate race.)[107] But a gerrymandering party does not need to eliminate *all* of its inefficient votes. It only needs to end up with *fewer* wasted votes than the opposition by winning its seats by smaller margins on average. The opposition is left winning a small number of seats by large margins, and losing a large number of seats where it claims many votes but still falls short of victory. The strategies that produce these results are often called "cracking" (splitting a party's supporters between districts so they fall shy of a majority in each one) and "packing" (stuffing remaining supporters in a small number of districts that they win handily).[108] Though the nuances vary, some kind of cracking and packing is how all partisan gerrymanders are constructed.[109]

The efficiency gap, then, is simply *the difference between the parties' respective wasted votes, divided by the total number of votes cast in the election*.[110] Wasted votes include both "lost" votes (those cast for a losing candidate) and "surplus" votes (those cast for a winning candidate but in excess of what she needed to prevail). Each party's wasted votes are totaled, one sum is subtracted

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[107] This is because victory in a two-candidate race is achieved with 50 percent of the vote (plus one). All other votes are cast either for the losing candidate or for the winning candidate but in excess of what she needed to prevail. Assume, for example, that Candidate A receives 65 percent of the vote and Candidate B receives 35 percent. Then 15 percent of Candidate A's votes and all 35 percent of Candidate B's votes are wasted—totaling 50 percent.

[108] *Vieth*, 541 US at 286 n 7 (Scalia) (plurality). For an illuminating discussion of wasted votes, see Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 Tex L Rev 1589, 1606 (1993).

[109] A sizeable literature has articulated different strategies for achieving successful partisan gerrymanders, but the ultimate objective is always to claim a larger efficiency gap in a party's favor—either on average or for a given set of expected future outcomes. See, for example, John N. Friedman and Richard T. Holden, *Optimal Gerrymandering: Sometimes Pack, but Never Crack*, 98 Am Econ Rev 113, 115 (2008); Guillermo Owen and Bernard Grofman, *Optimal Partisan Gerrymandering*, 7 Polit Geography Q 5, 6 (1988).

[110] See McGhee, 39 Legis Stud Q at 68 (cited in note 12) (expressing this idea algebraically).

from the other, and then, for the sake of comparability across systems, this difference is divided by the total number of votes cast. Figure 1 shows how this calculation is carried out for the hypothetical district plan discussed in the Introduction.[111] The bottom line is that there are 200 fewer wasted votes for Party A than for Party B (out of 1,000 total votes), resulting in an efficiency gap of 20 percent in Party A's favor.[112]

FIGURE 1. CALCULATION OF THE EFFICIENCY GAP

	Total Votes by Party		Lost Votes by Party		Surplus Votes by Party		Wasted Votes by Party	
District	A	B	A	B	A	B	A	B
1	70	30	0	30	20	0	20	30
2	70	30	0	30	20	0	20	30
3	70	30	0	30	20	0	20	30
4	54	46	0	46	4	0	4	46
5	54	46	0	46	4	0	4	46
6	54	46	0	46	4	0	4	46
7	54	46	0	46	4	0	4	46
8	54	46	0	46	4	0	4	46
9	35	65	35	0	0	15	35	15
10	35	65	35	0	0	15	35	15
Total	**550**	**450**	**70**	**320**	**80**	**30**	**150**	**350**

The efficiency gap is the bedrock of both our positive and normative approaches in this Article. As a positive matter, we believe the gap is the essence of what critics have in mind when they refer to partisan gerrymandering. They typically conceive of gerrymandering as the systematic disadvantaging of a party through the cracking and packing of its supporters.[113] A gerrymandering metric ought to capture this concept directly, and the efficiency gap does so. At its core, it is nothing more than a tally of all the cracking and packing decisions in a district plan.

Normatively, the efficiency gap identifies a concrete harm worthy of judicial intervention. A gap in a party's favor enables the party to claim more seats, relative to a zero-gap plan, *without claiming more votes*. After voters have decided which party they support—based on whatever criteria they choose, including the attractiveness of each party's policy agenda—the votes cast

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111 See note 14 and accompanying text.

112 As in the Introduction, we assume that 50 votes, not 51, are needed to win a district. Again, the efficiency gap with a 51-vote threshold is 20.6 percent in favor of Party A. See McGhee, 39 Legis Stud Q at 68 (cited in note 12).

113 See note 133.

by supporters of the gerrymandering party translate more effectively into representation and policy than do those cast by the opposing party's supporters. The gerrymandering party enjoys a political advantage not because of its greater popularity, but rather because of the configuration of district lines. The parties do not compete on a level playing field.

B. Key Properties

Beyond its positive and normative appeal, the efficiency gap has a number of useful properties that warrant discussion. First, under circumstances that are very common in US elections, it is unnecessary to sum the wasted votes in each individual district—a process that can be somewhat cumbersome. Instead, if we assume that all districts are equal in population (which is constitutionally required), and that there are only two parties (which is typical in SMD systems), then the computation reduces through simple algebra to something quite straightforward:[114]

$$\text{Efficiency Gap} = \text{Seat Margin} - (2 \times \text{Vote Margin})$$

In this formula, "Seat Margin" is the share of all seats held by a party, minus 50 percent. "Vote Margin" is the same for votes: the share received by a party, minus 50 percent. A party has an electoral advantage when the efficiency gap is positive, and a disadvantage when it is negative.[115] When the number is equal to zero, there is no efficiency gap and so no partisan benefit derived from redistricting.

Consider once again the example from Figure 1. Party A received 55 percent of the statewide vote (550 out of 1,000 votes), and with this support won eight of the ten seats (80 percent). The plan's efficiency gap thus is $(80\% - 50\%) - 2 \times (55\% - 50\%) = 20\%$. This is the same figure we calculated earlier by actually summing all of the lost and surplus votes in the election. How might the advantage for Party A be eliminated? There are two ways. The party either could have won six seats instead of eight for the 55 percent vote share it actually received ($[60\% - 50\%] - 2 \times [55\% - 50\%] = 0$),

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[114] See McGhee, 39 Legis Stud Q at 79–80 (cited in note 12) (deriving this equation). See also, for example, King and Browning, 81 Am Polit Sci Rev at 1252 (cited in note 22) (also assuming "that there are only two parties . . . and that the legislature is composed of a set of single-member, winner-take-all districts").

[115] The directionality of the measure is purely arbitrary. One might use the second party for all measures instead, in which case negative values would imply an advantage for the first party.

or it could have received 65 percent of the vote for the eight seats it claimed ([80% – 50%] – 2 × [65% – 50%] = 0). As it is, Party A won two more seats than it would have if the parties had wasted equal numbers of votes.

The efficiency gap's second interesting property follows from these calculations. Simply put, it is a measure of undeserved seat share: the proportion of seats a party receives that it would *not* have received under a plan with equal wasted votes. Above, for example, the efficiency gap for Party A is 20 percent, which also happens to be Party A's extra seat share relative to what it would have received under a perfectly balanced plan (80% – 60% = 20%). When it is sensible to do so, this percentage can be converted to raw seats as well—in this case, two extra seats out of ten. Thus, the efficiency gap is a tangible figure with real-world meaning that laypeople can easily understand.

Third, the efficiency gap identifies a specific *relationship* between vote share and seat share that corresponds to partisan fairness across a wide range of outcomes. Specifically, each additional percentage point of vote share for a party should result in an extra two percentage points of seat share. This relationship is implied by the efficiency gap formula noted above. If the gap is zero, it can remain at this level only if any shift in seat share is twice the size of any shift in vote share. Also importantly, the relationship is *not* simply proportional, with each additional percentage point of the vote netting an additional percentage point of seats. Scholars have long recognized that SMD systems such as the American one tend to provide a "winner's bonus" of surplus seats to the majority party,[116] and the efficiency gap is consistent with this understanding. But the gap offers what scholars to date have been unable to supply: a normative guide as to how large this bonus should be.[117] To produce partisan fairness—in the sense of equal wasted votes for each party—the bonus should be a precisely twofold increase in seat share for a given increase in vote share.[118]

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[116] See, for example, Grofman and King, 6 Election L J at 9 (cited in note 11).

[117] See, for example, Gelman and King, 88 Am Polit Sci Rev at 554 (cited in note 22) (describing the "normative position that healthy representative democracies have . . . high levels of electoral responsiveness" but not offering any target level for responsiveness); Grofman and King, 6 Election L J at 9 (cited in note 11) (referring to a "'bonus' of varying sizes").

[118] According to the efficiency gap equation, a purely proportional system disadvantages the majority party, and by increasingly significant amounts as the party's vote

Fourth, the efficiency gap can be calculated for *any* district plan, including in states where one party enjoys a dominant electoral position. This feature makes it possible to evaluate plans that, to this point, have been shielded from scrutiny because one party's advantage was so great. While some have argued that only electoral systems in which redistricting could conceivably affect control of the legislature are of any practical interest,[119] this position strikes us as overly restrictive. For instance, a large number of legislatures require a supermajority to pass key legislation.[120] Indeed, in California, the only redistricting lawsuit from the last cycle concerned supermajority control of the state senate in the context of a two-thirds vote requirement for tax increases.[121] Similarly, with respect to congressional redistricting, it is not the *state* majority but the *national* one that matters. If a party can extract extra seats that it does not deserve, those seats will pay dividends in Washington, DC, whether the state is competitive or not.

Finally, the efficiency gap does not require any counterfactual analysis. It can be calculated using actual election results, without the need for any further assumptions. As we describe in further detail below, we believe *limited* counterfactual analysis can be helpful in determining the robustness of the efficiency gap in the face of shifts in voter sentiment from election to election.[122] Such analysis is especially important if an analyst thinks there is a high likelihood that election outcomes will change substantially in the near future. But these counterfactuals are not fundamental to the efficiency gap, and their size and direction—and even the methods by which they are calculated—are left entirely to the analyst's discretion.

C. Comparison to Partisan Bias

Having defined the efficiency gap and explored its key properties, we are now in a position to compare it to the measure of partisan symmetry—partisan bias—that has dominated the

share climbs. If a party receives 60 percent of the vote and 60 percent of the seats, for example, a plan would have an efficiency gap of 10 percent *against* the party.

119 See, for example, Grofman and King, 6 Election L J at 19 (cited in note 11).

120 See Jason Mercier, *Proposed Constitutional Amendments Would Require Supermajority Vote for Tax Increases* *2 (Washington Policy Center, Feb 2013), archived at http://perma.cc/JTR4-4H4B ("18 states . . . have some form of supermajority vote requirement for tax increases.").

121 See *Vandermost v Bowen*, 269 P3d 446, 473 n 31 (Cal 2012).

122 See Part III.B.

literature[123] and appeared on occasion in the case law.[124] (Partisan bias, again, refers to the divergence in the share of seats that each party would win given the same share, typically 50 percent, of the statewide vote. For example, if Republicans would win 52 percent of a state's seats with 50 percent of the state's vote, then a district plan would have a pro-Republican bias of 2 percent.)[125] We first demonstrate that the efficiency gap and partisan bias are different concepts, at least in elections that are not tied. We then argue that the efficiency gap is the superior metric because it more directly captures the essence of gerrymandering and does not require the estimation of hypothetical election results.

To begin with, it is important to note that the efficiency gap and partisan bias are deeply connected. In fact, the two measures are mathematically identical in the special case in which both parties receive exactly 50 percent of the vote. A party's vote margin is zero at this point, meaning that the efficiency gap is simply equal to the party's seat margin,[126] while a party's seat margin in a tied election is the usual *definition* of partisan bias.[127] More than a mathematical abstraction, this identity implies a critical substantive point: a party can win more than half the seats with half the votes only by exacerbating the efficiency gap in its favor. While winning more seats is the outcome that partisan bias assesses, the manipulation of wasted votes, gauged by the efficiency gap, is the activity that leads to this outcome.

But the efficiency gap and partisan bias are *not* identical for all other election results. This is because whenever an election does not produce a tie, the parties' actual vote shares in each district must be shifted in order to calculate partisan bias.

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[123] See Grofman and King, 6 Election L J at 6 (cited in note 11) (describing support for partisan bias as "virtually a consensus position of the scholarly community").

[124] See, for example, *LULAC*, 548 US at 464–68 (Stevens concurring in part and dissenting in part).

[125] See Gelman and King, 88 Am Polit Sci Rev at 543 (cited in note 22) (defining partisan bias); Grofman and King, 6 Election L J at 6–13 (cited in note 11) (same). See also Janet Campagna and Bernard Grofman, *Party Control and Partisan Bias in 1980s Congressional Redistricting*, 52 J Politics 1242, 1245 (1990) (calculating bias for a tied election); Gary W. Cox and Jonathan N. Katz, *The Reapportionment Revolution and Bias in U.S. Congressional Elections*, 43 Am J Polit Sci 812, 820 (1999) (same).

[126] Specifically, if we insert a vote share of 50 percent into the efficiency gap equation, we obtain:

> Efficiency Gap = Seat Margin – 2 × Vote Margin = Seat Margin – 2 × (50% – 50%) = Seat Margin.

[127] See Grofman and King, 6 Election L J at 8 (cited in note 11).

Typically these vote shares are shifted so as to mimic a tied election, though sometimes they are shifted to mimic the flipping of the parties' statewide performances.[128] Whatever the rationale for the shifting, it causes partisan bias to diverge from the efficiency gap, which is computed using the observed election results. The parties' seat shares in a *counterfactual* election are the key determinant of partisan bias, while the parties' wasted votes in the *actual* election are the crucial input for the efficiency gap.

Figure 2 uses election simulations to depict more fully the relationship between the efficiency gap and partisan bias. We simulated 201 redistricting plans of 25 seats each, with the parties' statewide vote shares ranging from 25 percent to 75 percent.[129] We then calculated both the efficiency gap and partisan bias for each simulated plan and determined the difference between them. If the measures capture the same idea, the results should cluster around the horizontal zero line for all vote shares. Instead, they are identical at the point where both parties receive 50 percent of the vote, very similar (though not identical) for a few percentage points above and below this point, and then highly divergent after that. In other words, the further an election is from being tied, the more uncorrelated the efficiency gap and partisan bias become.

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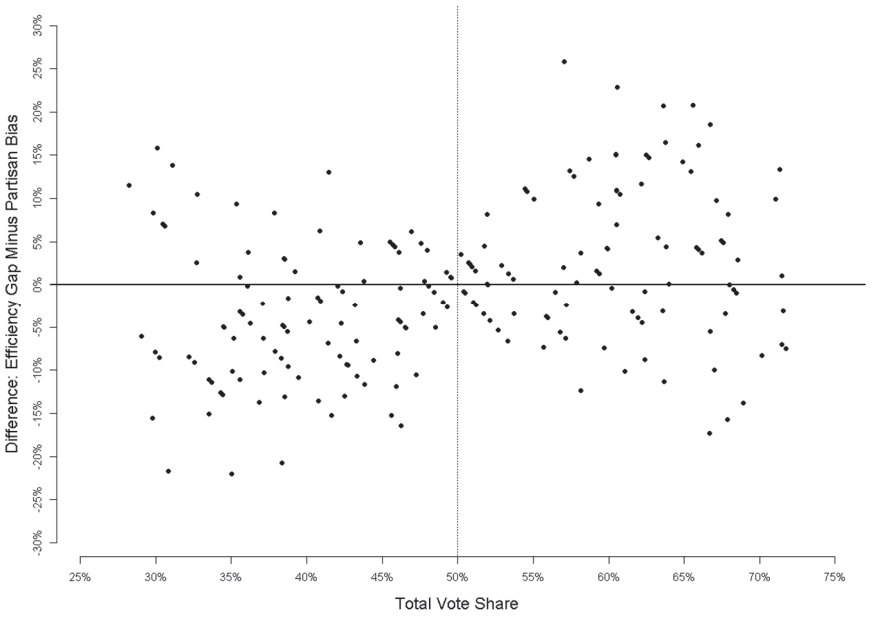
[128] See id.

[129] Specifically, we started with a statewide vote share of 25 percent and moved up in increments of 0.2 percent until we reached 75 percent, for 201 total plans. For each point along the way, we sampled 25 districts from a normal distribution with that mean and a standard deviation of 15 percent. Any districts whose seat shares were shifted above 100 percent or below 0 percent were assigned to those two values, respectively. Each of these groups was symmetric in expectation, but in practice, many deviated from perfect symmetry due to random chance.

FIGURE 2. EFFICIENCY GAP AND PARTISAN BIAS FOR SIMULATED DISTRICT PLANS



In earlier work, one of us used empirical data from state legislative elections to make much the same point. In competitive elections (those closer than 55 percent–45 percent), partisan bias is an excellent predictor of a party's seat share in a model that also controls for the party's vote share (coefficient = 0.73).[130] But in *uncompetitive* elections, the predictive power of partisan bias essentially disappears (coefficient = -0.07).[131] By comparison, the efficiency gap is a perfect predictor of seat share in both competitive and uncompetitive elections (coefficient = 1.0).[132] The predictive power of partisan bias is thus a function of how closely it converges on the efficiency gap (which it does fully in a tied election).

If the efficiency gap and partisan bias are distinct concepts, why is the former preferable to the latter as a measure of gerrymandering? The most basic answer relates to the meaning of gerrymandering, while the subtler reasons involve issues with the calculation of partisan bias. Starting with the more fundamental

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130 See McGhee, 39 Legis Stud Q at 67 (cited in note 12).

131 See id.

132 See id at 69.

point, when observers assert that a district plan is a gerrymander, they usually mean that it systematically benefits a party (and harms its opponent) in actual elections.[133] They do *not* mean that a plan would advantage a party in the hypothetical event of a tied election, or if the parties' vote shares flipped. In common parlance, a plan is a gerrymander if it enables a party to convert its votes into seats more efficiently than its adversary—even if this edge would vanish under different electoral conditions. The efficiency gap reflects this understanding, while partisan bias does not.

Turning next to the calculation of partisan bias, it is problematic, first, because it relies on the uniform swing assumption: the premise that vote switchers are present in equal numbers in each district.[134] Even the more advanced version of the metric introduced by Professors Gelman and King "requires the statistical assumption of *approximate uniform partisan swing*,"[135] that is, the supposition that "districts swing along with the statewide mean . . . but only on average (due to the random error term [ ])."[136] It is only by shifting district vote shares by (more or less) uniform amounts that the results of the crucial hypothetical election can be estimated.

Unfortunately, the assumption of uniformity is often inaccurate, even in its approximate version. The geographic distributions of the parties' supporters are highly heterogeneous,[137]

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[133] See id at 57 ("Some version of efficiency is typically the core concept of interest in the literature on redistricting."). See also, for example, *Bandemer*, 478 US at 141 (White) (plurality) ("The election results obviously are relevant to a showing of the effects required to prove a political gerrymandering claim under our view."); *Karcher*, 462 US at 751 (Stevens concurring) (suggesting a test for gerrymandering that asks "whether the plan has a significant adverse impact on an identifiable political group"). Notably, even proponents of partisan bias sometimes conceive of gerrymandering as "the degree to which an electoral system unfairly favors one political party in the translation of statewide . . . votes into the partisan division of the legislature." Gelman and King, 88 Am Polit Sci Rev at 543 (cited in note 22).

[134] See notes 82–83, 101–02, and accompanying text.

[135] Grofman and King, 6 Election L J at 12 (cited in note 11). See also id at 11–12 & n 44 (collecting relevant works by Gelman and King).

[136] Andrew Gelman and Gary King, *A Unified Method of Evaluating Electoral Systems and Redistricting Plans*, 38 Am J Polit Sci 514, 521 (1994). See also Gelman and King, 88 Am Polit Sci Rev at 555 (cited in note 22) ("Our method can be seen as a generalization of uniform partisan swing.").

[137] See Chen and Rodden, 8 Q J Polit Sci at 245–46 (cited in note 23) (finding a very high level of spatial autocorrelation for Democratic voting preferences in Florida); Stephanopoulos, 125 Harv L Rev at 1940–41 (cited in note 18) (same for an array of US Census variables throughout the country). See also Jackman, 24 British J Polit Sci at 331 (cited in note 83) ("[W]hen we estimate bias . . . we measure manipulation of the

meaning that a given shift in the statewide vote is likely to result in variable shifts at the district level. For instance, a statewide swing of 5 percent in the Republican direction might produce much larger pro-Republican swings in districts full of independent voters who voted for a charismatic Democrat in the previous election. But it might produce no pro-Republican swing at all in polarized districts made up of staunch partisans whose political views are largely set.[138] Moreover, districts' partisan swing is a partially endogenous phenomenon that can be influenced by the parties' own campaign strategies. If the parties focus their efforts in some districts but not in others (as they routinely do), then uneven shifts at the district level are even more probable.[139]

The second problem with the calculation of partisan bias is that it *cannot* be computed for highly uncompetitive systems (at least not sensibly). In such systems, the vote share shifting that would have to be assumed to simulate a tied election (let alone the flipping of the parties' performances) is simply too implausible to be taken seriously. As proponents of partisan bias concede, "the methodology we propose is intended only for jurisdictions where the politics is competitive enough that it is empirically feasible to develop reliable expectations what each party would receive in seats if it won a given sized majority of the votes."[140] It is precisely because enormous vote share shifts

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electoral system *conditional* on a spatial distribution of partisan support. As the spatial distribution changes, so too will the bias . . . of the electoral system.").

138 In the 2006 election for the US House of Representatives, for example, there was a mean pro-Democratic swing of 4.2 percent in contested districts—with a standard deviation of 6.1 percent. The pro-Democratic swing ranged from a low of -19.2 percent to a high of 34.6 percent. See Christian R. Grose and Bruce I. Oppenheimer, *The Iraq War, Partisanship, and Candidate Attributes: Variations in Partisan Swing in the 2006 U.S. House Elections*, 32 Legis Stud Q 531, 533 (2007).

139 See, for example, Jenni Newton-Farrelly, *Wrong Winner Election Outcomes in South Australia: Bias, Minor Parties and Non-uniform Swings* *5 (South Australian Parliament Research Library, Apr 1, 2010), archived at http://perma.cc/WAZ7-JVGP (describing how the uniform swing assumption failed when "[t]he [Australian Labor Party] ran the most successful defensive marginal seats campaign seen in South Australia," so that "[m]any of the biggest swings occurred in safe Labor seats and in fairly safe Liberal seats," while marginal Labor seats barely swung at all). See also Jackman, 24 British J Polit Sci at 335 (cited in note 83) (finding that the uniform swing assumption was wrong by an average of 4 percent in Australian elections in the early 1980s).

While we use some uniform swing analysis to conduct our sensitivity tests, these tests are not fundamental to the measurement of the efficiency gap. At any rate, one could easily conduct the sensitivity tests using assumptions other than uniform swing.

140 Grofman and King, 6 Election L J at 19 (cited in note 11). See also Gelman and King, 88 Am Polit Sci Rev at 545 (cited in note 22) ("We therefore limit our analysis to

are unrealistic that, as we noted above, partisan bias diverges from the efficiency gap so markedly in uncompetitive elections.[141]

But even though partisan bias is inapplicable to uncompetitive systems, gerrymandering is still possible—and ought to be measurable—in these settings. A party can manipulate district lines so that its votes translate more efficiently into seats whether it receives 50 percent or 70 percent of the statewide vote. Notably, almost *half* of recent state legislative elections have been so uncompetitive that partisan bias cannot be calculated for them reliably.[142] A metric that is so confined in its scope is of limited value.

One might respond that the question of majority control carries special normative weight, and so what happens in uncompetitive systems, in which majority control is not at stake, is of little interest. But as we have argued, this position is untenable when applied to US House elections, in which the relevant majority is national rather than local. It is somewhat more valid when applied to state legislative elections, at least in states without supermajority requirements. But supermajority requirements are pervasive, and so hardly irrelevant. Moreover, changing the *size* of a majority party's control is likely to have policy consequences even if majority control itself is not at issue. Even in today's polarized environment, cross-party coalitions are reasonably common at the state legislative level, suggesting that the minority party might be able to pull policy more in its direction as its numbers increase, even if it does not control the agenda entirely.[143]

The final problem with the calculation of partisan bias is that it can sometimes lead to quite counterintuitive results. These oddities tend to occur when seats that actually are won by one party are assigned to the *other* party when vote shares are shifted to simulate the hypothetical election. (In earlier work, one of us has referred to this phenomenon as seats entering the "counterfactual window.")[144] Take, for example, the ten-district

'competitive electoral systems,' which we define as states in which each political party managed to garner a majority of seats or votes in at least one election between 1968 to 1988.").

141 See notes 129–32 and accompanying text.

142 See McGhee, 39 Legis Stud Q at 66 (cited in note 12) (noting that in 44 percent of these elections the majority party received more than 55 percent of the statewide vote).

143 See Shor and McCarty, 105 Am Polit Sci Rev at 540, 546 (cited in note 20) (showing a wide range of polarization levels in state legislatures).

144 See McGhee, 39 Legis Stud Q at 62 (cited in note 12).

plan we used earlier to show how the efficiency gap is computed.[145] Since Party A received 55 percent of the statewide vote, its district-specific vote shares need to be reduced by 5 percent (and Party B's increased by 5 percent) to determine the plan's partisan bias. As Figure 3 shows, this shifting causes five districts (districts 4–8) that in fact were won by Party A to be allocated to Party B in the hypothetical tied election. The plan therefore has a partisan bias of 20 percent *against* Party A (since Party B would win seven of the ten districts in a tied election), even though the plan has an efficiency gap of 20 percent *in favor of* Party A (since Party A actually won eight of the ten districts). This scenario sharpens the point with which we began our critique of partisan bias: because the metric assesses the results of a counterfactual election, it sometimes may be unmoored entirely from the actual election outcomes that are of primary concern.

FIGURE 3. CALCULATION OF PARTISAN BIAS

	Actual Votes by Party		Actual Winner by Party		Shifted Votes by Party		Shifted Winner by Party	
District	A	B	A	B	A	B	A	B
1	70	30	1	0	65	35	1	0
2	70	30	1	0	65	35	1	0
3	70	30	1	0	65	35	1	0
4	54	46	1	0	49	51	0	1
5	54	46	1	0	49	51	0	1
6	54	46	1	0	49	51	0	1
7	54	46	1	0	49	51	0	1
8	54	46	1	0	49	51	0	1
9	35	65	0	1	30	70	0	1
10	35	65	0	1	30	70	0	1
Total	**550**	**450**	**8**	**2**	**500**	**500**	**3**	**7**

The conclusion we draw from this analysis is that there is no good reason to use partisan bias as a measure of gerrymandering. It is conceptually flawed because it focuses on hypothetical rather than actual election results. And as a practical matter, it cannot sensibly be computed for the many electoral systems that are uncompetitive, while it converges on the efficiency gap as systems become more competitive. Partisan bias therefore is either an invalid metric (in uncompetitive elections) or a redundant one (in competitive settings).

[145] See Part II.A.

D. Limitations

Up to this point, we have introduced the efficiency gap and emphasized its advantages over partisan bias. Next we consider the measure's possible limitations. There are three in particular: (1) the unexpected results that begin to emerge when one party receives an extraordinarily high vote share; (2) the metric's instability over time; and (3) the measure's sensitivity to the treatment of uncontested seats. But none of these limitations is crippling. Sufficiently high vote shares are very rare; the gap's volatility can be addressed through sensitivity testing; and sensible assumptions for uncontested seats tend to dampen rather than exaggerate the gap.

As we have noted, the efficiency gap is useful for evaluating fairness across a range of plans, even ones in which one party significantly outperforms the other.[146] But for any system in which one party *truly* dominates its opponent—specifically, when one party receives more than 75 percent of the statewide vote—the efficiency gap can produce results that at first glance seem strange. When one party receives 75 percent of the vote, a plan with a gap of zero will give that party 100 percent of the seats.[147] And once a party holds all the seats, any additional vote share above 75 percent will suggest a growing gap in favor of the *opposing* party. This outcome is technically correct: when a party already holds all the seats, additional votes are wasted since they cannot contribute to more victories. Nonetheless, it fails to capture the idea of fairness at stake in redistricting, since the majority party in this situation could hardly be said to suffer a disadvantage.

That said, this scenario is easily identified in any redistricting analysis. All an analyst must do is flag elections in which a party received at least 75 percent of the statewide vote and 100 percent of the seats. More to the point, results this lopsided are extremely rare. No party has received more than 75 percent of the aggregate vote in state legislative elections since 1982, and there are only 18 such cases out of 800 in congressional elections (all of them either in the South or in states with fewer than four House districts).[148] And even in *these* cases, the majority party

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146 See text accompanying notes 140–42.

147 Per the formula introduced in Part I.B, $(100\% - 50\%) - 2 \times (75\% - 50\%) = 0$.

148 For this congressional calculation, we excluded all uncontested seats, since they are especially likely to bias the outcome compared to the larger number of seats at stake in legislatures. The specific cases are: Alaska (2000, 2002, 2004), Hawaii (1984, 1992,

did not always win every single seat, meaning that the actual universe of potentially odd outcomes is smaller still. Accordingly, this is not a problem that is especially relevant to real-world redistricting.

The efficiency gap's potentially more important limitation is instability. While in theory the efficiency gap *could* be constant over time—it remains fixed so long as seat shares and vote shares move together in the two-to-one ratio specified by the formula—as a practical matter it tends to fluctuate. In fact, in the original exposition of the measure, one of us showed that most redistricting plans are volatile enough that their precise consequences cannot be forecast with great accuracy. Specifically, a plan's efficiency gap in one election is a relatively weak predictor of its gap in the next election (coefficient = 0.23) in a model that also includes a variety of other factors.[149] Many partisan gerrymanders therefore are not solid enough to avoid coming undone in the face of changing political winds.

However, this instability is not so much a weakness of the measure as it is a property of the elections themselves. The parties' vote shares vary much more over the life of a district plan than is commonly realized: by up to 5.5 percent in either direction for most state house plans over a typical decade, and by up to 7.5 percent for most congressional plans.[150] It is relatively unsurprising that seat shares do not change in tandem pursuant to the two-to-one ratio, and that the efficiency gap thus swings from election to election. By comparison, partisan bias is fairly stable.[151] But this relative stability is an artifact of the measure itself, stemming from the fact that it shifts all actual election results to the point of the hypothetical election. This shifting negates all uniform swings that may have occurred, and even negates any *non*-uniform swings that fail to move any districts into or out of the counterfactual window.[152]

Moreover, to say that many gerrymanders come undone is not to say that they *all* evaporate. As we illustrate in the next Part, some district plans in previous cycles indeed featured large

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2008), Louisiana (2000), Mississippi (1990), North Dakota (1984, 1986), South Dakota (1998), Vermont (1982, 1984, 1990, 1992, 1996), West Virginia (1998), and Wyoming (1984).

149 See McGhee, 39 Legis Stud Q at 72–74 (cited in note 12). By comparison, the equivalent coefficient for partisan bias is 0.68. See id.

150 See Part III.B.

151 See McGhee, 39 Legis Stud Q at 56 (cited in note 12).

152 See id at 59.

and durable efficiency gaps over multiple elections. They persisted in benefiting a particular party, year in and year out.[153] As for the plans currently in effect, sensitivity testing can determine their stability in the face of a wide range of future electoral shifts. So long as certain plans would remain unbalanced over an array of potential outcomes—as several indeed would, per the next Part's calculations—the case for judicial intervention is unaffected. In fact, it is strengthened, because then courts can be more confident that the plans' distortion is a lasting rather than an ephemeral phenomenon.

Finally, the efficiency gap can be sensitive to the treatment of uncontested seats. These seats pose a tricky problem for any measure of gerrymandering (including partisan bias).[154] Since gerrymanders redistribute voters in order to pack and crack the opposition, determining the degree of packing and cracking requires knowing how many people in each district support each party. This support need not be unconditional: it can change over time in response to the candidates, the parties' platforms, the parties' relative performances in office, and so forth. Indeed, this variation is the essence of the sensitivity testing we describe in greater detail below.[155] But the notion of support hinges on freedom of choice: voters must be able, in principle, to select more than one option. Absent such a choice, we simply do not obtain any information about voters' preferences.

Uncontested races by definition offer no choice at all: they require voters to support one party, and deny them the opportunity to reveal their true sympathies. Indeed, the one thing we can say with virtual certainty about an uncontested race is that its outcome would have been different had it been contested. The *winner* might have been the same, but the *share of the vote* for the winner almost certainly would have been lower. For example, in 95 percent of state legislative districts with uncontested Democrats, Republicans managed at least 12 percent of the vote when the same district was contested in other elections. Likewise, in 95 percent of cases with uncontested Republicans, Democrats garnered at least 21 percent of the vote when they ran a

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153 See Part III.B.

154 See Campagna and Grofman, 52 J Politics at 1247 n 7 (1990) (cited in note 125) ("One key issue is how to handle uncontested seats. [One needs] to avoid using 100% as the vote share for a party in an uncontested seat (which, for Congress, tends to bloat . . . vote share)."); Gelman and King, 38 Am J Polit Sci at 524 (cited in note 136) ("[U]ncontested elections do not fit any linear model unless explicitly controlled for.").

155 See Part III.A.

candidate for the seat. In most of these cases, the minority party's average vote share was even higher than these numbers would suggest.

For this reason, scholars often try to assign vote shares to uncontested races that reflect how voters *might* have cast their ballots *if* they had been given a choice.[156] There are several ways this assignment can be done. The most defensible is to use variables that have been shown in the past to predict vote share, and then to impute values for uncontested races based on these variables. One might also examine how uncontested districts have turned out in previous years when those same seats were contested. Or one might simply assume that the opposing party would have received a certain vote share (for example, 25 percent) had it run a candidate in an uncontested district. Clearly, these imputation approaches can be more or less sophisticated, and can bring varying amounts of information to bear on the problem.

For our analysis here, we followed two different imputation strategies. For congressional races, we obtained presidential vote share data at the district level, and then ran regressions of vote choice in contested seats on incumbency status and district presidential vote separately for each election year. From this information, we imputed values for uncontested seats. For uncontested Democrats, this procedure resulted in a mean Democratic vote share of 70 percent, with 90 percent of values falling between 56 percent and 87 percent. For uncontested Republicans, it produced a mean Democratic vote share of 32 percent, with 90 percent of values falling between 22 percent and 43 percent.

Unfortunately, we did not have presidential vote share data by state house district for all the years in our analysis, so we were forced to take a different imputation approach for these chambers. For all contested state house races, we ran a multilevel model with a fixed effect for incumbency and random effects for years, states, and districts. For uncontested districts that had been contested at some point in their lifespan, this equation assigned a single value by effectively borrowing information from other districts in the same state and election year, as well as from the same district at other points in time. For uncontested districts that were never contested, we took a random

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[156] See McGhee, 39 Legis Stud Q at 66 n 5 (cited in note 12) (using a "default setting for uncontested races, which assigns uncontested Republicans a vote share of 0.25 and uncontested Democrats a vote share of 0.75").

draw from the distribution of district random effects and used it for prediction. Despite the differences in chamber and methodology, the results were remarkably similar to those for the House. For uncontested Democrats, we calculated a mean Democratic vote share of 66 percent, with 90 percent of values falling between 52 percent and 83 percent. For uncontested Republicans, we calculated a mean Democratic vote share of 36 percent, with 90 percent of values falling between 25 percent and 48 percent.

Going forward, we encourage other scholars to explore a range of imputation techniques to ensure that the direction of a gerrymander (if not its size) is robust to any particular strategy. But this catholic philosophy has its limits. We strongly discourage analysts from either dropping uncontested races from the computation or treating them as if they produced unanimous support for a party. The former approach eliminates important information about a plan, while the latter assumes that coerced votes accurately reflect political support. Neither correctly represents how the gerrymandering party itself would view its plan.

III. GERRYMANDERING OVER TIME AND SPACE

Now that we have introduced the efficiency gap, we turn to what for many readers will be the most important question addressed by this Article: What gaps have district plans actually exhibited over the years and across the states? We begin this Part by presenting some summary statistics about the gaps of congressional and state house plans from 1972 to 2012. The gaps' distributions over this period both had medians close to zero and were roughly symmetric in shape. Thus, as a historical matter, neither party enjoyed a systematic advantage over its opponent. In recent years, however, there has been a startling rise in the level of the efficiency gap. In the 2012 election, in particular, the average absolute gap of both congressional and state house plans spiked to unprecedented heights.

We next report our findings about all of the *individual* district plans in our database. For each prior plan, we show both its average gap over its existence and the gap's full range of values during this period. For each current plan, we show its gap in the 2012 election as well as the spectrum of values the gap could take given plausible shifts in voter sentiment. One important conclusion is that most plans are reasonably fair and reasonably likely to favor different parties at different points during their lifespans. But another key point is that multiple current plans

are exceptions to this general rule. More of today's plans feature large efficiency gaps that are unlikely to dissipate than ever before in modern history.

Lastly, we single out the plans, both past and present, that have given rise to partisan gerrymandering litigation. Interestingly, the plans that plaintiffs have targeted have not featured especially large efficiency gaps. This poor record suggests that plaintiffs often have lacked accurate estimates of plans' partisan effects.[157] It also hints that courts may have acted prudently in rejecting many gerrymandering challenges. But this past prudence does not mean that courts should continue to rebuff gerrymandering suits. The efficiency gap provides exactly what litigants and courts have long been missing: a reliable assessment of plans' partisan implications.

A. Summary Statistics

We used congressional and state house election results from 1972 to 2012 to carry out our efficiency gap calculations.[158] We considered congressional plans only for states that had at least eight districts at some point during this period, because redistricting in smaller states has only a minor influence on the national balance of power. We also considered only single-member state house districts, because the efficiency gap is more difficult to compute for multimember districts.[159] Furthermore, we report

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[157] See Part III.C.

[158] For congressional election results, see *Election Information: Election Statistics* (Office of the Clerk of the US House of Representatives), archived at http://perma.cc/7UNC-HQS5. The same information is available in a more usable format in a database maintained by Professor Gary Jacobson. For state house election results, we relied on a database assembled by Professor Carl Klarner for data through 2010, and we compiled the 2012 results ourselves. See Carl Klarner, et al, *State Legislative Election Returns Data, 1967–2010* (IQSS Dataverse Network), archived at https://perma.cc/P3WP-XJ5Q.

The efficiency gap also can be calculated using *presidential* election results aggregated by district. These results have the advantage of being (mostly) unaffected by district-level candidate characteristics. For congressional plans, our findings using presidential data are similar to those we report in the Article (especially for more recent years). For state house plans, unfortunately, presidential data is unavailable for most of the period we examine, meaning we cannot use it as a robustness check.

[159] For a few state houses in particular periods, we lacked so much data (either because it was not collected or because the state had too few single-member districts) that it seemed sensible to drop the body entirely. The omitted cases are: Alaska (1972–1980), Arkansas (all years), Hawaii (all years), Louisiana (all years), Maryland (all years), Mississippi (1972–1982), New Hampshire (all years), North Carolina (1972–1990), Virginia (1972–1982), and Wyoming (1972–1990). See note 106 and accompanying text.

the efficiency gap in *seats* for congressional plans and in *seat shares* for state house plans. What matters in congressional plans is their impact on the total number of seats held by each party at the national level.[160] Conversely, state houses are self-contained bodies of varying sizes, for which seat shares reveal the scale of parties' advantages and enable temporal and spatial comparability.

Figure 4 shows the distributions of the efficiency gap for congressional and state house plans from the 1970s—the first full cycle of the modern one person–one vote era—to the present. Each plan in each election year is represented in the distributions; we do not average each cycle's plans here. The most obvious point about the curves is that their medians both are close to zero and their shapes both are approximately symmetric.[161] Both curves are tilted *slightly* in a pro-Republican direction, as reflected in their longer Republican tails and their average efficiency gaps of -0.20 seats for Congress and -0.32 percent for state houses (where negative values are pro-Republican). But this imbalance is relatively trivial. For the most part, the efficiency gap hovers around zero, and there are plans that clearly favor both parties.

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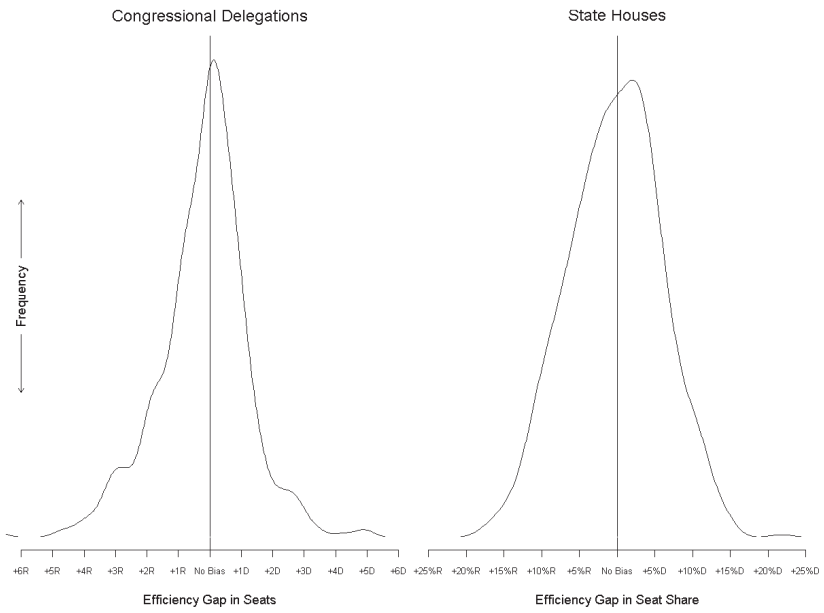
[160] See Adam B. Cox, *Partisan Gerrymandering and Disaggregated Redistricting*, 2004 S Ct Rev 409, 411 (arguing that the harms in gerrymandering of congressional plans "stem from the manipulation of the composition of Congress as a whole").

[161] For a similar finding with respect to the distribution of partisan bias at the congressional level, see King and Browning, 81 Am Polit Sci Rev at 1261–62 (cited in note 22) ("[T]he mean is almost exactly 0, and there is an approximately symmetric normal distribution around this point.").

FIGURE 4. EFFICIENCY GAP DISTRIBUTIONS, 1972–2012



Our results diverge from recent findings by other scholars that most district plans are biased in a pro-Republican direction.[162] We attribute the divergence to several factors. First, the other scholars used partisan bias as their measure of gerrymandering, not the efficiency gap.[163] As we explained earlier, partisan bias scores become increasingly uncorrelated with efficiency gap scores as elections grow less competitive.[164] Second, the other scholars calculated partisan bias using presidential election results rather than legislative election results.[165] If certain voters consistently support Republicans at the presidential level and Democrats at the legislative level, then presidential data may produce more pro-Republican estimates than legislative data.[166] And third, the other scholars studied elections only in

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[162] See Chen and Rodden, 8 Q J Polit Sci at 260–63 (cited in note 23).

[163] See id at 248.

[164] See Part II.C.

[165] See Chen and Rodden, 8 Q J Polit Sci at 248, 260–61 (cited in note 23).

[166] The relationship between presidential and legislative estimates also may vary over time. Our preliminary hypothesis is that both approaches produce similar results for modern elections, in which voters are well sorted by ideology, and more divergent

the early 2000s, a period in which we also find a pro-Republican skew.[167] Our conclusion that plans over the entire modern era have been reasonably balanced is consistent with the work of political scientists who have examined longer timespans.[168]

Next, Figures 5 and 6 chart the average *net* efficiency gap and the average *absolute* efficiency gap over time.[169] The average net gap is the mean of all plans' actual gaps in a given year, while the average absolute gap is the mean of the absolute values of all plans' gaps. The average net gap indicates the overall partisan *direction* of gerrymandering, while the average absolute gap reveals its overall *magnitude*. The average net gap plots confirm the account, hinted at above, of plans increasingly favoring Republicans over time. At the congressional level, plans in the 1970s were roughly balanced in aggregate (0.10 seats), plans in the 1980s slightly benefited Democrats (0.27 seats), plans in the 1990s slightly benefited Republicans (-0.27 seats), plans in the 2000s substantially benefited Republicans (-0.72 seats), and plans in 2012 even more dramatically benefited Republicans (-1.21 seats).[170] At the state house level, similarly, the trend has been from a modest edge for Democrats in the 1970s (1.52 percent) and

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results for past elections, in which the parties were not as ideologically coherent. We hope that future research will test this hypothesis.

[167] See Chen and Rodden, 8 Q J Polit Sci at 261, 264 (cited in note 23). See also Figures 5, 6 (showing a change in the efficiency gap over time).

[168] See, for example, Cox and Katz, *Elbridge Gerry's Salamander* at 59 (cited in note 22) (showing a pro-Republican bias in the 1950s at the congressional level followed by close to zero bias in the 1960s); Gelman and King, 38 Am J Polit Sci at 540 (cited in note 136) (same, and also showing a pro-Democratic bias in the 1970s and 1980s); Gelman and King, 88 Am Polit Sci Rev at 546 (cited in note 22) (showing a wide range of bias values for state legislative plans in the 1970s and 1980s); King and Browning, 81 Am Polit Sci Rev at 1261–62 (cited in note 22).

[169] Since we do not have exactly the same states for every year in our database of state legislative elections, we wanted to make sure that the trends we observe are not a product of this data issue. We therefore ran an ordinary least squares (OLS) regression with fixed effects for years and states. The year fixed effects represent the change over time, independent of constant state characteristics. We averaged the actual efficiency gaps for 1972 and then added the year fixed effects to that value to generate the remainder of the time series. This process produces results very similar to simple averaging.

[170] This is quite similar to the pattern that one of us found in a historical analysis of partisan bias. See John Sides and Eric McGhee, *Redistricting Didn't Win Republicans the House* (Wash Post Wonkblog, Feb 17, 2013), archived at http://perma.cc/KBW5-24V4 (showing that Democrats benefited from gerrymandering at the congressional level in the 1970s and 1980s, Republicans benefited slightly in the 1990s, and Republicans benefited significantly in the 2000s and 2012). See also Tony L. Hill, *Electoral Bias and the Partisan Impact of Independent Redistricting Bodies: An Analysis Incorporating the Brookes Method* *19 (unpublished manuscript presented at the Annual Conference of the Midwest Political Science Association, Apr 2008) (on file with authors) (same).

1980s (1.52 percent), to ever larger advantages for Republicans in the 1990s (-1.04 percent), 2000s (-2.11 percent), and 2012 (-3.67 percent).[171]

The story for the average absolute gap is somewhat different. At both the congressional and state house levels, it remained roughly constant between 1972 and 2010 (though with perhaps a slight upward tilt, especially from the 1980s onward). But it then spiked in the 2012 election to the highest peaks recorded in the modern era—1.58 seats at the congressional level, compared to an average of 1.02 seats in the four previous cycles, and 6.07 percent at the state house level, compared to an average of 4.94 percent in the four prior decades. The increase in the *magnitude* of gerrymandering thus is a very recent phenomenon, while the movement in the Republican *direction* dates back somewhat further.

These findings indicate that the growing Republican advantage in the 1990s and 2000s was due not to more severe gerrymandering but rather to some other factor: perhaps control over redistricting in more states, larger numbers of Republican incumbents eking out narrow wins, or favorable trends in voters' residential patterns. If plans in this period had been gerrymandered more aggressively than their predecessors, then their average absolute gap would have increased, not held steady. The findings also suggest that the striking outcomes of the 2012 election *are* due, at least in part, to more extreme gerrymandering. In 2012, unlike in previous years, the average absolute gap spiked just as the average net gap surged in a pro-Republican direction.[172]

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171 The pro-Democratic spike in the average net gap in 2010 is also notable. It is likely explained by a number of Democratic incumbents barely hanging on to their seats in a very pro-Republican year.

172 For a similar argument, see Anthony J. McGann, Charles Anthony Smith, and James Alexander Keena, *Revenge of the Anti-federalists: Constitutional Implications of Redistricting* *28–29, 42–50 (unpublished manuscript, 2014) (on file with authors) (attributing the rise in pro-Republican partisan bias in 2012 to more severe gerrymandering in the wake of *Vieth*).

FIGURE 5. AVERAGE NET AND ABSOLUTE EFFICIENCY GAPS FOR CONGRESSIONAL PLANS, 1972–2012

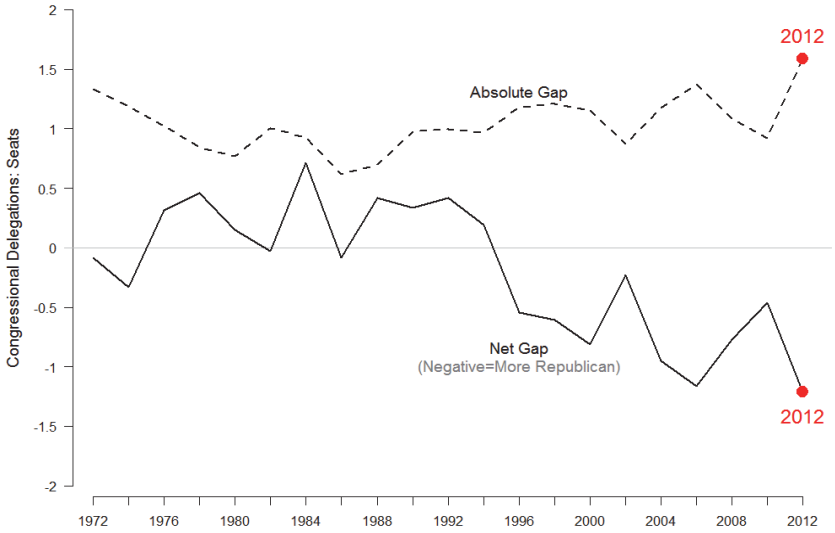
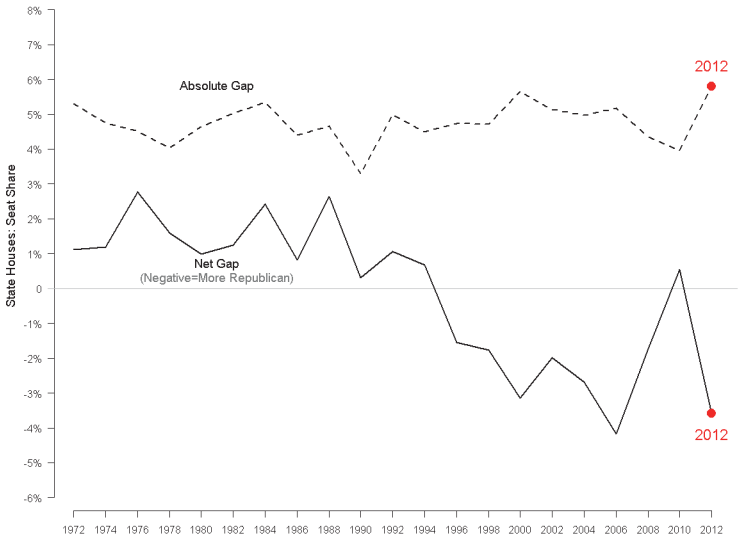


FIGURE 6. AVERAGE NET AND ABSOLUTE EFFICIENCY GAPS FOR STATE HOUSE PLANS, 1972–2012



B. Individual Plans

We turn next from summary statistics about the efficiency gap to individual district plans. This plan-level information, of course, is precisely what litigants and courts would need to assess maps' partisan fairness. Figures 7 and 8, then, display the gaps of congressional and state house plans used in the five cycles of the modern redistricting era. As before, we present the gaps in terms of seats for Congress and seat shares for state houses. When multiple plans were employed by a state in a given cycle, we depict each of them separately.[173] Furthermore, we are interested in capturing the extent to which each plan's gap changed (or would change) over its lifetime in order to gauge the robustness of the plan's partisan skew. Gerrymanders, we reiterate, can often come undone in shifting political circumstances.

To this end, for each plan in earlier cycles, we show its average efficiency gap as well as the full range of values taken by the gap over the plan's existence. This information reveals the plan's partisan implications as they in fact unfolded. For each plan *currently* in effect, the gap's range cannot be calculated directly—the necessary elections simply have not occurred. Instead, to explore the spectrum of possible outcomes, we shift the observed 2012 vote share up and down by a uniform amount, and then record how the gap changes as a result. When choosing the scale and direction of this shifting, we wanted to remain as agnostic as possible about the future electoral path of each state. We thus used the variation that actually occurred in past elections to anchor our simulation, and selected a level of shifting that covered four out of every five prior outcomes.[174] Since each plan typically spans five elections, this approach ensures that any plan that does *not* cross the zero axis in the simulation is unlikely to do so in a given cycle. The shifts we derived from the historical data also are quite large: 7.5 percent in either direction for Congress and 5.5 percent in either direction for state houses. Accordingly, we are confident that we have devised a

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[173] See, for example, Figure 7 (depicting two plans for Texas in the 2000s).

[174] Specifically, we started with the aggregate vote share in each state in the first year each plan was used (usually 1972, 1982, 1992, or 2002). We then calculated the deviations from that year's outcome that occurred throughout the remainder of the redistricting cycle. These deviations gave us a sense of the range of outcomes that may ultimately transpire for the plans currently in effect. We then chose vote share shifts that covered the tenth through the ninetieth percentiles of each variable's distribution.

stringent test of gerrymanders' robustness to varying electoral conditions.

Our efficiency gap computations, combined with our sensitivity testing, lead to several important conclusions. First, many plans either are balanced to begin with or can unravel in changing political circumstances. Out of the 120 congressional plans we examined, 80 had mean efficiency gaps of less than one seat, and 59 crossed the zero axis at some point during their lifespans. Likewise, of the 167 state house plans in our study, 85 had mean gaps of below 4 percent, and 78 favored different parties at different points in the cycle.[175] It thus is only the occasional plan that has a large or durable efficiency gap. Severe and persistent gerrymandering is the historical exception rather than the rule.

Second, while a Republican advantage is more common, there are numerous examples of plans that strongly favor Democrats as well. Political scientists often argue that America's underlying political geography benefits Republicans, because Democratic supporters are concentrated in urban centers where they are likely to waste their votes in overwhelmingly safe districts.[176] As we discuss below, the spatial allocation of voters may be legally relevant as a justification for plans whose efficiency gaps exceed the key thresholds.[177] Nevertheless, there are multiple cases of plans that are biased robustly in favor of Democrats, including the Texas congressional plans in the 1970s, 1980s, and 1990s; the first California congressional plan in the 1980s;[178] the current Massachusetts and Rhode Island state house plans; and several southern state house plans in the 1970s, 1980s, and 1990s. Pronounced Republican edges may be more prevalent, but they do not exhaust the universe of unbalanced plans.

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[175] We use these levels here because they are *half* of the thresholds that we later recommend in our discussion of presumptively valid and invalid plans. See Part IV.A. In addition, a substantial portion of the plans that do not cross the zero axis were in effect for only one or two elections. Had they been used for the entire decade, they may well have crossed the zero axis too.

[176] See, for example, Chen and Rodden, 8 Q J Polit Sci at 241 (cited in note 23); Gary C. Jacobson, *Terror, Terrain, and Turnout: Explaining the 2002 Midterm Elections*, 118 Polit Sci Q 1, 19 (2003) (describing how Democratic votes are more likely to be "wasted" due to less efficient spatial distribution).

[177] See Part IV.B.

[178] California's infamous "Burton gerrymander" actually exhibits the largest efficiency gap of any congressional plan in our database. For an in-depth discussion of this plan, see Andrew J. Taylor, *Elephant's Edge: The Republicans as a Ruling Party* 40 (Praeger 2005).

Third, plans' efficiency gaps have become both larger and more pro-Republican over time. This point already was made by the time series charts we presented earlier, but it is confirmed by the plan-level data. At the congressional level, there were two plans in the 1970s with average gaps of more than two seats (one pro-Democratic and one pro-Republican), four plans in the 1980s (three pro-Democratic), four plans in the 1990s (two pro-Republican), four plans in the 2000s (three pro-Republican), and *seven* plans in 2012 (*all* pro-Republican). Similarly, at the state house level, there were six plans in the 1970s with an average gap of greater than 8 percent (four pro-Democratic), six plans in the 1980s (four pro-Democratic), five plans in the 1990s (four pro-Republican), three plans in the 2000s (two pro-Republican), and *fourteen* plans in 2012 (*twelve* pro-Republican).[179] Whether one considers aggregated or disaggregated data, it thus is clear that the scale and skew of today's gerrymandering are unprecedented in modern history.

C. Gerrymandering Litigation

The final piece of information conveyed by Figures 7 and 8 is whether a plan gave rise to partisan gerrymandering litigation. If it did, it is presented in italics and with a dotted line in the charts. Because the courts did not recognize this cause of action until the 1980s, we do not count gerrymandering-like claims that were brought in the 1970s.[180] By our count, four of the plans in our study were challenged on this basis in the 1980s, eight in the 1990s, eleven in the 2000s, and eight in the 2010s (so far).[181] Interestingly, the Court's decisions in *Vieth* and *LULAC* seem to have had only a minor dampening effect on plaintiffs' willingness to file gerrymandering suits. Plaintiffs may not have noticed the Court's signals about the sorts of theories they should

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[179] These are the same thresholds we use later in our discussion of the appropriate legal test for partisan gerrymandering. See Part IV.A.

[180] See, for example, *Gaffney v Cummings*, 412 US 735, 735–36 (1973) (dealing with a Connecticut reapportionment plan).

[181] In the interest of brevity, we do not cite all of these cases here. The citations are available from the authors. See, for example, *Radogno v Illinois State Board of Elections*, 2011 WL 5868225, *5 (ND Ill) (three-judge panel); *Martinez v Bush*, 234 F Supp 2d 1275, 1340 (SD Fla 2002) (three-judge panel); *Pope v Blue*, 809 F Supp 392, 399 (WD NC 1992) (three-judge panel); *Badham v March Fong Eu*, 694 F Supp 664, 670 (ND Cal 1988) (three-judge panel).

assert,[182] but they have capitalized on the Court's refusal to rule out gerrymandering claims entirely.

The most important point about the litigated plans is that they are *not* the ones that have exhibited the largest or most durable efficiency gaps. In the current cycle, for instance, none of the eight challenged plans satisfies the definition we set forth below of a presumptive gerrymander (that is, a gap of more than two seats for Congress, or 8 percent for state houses, that is expected to endure for the entire cycle).[183] Of the sixteen plans that do satisfy our definition, none was contested in court on this basis. The story is the same in earlier cycles. Of the twenty-three prior plans that were alleged to be unlawful gerrymanders, only five would have met our standard: Florida's congressional and state house plans in the 2000s, Texas's congressional plans in the 1990s and 2000s, and California's congressional plan in the 1980s. The numerous other plans that would have met our standard escaped any judicial scrutiny of their partisan implications.

To be fair, the litigated plans have not been *entirely* random, at least at the congressional level. The average litigated House plan has had a mean absolute efficiency gap of 1.47 seats, compared to 0.98 for unlitigated plans. Moreover, many of the plans that were not challenged on gerrymandering grounds *were* challenged on other bases, often with partisanship as the unspoken impetus for the litigation. For example, of the sixteen current plans that satisfy our definition of a presumptive gerrymander, eleven were attacked on one person–one vote, Voting Rights Act, racial gerrymandering, or state law grounds.[184]

Putting aside these caveats, why have plaintiffs been so inaccurate in the plans they have targeted? One likely answer is that they have lacked reliable information about the magnitude and durability of gerrymandering. The most common existing measure of gerrymandering, partisan bias, very rarely has been cited in litigation.[185] And, to our knowledge, there has not been

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[182] See Part I.C.

[183] See Part IV.A.

[184] See *Litigation in the 2010 Cycle*, archived at http://perma.cc/RL9S-56ZH. See also Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 Harv L Rev 593, 630–31 (2002) (noting that, in "the absence of any real constitutional vigilance over partisan gerrymandering, . . . litigants must squeeze all claims of improper manipulation of redistricting into [other categories]").

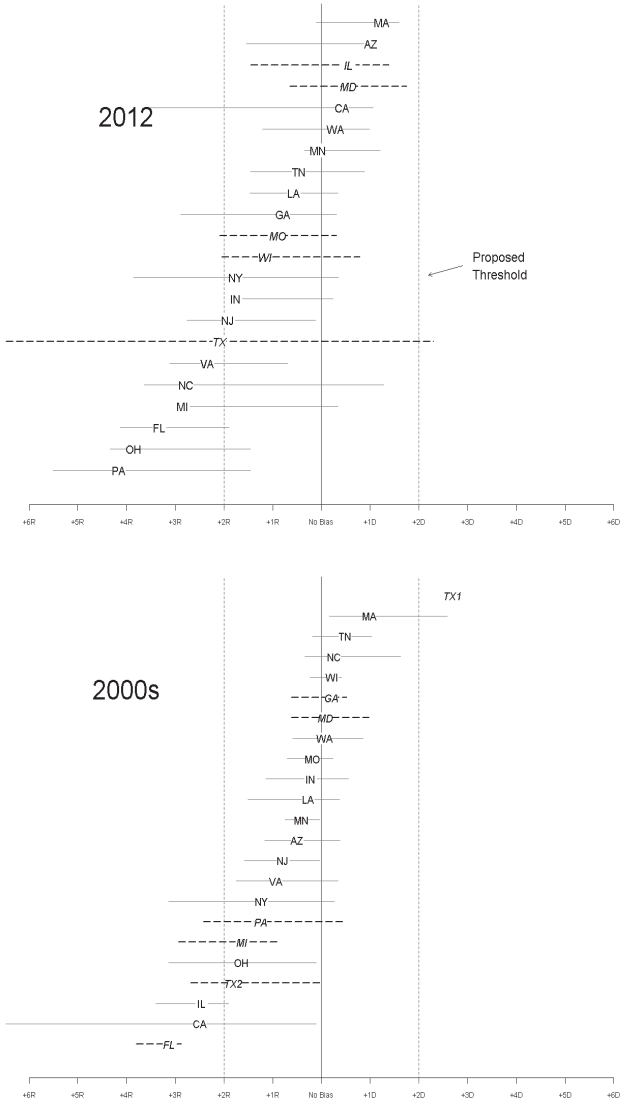
[185] A Westlaw search turns up only four gerrymandering decisions that have referred to partisan bias. See *LULAC*, 548 US at 419–20 (Kennedy) (plurality); *Good v Austin*, 800 F Supp 551, 555 (E & WD Mich 1992) (three-judge panel); *Quilter v*

any previous effort to determine the stability of gerrymandering through sensitivity testing. Plaintiffs thus have not had the necessary tools to identify especially egregious plans. Another potential answer is that, given the extremely low odds of prevailing on a gerrymandering claim, there simply may be no rhyme or reason to when one is included in a suit. The decision to assert such a claim may be essentially arbitrary, in which case one would not expect litigated plans to exhibit unusually large efficiency gaps.

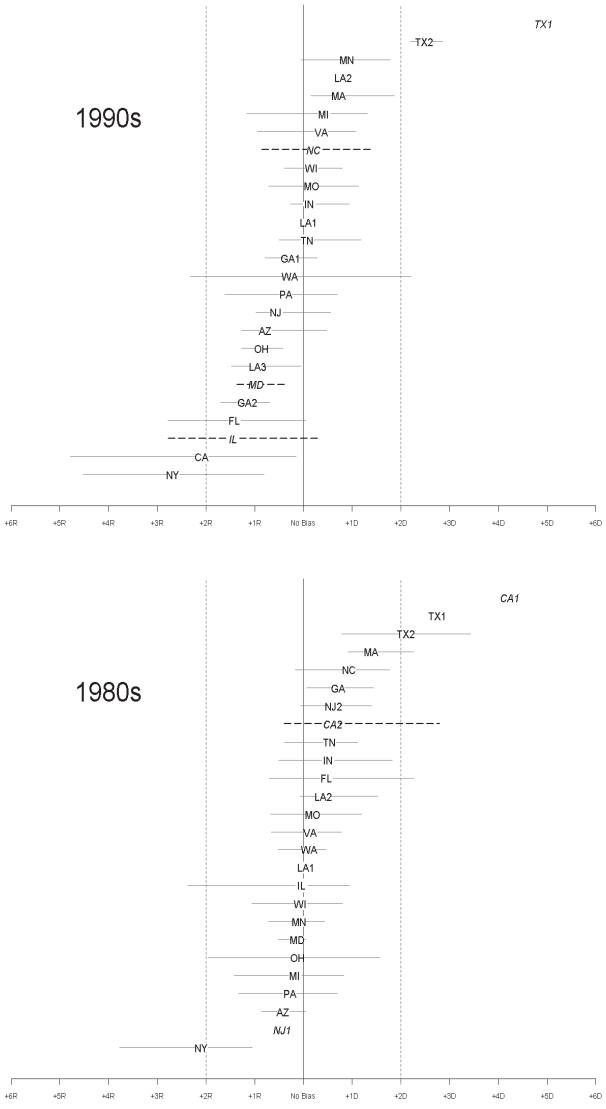
Whatever the reason may be for plaintiffs' past inaccuracy, we think it actually has positive implications for judicial intervention in the future. If past plaintiffs challenged plans almost at random, then courts acted wisely in rejecting these suits. But if future plaintiffs begin attacking only the *worst* gerrymanders—the ones with the largest and most durable efficiency gaps—then courts' prior passivity would be no justification for continued inaction. Then plaintiffs would be coming to courts not with unsubstantiated allegations but rather with hard data about plans' gaps relative to those of other states. The resulting cases would bear little resemblance to their antecedents in earlier cycles.

Voinovich, 794 F Supp 695, 733–34 (ND Ohio 1992) (three-judge panel), revd, 507 US 146 (1993); *Maestas v Hall*, 274 P3d 66, 79–80 (NM 2012).

FIGURE 7. EFFICIENCY GAPS FOR CONGRESSIONAL PLANS BY STATE, 1972–2012[186]



186 This chart includes all states that had at least eight congressional districts at any point in the relevant period.


1990s
TX1
TX2
MN
LA2
MA
MI
VA
NC
WI
MO
IN
LA1
TN
GA1
WA
PA
NJ
AZ
OH
LA3
MD
GA2
FL
IL
CA
NY
+6R
+5R
+4R
+3R
+2R
+1R
No Bias
+1D
+2D
+3D
+4D
+5D
+6D

1980s
CA1
TX1
TX2
MA
NC
GA
NJ2
CA2
TN
IN
FL
LA2
MO
VA
WA
LA1
IL
WI
MN
MD
OH
MI
PA
AZ
NJ1
NY
+6R
+5R
+4R
+3R
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+1R
No Bias
+1D
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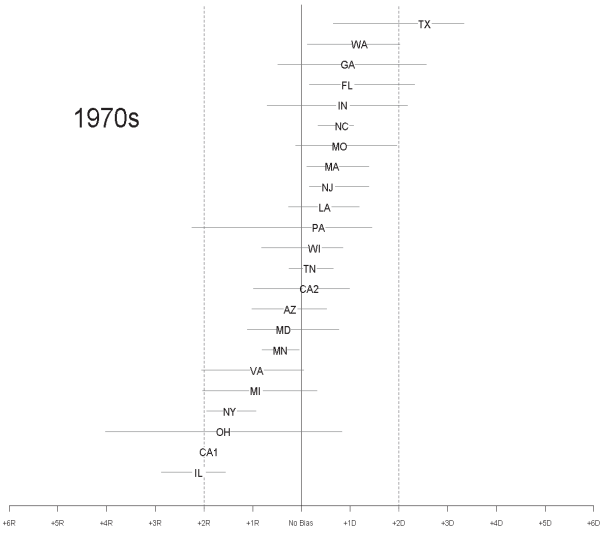
1970s
TX
WA
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FL
IN
NC
MO
MA
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LA
PA
WI
TN
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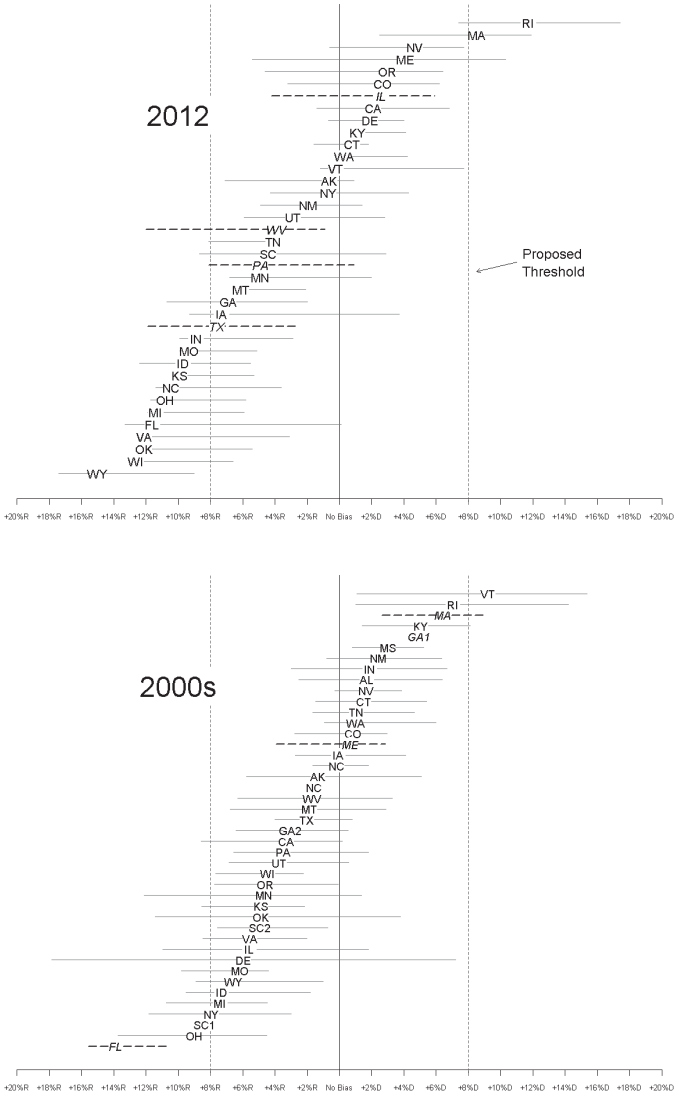
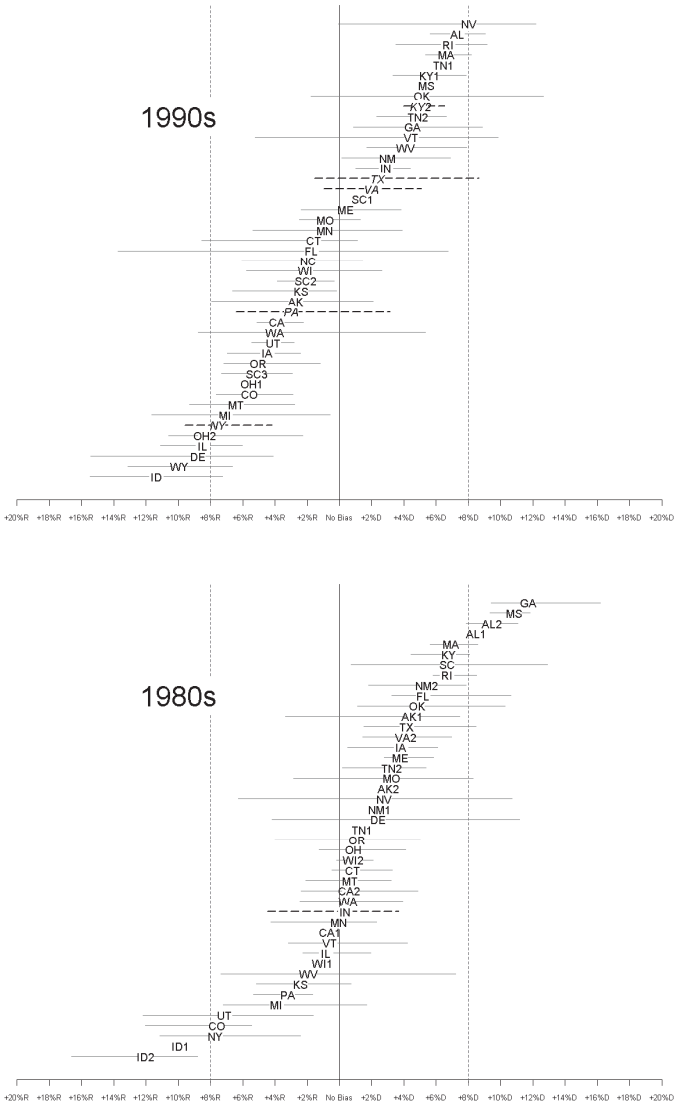
AZ
MD
MN
VA
MI
NY
OH
CA1
IL
+6R
+5R
+4R
+3R
+2R
+1R
No Bias
+1D
+2D
+3D
+4D
+5D
+6D

FIGURE 8. EFFICIENCY GAPS FOR STATE HOUSE PLANS BY STATE, 1972–2012




1990s
NV
AL
RI
MA
TN1
KY1
MS
OK
KY2
TN2
GA
VT
WV
NM
IN
TX
VA
SC1
ME
MO
MN
CT
FL
NC
WI
SC2
KS
AK
PA
CA
WA
UT
IA
OR
SC3
OH1
CO
MT
MI
NY
OH2
IL
DE
WY
ID
+20%R +18%R +16%R +14%R +12%R +10%R +8%R +6%R +4%R +2%R No Bias +2%D +4%D +6%D +8%D +10%D +12%D +14%D +16%D +18%D +20%D

1980s
GA
MS
AL2
AL1
MA
KY
SC
RI
NM2
FL
OK
AK1
TX
VA2
IA
ME
TN2
MO
AK2
NV
NM1
DE
TN1
OR
OH
WI2
CT
MT
CA2
WA
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MN
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IL
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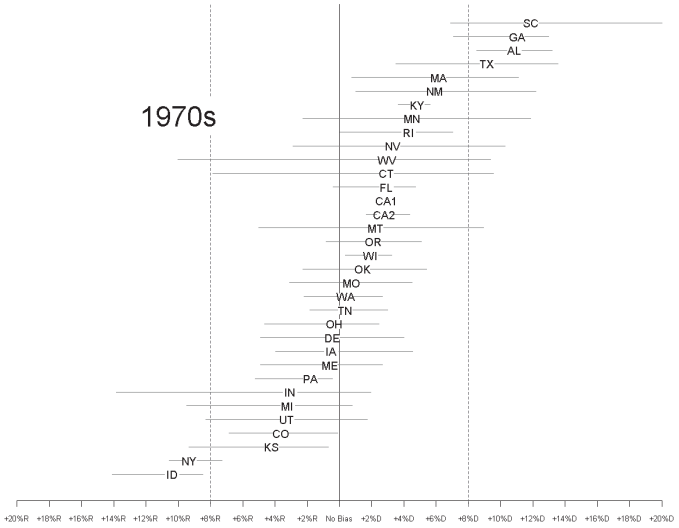
+20%R +18%R +16%R +14%R +12%R +10%R +8%R +6%R +4%R +2%R No Bias +2%D +4%D +6%D +8%D +10%D +12%D +14%D +16%D +18%D +20%D



IV. A POTENTIAL TEST

The goal of this Article is not only to introduce the efficiency gap to a legal audience and to summarize its levels over time and space. It is also to show how the efficiency gap could be made the centerpiece of a doctrinal test for partisan gerrymandering. It is to show, in other words, how an approach based on the efficiency gap could exploit the opportunity created by the Court in *LULAC* while addressing the concerns raised about symmetry by Justice Kennedy.[187]

In this Part, then, we explain how we envision that the efficiency gap would operate as doctrine. First, courts would need to choose an efficiency gap threshold above which district plans would be presumptively unlawful and below which they would be presumptively valid. Our suggestion is that the bar be set at *two seats* for congressional plans and *8 percent* for state house plans—with the additional caveat that the plans not be expected, based on sensitivity testing, ever to have an efficiency gap of zero over their lifetimes.[188] Second, states whose plans have efficiency gaps above these thresholds would have the chance to show that the gaps either resulted from the consistent application of legitimate policies, or were inevitable due to the states' underlying political geography. If it is actually the case

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[187] See Part I.B.

[188] Since we have not gathered data on state *senate* plans, we do not attempt to set a threshold for them here.

that plans with gaps below the thresholds could not be drawn while still achieving the states' policies, or could not be drawn at all, then there would be no constitutional violation.

Finally, we revisit the criticisms leveled at partisan symmetry by Justice Kennedy in *LULAC*, and argue that they are unfounded with respect to the efficiency gap. The efficiency gap does not require any assumptions about where potential vote switchers might live, nor does it involve speculation about the results of specific hypothetical elections. Moreover, the empirical data we have presented enables reasonable thresholds to be selected, which then would be used not alone, but rather along with states' redistricting policies and political geography, to answer the ultimate constitutional question.

A. Setting the Threshold

The issue that most bedeviled the *Vieth* Court was how to distinguish between *some* partisan unfairness, which presumably is lawful, and *too much* unfairness, which is not. The Court stressed that "[t]he central problem is determining when political gerrymandering has gone too far," adding that the "unanswerable question" is "[h]ow much political motivation and effect is too much."[189] In the Court's view, none of the verbal formulations offered by the parties or the dissenting justices in the case could resolve this concern. Valid plans could not be told apart from invalid ones based on qualitative standards such as "predominant intent," "extremity of unfairness," or "unjustified entrenchment."[190]

The *Vieth* Court may well be right that, in the exceedingly complex area of redistricting, no qualitative test can distinguish between lawful and unlawful plans with sufficient consistency. But a qualitative test is not the only option. Another possibility is a *quantitative* approach that relies on a calculable metric of gerrymandering. Notably, a quantitative approach is how the Court answered Justice John Marshall Harlan's charge in *Reynolds v Sims*[191] that "cases of this type"—that is, cases involving claims of unequal district population—"are not amenable to the development of judicial standards."[192] Over a series of decisions,

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189 *Vieth*, 541 US at 296–97 (Scalia) (plurality).

190 See id at 284, 295, 299 (Scalia) (plurality).

191 377 US 533 (1964).

192 Id at 621 (Harlan dissenting). See also *Baker v Carr*, 369 US 186, 268 (1962) (Frankfurter dissenting) (claiming that there are no "legal standards or criteria or even reliable analogies to draw upon for making judicial judgments" in reapportionment cases).

the Court decided that *any* deviations from perfect population equality in congressional plans must be justified by legitimate policies that necessitate the inequality.[193] The Court also concluded that population deviations above 10 percent in state legislative plans must be justified in the same manner.[194] But deviations *below* 10 percent in state plans are presumptively valid unless they result from efforts to disadvantage a political or racial group.[195]

The efficiency gap makes possible the same doctrinal move in the gerrymandering context that population deviation enabled in the reapportionment context. Just as the Court was able to avoid hazy verbal formulations by adopting precise deviation thresholds, so too could it reply to *Vieth*'s "unanswerable question"[196] by specifying an efficiency gap level above which plans would be presumptively unlawful and below which they would be presumptively legitimate. This approach would neatly slice *Vieth*'s Gordian knot, informing lower courts and political actors, in clear quantitative terms, exactly "[h]ow much political . . . effect is too much."[197]

How much political effect, then, *is* too much? One option is to follow the Court's lead in the congressional reapportionment cases and to set an efficiency gap of zero as the threshold. In this case, any district plan that did not treat the parties *identically* in terms of wasted votes would be presumptively invalid. Any such plan would be upheld only if its efficiency gap either was the necessary result of a legitimate state policy, or was unavoidable given the geographic distribution of the parties' supporters. The overarching judicial goal, as in the congressional reapportionment

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193 See, for example, *Karcher*, 462 US at 730–31 ("First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether . . . . [Next,] the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal."); *Kirkpatrick v Preisler*, 394 US 526, 537 (1969) (Fortas concurring).

194 See, for example, *Voinovich v Quilter*, 507 US 146, 161–62 (1993); *Brown v Thomson*, 462 US 835, 842–43 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State.") (citations omitted); *Connor v Finch*, 431 US 407, 418 (1977).

195 See *Cox v Larios*, 542 US 947, 949 (2004).

196 *Vieth*, 541 US at 296 (Scalia) (plurality).

197 Id at 297 (Scalia) (plurality).

cases, would be to make the efficiency gap "as nearly as is practicable" equal to zero.[198]

For several reasons, we do not recommend a zero threshold. First, it would be incompatible with the Court's repeated statements in *Vieth* that *some* partisan unfairness indeed is permissible. The Court emphasized in its opinion that "segregat[ing voters] by political affiliation is (so long as one doesn't go too far) lawful and hence ordinary."[199] Right or wrong, this sentiment cannot be reconciled with a mandate that plans' efficiency gaps be reduced to zero. Second, a zero threshold would mean that almost every current plan is presumptively unconstitutional—and that almost every plan ever enacted also likely should have been struck down. Even the most zealous reformer should hesitate before advocating standards with such disruptive consequences.[200] Lastly, as we illustrated above with empirical evidence, plans' efficiency gaps vary markedly from election to election.[201] It thus is futile to insist on a gap of zero at any particular moment, because in all likelihood the gap will have assumed a non-zero value by the time of the next election.

Instead of a zero threshold, we recommend setting the bar at two seats for congressional plans and 8 percent for state house plans, with the further proviso that sensitivity testing show that the efficiency gaps are unlikely to hit zero over the plans' lifetimes.[202] Our rationale for using different metrics for congressional and for state house plans (seats and seat shares, respectively) is identical to why we presented the data differently

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198 *Karcher*, 462 US at 730, quoting *Kirkpatrick*, 394 US at 530. See also Grofman and King, 6 Election L J at 21 (cited in note 11) (suggesting minimization of partisan bias as a potential test for gerrymandering).

199 *Vieth*, 541 US at 293 (Scalia) (plurality). See also *Bandemer*, 478 US at 133 (White) (plurality) (rejecting a standard based on "minor departures from some supposed norm").

200 See *Bandemer*, 478 US at 133 (White) (plurality) (commenting that an overly "low threshold for legal action would invite attack on all or almost all reapportionment statutes").

201 See Part III.B.

202 See Grofman and King, 6 Election L J at 22 (cited in note 11) (offering as another judicial option a test employing a partisan bias threshold). These thresholds are based on the assumption that plaintiffs generally would challenge plans after they have been used for a *single* election. The thresholds should be reduced somewhat if plaintiffs were to attack plans already used in *multiple* elections. Due to reversion to the mean, the efficiency gap distributions for plans used in multiple elections are narrower than the plan-year distributions presented in Part III.A—which implies that the thresholds should be lower as well.

in the previous Part.[203] States' congressional delegations combine to form a single legislative body, the US House of Representatives, in which the parties seek to win as many seats as possible. Since aggregate House seats are the parties' main objective, it follows that the efficiency gap should be measured in seats rather than in percentage points. An eight-point gap in California simply is not commensurate, legally or politically, to an eight-point gap in Connecticut. But this logic flips for state house plans. Each state house is a self-contained entity, elected entirely by the state's own voters. State houses also vary dramatically in size, from as few as 40 members (in Alaska) to as many as 400 (in New Hampshire).[204] For discrete bodies of such divergent sizes, seat shares, not raw seats, are the appropriate unit of measurement.

We selected the two-seat threshold for congressional plans by examining their actual efficiency gaps over the last five redistricting cycles (that is, the entire period following the reapportionment revolution of the 1960s).[205] A gap of two or more seats placed a plan in the worst 14 percent of all plans in this era, roughly 1.5 standard deviations from the mean. In each of the decades we analyzed, only a handful of plans had average gaps of this magnitude. Illinois and Texas did so in the 1970s; California (the first plan), New York, and Texas (both plans) in the 1980s; California, New York, and Texas (both plans) in the 1990s; and California, Florida, Illinois, and Texas (the first plan) in the 2000s.[206] (It is too soon, of course, to compute average gaps for the 2010s.) A two-seat gap therefore indicates that a district plan is gerrymandered to an unusual extent and that the gerrymandering has an unusually large impact on the makeup of the House as a whole. Such a gap does not quite make a plan an *outlier* in the overall distribution, but it does show that the plan is far from the historical norm.

Analogously, we chose the eight-point threshold for state house plans on the basis of their efficiency gaps over the last five decades. A gap of at least eight points placed a plan in the worst 12 percent of all plans in this period, also about 1.5 standard

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[203] See id at 21–22 (noting the possibility of setting a partisan bias threshold in terms of seats rather than percentage points). See also Part III.A.

[204] See Alaska Const Art 2, § 1; NH Const Art 9.

[205] See Cox and Katz, *Elbridge Gerry's Salamander* at 12–13 (cited in note 22) (describing redistricting in historical perspective).

[206] See Figure 7.

deviations from the mean. Again, only a small minority of plans had average gaps of this size in each decade we studied. Alabama, Georgia, Idaho, New York, South Carolina, and Texas did so in the 1970s; Alabama (both plans), Georgia, Idaho (both plans), and Mississippi in the 1980s; Idaho, Illinois, Nevada, Ohio (second plan), and Wyoming in the 1990s; and Florida, Ohio, and Vermont in the 2000s. An eight-point gap for a state house plan, like a two-seat gap for a congressional plan, thus is indicative of uncommonly severe gerrymandering.[207]

A word is in order too about the sensitivity testing we suggest incorporating into the thresholds. We recommend the testing because, as we have stressed, a plan's efficiency gap may change substantially from one election to the next. It makes little sense to say that a plan is a presumptively unlawful gerrymander in one election, if in the next its efficiency gap could switch to favor the opposing party. To take into account this volatility, we propose treating a plan as presumptively invalid only if its gap exceeds the threshold we have identified *and* the gap is unlikely to hit zero over the plan's lifetime. To determine the odds of the gap hitting zero, we suggest shifting the actual election results by percentages derived from historical data—up to 7.5 percent in each direction for congressional plans and up to 5.5 percent for state house plans—and then calculating the gap for each vote share shift.[208] Only if the gap remains on the same

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[207] We also considered, but ultimately decided against, recommending a *ten*-point threshold for state house plans. The rationale for a ten-point threshold is that it would mirror the ten-point population deviation that the Court presumptively permits in the reapportionment context. See *LULAC*, 548 US at 468 n 9 (2006) (Stevens concurring in part and dissenting in part) ("It would, of course, be an eminently manageable standard for the Court to conclude that deviations of over 10% from symmetry create a prima facie case of an unconstitutional gerrymander, just as population deviations among districts of more than 10% create such a prima facie case."). But, in our view, this coincidental convergence is not a good enough reason to make the state house threshold substantially laxer than the congressional threshold. An efficiency gap of at least ten points, notably, placed a state house plan in the worst *5 percent* of prior plans, roughly *1.9* standard deviations from the mean.

Another option is to choose a threshold based on the likelihood (derived from historical data) that a plan with a certain efficiency gap in the first election after redistricting will favor the opposing party at some point during the remainder of the cycle. Using a probability of switching signs of 10 percent, this approach gives rise to approximately the same thresholds we arrived at by examining plans' overall efficiency gap distributions. In other words, plans with efficiency gaps right at our recommended thresholds in the first election after redistricting have roughly a 10 percent chance of favoring the opposing party in one of the cycle's four remaining elections.

[208] See Part III.B (discussing our sensitivity testing in more detail).

side of the zero axis in all of these calculations should the presumption of unconstitutionality apply.

What would this approach mean for the plans currently in force across the country?[209] At the congressional level, Florida, Michigan, North Carolina, Ohio, Pennsylvania, Texas, and Virginia had efficiency gaps of at least two seats in the 2012 election (all in the Republicans' favor). But the sensitivity testing shows that plausible shifts in voter sentiment could result in the Michigan, North Carolina, and Texas plans advantaging Democrats instead. Thus only the Florida, Ohio, Pennsylvania, and Virginia plans would be presumptively unlawful. At the state house level, Florida, Idaho, Indiana, Kansas, Massachusetts, Michigan, Missouri, North Carolina, Ohio, Oklahoma, Rhode Island, Virginia, Wisconsin, and Wyoming had efficiency gaps of at least eight points in the 2012 election (most but not all in the Republicans' favor). Of these plans, all but Florida's are unlikely to cross the zero axis during the rest of the decade, and so would be presumptively invalid under our proposed test.[210]

A final point about these thresholds is that they need not be adopted by courts at quite this level of specificity, at least not at once. Lacking experience with the efficiency gap, courts may be reluctant in early cases to set particular levels above which plans are presumptively unlawful and below which they are presumptively legitimate. Instead, courts may prefer to strike down plans with extremely high efficiency gaps and to uphold plans with very low gaps, while leaving it ambiguous where exactly the transition from presumptive validity to invalidity occurs. This, notably, is the path the Court took in the domain of state legislative reapportionment. In a line of cases between 1967 and 1975, the Court invalidated plans with total population deviations of 20 percent,[211] 26 percent,[212] and 34 percent,[213] while

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[209] The plans' efficiency gaps are depicted in Figures 7 and 8.

[210] A variant of this approach might be applied historically as well, examining (1) whether a plan had an average efficiency gap of more than two seats or eight points over its lifespan; and (2) whether a plan's efficiency gap ever crossed the zero axis during the decade. In the 2000s, for example, the California, Florida, Illinois, and first Texas congressional plans would have failed this test, along with the Florida, Ohio, and Vermont state house plans. See Figure 8.

[211] See *Chapman v Meier*, 420 US 1, 22 (1975) (involving a North Dakota reapportionment plan).

[212] See *Kilgarlin v Hill*, 386 US 120, 122 (1967) (involving a Texas reapportionment plan).

[213] See *Swann v Adams*, 385 US 440, 442 (1967) (involving a Florida reapportionment plan).

sustaining plans with deviations of 8 percent[214] and 10 percent.[215] It was only after this doctrinal sequence had unfolded that the Court announced that "[w]e have come to establish a rough threshold of 10% maximum deviation from equality."[216] In the gerrymandering context, likewise, the efficiency gap thresholds could emerge organically over a series of decisions. They need not be specified at the outset.

B. Presumptive Validity and Invalidity

Throughout our discussion to this point, we have spoken of *presumptive* rather than *irrebuttable* validity and invalidity. We now unpack how we think these presumptions should operate. In our view, a state whose plan's efficiency gap exceeds the relevant threshold should have the chance to argue that the gap either was the necessary result of a legitimate and consistently applied state policy, or was inevitable given the state's underlying political geography. The plaintiff then could respond by showing that a plan with a smaller gap could have been drawn while still attaining the state's goals (or notwithstanding the state's political geography). If a state successfully meets its burden, and the plaintiff fails to refute the state's position, then the presumption of unconstitutionality would be rebutted.

But before elaborating on litigants' potential claims and ripostes under this framework, it is worth asking why plans with efficiency gaps above the thresholds should not be *automatically* invalid. One answer is that justices have suggested in multiple gerrymandering cases that the pursuit of proper redistricting goals may save plans that fail to treat the parties equally. For instance, Justice Stevens commented in *Karcher* that, "[a]lthough a scheme in fact worsens the voting position of a particular group . . . it will nevertheless be constitutionally valid if the State can demonstrate that the plan as a whole embodies acceptable, neutral objectives."[217] Similarly, Justice Souter argued in *Vieth* that if a plaintiff satisfies a five-part prima facie

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[214] See *Gaffney v Cummings*, 412 US 735, 750 (1973) (involving a Connecticut reapportionment plan).

[215] See *White v Regester*, 412 US 755, 763 (1973) (involving a Texas reapportionment plan).

[216] *Brown*, 462 US at 852 (Brennan dissenting). See also *Connor*, 431 US at 418 (declaring that "'under-10%' deviations . . . [are] of prima facie constitutional validity").

[217] *Karcher*, 462 US at 759–60 (Stevens concurring). See also id at 760 ("The same kinds of justification that the Court accepts as legitimate in the context of population disparities would also be available.").

test, then the burden should shift to the state "to justify [its] decision by reference to objectives other than naked partisan advantage."[218]

Another doctrinal answer comes from the state reapportionment cases, in which the Court repeatedly has upheld plans with population deviations *above* 10 percent that resulted from policies of respecting town and county boundaries.[219] By analogy, plans with efficiency gaps above two seats or eight points should be sustained too, as long as the gaps were the product of comparable state policies. On the merits as well, we believe that a rule of automatic invalidity for plans with excessive gaps would assign too high a premium to partisan fairness. Partisan fairness is indeed a redistricting value of paramount importance. But it is not the only important value implicated by redistricting, and we do not see why it should be given doctrinal pride of place over compactness, respect for political subdivisions, respect for communities of interest, competitiveness, minority representation, and the like.[220]

These other values capture precisely the sorts of interests that states might assert as justifications for plans with efficiency gaps above the thresholds. States might argue that plans with smaller gaps simply could not have been drawn while complying with the Voting Rights Act or keeping districts sufficiently compact, competitive, or congruent with subdivisions or communities. In making such claims, states presumably would rely heavily on cartographic evidence, since only actual district maps can reveal the extent of the trade-off between partisan fairness and other redistricting goals. States also could point to academic studies indicating, among other things, that compactness is negatively correlated with partisan fairness,[221] and that the

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[218] *Vieth*, 541 US at 351 (Souter dissenting). See also id (listing "the need to avoid racial vote dilution," "one person, one vote," and "proportional representation" as legitimate state objectives).

[219] See, for example, *Brown*, 462 US at 843–44 (upholding a district with a population 60 percent below the mean because it was perfectly congruent with the county); *Mahan v Howell*, 410 US 315, 329 (1973) (upholding a Virginia plan with a total population deviation of 16 percent that was attributable to a "policy of maintaining the integrity of political subdivision lines"); *Abate v Mundt*, 403 US 182, 187 (1971) (upholding a county plan with a total population deviation of 12 percent caused by "preserving an exact correspondence between each town and one of the county legislative districts").

[220] See *Miller v Johnson*, 515 US 900, 916 (1995) (noting these principles as important in redistricting).

[221] See, for example, Chen and Rodden, 8 Q J Polit Sci at 264 (cited in note 23) (finding that simulated district plans based on "traditional districting principles of contiguity

creation of majority-minority districts may lead to partisan distortion too.[222]

Of course, a mere *assertion* that a large efficiency gap followed inexorably from the application of a legitimate state policy would fail to rebut the presumption of unconstitutionality. A state would have to present concrete proof that its objectives could not have been realized to the same extent had it devised a plan with a smaller gap. And even if the state presented such proof, the plaintiff would get its bite at the apple as well. The plaintiff could submit sample maps showing that the state's goals could have been advanced equally well by a more symmetric plan. To the extent academic evidence is probative, the plaintiff also could highlight findings that congruence with subdivisions and with communities is associated with *greater* partisan fairness,[223] and that if they are drawn correctly, majority-minority districts need not have any partisan implications.[224] It then would be the court's responsibility to determine whether the state's legitimate policy choices in fact necessitated an efficiency gap above the threshold.[225]

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and compactness will generate substantial electoral bias in favor of the Republican Party"); Stephanopoulos, 3 UC Irvine L Rev at 711 (cited in note 101) (presenting a regression model finding that the use of a compactness criterion reduces partisan fairness in state legislative elections). But see Roland G. Fryer Jr and Richard Holden, *Measuring the Compactness of Political Districting Plans*, 54 J L & Econ 493, 515 (2011) (finding that maximally compact plans would result in partisan biases of nearly zero in California, New York, Pennsylvania, and Texas).

[222] See, for example, David Epstein, et al, *Estimating the Effect of Redistricting on Minority Substantive Representation*, 23 J L, Econ & Org 499, 506 (2007); Kevin A. Hill, *Does the Creation of Majority Black Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J Politics 384, 399 (1995); David Lublin and D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 Am J Polit Sci 792, 793 (2000).

[223] See, for example, Jonathan Winburn, *The Realities of Redistricting: Following the Rules and Limiting Gerrymandering in State Legislative Redistricting* 9, 200–01 (Lexington 2008) (finding that the criterion of respect for political subdivisions curbed gerrymandering in multiple states); Todd Makse, *Defining Communities of Interest in Redistricting through Initiative Voting*, 11 Election L J 503, 510–12 (2012); Stephanopoulos, 125 Harv L Rev at 1941–48 (cited in note 18) (finding that plans whose districts are especially noncongruent with communities of interest—that is, plans with high average levels of spatial diversity—tend to have high levels of partisan bias too).

[224] See Adam B. Cox and Richard T. Holden, *Reconsidering Racial and Partisan Gerrymandering*, 78 U Chi L Rev 553, 572–79 (2011) (explaining that the creation of majority-minority districts is never a first-best Republican strategy, and actually can be an optimal Democratic strategy if African American majorities are slim).

[225] A further issue is whether there should be an upper limit to the size of the efficiency gap that can be justified by a legitimate state policy. See, for example, *Brown*, 462 US at 849 (O'Connor concurring) ("[E]ven the consistent and nondiscriminatory application of a legitimate state policy cannot justify substantial population deviations . . . where the effect

The second kind of argument a state could make is that no smaller efficiency gap was possible because of the state's underlying political geography.[226] The state may have *wanted* to enact a plan with a gap below the threshold, the claim would go, but this goal was unattainable due to the spatial distribution of the parties' supporters. Cartographic evidence again would be crucial in making this case, preferably in the form of maps showing that a smaller gap simply could not have been produced. A state also could cite recent work by political scientists showing that "in many urbanized states, Democrats are highly clustered in dense central city areas, while Republicans are scattered more evenly through the suburban, exurban, and rural periphery."[227] These residential patterns mean that "pro-Republican bias can be quite pronounced even in the absence of intentional gerrymandering."[228]

For its part, a plaintiff would aim to draw a sample map illustrating that a smaller efficiency gap in fact was possible (despite the state's political geography). The map would not only need to feature a smaller gap, but also to comply with all federal and state legal requirements. But if it could be crafted, then the state's inevitability argument would collapse. Notably, the same political scientists that have documented the edge Republicans enjoy because of their superior spatial distribution also have given advice to Democrats about how to compensate for their weaker position. "[A] clever Democratic cartographer might generate radial districts emanating from the city centers so as to break up the major agglomerations . . . . Such a . . . districting arrangement would possibly neutralize the inherent Republican

would be to eviscerate the one-person, one-vote principle."); *Mahan*, 410 US at 329 (commenting that a 16 percent total deviation "may well approach tolerable limits" despite being justified by a policy of respecting town and county boundaries). Just as the Court has raised but not resolved this issue in the state reapportionment context, so too do we flag it without offering a solution.

[226] And a third kind of argument a state could make—at the congressional level only—is that its large efficiency gap in one party's favor is offset by plans in other states biased in the *opposite* party's direction. One wrong could be seen as canceling out another. However, we do not explore this defense further because our motivation is to reduce the efficiency gaps of *all* district plans. We do not seek merely to have one gerrymander balanced by another.

[227] Chen and Rodden, 8 Q J Polit Sci at 241 (cited in note 23). See also Jonathan Rodden, *The Geographic Distribution of Political Preferences*, 13 Ann Rev Polit Sci 321, 324 (2010) (finding that in a range of countries "[l]eftists were highly concentrated in industrialized urban districts and mining regions," leading "the parties of the left to suffer in the transformation of votes to seats").

[228] Chen and Rodden, 8 Q J Polit Sci at 265 (cited in note 23).

advantages in geographic districting."[229] As long as this sort of map actually could be produced, the presumption of unconstitutionality would not be rebutted.

This doctrinal framework, with its quantitative thresholds and rebuttable presumptions, may seem overly complex. But it is more or less identical to—and, indeed, inspired by—the Court's approach to one person–one vote cases at the state legislative level. That approach has been used for decades without prompting any claims that it is judicially unmanageable.[230] And we see no reason why it would prove less workable in the gerrymandering context. The substantive issue would be different, but the logic of the cause of action would remain the same.

C. Concerns and Responses

We noted earlier that Justice Kennedy voiced a series of concerns about partisan symmetry in *LULAC*.[231] Does the efficiency gap test that we have set forth respond adequately to these concerns? As we explain below, we believe that it does. We also believe that it addresses the worry, expressed by the Court in both *Bandemer* and *Vieth*, that shifting voter preferences might erode the durability of any gerrymander.

Justice Kennedy's first misgiving about partisan symmetry was that it "may in large part depend on conjecture about where possible vote-switchers [ ] reside."[232] This critique, however, applies only to the particular measure of partisan symmetry—partisan bias—that was cited in *LULAC* by Justice Stevens and by the political scientist amici. It does not apply to *all* partisan symmetry metrics, and in particular it does not apply to the efficiency gap. As we described earlier, to calculate a plan's partisan bias, it is necessary to estimate the results of a hypothetical election in which the parties' vote shares flip (or are both equal to fifty percent).[233] The only way to estimate these hypothetical results is by assuming that the parties' vote shares shift by the

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[229] Id at 256. See also Cox and Holden, 78 U Chi L Rev at 572–79 (cited in note 224) (explaining how Democrats might use a "matching slices" redistricting strategy to their advantage). The efficiency gap distributions in Part III.A further indicate that political geography is not as unfavorable to Democrats as Chen and Rodden contend. Both distributions have medians very close to zero, around which they are spread symmetrically.

[230] See notes 194–95, 211–16, and accompanying text.

[231] See notes 82–88 and accompanying text.

[232] *LULAC*, 548 US at 420 (Kennedy) (plurality).

[233] See Part II.C.

same amount in each district.[234] But, as Justice Kennedy correctly observed, this assumption is problematic. Vote switchers are unlikely to reside in each district in the same proportions, meaning that the partisan swing from district to district is unlikely to be uniform.[235]

The efficiency gap avoids the need to estimate hypothetical election results (and, with it, the need to speculate about vote switchers' locations). The parties' respective wasted votes are calculated using actual election outcomes. No vote shares are shifted in any direction.[236] It is true that the sensitivity testing we recommend relies on a methodology similar to that of partisan bias.[237] But the testing is not used to generate our point estimates of the efficiency gap, nor is it used in our historical analysis of district plans. Moreover, even for contemporary plans, the vote share shifts we employ are smaller than those typically needed to compute partisan bias.[238] And there is no reason why a litigant could not use an assumption other than uniform swing to conduct sensitivity testing, so long as the alternative premise was justified with an argument about the political realities on the ground. In short, while uniform swing is an *option* for the efficiency gap, it is a *prerequisite* for partisan bias.

Second, Justice Kennedy was hesitant about striking down a district plan *before* an election had taken place and demonstrated the plan's partisan unfairness. "[W]e are wary of adopting a constitutional standard that invalidates a map based on unfair results that would occur in a hypothetical state of affairs. Presumably such a challenge could be litigated if and when the feared inequity arose."[239] This objection also does not apply to the doctrinal framework we have laid out. We have used only past election outcomes—not predicted future ones—to calculate the efficiency gap. If courts were to refer to our data in

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234 See *LULAC*, 548 US at 420 (Kennedy) (plurality).

235 See notes 134–39 and accompanying text.

236 See McGhee, 39 Legis Stud Q at 68 (cited in note 12) (noting that the efficiency gap "avoids many of the problems of symmetry and responsiveness and does not require any counterfactual at all").

237 See Part III.B.

238 As noted above, we use vote share shifts of up to 7.5 percent in each direction for congressional plans and up to 5.5 percent in each direction for state house plans. See Part III.B. By comparison, an election in which one party receives 60 percent of the statewide vote and the other party receives 40 percent—a common enough scenario—requires a vote share shift of *20 percent* for partisan bias to be calculated.

239 *LULAC*, 548 US at 420 (Kennedy) (plurality).

gerrymandering cases, they would be relying on "unfair results" derived not from "a hypothetical state of affairs" but rather from actual historical experience.[240]

Of course, since election outcomes *can* be forecast with reasonable accuracy, it would be reckless for political actors to enact plans with expected efficiency gaps above the thresholds. Even if these plans were immune from scrutiny prior to the first election held under them, they would be highly susceptible to invalidation immediately thereafter. And if the plans were discarded at this juncture, then so too might be many of the actors' redistricting aims. Not only would the plans' partisan skew disappear, but communities might be destabilized, competitiveness might surge, and incumbents might be imperiled (especially if the remedy took the form of a court-drawn map). To avoid such scenarios, we think political actors would be quite likely to design plans with subthreshold efficiency gaps from the outset. Even if the threat of litigation was an election cycle away, it still would be proximate enough to produce compliance in most cases.[241]

Third, Justice Kennedy did not see how, in the absence of empirical evidence, "a standard for deciding how much partisan dominance is too much" could be chosen.[242] But providing extensive data about the efficiency gap, and then showing how it could be used to select a legal threshold, are perhaps the two most important contributions of this Article. In the Article's empirical portion, we calculated the efficiency gap for congressional and state house plans over the entire modern redistricting era.[243] And earlier in this Part, we explained how the current plans' efficiency gap distributions, in combination with historical analysis, sensitivity testing, and analogies to the Court's reapportionment doctrine, could be deployed to set the crucial levels.[244] Scholars and judges may quibble about our two-seat threshold for congressional plans and our eight-point threshold for state house

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240 Id (Kennedy) (plurality).

241 See Grofman and King, 6 Election L J at 14 (cited in note 11) ("[I]f the Court required partisan symmetry . . . only after the first election, redistricters would surely anticipate this in drawing the districts in the first place, especially since it is so easy to assess the plan before the election.").

242 *LULAC*, 548 US at 420 (Kennedy) (plurality).

243 See Part III.A.

244 See Part IV.A.

plans, but it seems hard to deny that they are reasonable measures of "how much partisan dominance is too much."[245]

Justice Kennedy's fourth objection was that "asymmetry *alone* is not a reliable measure of unconstitutional partisanship."[246] In other words, the standard for unlawful gerrymandering should incorporate *both* asymmetry *and* other relevant considerations. The test we have proposed, of course, does exactly that. In the first stage of the analysis, only asymmetry (in the form of the efficiency gap) would be at issue. The key question would be whether the plan's gap is above or below the relevant threshold. But in the second stage, all sorts of other factors—redistricting criteria such as compactness, respect for political subdivisions, and respect for communities of interest, democratic values such as competitiveness and minority representation, the state's underlying political geography, and so on—would come into play. Here the dispositive issue would be whether these other factors necessitated a gap above the threshold. Under this two-step sequence, partisan fairness would not be prioritized above every competing consideration. Rather, it would be balanced against them, and could be compromised in order to achieve other pressing objectives.[247]

Finally, we address the concern, voiced by the Court in both *Bandemer* and *Vieth*, that voters' preferences may be highly volatile, in which case partisan unfairness in one election might not translate into unfairness in the next. As the Court remarked in *Bandemer*, "[A] finding of unconstitutionality must be supported by evidence of *continued* frustration of the will of a majority of the voters."[248] Or as the Court put it in *Vieth*, "Political affiliation is not an immutable characteristic."[249] Unlike all other standards proposed to date,[250] our test explicitly takes into

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[245] *LULAC*, 548 US at 420 (Kennedy) (plurality). Ultimately, though, "it is this Court, not proponents of the symmetry standard, that has the judicial obligation to answer the question of how much unfairness is too much." Id at 468 n 9 (Stevens concurring in part and dissenting in part).

[246] Id at 420 (Kennedy) (plurality) (emphasis added).

[247] The same sort of balancing, of course, occurs in the reapportionment context. Deviations from population equality are permitted in order to accomplish other goals. See notes 193–95 and accompanying text.

[248] *Bandemer*, 478 US at 133 (White) (plurality) (emphasis added).

[249] *Vieth*, 541 US at 287 (Scalia) (plurality).

[250] Grofman and King, for instance, do not incorporate sensitivity testing into any of their suggested partisan bias tests. They would calculate bias only for a tied election or at the actual vote share point. See Grofman and King, 6 Election L J at 21–25 (cited in note 11).

account the possibility that voters' attitudes may change over time. Thanks to the sensitivity testing we recommend, a plan would be presumptively unlawful only if its efficiency gap exceeded the threshold *and* the gap was unlikely to hit zero over the plan's lifetime. Moreover, the odds of the gap hitting zero are determined not by speculation but rather on the basis of historical evidence about the shifts in voter sentiment that can be expected to occur over the course of a decade. These aspects of our test distinguish it from all of the approaches the Court previously has considered and rejected, and they render it uniquely responsive to the Court's anxiety about fickle voter preferences.

CONCLUSION

The cause of action for partisan gerrymandering has lain dormant for essentially its entire existence. In *LULAC*, however, the Court hinted for the first time in a generation that the claim could yet arise from its slumber. In particular, a majority of the justices expressed genuine interest in the concept of partisan symmetry. In this Article, we have taken the Court at its word. We have introduced a new measure of partisan symmetry, the efficiency gap, that captures the essence of gerrymandering and is superior to earlier symmetry metrics. We also have calculated the efficiency gap for a vast array of congressional and state house plans over the past five redistricting cycles. And, perhaps most helpfully for the judiciary, we have developed one option for converting the efficiency gap into usable doctrine. Notably, our proposal gives a concrete reply to *Vieth*'s "unanswerable question" of "[h]ow much political . . . effect is too much"[251]—a gap of two seats for congressional plans and a gap of 8 percent for state house plans, but only if the gaps are likely to be durable.[252]

What are the odds, then, that the courts will finally put some teeth into gerrymandering claims? Certainly the *need* for a more potent doctrine has never been greater. As we have stressed, today's plans feature the largest efficiency gaps recorded in modern history. At the Supreme Court level, however, we doubt that the currently sitting justices are eager to launch another redistricting revolution. We would be surprised by an explicit *rejection* of the efficiency gap, given the justices' positive comments in *LULAC*, but we would be equally surprised if today's

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[251] *Vieth*, 541 US at 296–97 (Scalia) (plurality).

[252] See Part IV.A.

conservative Court began striking down the largely pro-Republican gerrymanders that exist across the country. The Court's more likely course is to let sleeping dogs lie.

But we are substantially more optimistic at the lower court level. In the years since *LULAC*, plaintiffs have lost their gerrymandering suits because they have ignored the Court's discussion of partisan symmetry and sought in vain to revive the standards rebuffed in *Vieth*. It would not take much—just a single resourceful plaintiff and a single creative court—for a test based on the efficiency gap to win a doctrinal foothold. And from this foothold it also would not be too implausible for the test to spread to other jurisdictions. Doctrinal experimentation and diffusion are common in election law,[253] and we see no reason why they could not occur in the gerrymandering context too. And if they *did* occur, and if they were perceived as positive developments, and if the Supreme Court's membership shifted in a favorable direction (all admittedly big ifs), then partisan symmetry might eventually be adopted as the law of the land. Then the promise of *LULAC*, the promise that motivated us to write this Article, might be fulfilled.

[253] See, for example, *Obama for America v Husted*, 697 F3d 423, 428 (6th Cir 2012) (extending the logic of *Bush v Gore*, 531 US 98 (2000), to unequal treatment of early voters); *Texas v Holder*, 888 F Supp 2d 113, 143–44 (DDC 2012) (three-judge panel), vacd and remd, 133 S Ct 2886 (2013) (applying § 5 of the Voting Rights Act to prevent a photo identification requirement from taking effect); *United States v Village of Port Chester*, 704 F Supp 2d 411, 448–53 (SDNY 2010) (invoking § 2 of the Voting Rights Act to require cumulative voting as a remedy for vote dilution).