

## AT-LARGE ELECTIONS IN N.Y.S. CITIES, TOWNS, VILLAGES, AND SCHOOL DISTRICTS AND THE CHALLENGE OF GROWING POPULATION DIVERSITY

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INTRODUCTION.....	734
I. AT-LARGE LEGISLATIVE ELECTIONS IN NEW YORK .....	735
A. <i>Municipal Entities</i> .....	736
1. Towns.....	736
2. Villages .....	738
3. School Districts.....	738
4. Fire Districts .....	740
5. Cities.....	741
6. Counties.....	741
B. <i>The Merits: New Yorkers Prefer At-Large Elections</i> .....	744
II. THE VOTING RIGHTS ACT AND AT-LARGE LOCAL ELECTIONS IN NEW YORK.....	745
A. <i>Niagara Falls</i> .....	749
B. <i>Babylon</i> .....	751
C. <i>Hempstead</i> .....	752
D. <i>Port Chester</i> .....	755
III. GOING FORWARD.....	757
IV. ACHIEVING MORE EQUITABLE REPRESENTATION WITHOUT LITIGATION THROUGH VOTING SYSTEM CHANGE.....	763

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## INTRODUCTION

At-large elections of board members are the norm in New York's towns, villages, and school districts, and are used in about a quarter of the state's cities as well. Additional cities elect some, but not all, of their councils on an at-large basis. And in some counties, the use of multi-member districts to choose some county legislators is, in effect, the analog of an at-large election process.

The use of at-large elections is suspect under the Federal Voting Rights Act<sup>1</sup> as a procedure highly likely to result in denying members of protected minority groups an effective choice at the polls. To date, there have been four major voting rights cases in New York challenging municipal at-large election systems, but not those in school districts.<sup>2</sup> The 2010 election documented significant demographic change across the state—in particular, the rapid growth of Hispanic populations in suburban and ex-urban cities, towns, villages, and school districts.<sup>3</sup> Combined with this development, the widespread use of at-large elections in New York may signal the future vulnerability of local jurisdictions to legal challenges under the Voting Rights Act. While these jurisdictions do not need to re-district simply because they elect representatives at large, the issue is closely connected to redistricting because the usual remedy under the Voting Rights Act is to impose district-based elections on jurisdictions that do not provide protected minorities with an equal opportunity “to elect representatives of their choice.”<sup>4</sup>

Here, I examine the origin of the adoption of at-large elections

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<sup>1</sup> 42 U.S.C. § 1971 (2006).

<sup>2</sup> See *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 453 (S.D.N.Y. 2010) (finding the village's at-large election system for Board of Trustee members violated the Hispanic population's rights granted in the Voting Rights Act and upholding implementation of a cumulative voting system); *Goosby v. Town Bd.*, 956 F. Supp. 326, 356 (E.D.N.Y. 1997) (finding the at-large election system resulted in the invidious exclusion of blacks from effective participation in the voting process, thus violating the Voting Rights Act); *Reed v. Town of Babylon*, 914 F. Supp. 843, 892 (E.D.N.Y. 1996) (upholding the at-large election system for town board elections, because the plaintiffs failed to demonstrate a violation of the Voting Rights Act or constitutional rights); *NAACP v. City of Niagara Falls*, 913 F. Supp. 722, 755 (W.D.N.Y. 1994) (upholding the at-large election system for city council elections and finding the NAACP failed to establish a prima facie case under the Voting Rights Act after reviewing the totality of the circumstances).

<sup>3</sup> WILLIAM H. FREY, *MELTING POT CITY AND SUBURBS: RACIAL AND ETHNIC CHANGE IN METRO AMERICA IN THE 2000S*, at 4, 10 (2011).

<sup>4</sup> 42 U.S.C. § 1973(b); see also *Goosby*, 956 F. Supp. at 356.

in New York, the rationale for their initial and continued use, and the extent to which the assumptions about their discriminatory effect are borne out by actual experience. We find that regardless of the districting system in use in jurisdictions with substantial minority populations, African American leadership has, in recent years, been elected in numbers proportionate to the size of local African American populations. The same cannot be said, however, for Hispanic populations and more recent immigrant groups.

Hispanic leaders in the New York State legislature seek the elimination of the use of at-large elections in general-purpose local governments in New York, and the adoption of data collection provisions by boards of elections that might make it possible for more potential litigants to meet evidentiary requirements in voting rights suits against municipalities and school districts.<sup>5</sup> We conclude that a better path to equity in elections would be to pass state legislation that would encourage the alteration of local voting rather than districting practices. This would allow the retention of at-large systems while at the same time assuring effective choice at the polls by minority voters. The adoption of cumulative voting in the Village of Port Chester provides a model.<sup>6</sup>

#### I. AT-LARGE LEGISLATIVE ELECTIONS IN NEW YORK

Jurisdictions that use at-large elections require no redistricting because they have no districts; all board members are chosen through jurisdiction-wide balloting. State law makes at-large election the prescribed process for choosing board members in towns, villages, and school districts.<sup>7</sup> By provision of their charters, about a quarter of New York cities also employ at-large elections for selecting all of their council members.<sup>8</sup> In others, with “mixed” systems, one member—often the council presiding officer—or a subset of members is chosen at-large. Most, but not

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<sup>5</sup> *Report Analyzing Westchester Redistricting Released*, [http://assembly.state.ny.us/member\\_files/076/20110808](http://assembly.state.ny.us/member_files/076/20110808) (last visited Mar. 28, 2012).

<sup>6</sup> *Cumulative Voting*, PORT CHESTER VOTES, <http://portchestervotes.com/node/22> (last visited Mar. 28, 2012) (explaining to Port Chester voters how the cumulative voting system works).

<sup>7</sup> See, e.g., N.Y. TOWN LAW § 60 (McKinney 2003); N.Y. ELEC. LAW §§ 15-104, 15-126 (McKinney 2009); N.Y. EDUC. LAW §§ 2018, 2032 (McKinney 2007).

<sup>8</sup> See, e.g., SYRACUSE, N.Y., CODE OF ORDINANCES art. III, § 3-101(1) (Municode through 2010 Code).

all counties must redistrict. Those that do not construct their governing boards on the basis of town and city boundaries, and use weighted voting to meet federal constitutional requirements for equal representation.

### *A. Municipal Entities*

#### 1. Towns

Towns in New York date their origins to the Duke of York's Law of 1676.<sup>9</sup> Established within counties to meet rural needs throughout the state (except where cities were chartered), they were initially governed through town meetings.<sup>10</sup> These meetings elected a large number of local officials, with all those qualified and present voting to fill all offices. Changes in the law in 1875 and 1893 allowed town elections to be conducted in district meetings rather than a single town gathering, but candidacies were still town-wide.<sup>11</sup> Town boards were comprised of a subset of these elected officials: a supervisor, a clerk, and a number of justices, with one of the latter often presiding.<sup>12</sup>

According to reformers writing for a Special Joint Legislative Commission on Taxation and Retrenchment in 1923, "the main . . . structure[s] of local government and the way in which local problems are handled have not been changed since the State was created."<sup>13</sup> Their recommendation for towns was to differentiate the legislative and executive functions, with the clerk performing the executive function and the council headed by a supervisor.<sup>14</sup> As a result of a 1932 general re-codification of New York's town law, persons for the first time were elected at-

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<sup>9</sup> 1 THE COLONIAL LAWS OF NEW YORK FROM THE YEAR 1664 TO THE REVOLUTION 63 (1894) [hereinafter COLONIAL LAWS]; STATE OF N.Y. SPECIAL JOINT COMM. ON TAXATION AND RETRENCHMENT, REPORT No. 55, at 11 (Feb. 1, 1923) [hereinafter RETRENCHMENT REPORT].

<sup>10</sup> COLONIAL LAWS, *supra* note 9, at 63–64.

<sup>11</sup> Act of June 5, 1875, ch. 482, 1875 N.Y. Laws 26; Act of Mar. 1, 1893, ch. 82, 1893 N.Y. Laws 10. *See also* 6 MESSAGES FROM THE GOVERNORS 675–76 (Charles Z. Lincoln ed., 1909).

<sup>12</sup> JOHN A. FAIRLIE, LOCAL GOVERNMENT IN COUNTIES, TOWNS AND VILLAGES 176 (1914).

<sup>13</sup> RETRENCHMENT REPORT, *supra* note 9, at 11.

<sup>14</sup> Gerald Benjamin, The Evolution of New York State's Local Government System 38–40 (Oct. 1990), *available at* <http://www.nyslocalgov.org/pdf/benjaminrevolution.pdf>. (unpublished paper prepared for Local Government Restructuring Project, Nelsen A. Rockefeller Institute of Government Albany, New York).

large to the distinct legislative office of town councilman in the state's larger towns.<sup>15</sup> It was not until 1976, however, that the separation of functions was fully completed, with the removal of town justices from service on town boards throughout the state.<sup>16</sup>

Currently in New York, most towns are governed by a board comprised of a supervisor and four council members, all elected at-large.<sup>17</sup> By local action, the number of council members may be reduced to three or increased to seven.<sup>18</sup> State law allows towns to adopt a ward system for the election of council members.<sup>19</sup> Thus far, only thirteen of 932 towns have done so.<sup>20</sup> They are: Ellicott (Chataqua County); Hyde Park, Poughkeepsie, and Wappinger (Dutchess County); Greece (Monroe County);

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<sup>15</sup> See Act of Apr. 8, 1932, ch. 634, 1932 N.Y. Laws 1355, 1358, 1375 (codified at N.Y. TOWN LAW §§ 20, 60 (McKinney 2004)).

<sup>16</sup> Act of July 24, 1976, ch. 739, 1976 N.Y. Laws § 1(d) (codified at N.Y. TOWN LAW § 60-a).

<sup>17</sup> N.Y. TOWN LAW §§ 20(a), 60; N.Y. ELEC. LAW § 9-212(1) (McKinney 2009). See N.Y. DEP'T OF STATE, LOCAL GOVERNMENT HANDBOOK 61-63 (6th ed. 2009) [hereinafter LOCAL GOVERNMENT HANDBOOK] (providing a detailed description of the legal basis for the governance framework of towns in New York).

<sup>18</sup> N.Y. TOWN LAW § 20.

<sup>19</sup> *Id.* §§ 81, 85.

<sup>20</sup> See BROOKHAVEN, N.Y., CODE ch. 27, § 27-1 (General Code Publishers through 2012 Code); HEMPSTEAD, N.Y., TOWN CODE ch. 7, art. I, § 7-7 (General Code Publishers through 2012 Code); N. HEMPSTEAD, N.Y., TOWN CODE ch. 15A, § 15A-1 (General Code Publishers through 2012 Code); *Dutchess County Town: Wappinger*, TOWN OF WAPPINGER, <http://www.townofwappinger.us/pdf/map/Wappinger%20Ward%20Map%20Landscape.pdf> (last visited Mar. 25, 2012); *Elected & Appointed Boards*, TOWN OF ELLICOTT, [http://www.townofellicott.com/index.php?option=com\\_content&view=article&id=75&Itemid=101](http://www.townofellicott.com/index.php?option=com_content&view=article&id=75&Itemid=101) (last visited Mar. 25, 2012); *Greece Ward Map*, TOWN OF GREECE, <http://greeceny.gov/files/WARD%20MAP%20with%20election%20districts%202011%20-%20large.pdf> (last visited Mar. 25, 2012); *Government Officials*, TOWN OF WALLKILL, [http://www.townofwallkill.com/html/menu\\_town\\_officials.html](http://www.townofwallkill.com/html/menu_town_officials.html) (last visited Mar. 25, 2012); *Town Board*, TOWN OF POUGHKEEPSIE, <http://www.townofpoughkeepsie.com/board/board.htm> (last visited Mar. 25, 2012); *Town Board*, TOWN OF CAMILLUS, <http://townofcamillus.com/default.aspx?PageID=845> (last visited Mar. 25, 2012); *Town Board*, TOWN OF SALINA, N.Y., <http://www.salina.ny.us/content/departments/board> (last visited Mar. 25, 2012); *Town Board & Elected Officials*, TOWN OF QUEENSBURY, [http://www.queensbury.net/index.php?option=com\\_content&view=article&id=52:town-board-a-elected-officials&catid=76](http://www.queensbury.net/index.php?option=com_content&view=article&id=52:town-board-a-elected-officials&catid=76) (last visited Mar. 25, 2012); *Town Board, Town Officials*, TOWN OF NEW HARTFORD, <http://www.newhartfordtown.com/NHofficialscontact.htm> (last visited Mar. 19, 2012); *Town of Hyde Park Ward Map*, HYDE PARK, N.Y., <http://www.hydeparkny.us/Government/districtmap.html> (last visited Mar. 25, 2012). Hempstead (75,592), Brookhaven (448,248), North Hempstead (222,611), and Greece (94,141) are among New York's largest localities in population. See 2010 Census Interactive Population Map, U.S. CENSUS 2010, <http://2010.census.gov/2010census/popmap/index.php> (last visited Mar. 19, 2012).

Hempstead and North Hempstead (Nassau County); New Hartford (Oneida County); Camillus and Salina (Onondaga County); Wallkill (Orange County); Brookhaven (Suffolk County) and Queensbury (Warren County).<sup>21</sup>

## 2. Villages

New York's general policy for preferring at-large election of village officials has been in place for more than a century and a half. The first general law authorizing the incorporation of villages, passed in 1847, provided that "[a]t the first election and at all subsequent elections of officers in such village, every person qualified to vote for town officers in the town in which such village or any part thereof shall be situated, may vote for all the officers to be chosen."<sup>22</sup> Since 1874, when the chartering of individual villages by special law was barred by constitutional change, all villages established in New York were created within this framework.<sup>23</sup> A recodification of Village Law in 1897 abolished all existing wards or districts remaining in them, and provided for the recreation of wards at local option, subject to referendum, in villages with populations of 5,000 or greater.<sup>24</sup> As is the case for towns, state law provides that villages may opt to elect their trustees from wards; four of 555 have done so.<sup>25</sup>

## 3. School Districts

During the early development of public education in New York, responsibility for its oversight and administration was vested in town-based superintendents of common schools. By the mid-nineteenth century, however, state law provided for the organization of school districts including more than one town, with governance by three trustees elected at town meetings.<sup>26</sup>

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<sup>21</sup> See *supra* note 20.

<sup>22</sup> Act of Dec. 7, 1847, ch. 426, 1847 N.Y. Laws 532, 536 (codified at N.Y. VILLAGE LAW § 2-216 (amended 1972)).

<sup>23</sup> LOCAL GOVERNMENT HANDBOOK, *supra* note 17, at 68. Villages still operating under pre-1874 charters are Alexander, Carthage, Catskill, Cooperstown, Deposit, Fredonia, Ilion, Mohawk, Ossining, Owego, Port Chester and Waterford. Since the 1897 re-codification these villages must comply with the state's general village law, except insofar as it is incompatible with particular charter provisions.

<sup>24</sup> See N.Y. VILL. LAW §§ 48-49 (Gould 1897).

<sup>25</sup> N.Y. ELEC. LAW § 15-130 (McKinney 2009).

<sup>26</sup> N.Y. REV. STAT. § 99 (Gould 1852).

The urban-focused turn-of-the-century efforts of progressive-era school reformers favored at-large elections and smaller sized boards because, they argued, “board members elected by wards advanced their own parochial and special interests at the expense of the school district as a whole.”<sup>27</sup> Other goals on the progressive agenda were the separation of the administration education from that of other local government functions, holding school elections on a different day from general municipal elections, the elimination of partisanship in school elections, and the elevation of the role of professionals in schooling. In a special study for the New York State Constitutional Convention Commission completed in 1915, Frederick E. Shapleigh of the Public School League of Buffalo said, “The small [school] board, elected at large [sic], has proved far more free from politics and resultant inefficiency than the large board elected to represent wards or districts.”<sup>28</sup>

Historians have noted that progressive efforts to achieve structural reform of school governance, like those centered on municipal governance generally, were part of a larger struggle by the established Protestant upper and middle classes to retain local political control in the face of massive immigration, first from Ireland and later from southern and central Europe.<sup>29</sup> In New York, a few big city governments retained some role in the administration of schools within them, though even there, in the political tugging and hauling over time, a degree of internal separation was achieved.<sup>30</sup> The mayor of Yonkers appoints the school board there.<sup>31</sup> Reestablishment of mayoral control of education was aggressively and successfully pursued by Mayor

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<sup>27</sup> Michael W. Kirst, *Turning Points: A History of American School Governance*, in WHO'S IN CHARGE HERE? THE TANGLED WEB OF SCHOOL GOVERNANCE AND POLICY 14, 19 (Noel Epstein ed., 2004).

<sup>28</sup> Frederick E. Shapleigh, *The Relation of the State to the City School System*, in CITY AND COUNTY GOVERNMENT 5, 57 (1915).

<sup>29</sup> See David H. Tyack, *Needed: The Reform of a Reform*, in NEW DIMENSIONS OF SCHOOL BOARD LEADERSHIP 29, 31, 35, 37 (William E. Dickinson ed., 1969); Chandler Davidson & George Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. POL. 982, 1003–04 (1981); Samuel P. Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 PAC. NORTHWEST Q. 157, 160 (1964).

<sup>30</sup> See, e.g., DIANE RAVITCH, *THE GREAT SCHOOL WARS NEW YORK CITY, 1805–1973: A HISTORY OF THE PUBLIC SCHOOLS AS BATTLEFIELD OF SOCIAL CHANGE* (1974).

<sup>31</sup> N.Y. EDUC. LAW § 477 (McKinney 2009).

Michael Bloomberg in New York City<sup>32</sup> and is currently an issue in Rochester.<sup>33</sup> Nonetheless, success in achieving the reform agenda across the state was almost complete; as one element of this outcome, at-large elections of school boards became the norm.

Long evolution and the outcomes of a multiplicity of reform efforts over time has resulted in the current fivefold categorization for New York's 697 school districts: city school districts (62), central high school districts (3), union free school districts (161), central school districts (460), and common school districts (11).<sup>34</sup> Provisions in law for their governance differ in detail. But in general, state law currently provides for five-, seven- or nine-member school boards elected at an "annual meeting and election . . . held on the third Tuesday of May."<sup>35</sup> Except in common school districts or if local action has been taken to the contrary, aspirants for board membership do not run for the board in general, but seek particular seats. In any event, voters cast ballots to fill all positions; that is, voting is at-large.<sup>36</sup> There is no general provision in law to permit local choice of district-based school board elections. In the City of Buffalo, state law provides for district-based elections of some school board members.<sup>37</sup>

#### 4. Fire Districts

Under provisions of the town law, five-member boards of fire district commissioners are elected at-large in December of each year for staggered five year terms.<sup>38</sup>

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<sup>32</sup> See N.Y. EDUC. LAW § 2590-b; Michael R. Bloomberg, Mayor, City of New York, State of the City Address (Jan. 30, 2002).

<sup>33</sup> See Joy Resmovits, *Taking Schools Into Their Own Hands*, WALL ST. J., Aug. 16, 2010, at A3; David Hursh, *A Look at Mayoral Control of the Rochester City School District*, WARNER PERSP. EDUC. BLOG (Jan. 25, 2010, 2:48 PM), <http://www.warner.rochester.edu/blog/warnerperspectives/?p=506>.

<sup>34</sup> N.Y. STATE EDUC. DEP'T, SCHOOL DISTRICT ORGANIZATION: GUIDE TO REORGANIZATION OF SCHOOL DISTRICTS IN NEW YORK STATE, [http://www.p12.nysed.gov/mgtserv/sch\\_dist\\_org/GuideToReorganizationOfSchoolDistricts.htm](http://www.p12.nysed.gov/mgtserv/sch_dist_org/GuideToReorganizationOfSchoolDistricts.htm).

<sup>35</sup> N.Y. EDUC. LAW § 1804(4).

<sup>36</sup> See *id.* §§ 2018, 2032.

<sup>37</sup> See *id.* § 2553.

<sup>38</sup> See N.Y. TOWN LAW §§ 174–175 (McKinney 2003).



## 5. Cities

The story for cities was different.<sup>39</sup> Home rule for cities, and especially New York City, was a major issue in New York State for much of the nineteenth and twentieth centuries.<sup>40</sup> The state legislature retained control of chartering cities on a case-by-case basis until the end of the nineteenth century, and ward systems were preferred for their councils. Cities were first classified into three groups at the 1894 constitutional convention, to allow general legislative treatment of municipalities within each class.<sup>41</sup> The second class city law, passed in 1898, prescribed a ward system for the state's cities within this class.<sup>42</sup> Only with the adoption of optional home rule for second and third class cities in 1914 did at-large elections of council members become an option for New York cities.<sup>43</sup> The 1924 Home Rule Law, implementing the Home Rule Amendment of 1923, provided for the local drafting and adoption of charters.<sup>44</sup> Currently, of New York's sixty-two cities, fifteen elect their boards entirely at-large: thirty-five use a mixed ward and at-large system (in twenty-three, just one member, a mayor or presiding officer, is selected at-large); and twelve use single member districts only.

## 6. Counties

Counties are an exception to the general preference on New York local government for at-large election to legislative positions. Historically, governing authority for New York counties was vested in the boards of supervisors, comprised of persons elected to town supervisor positions within the county's

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<sup>39</sup> See Benjamin, *supra* note 14, at 50–54.

<sup>40</sup> See generally W. Bernard Richland, *Constitutional City Home Rule in New York*, 54 COLUM. L. REV. 311 (1954) (discussing a still-classic view on this subject).

<sup>41</sup> See 2 REVISED RECORD OF THE CONSTITUTIONAL CONVENTION OF THE STATE OF NEW YORK: MAY 8, 1894, TO SEPTEMBER 29, 1894, at 104–05 (1900). First class cities were those with populations of 50,000 or greater and second class cities consisted of those with populations less than 50,000. *Id.* at 104.

<sup>42</sup> Second Class Cities Act, ch. 182, 1898 N.Y. Laws 371, 372 (codified at N.Y. CONST art. III, § 17 (amended 2001)).

<sup>43</sup> Optional City Government Law, ch. 444, 1914 N.Y. Laws 1883, 1884 (codified at N.Y. CITY HOME RULE LAW § 12, *repealed by* N.Y. MUNICIPAL HOME RULE LAW § 58).

<sup>44</sup> N.Y. CONST. art. XII, § 3.

constituent towns.<sup>45</sup> In counties that included cities within their borders, their number was augmented with city supervisors specially elected, usually from wards, to serve in county government. Westchester and Nassau are suburban counties that gained charters by special legislative action long before the adoption of home rule for counties made this possible throughout the state on local initiative. Initially, these counties retained their boards of supervisors.<sup>46</sup>

The U.S. Supreme Court decisions in 1964 and 1965 mandating a one-person-one-vote standard in American legislative bodies challenged the continued viability of these boards.<sup>47</sup> Most counties switched to legislatures, with representatives elected from single- or multi-member districts. Considering both partisan factors and the preservation of the town-based structure of county government (which valued the town-county linkage in local governance), others opted to use a weighted voting system to meet requirements for equal representation.<sup>48</sup> Seventeen counties still do this, six of which include cities that elect supervisors from wards.<sup>49</sup> The City of Saratoga Springs is an exception; it elects its two members of the Saratoga County board of supervisors at-large.<sup>50</sup>

Multi-member districts were also used, at least initially, to preserve town-based representation at the county level. Seven counties used multi-member districts in 2011.<sup>51</sup> Another two

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<sup>45</sup> 1 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 302, 403 (1906); 4 CHARLES Z. LINCOLN, *THE CONSTITUTIONAL HISTORY OF NEW YORK* 218–19, 445–51.

<sup>46</sup> Benjamin, *supra* note 14, at 21–22; *but see A Brief History of the County Board of Legislators*, WESTCHESTER CNTY. BD. OF LEGISLATORS (Feb. 25, 2010, 5:32 PM), <http://westchesterlegislators.com/history.html>.

<sup>47</sup> *WMCA, Inc. v. Lomenzo*, 377 U.S. 633 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>48</sup> *Iannucci v. Bd. of Supervisors*, 229 N.E.2d 195, 244 (N.Y. 1967) (sanctioning the practice of a weighted voting system). For a strong critique of weighted voting, see Bernard Grofman & Howard Scarrow, *Weighted Voting in New York*, 6 LEGIS. STUD. Q. 287 (1981).

<sup>49</sup> Those counties are: Chenango, Columbia, Delaware, Essex, Fulton, Hamilton, Livingston, Madison, Montgomery, Ontario, Saratoga, Schoharie, Seneca, Warren, Washington, Wayne, and Wyoming. Expert Report at 5–6, *Levy v. Miami-Dade Cnty.*, 254 F. Supp. 2d 1269 (2003) (No. 01-CV-00101).

<sup>50</sup> SARATOGA SPRINGS, N.Y., CHARTER tit. 12, §12.3 (General Code through 2011 Code).

<sup>51</sup> They were Allegany, Cattaraugus, Greene, Rensselaer, Schenectady, Schuyler, and Yates. *See generally County Legislators*, SCHENECTADY COUNTY, <http://www.schenectadycounty.com/FullStory.aspx?m=65&amid=273> (last

employed a combination of two-member and single-member districts.<sup>52</sup> Ulster County recently switched from a thirty-three-member legislature elected from multi-member districts to a twenty-three-member body elected from single-member districts.<sup>53</sup> In Orleans County, the design of the representative system is similar to that for a city with a mixed district and at-large council. Four legislators are elected from districts and three at-large, but with three distinct regions of residence specified for the at-large members.<sup>54</sup> Schenectady County now uses both weighted voting and multi-member districts.<sup>55</sup> Where multi-member districts are still used for county legislative elections, the representative and political dynamics are similar to those in

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visited Apr. 2, 2012) (listing Schenectady County Districts and County Legislators); *Legislators*, ALLEGANY COUNTY, [http://www.alleganyco.com/default.asp?show=btn\\_leadership/legislators](http://www.alleganyco.com/default.asp?show=btn_leadership/legislators) (last visited Apr. 2, 2012) (listing Allegany County Districts and County Legislators); *Legislators of Cattaraugus County*, CATTARAUGUS COUNTY, <http://ww2.cattco.org/government/legislators> (last visited Apr. 2, 2012) (listing Cattaraugus County Districts and County Legislators); *Members of the County Legislature*, SCHUYLER COUNTY GOV'T, <http://www.schuylercounty.us/memlegi.htm> (last visited Apr. 2, 2012) (listing Schuyler County Districts and County Legislators); *Members of the Yates County Legislature*, YATES COUNTY, [http://www.yatescounty.org/display\\_page.asp?pid=187](http://www.yatescounty.org/display_page.asp?pid=187) (last visited Apr. 2, 2012) (listing Yates County Districts and County Legislators); *Rensselaer County Legislators*, RENSSELAER COUNTY, <http://www.rensselaercounty.org/Districts.htm> (last visited Apr. 2, 2012) (listing Rensselaer County Districts and County Legislators); *Welcome to the Greene County Legislature*, GREENE COUNTY, <http://00644c9.netsolhost.com/legislature/index.htm> (last visited Apr. 2, 2012) (listing Greene County Districts and County Legislators).

<sup>52</sup> These are Steuben and Tioga. *See generally Legislature*, TIOGA COUNTY, <http://www.tiogacountyny.com/departments/legislature.html> (last visited Apr. 2, 2012) (listing Tioga County Districts and County Legislators); *Members of the 2012 Steuben County Legislature*, STEUBEN COUNTY, <http://www.steubencony.org/pages.asp?PID=297> (last visited Apr. 2, 2012) (listing Steuben County Districts and County Legislators).

<sup>53</sup> ULSTER COUNTY, N.Y. CHARTER art. 2, § C-8 (2007). In general, the use of multi-member districts in the United States has been in decline in recent years as a result of voting rights act concerns, discussed in detail for at-large elections in New York State *infra*. *See* Josh Goodman, *The Disappearance of Multi-Member Constituencies*, STATELINE (July 7, 2011), <http://www.governing.com/blogs/politics/The-Disappearance-of-Multi-Member-Constituencies.html>; *see also* Karl Kurtz, *Declining Use of Multi-Member Districts in State Legislatures*, THICKET (July 13, 2011, 10:01 AM), [http://ncsl.typepad.com/the\\_thicket/2011/07/the-decline-in-multi-member-districts.html](http://ncsl.typepad.com/the_thicket/2011/07/the-decline-in-multi-member-districts.html).

<sup>54</sup> Jim Krencik, *Legislature Hears Concerns About District Lines*, JOURNAL-REGISTER (May 30, 2011), <http://journal-register.com/local/x1190397444/Legislature-hears-concerns-about-district-lines>.

<sup>55</sup> *See* SCHENECTADY COUNTY, N.Y. CHARTER art. II, § 2.04 (2001), *available at* <http://www.schenectadycounty.com/content/Charter-Print%20version.pdf>.

discrete localities that employ at-large election.

*B. The Merits: New Yorkers Prefer At-Large Elections*

At-large elections continue to be valued for their presumed tendency to encourage elected officials to act in accord with the general interest of the entire community. Research showing that governing boards elected at-large are more fiscally prudent than those elected from wards has recently been brought into question.<sup>56</sup> Proponents argue, too, that creating districts in small jurisdictions is impractical, elevates conflict, and may be costly in time and money. In contrast, election of board members from wards or districts is presumed to predispose them to emphasize neighborhood priorities over community-wide concerns, and enhance the prospects for racial and ethnic diversity in board membership. Single-member district representatives also are said to provide a clearer more identifiable link of voters to local government. Campaigns in smaller districts are also less expensive, and may make elective office more widely accessible.<sup>57</sup>

These arguments about the relative merits of a board elected from wards versus one with members chosen at-large were at the center of a lively debate in the Town of New Castle in Westchester County in 2011; the debate was over whether to switch to the former from the latter.<sup>58</sup> The persistent strength of the at-large idea is evidenced by the two-to-one majority of those who voted in the town-wide referendum that said “no” to this

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<sup>56</sup> See Lawrence Southwick, Jr., *Local Government Spending and At-Large Versus District Representation; Do Wards Result in More “Pork”?*, 9 *ECON. & POL.* 173 (1997); Lynn MacDonald & Tim R. Saas, *The Impacts of Council Size, Government Form and Election Method on Local Public Expenditures* (Nov. 2003), [http://localgov.fsu.edu/readings\\_papers/form%20of%20govt/MacDonald&Sass\\_CouncilSize%20FOG%20elections%20and%20expenditures.pdf](http://localgov.fsu.edu/readings_papers/form%20of%20govt/MacDonald&Sass_CouncilSize%20FOG%20elections%20and%20expenditures.pdf).

<sup>57</sup> For a summary of arguments and scholarly findings regarding district and at-large elections, see UNIV. OF N.C. SCH. OF GOV'T, *DISTRICT V. AT-LARGE ELECTIONS*, available at <http://www.sog.unc.edu/sites/www.sog.unc.edu/files/effects-districts%20v%20atlarge.doc>; Richard Briffault, *Election Delegates to a State Constitutional Convention: Some Legal and Policy Issues*, 36 *RUTGERS L.J.* 1125, 1153–54 (2005).

<sup>58</sup> See Elizabeth Ganga, *New Castle Ward Referendum Organizer Responds to Questions Raised in Debate*, *NEW CASTLE* (Nov. 4, 2011), <http://northernwestchester.lohudblogs.com/2011/11/04/new-castle-ward-referendum-organizer-responds-to-questions-raised-in-debate/>; Elizabeth Ganga, *New Castle Referendum for Town Board Wards Brings Fierce Debate Among Candidates*, *LOHUD.COM* (Oct. 19, 2011, 12:56 AM), <http://www.lohud.com/article/20111019/NEWS02/110190316/New-Castle-referendum-Town-Board-wards-brings-fierce-debate-among-candidates>.

change.<sup>59</sup> This outcome is similar to those in referenda on this question held across the state since the mid-1970s.<sup>60</sup> Most recently, switching from an at-large to a district system was rejected at referendum by Babylon, Islip, and Huntington, three large towns on Long Island.<sup>61</sup>

## II. THE VOTING RIGHTS ACT AND AT-LARGE LOCAL ELECTIONS IN NEW YORK

The long-time criticism that at-large voting allows a unified majority in the community to control the selection of *all* its elected officials, denying any voice in the government to social, ethnic or racial minorities, even if they are of substantial size, became much more important with passage of the Voting Rights Act (VRA) in 1965. This federal legislation sought to protect minorities from discrimination at the polls. Because of a history of very low rates of participation among minority group members there in elections, three New York counties were covered by section five of this act.<sup>62</sup> This provision requires pre-clearance by the Justice Department or the U.S. District Court of the District of Columbia of proposed changes in electoral processes or structures that might have an invidious impact upon minority participation.<sup>63</sup>

More important for this analysis, section two of this law allowed challenges in Federal court to alleged electoral discrimination in any jurisdiction in the country.<sup>64</sup> Because section two was initially interpreted by the Supreme Court as requiring a demonstration of *intent* to discriminate in election rules, structures, or procedures, however, the long-established

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<sup>59</sup> Tom Auchterlonie, *Ward Referendum Loses in Landslide*, CHAPPAQUA-MOUNT KISCO PATCH (Nov. 10, 2011), <http://chappaqua.patch.com/articles/ward-referendum-loses-in-landslide>.

<sup>60</sup> LOCAL GOVERNMENT HANDBOOK, *supra* note 17, at 63.

<sup>61</sup> John T. McQuiston, *Voters in Babylon Reject Effort to Abolish At-Large Elections*, N.Y. TIMES, July 15, 1999, at B5; Vivian S. Toy, *Special Election Set Over Council Races*, N.Y. TIMES, Oct. 23, 2005, at 14LI2; *Good Government*, NEIGHBORHOOD NETWORK, <http://www.longislandnn.org/government/index.htm> (last visited Mar. 28, 2012); Timothy Bolger, *Huntington Referendum on Districts Set*, LONG ISLAND PRESS (Nov. 6, 2009), <http://www.longislandpress.com/2009/11/06/huntington-referendum-vote-on-districts-set>.

<sup>62</sup> *Section 5 Covered Jurisdictions, Civil Rights Division Home Page*, U.S. DEP'T OF JUSTICE, [http://www.justice.gov/crt/about/vot/sec\\_5/covered.php](http://www.justice.gov/crt/about/vot/sec_5/covered.php) (last visited Mar. 28, 2012).

<sup>63</sup> 42 U.S.C. § 1973a(c) (2006).

<sup>64</sup> *Id.* § 1973a(b).

use of at-large elections in most New York localities was not, at first, actionable.<sup>65</sup> But in renewing the VRA in 1982, Congress said that the critical question was not to be intent, but the discriminatory *effect* that left protected minorities “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>66</sup> Writing for the majority in *Thornburg v. Gingles*,<sup>67</sup> the seminal decision that overturned the use of multi-member districts for electing North Carolina General Assembly members, Justice William Brennan said: “The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.”<sup>68</sup>

Other structures or processes that are commonly used in New York along with at-large election may add to their discriminatory effect. One is the scheduling of elections in a manner that reduces turnout among less formally educated, less affluent voters, many of whom are members of minority groups. City, county, and town elections in New York are held on the general election day in November, but in odd numbered years.<sup>69</sup> Village elections are held in March, with a local option to switch the date.<sup>70</sup> School board elections are held in May, and Fire Districts are held in December.<sup>71</sup>

There are at least two other structural factors that sometimes advantage majorities in New York’s at-large jurisdictions: smaller boards (e.g. five members) combined with staggered four year terms that make fewer positions available at any one election; and the provision that voters may cast multiple votes, one for each position to be filled, but with the restriction that only one vote may be given by each voter to a single candidate.<sup>72</sup> These

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<sup>65</sup> See *Mobile v. Bolden*, 446 U.S. 55, 74 (1980), *superseded by* U.S. CONST. amend. XV, § 2.

<sup>66</sup> S. REP. NO. 97-417, at 76 (1982).

<sup>67</sup> 478 U.S. 30 (1986).

<sup>68</sup> *Id.* at 47; George Bundy Smith, *The Multimember District: A Study of the Multimember District and the Voting Rights Act of 1965*, 66 ALB. L. REV. 11, 25 (2002).

<sup>69</sup> N.Y. CONST. art. XIII, § 8, cl. 5 (mandating that city elections be held in odd numbered years).

<sup>70</sup> N.Y. ELEC. LAW § 15-104(1)(a) (McKinney 2009).

<sup>71</sup> N.Y. TOWN LAW §§ 174–175 (McKinney 2004); N.Y. EDUC. LAW § 1804(4) (McKinney 2007).

<sup>72</sup> See, e.g., Assem. 9105, 2012 Leg., 235th Reg. Sess. (N.Y. 2012) (a pending

types of provisions have typically been viewed as having the effect of racial vote dilution under section two of the Voting Rights Act, and retrogression under section five, and are also suggestive of intent to discriminate.<sup>73</sup> If boards are larger, minorities might be advantaged by the commonly used plurality winner rule. (The person with the most votes wins; a majority is not required). This is especially true when there is an organized effort to cast a “bullet vote” for a single candidate, which both adds to the preferred individual’s total and reduces the overall number of votes cast—and therefore the number of votes needed to become a plurality choice in a multi-candidate at-large race.

Because the population of New Castle, New York is largely white, voting rights considerations were not germane to its choice to continue to use at-large elections for the town board there.<sup>74</sup> But over the last twenty years, federal courts have decided voting rights cases regarding the use of at-large local elections as alleged barriers against effective electoral choice by minority voters in one city, two towns, and one village in New York.<sup>75</sup>

Following the 1990 census, voting rights litigation was undertaken on behalf of African American communities in the City of Niagara Falls (Niagara County),<sup>76</sup> and the towns of Hempstead (Nassau County),<sup>77</sup> and Babylon (Suffolk County).<sup>78</sup> Following the 2000 census, Port Chester (Westchester County) was challenged by the U.S. Department of Justice for the negative effects of at-large elections there on the representation of the village’s Hispanic population.<sup>79</sup> The use of at-large elections in Niagara Falls and Babylon was not found to be

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bill that states that limited voting in circumstances in which it would influence the outcome of an election is prohibited); Kirk Semple, *Trying to Make History, With Six Votes Per Person*, N.Y. TIMES, June 12, 2010, at A14; *About Our Department*, TOWN OF WOODBURY, [http://www.townofwoodbury.com/offices/town\\_board.shtml](http://www.townofwoodbury.com/offices/town_board.shtml) (last visited Mar. 28, 2011).

<sup>73</sup> *Large v. Fremont Cnty.*, No. 10-8071, 2012 U.S. App. Lexis 3559, at \*24 (10th Cir. Feb. 22, 2012).

<sup>74</sup> See *New Castle, New York*, CITY-DATA, <http://www.city-data.com/city/New-Castle-New-York.html> (last visited Mar. 28, 2012) (showing that about 90 percent of New Castle’s population is Caucasian).

<sup>75</sup> See *infra* Part II.A–D.

<sup>76</sup> *NAACP v. Niagara Falls*, 913 F. Supp. 722, 726 (W.D.N.Y. 1994), *aff’d*, 65 F.3d 1002 (2nd Cir. 1995).

<sup>77</sup> *Goosby v. Town Bd.*, 956 F. Supp. 326, 328 (E.D.N.Y. 1997), *aff’d*, 180 F.3d 476 (2nd Cir. 1999).

<sup>78</sup> *Reed v. Town of Babylon*, 914 F. Supp. 843, 848 (E.D.N.Y. 1996).

<sup>79</sup> See *infra* Part II.D.

discriminatory.<sup>80</sup> In contrast, the use of this method of choosing representatives in Hempstead and Port Chester was found to be violation of the Act, and remedial action was required.<sup>81</sup>

In all cases, federal judges entered into detailed consideration of local political history, including the operation of partisan nominating processes, group voting patterns, and election outcomes. Particular attention was given to sorting partisan from racial factors in determining the reason for the failure of overwhelmingly Democrat African American communities' preferred candidates to prevail in local elections. In all cases, the three threshold criteria established in *Thornburg v. Gingles*<sup>82</sup> were applied to determine if discrimination was present.<sup>83</sup> These are whether:

- the minority group is “sufficiently large and geographically compact to constitute a majority in a single-member district” in the jurisdiction in question, if such a district were created;
- the minority group votes cohesively, as a bloc; and
- the “white majority votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.”<sup>84</sup>

In addition, the Court in each case considered the “totality of circumstances” in the locality that might result in racial discrimination in the structuring and administration of elections and providing the access to elective office, in accordance with a list of nine criteria placed in the record in 1982 by the Senate Judiciary Committee, in reporting out the Voting Rights Act for renewal.<sup>85</sup> These are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting

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<sup>80</sup> See *infra* Part II.A–B.

<sup>81</sup> See *infra* Part II.C–D.

<sup>82</sup> 478 U.S. 30 (1986).

<sup>83</sup> *Id.* at 50–51.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.* at 43.



- practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
  5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
  6. whether political campaigns have been characterized by overt or subtle racial appeals;
  7. the extent to which members of the minority group have been elected to public office in the jurisdiction;
  8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
  9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.<sup>86</sup>

#### *A. Niagara Falls*

Effective in 1988, Niagara Falls changed its city charter to move from a five-person council-manager form of government to a strong mayor-council form, with a seven-person city council elected at-large for staggered four year terms.<sup>87</sup> The first seven-person council was elected in 1987.<sup>88</sup> African Americans in 1990 constituted 15.58 percent of Niagara Falls's population, rising from 10.06 percent in 1970 and 12.94 percent in 1980.<sup>89</sup> Under the previous five-member council elected at-large system, and in the first years of the new system, no African American had ever been elected to city office.<sup>90</sup> In 1993, the NAACP sued the city, arguing that its African American population was geographically concentrated, sufficiently large to comprise a district in a

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<sup>86</sup> *Id.* at 36–37; S. REP NO. 97-417, at 28 (1982).

<sup>87</sup> NAACP v. Niagara Falls, 913 F. Supp. 722, 727 (W.D.N.Y. 1994), *aff'd*, 65 F.3d 1002 (2nd Cir.1995).

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 729.

<sup>90</sup> *Id.* (explaining that Andrew Williams, an African American, was elected to the Council in 1991 with the largest total vote, and came to serve as its chairman).

hypothetical single member district system, and usually voted in a bloc, but that white bloc voting in the city and the totality of circumstances there denied effective choice in elections by minority voters in violation of the Federal Voting Rights Act.<sup>91</sup>

The facts of geographic concentration of African Americans in the city and their pattern of bloc voting were uncontested in the litigation. Federal District Court Judge William Scretny was not convinced, however, that the record of recent elections in the city demonstrated the presence of a pattern of white bloc voting, or that it evidenced a totality of circumstances that denied effective electoral choice in Niagara Falls to African Americans. He found that, “on the whole, the white majority population in the City of Niagara Falls does not vote in such a way that it usually defeats the African American voters’ candidate of choice,” and found also that “[i]n recent elections, African Americans have been particularly successful in electing their candidates of choice.”<sup>92</sup>

On appeal, Judge Jose Carbanes, writing for a three-judge panel of the Federal Circuit Court, found that the District Court had inappropriately discounted the evidence of white bloc voting offered by the NAACP and its expert witnesses, derived largely from elections prior to the change in Niagara Falls’ local government structure in 1988.<sup>93</sup> In the Circuit Court’s view, however—and in accord with the Senate factors detailed above—the city’s failure until 1991 to elect an African American to its council was by itself insufficient as evidence of the discriminatory effect of at-large elections there.<sup>94</sup> Judge Carbanes wrote: “We decline to adopt an approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters. Such an approach,” he said, “would project a bleak, if not hopeless, view of our society.”<sup>95</sup> In sum, and notwithstanding the errors it found by the lower court in interpreting the record regarding white bloc voting, the Circuit Court concluded that there was insufficient evidence in the totality of circumstances in Niagara Falls to overturn its at-large system.<sup>96</sup>

A decade and a half later, the 2010 census showed that 21.6%

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<sup>91</sup> *Id.* at 727.

<sup>92</sup> *Id.* at 740.

<sup>93</sup> NAACP v. Niagara Falls, 65 F.3d. 1002, 1009 (2nd Cir. 1995).

<sup>94</sup> *Id.* at 1023.

<sup>95</sup> *Id.* at 1016.

<sup>96</sup> *Id.* at 1005.

of the population of Niagara Falls was African American; there were two African American members on its city council.<sup>97</sup>

### *B. Babylon*

In 1990, the town of Babylon was (and still is, after the above referenced failure in 1999 to adopt a districting system) governed by five-person board comprised of a Supervisor and four council members.<sup>98</sup> The latter were elected at-large, two each in every election cycle, for four-year terms.<sup>99</sup> Babylon's population of 202,889 was, in 1990, just over 14.9 percent African American (13.34 percent of voting age population).<sup>100</sup> African Americans resided largely in three separate communities: Wyandanch and Wheatley Heights, North Amityville, and Deer Park.<sup>101</sup> Though Republicans had long dominated town government, since 1987 the town board was controlled by a Democrat majority.<sup>102</sup> Most African Americans in Babylon were registered as Democrats.<sup>103</sup> In the early 1990s, a group led by Dr. Eugene T. Reed, a long-time Long Island civil rights activist, alleged that their town's at-large system diluted African American voting strength in violation of the Voting Rights Act.<sup>104</sup>

Employing the *Gingles* criteria in deciding *Reed v. Town of Babylon*, Federal Judge Joanna Seybert found that the voting rights claims failed to meet threshold requirements for two reasons.<sup>105</sup> First, the town's African American population was insufficiently large and concentrated so as to allow it to comprise a majority in a single member district if one were created.<sup>106</sup> Second, the town showed no pattern of racially polarized voting that evidenced dilution of African American voting strength.<sup>107</sup>

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<sup>97</sup> POPULATION BY RACE AND HISPANIC OR LATINO ORIGIN, NEW YORK STATE LOCAL AREAS, PUB. LAW 94-171, at 18 (2010), available at <http://www.esd.ny.gov/NYSDataCenter/Data/Census2010/PL2010Tab3NY.pdf> [hereinafter POPULATION BY RACE].

<sup>98</sup> *Reed v. Town of Babylon*, 914 F. Supp. 843, 849 (E.D.N.Y. 1996).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 849–50.

<sup>101</sup> *Id.* at 850–51.

<sup>102</sup> *Id.* at 854.

<sup>103</sup> *Id.* at 853.

<sup>104</sup> *See id.* at 848, 859, 861.

<sup>105</sup> *See id.* at 863, 892.

<sup>106</sup> *See id.* at 863, 872–74.

<sup>107</sup> *See id.* at 877, 884.

On the first point, Judge Seybert, citing *Holder v. Hall*,<sup>108</sup> noted that those seeking change in Babylon could not assume a hypothetical enlarged governing board.<sup>109</sup> Without an increase in the number of board members, creation of a single-member district with an African American majority would require the inclusion of 94 percent of Babylon's black population.<sup>110</sup> After examining the single-member district maps proposed by the plaintiffs in this case, and mindful of the Supreme Court's specification of the heightened level of scrutiny required if race was the predominant consideration in districting,<sup>111</sup> Judge Seybert concluded that these were "drawn with a near-exclusive focus on race," and took insufficient consideration of such traditional "districting criteria . . . [such] as compactness, respect for the Town's geography, contiguity and the integrity of political subdivisions and communities of interests."<sup>112</sup>

On the second point, Judge Seybert found considerable evidence that aggregated results of white and African American voting for Democrats in Babylon showed little difference, candidates' race notwithstanding.<sup>113</sup> Moreover, African Americans were substantially involved in the local Democratic Party organization, including candidate selection, and the Democrat majority on the town government was responsive to black community needs and priorities.<sup>114</sup>

Babylon's population in the 2010 census was 213,603; 16.32 percent of which was African American and 16.76 percent Hispanic.<sup>115</sup> There was one black and one Hispanic member serving on the town council in 2011.<sup>116</sup>

### *C. Hempstead*

In 1990, 12.1 percent of the Town of Hempstead's 725,639

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<sup>108</sup> 512 U.S. 874 (1994); *Reed*, 914 F. Supp. at 865–66.

<sup>109</sup> *Reed*, 914 F. Supp. at 866 (citing *Concerned Citizens for Equality v. McDonald*, 63 F.3d 413, 417 (5th Cir. 1995)).

<sup>110</sup> *Id.* at 868.

<sup>111</sup> *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 939 (1995); *Shaw v. Reno*, 509 U.S. 630, 657–58 (1993).

<sup>112</sup> *Reed*, 914 F. Supp. at 873–74.

<sup>113</sup> *See id.* at 881–83. Interestingly, the analysis included a judicial race in which a winning Republican candidate was African American. *Id.* at 874.

<sup>114</sup> *Id.* at 890–91.

<sup>115</sup> POPULATION BY RACE, *supra* note 97, at 28.

<sup>116</sup> *Town of Babylon Council Members*, THE TOWN OF BABYLON, <http://www.townofbabylon.com/towncouncil.cfm> (last visited Mar. 28, 2012).

residents and (11.2 percent of the voting age population) was African American.<sup>117</sup> African-Americans lived mostly in the adjoining communities of Roosevelt, Freeport, Hempstead (village), Lakeview, Uniondale and Baldwin.<sup>118</sup> The town was governed by a supervisor and six council members, all elected at-large.<sup>119</sup> Three council members were chosen for four-year terms in staggered odd-numbered years.<sup>120</sup> Town politics had been Republican-dominated for much of the twentieth century.<sup>121</sup> Nomination to town office was controlled by the county Republican leader, and no black person was nominated or elected to the town board until 1993.<sup>122</sup> In that year, Curtis Fisher was appointed to the board to fill a vacancy, in the midst of the litigation on the town's at-large system, on the initiative of the county Republican leader, Ralph Mondello.<sup>123</sup>

Supported by the Center for Constitutional Rights in New York City, Dorothy Goosby (who, until then had been an unsuccessful Democrat candidate for the Hempstead Town Board) with others, filed a class action suit against the Town of Hempstead charging that its at-large voting system for electing the board diluted minority votes in violation of section two of the Voting Rights Act.<sup>124</sup> Applying the three-fold *Gingles* criteria in considering the town's political history, and also the Senate guidelines for consideration of the totality of political circumstances in Hempstead, Federal Judge John Gleeson found that the African American community was sufficiently large and concentrated to become a majority in a single-member district if such a districting system were created there.<sup>125</sup> The judge also found patterns of polarized voting in both the black and white communities, with white bloc voting, in combination with the town's at-large system,

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<sup>117</sup> *Goosby v. Town Bd.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2nd Cir. 1999).

<sup>118</sup> *Id.* at 333, 345, 349. When enrolled, African Americans were far more Democrat in their partisanship than Republican. *Id.* at 347–48.

<sup>119</sup> *Id.* at 331.

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 332.

<sup>122</sup> *Id.* at 332, 339–40.

<sup>123</sup> *Id.* at 332, 340–41.

<sup>124</sup> *Id.* at 328; Stewart Ain, *Decision Expected in Blacks' Suit Against Hempstead*, N.Y. TIMES, Oct. 13, 1996, at 13L110.

<sup>125</sup> *Goosby*, 956 F. Supp. at 329–30, 348–49. Notably, the presence of a larger board made this factor easier to satisfy than it was in Babylon, with a smaller board. *Id.* at 350; *Reed v. Town of Babylon*, 914 F. Supp. 843, 868 (E.D.N.Y. 1996).

foreclosing African American access and influence.<sup>126</sup> There was some evidence of invidious use of racial appeals in local elections.<sup>127</sup> Moreover, Judge Gleeson found, the Republican-dominated Hempstead town government, though not racially biased in its formal actions, was largely closed to African American influence and unresponsive to the priorities of the town's black communities.<sup>128</sup> Considering the totality of circumstances, Judge Gleeson (and the circuit court considering the matter on appeal after him)<sup>129</sup> found the town's argument that the minority's preferred candidates had failed at the polls largely for partisan reasons unconvincing, not substantially because of the effects of the electoral system.<sup>130</sup>

As a result of this analysis, Judge Gleeson determined in *Goosby v. Town Board of the Town of Hempstead* that the at-large system used in the town discriminated against minority voters and candidates, and ordered the creation of a six single-member district system for electing town council members.<sup>131</sup> In response, the appeals court summarized, in May of 1997, that

The Town Board submitted two redistricting proposals. . . . [A] two-district system, with one single-member district encompassing the majority of the Town's black population and approximately one-sixth of the Town's total population, and a second five-member district including the remaining five-sixths of the Town's population. The Town Board's alternative plan consisted of six single-member districts, one of which was the same majority black district advanced under the first plan.<sup>132</sup>

The first was rejected by the court as predominantly race-based; the second was accepted.<sup>133</sup> The aforementioned appeal by the town failed.<sup>134</sup> Ms. Goosby was later elected to the council from the newly created first district; she continued in 2011 to serve as the sole African American member.<sup>135</sup>

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<sup>126</sup> *Goosby*, 956 F.Supp. at 351.

<sup>127</sup> *Id.* at 353.

<sup>128</sup> *Id.* at 352–53.

<sup>129</sup> *Goosby v. Town Bd.*, 180 F. 3d 476, 503–04 (2d Cir. 1999).

<sup>130</sup> *Id.* at 495, 497; *Goosby*, 956 F. Supp. at 353, 355.

<sup>131</sup> *Goosby*, 956 F.Supp. at 356.

<sup>132</sup> *Goosby*, 180 F.3d at 483.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 498.

<sup>135</sup> *Council Members: Dorothy L. Goosby*, TOWN OF HEMPSTEAD, <http://townofhempstead.org/index.php/council-members/goosby> (last visited Mar. 28, 2012).

*D. Port Chester*

In the year 2000, Port Chester, a village in suburban Westchester County, had a population of 27,867, 12,884 (46.2 percent) of whom were of Hispanic background.<sup>136</sup> Though only a slightly smaller proportion of the village's voting age population was Hispanic, the Hispanic citizen voting age population was only slightly more than one fifth (21.95 percent) of the potential electorate.<sup>137</sup> Port Chester was governed by a board comprised of a mayor and six trustees, the former elected for two years, and the latter for staggered three-year terms (two elected each year).<sup>138</sup> The failure of candidates of Hispanic background to ever win an election in the village and largely coterminous school district led to a voting rights challenge of the at-large system used in village elections.<sup>139</sup> In reaction, the Village Board of Trustees said in a resolution (December 4, 2006), that the problem was not discrimination, but rather "apathy" in the Hispanic community.<sup>140</sup> To the plaintiffs' advantage, the minority group was a larger proportion of the village population than in previous cases litigated in New York, and there were six, not five, village board positions (in addition to the mayor).<sup>141</sup>

After reviewing the arguments and evidence, Federal Judge Stephen C. Robinson found that the three *Gingles* preconditions for a voting rights challenge were met.<sup>142</sup> The village's Hispanic minority was sufficiently large and concentrated geographically to provide a majority in a single-member district, if Port Chester

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<sup>136</sup> *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 419 (S.D.N.Y. 2010).

<sup>137</sup> *Id.* at 419–20.

<sup>138</sup> *Id.* at 420.

<sup>139</sup> *Id.* at 416; Press Release, Dep't of Justice, U.S. Attorney, S.D.N.Y., U.S. Files Voting Rights Lawsuit Against the Village of Port Chester, N.Y. (Dec. 15, 2006), available at <http://www.justice.gov/usao/nys/pressreleases/CivilRights/portchesterlawsuitpr.pdf>.

<sup>140</sup> See Memorandum in Support of Petitioner Application for a Preliminary Injunction at 5, *Vill. of Port Chester*, 704 F. Supp. 2d 411; Barbara Whitaker, *In Victory for Hispanics, Judge Halts Port Chester Elections*, N.Y. TIMES, Mar. 3, 2007, at B2.

<sup>141</sup> See *Vill. of Port Chester*, 704 F. Supp. 2d at 419–20; *NAACP v. Niagara Falls*, 913 F. Supp. 722, 727 (W.D.N.Y. 1994), *aff'd*, 65 F.3d 1002 (2nd Cir.1995); *Reed v. Town of Babylon*, 914 F. Supp. 843, 868 (E.D.N.Y. 1996); *Goosby v. Town Bd.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2nd Cir. 1999).

<sup>142</sup> *Vill. of Port Chester*, 704 F. Supp. 2d at 446.

was divided into six such districts to elect its board.<sup>143</sup> Maps submitted into evidence showed how this might be done. The minority voted as a bloc, but white bloc voting resulted in the minority systematically failing to gain victory for its preferred candidates. Considering the totality of circumstances, Judge Robinson found evidence of structural bias in village elections; one germane element was an overt anti-Hispanic appeal in a mailing that was circulated in connection with the 2007 village election for mayor.<sup>144</sup> He found a violation of the Voting Rights Act, and directed that remedial plans be proposed.<sup>145</sup>

Port Chester, less than two square miles in area, continued to resist the creation of single-member districts.<sup>146</sup> As in many communities with at-large voting, a number of residents did not like the idea of their village being divided into wards. It seemed impractical, violated citizens' commitment to the idea of a single community, and promised divisive politics (and increased financial cost) at times of decennial redistricting. So when faced with the outcome of their voting rights lawsuit, village leaders decided in 2009 to adopt a system of cumulative voting.<sup>147</sup> This allows each voter to have one vote for each seat on the board, but to cast all his or her votes for a single person. With cumulative voting, an organized minority may concentrate its voting power in support of a preferred candidate.

Judge Robinson approved this locally advanced and preferred plan, notwithstanding the Department of Justice's expressed preference for single member districts.<sup>148</sup> (The department took this stance even though it had accepted this remedy in a number of cases in other states.)<sup>149</sup> The court approved a consent decree on December 22, 2009, providing not only for this process, but for substantial voter education efforts and oversight arrangements to assure election integrity.<sup>150</sup>

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<sup>143</sup> *Id.* at 447.

<sup>144</sup> *Id.* at 436.

<sup>145</sup> *Id.* at 446–47.

<sup>146</sup> *See id.* at 447.

<sup>147</sup> Kirk Semple, *In a First, Port Chester Puts a Latino On Its Board*, N.Y. TIMES, June 17, 2010, at A27.

<sup>148</sup> *See* Shawna C. MacLeod, Note, *One Man, Six Votes, and Many Unanswered Questions: Cumulative Voting as a Remedial Measure for Section 2 Violations in Port Chester and Beyond*, 76 BROOK. L. REV. 1669, 1687–88 (2011).

<sup>149</sup> *Id.* at 1680–81.

<sup>150</sup> Press Release, U.S. Attorney, S.D.N.Y., Vill. of Port Chester, N.Y., Enters Into Historic Voting Rights Consent Decree with the United States (Dec. 22, 2009), available at <http://www.justice.gov/usao/nys/pressreleases/December09/>



In June of 2010, at the first election following the signing of this decree, the entire six-member village board was elected, enhancing the prospect of the election of a candidate preferred by minority voters.<sup>151</sup> Overall, in fact, the use of cumulative voting “produced a multiethnic and multipartisan panel of trustees.”<sup>152</sup> It included Democrat Luis Marino (a custodial worker from Peru who had lived in Port Chester for some time), independent candidate Bart Didden, Democrat Daniel Brakewood, Conservative John Branca, Republican Joseph Kenner (an African American), and Republican Sam Terenzi.<sup>153</sup> Interestingly, this board then sought, by an appeal in Federal Court, to overturn the process that had produced it.<sup>154</sup> Trustee Kenner argued that the original voting rights case never should have been brought, that the Hispanic community’s preferred candidate would have won under the old system, and that the results of the litigation had cast a “shameful and unwarranted stigma” on Port Chester.<sup>155</sup> The appeal failed.

The financial costs of defending voting rights actions may be substantial for hard-pressed local governments. Not including the cost of the final appeal, for which \$225,000 was initially budgeted, this lawsuit cost the village of Port Chester an estimated \$1.2 million in legal fees.<sup>156</sup> The cost to the federal government has not been estimated. The annual budget for Port Chester in 2010 was \$34.9 million; the village’s real property tax levy in that year was \$23.2 million.<sup>157</sup>

### III. GOING FORWARD

Both statutory history and legal precedent make clear that the

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portchestervotingsettlementpr.pdf.

<sup>151</sup> Leah Rae, *Port Chester Voting Yields Diverse Board*, JOURNAL NEWS (Westchester, N.Y.), June 17, 2010, at AWP3.

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*; Jenny Shen and Nic Riley, *On Port Chester’s Election*, BRENNAN CTR. FOR JUSTICE (June 22, 2010), [http://www.brennancenter.org/blog/archives/on\\_port\\_chesters\\_election\\_and\\_counting\\_minority\\_votes/](http://www.brennancenter.org/blog/archives/on_port_chesters_election_and_counting_minority_votes/). For a strong defense of the use of cumulative voting in Port Chester, see Alec Slatky, *Debunking the Myths about Port Chester*, FAIR VOTE (June 25, 2010), <http://www.fairvote.org/debunking-the-myths-about-port-chester#.Tw4UAIF62So>.

<sup>154</sup> Kirk Semple, *Port Chester to Appeal U.S. Voting Rights Ruling Aimed at Helping Latinos*, N.Y. TIMES, Feb. 24, 2011, at A25.

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> VILLAGE OF PORT CHESTER, ADOPTED BUDGET FISCAL YEAR JUNE 1, 2010 TO MAY 31, 2011, at 1, 4 (2010).

number and proportion of protected minority group members on a local board is not dispositive of whether minority group voters in that jurisdiction have a fair chance of effectively exercising choice at the polls. For example, after considering the *Gingles* criteria and the Senate guidelines—including the totality of circumstances in the community—Judge Gleeson in the *Hempstead* case discussed earlier was not dissuaded from his judgment that a voting rights remedy was needed. He reached this conclusion notwithstanding the appointment, during the course of the litigation, of an African American town board member by the dominant Republican majority.<sup>158</sup> But the presence of minority group members on these local boards is indicative of greater incorporation of the diversity of the community in the local polity. A review of the 2010 census of population and board membership in New York localities using at-large election shows that this incorporation has indeed been occurring for African Americans, but far less so for people of Hispanic decent.<sup>159</sup>

Of the New York cities using at-large elections in 2011, six had African American populations that, if concentrated and voting as a bloc, would comprise the majority in at least one district in a single-member district system: Niagara Falls, Newburgh, Schenectady, Mount Vernon, Peekskill, and White Plains.<sup>160</sup> In all but Peekskill, the African American proportion of the city council membership equaled or exceeded that group's proportion of the population.<sup>161</sup> In fact, as Table I shows, New York cities with substantial African American populations have proportionately incorporated leadership from this minority group regardless of the nature of the districting system they have in

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<sup>158</sup> See *supra* Part II.C.

<sup>159</sup> See, e.g., *New York State & County Quickfacts*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/36000.html> (last visited Mar. 27, 2012) (showing black and Hispanic individuals make up over 30 percent of New York's population). See also *Board of Trustees*, VILLAGE OF PORT CHESTER, N.Y., [http://www.portchesterny.com/Pages/PortChesterNY\\_BTrust/index](http://www.portchesterny.com/Pages/PortChesterNY_BTrust/index) (last visited Mar. 27, 2012) (showing diversity on a town board).

<sup>160</sup> POPULATION BY RACE, *supra* note 97, at 53–54, 56, 60, 66. Newburgh has since switched to a mixed system.

<sup>161</sup> A note on methodology. The author created a database for minority representatives and minor population in at-large cities. The sources for the database were the 2010 Census and the official city websites with names and photos of council members for the following cities: Auburn, Glen Cove, Long Beach, Mount Vernon, Newburgh, Niagara Falls, Peekskill, Ogdensburg, Rye, Saratoga Springs, Schenectady, Sherrill, Watertown, Watervliet, and White Plains.

use.<sup>162</sup>

Table I

New York Cities with Substantial African American Populations  
(Numbers of Cities)

Districting System	% Council Members that is A.A. relative to city % AA VAP	
	Equal or Higher	Lower
At-large	5	1
District	4	0
Mixed	5	1

Source: 2010 Census and review of city government websites

This evidence suggests that over time, growing African American populations in cities, and demands for inclusion, combined with strategic calculations by established local leadership seeking to gain or achieve partisan control, resulted in the elevation of minority representatives to local legislative leadership roles. Almost certainly, voting rights litigation, or its threat, was and continues to be an element in the overall political calculus. Not all of this litigation concerned the use of at-large systems. In New Rochelle, the issue was the design of districts in a single-member district system.<sup>163</sup> But considerable incorporation of minorities in community leadership roles occurred over time without litigation, and without regard to the presence or absence of at-large council elections.

In contrast, as demonstrated in Table II, integration of Hispanic leadership in New York cities is far less advanced. In general, elected councilors of Hispanic origin in New York cities with substantial Hispanic populations are a smaller percentage of council members than voting-age Hispanics are of city populations.

<sup>162</sup> See Table I.

<sup>163</sup> *New Rochelle Voter Defense Fund v. City of New Rochelle*, 308 F. Supp. 2d 152, 162 (S.D.N.Y. 2003).

Table II

New York State Cities with Substantial Hispanic Populations  
(Numbers of Cities)

Districting System	% Council Members that is Hispanic relative to city % Hispanic VAP	
	Equal or Higher	Lower
At-large	1	2
District	0	2
Mixed	3	4

Source: 2010 census and review of city government websites

This is true in other New York municipalities that employ at-large elections. Voting Rights Act protections were extended by congress to “language minorities” in 1975.<sup>164</sup> There are now twenty-eight New York towns and villages, mostly in downstate suburban counties, in which the Hispanic voting age population by itself exceeds a fifth of these communities’ voting age population, the necessary proportion—if concentrated and voting as a bloc—to be a majority in a single-member district in a jurisdiction with a five-member board.<sup>165</sup> In these places on average, the Hispanic voting age population has grown by twenty-nine percent; in a few selected cases it has come close to doubling. Research at the Center for Research, Regional Education and Outreach at SUNY New Paltz showed that in thirteen of the twenty-one of these for which we could obtain data, there was no Hispanic board member in 2010.<sup>166</sup> In only four towns and villages was the proportion of Hispanic persons on the governing board roughly proportional to the number of Hispanic persons in the voting age population.<sup>167</sup>

<sup>164</sup> Voting Rights Act of 1965, Pub. L. No. 94-73, 89 Stat. 400 (codified at 42 U.S.C. § 1971 (2006)).

<sup>165</sup> The author created a database of cities, towns, and villages in New York with Hispanic populations greater than 20 percent. The data was found on websites of the municipalities. See POPULATION BY RACE, *supra* note 97.

<sup>166</sup> Thirteen of the twenty-one municipalities surveyed do not have any Hispanic representatives on their boards: Town of East Hampton, Town of Islip, Town/Village of Mount Kisco, Village of Island Park, Town of Mamaroneck, Town of Ossining, Village of Greenport, Village of Manorhaven, Village of Ossining, Village of Sleepy Hollow, Village of Spring Valley, Village of Westbury, and Village of Valley Stream.

<sup>167</sup> These towns are Haverstraw, Hempstead, Port Chester, and Thompson. See MICHAEL FONDACARO, DIRECTORY OF LATINO ELECTED OFFICIALS IN NEW YORK

Villages generally do not hold their elections in New York on the general election day, so the November 2011 election produced no new outcomes for their boards. The six towns in our sample were Ossining, Rye, Haverstraw, Easthampton, Islip and Mount Kisco. All use at-large elections. In 2011, Rye and Haverstraw continued one person of Hispanic origin in office.<sup>168</sup> The four others still have no Hispanic board members.<sup>169</sup> Though other Hispanic persons ran for office, no other member of this minority group was elected this year.

Looking at villages alone, notwithstanding the almost universal use of at-large elections, incorporation of African American elected leadership has been substantial, while the election to office of persons of Hispanic origin is still pending (Table III).

Table III

Minority Group Share of Elected Leadership in  
New York Villages with Substantial Minority Populations  
(Number of Villages)

	Council % relative to VAP%	
	Equal or Higher	Lower
African American	10	4
Hispanic	1	20

Source: 2010 census and review of city government websites

This pattern suggests that, as its attorneys argued in Port Chester's defense and as Judge Stephen C. Robertson summarized, "given time and assuming continued growth of the Hispanic population of the Village, the Hispanic community could

STATE (2011), available at [www.nylarnet.org/reports/pol\\_Directory.pdf](http://www.nylarnet.org/reports/pol_Directory.pdf).

<sup>168</sup> See *Town Council Members*, TOWN OF RYE, [http://www.townofryeny.com/index.php?act=view\\_cms&id=14&contentFull=full](http://www.townofryeny.com/index.php?act=view_cms&id=14&contentFull=full) (last visited Mar. 18, 2012); *Town of Haverstraw Board Members*, TOWN OF HAVERSTRAW, <http://www.townofhaverstraw.org/board.html> (last visited Mar. 18, 2012).

<sup>169</sup> The four towns are East Hampton, Islip, Mount Kisco, and Ossining. See *East Hampton Town Board*, TOWN OF EAST HAMPTON LONG ISLAND, N.Y., <http://www.town.east-hampton.ny.us/HtmlPages/TownBoardBackgroundInformation.htm> (last visited Mar. 18, 2012); *Elected Officials*, TOWN OF ISLIP, <http://www.townofislip-ny.gov/about-islip/elected-officials> (last visited Mar. 18, 2012); *Ossining Town Board*, TOWN OF OSSINING, <http://www.townofossining.com/depts/townboard.htm> (last visited Mar. 18, 2012); *Village Board of Trustees*, VILLAGE/TOWN OF MOUNT KISCO, [http://www.mountkisco.org/Pages/MtKiscoNY\\_BComm/VillageBoard/index](http://www.mountkisco.org/Pages/MtKiscoNY_BComm/VillageBoard/index) (last visited Mar. 18, 2012).

come to dominate the political landscape in Port Chester even under the current at-large system.”<sup>170</sup> But, the judge added, “[t]his Court . . . is not charged with projecting what might happen years, or decades, from now; rather, we are faced with the current political reality in the Village . . . .”<sup>171</sup>

The story is generally the same for school districts for which, as noted, all elections are at-large. For the purpose of analysis we assumed a board size of seven members. We considered jurisdictions for which we could get information on the racial and/or ethnic background of board members and that had at least a 14 percent or more African American, or 14 percent or more Hispanic population, or both. The pattern is generally the same as for the municipalities we examined with significant-sized minority populations: far more inclusion on boards of African American leadership than Hispanic leadership. In fact, only five school districts out of fifty-one for which we were able to gather data had Hispanic elected leadership commensurate with or exceeding the size of their Hispanic populations.

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Table IV

Minority Group Share of Elected Leadership in New York School Districts with Substantial Minority Populations

	Board % Relative to Population %		
	Equal or Higher	Similar	Lower
African American	19	4	10
Hispanic	3	2	46

Source: 2010 census and review of city government websites

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Though examining historic community voting patterns in detail is beyond the scope of this study, preliminary maps prepared in connection with this research show that Hispanic populations in selected towns on Long Island are heavily concentrated residentially. Times are difficult; lawsuits are expensive. New York’s diversity continues to grow. (The political incorporation of the Asian American community, rapidly growing, is just beginning.) Prudence suggests that these communities with increasingly diverse populations anticipate the need to be

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<sup>170</sup> *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 446 (S.D.N.Y. 2010).

<sup>171</sup> *Id.* at 446–47.

responsive in the redesign of their electoral arrangements in light of the speed of population change and the risk of litigation.

#### IV. ACHIEVING MORE EQUITABLE REPRESENTATION WITHOUT LITIGATION THROUGH VOTING SYSTEM CHANGE

In 2001, California, which has a very substantial and rapidly growing Hispanic population, passed a state Voting Rights Act that specifically targets at-large election systems.<sup>172</sup> Concomitant with the voting rights litigation in Port Chester, Assembly member Peter M. Rivera, chair of the State Assembly Puerto Rican/Hispanic Task Force, introduced a bill on Martin Luther King Day in 2007 to “forc[e] communities that continue to rely on at-large elections to adopt district or ward elections by the fall of 2009.”<sup>173</sup> This proposed legislation did not pass, but was reintroduced in 2009 and 2011.<sup>174</sup> It would ban at-large elections in New York towns and villages entirely, while directing county boards of elections to draw newly required ward boundaries for localities.<sup>175</sup> To assist in this effort, the bill makes a provision for technical support for county boards from the Legislative Office on Demographic Research and Reapportionment and from the Secretary of State’s Office.<sup>176</sup>

A second legislative initiative seeks to provide data that would ease the possibility of voting rights litigation not only in general purpose governments but also in school districts. Though school district and other special district elections have been the subject of voting rights litigation elsewhere in the country, this has not been the case in New York.<sup>177</sup> Perhaps this is because such

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<sup>172</sup> CAL. ELEC. CODE §§ 14025–14032 (West 2012).

<sup>173</sup> Press Release, Assemblyman Peter M. Rivera, State Lawmaker and Community Leaders Unveil Plan to Protect Minority Voting Rights on Dr. Martin Luther King Day (Jan. 15, 2007), *available at* [http://assembly.state.ny.us/member\\_files/076/20070116](http://assembly.state.ny.us/member_files/076/20070116).

<sup>174</sup> Assem. 4879, 2009 Legis., 232d Reg. Sess. (N.Y. 2009); Assem. 4423, 2011 Legis., 234th Reg. Sess. (N.Y. 2011).

<sup>175</sup> Assem. 4423, 2011 Legis., 234th Reg. Sess. (N.Y. 2011).

<sup>176</sup> *Id.*

<sup>177</sup> *See Cases Raising Claims Under Section 2 of the Voting Rights Act*, DEP’T OF JUSTICE, [http://www.justice.gov/crt/about/vot/litigation/recent\\_sec2.php](http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php) (last visited Apr. 1, 2012). Fire districts are small, low visibility governments. Many are in communities with few minority group residents. Historically, allegations of racial discrimination in them have arisen on Long Island. *See* Clinton Grant & John Syffrard, *Dr. Eugene Reed and the Battle for Civil Rights on Long Island*, [http://people.hofstra.edu/alan\\_j\\_singer/294%20Course%20Pack/x10.%20Civil%20Rights/Eugene%20Reed.pdf](http://people.hofstra.edu/alan_j_singer/294%20Course%20Pack/x10.%20Civil%20Rights/Eugene%20Reed.pdf).

elections in the state are not commonly conducted on the geographic basis used for other elections, making it very difficult to access aggregate statistical evidence regarding bloc voting.<sup>178</sup> In commenting on the utility of evidence from a largely coterminous school district in considering the discriminatory effect of at-large elections in Port Chester, for example, Federal District Court Judge Robinson wrote: “Because these elections take place in a single voting precinct . . . it is not possible to perform the same types of statistical analysis for the School Board elections as were performed for all other endogenous and exogenous elections studied in this case.”<sup>179</sup>

In response to evidentiary challenges presented by the *Gingles* standards, Assemblymember Peter Rivera has also entered legislation in the state Assembly to mandate the collection of individual-level racial and ethnic data by county boards of elections.<sup>180</sup> New York State Senator Mark Grisanti said in his memorandum accompanying this bill:

The collection of data by race and ethnicity will allow researchers to better gauge voter registration and turnout in the state. With this information efforts to promote voting would be more effective. policymakers [sic] will be better able to monitor and regulate the electoral process to insure the highest degree of participation by citizens. Political parties and civic organizations will be in a better position to mobilize voters.<sup>181</sup>

In light of the evidence presented here, the approach encompassed by these two bills seems too inclusive and excessively confrontational. At-large elections are the norm and are preferred in local government in New York. Most localities in New York that employ them still have relatively small minority

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<sup>178</sup> Federal, state, city, county, and town elections in New York are administered in accord with State Election Law by county Boards of Elections, overseen by a state Board of Elections. The Election Law makes villages responsible for administering their own elections, though they may contract with counties to do this. *See* N.Y. ELEC. LAW § 15.104 (McKinney 2009). School district elections are administered by the districts themselves in accord with the Education Law, under the aegis of the state Education Department. *See* N.Y. STATE SCH. BD. ASS'N & N.Y. STATE BAR ASS'N, SCHOOL LAW 103–09 (32d ed. 2008). Town Law provides for fire districts to administer their own elections. N.Y. TOWN LAW § 175 (McKinney 2004).

<sup>179</sup> *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 429 (S.D.N.Y. 2010).

<sup>180</sup> Assem. 5760, 2011 Leg., 234th Reg. Sess. (N.Y. 2011); S. 4635, 2011 Leg., 234th Reg. Sess. (N.Y. 2011).

<sup>181</sup> Sponsor's Memorandum from Mark Grisanti, N.Y. State Sen., in Support of S. 4635, 2011 Leg., 234th Reg. Sess. (N.Y. 2011).



populations. Uniformly in recent years, citizens voting in local referenda have rejected switching from at-large to districting systems. Voting rights litigation attacking at-large systems, claiming they deny minority group members effective choice at the ballot box, has had mixed success in New York State.

Moreover, what appears to be at stake is the pace of change, not the fact of demographic diversity integration in locally elected leadership in New York. Evidence gathered after the 2010 census for cities with substantial minority populations shows that places with at-large elections in the state have been as successful as those with mixed or district systems in electing African American leadership to their councils.<sup>182</sup> In contrast, in cities where Hispanic population is substantial, election of Hispanic council leadership has lagged, and the electoral system is one of several likely factors in this.<sup>183</sup>

In villages—where at-large systems are almost universally used—African American leadership has also generally emerged concomitant with the size of that minority's population. But as of today, Hispanic leadership has not. This may be in part because Hispanic populations are more recently arrived and have grown very rapidly in New York's cities (outside New York City) and villages during the last decennium, and include relatively large numbers of persons not eligible to vote.

Creating a district-based or mixed system for election to the local legislative body, the more traditional approach and that favored by the U.S. Justice Department, remains one potential response to growing population diversity. The City of Newburgh did this in 2011. With a population of 39 percent Caucasian, 30 percent African American and 47 percent Hispanic in 2010, the city's board will have three black and two white members in 2012.<sup>184</sup> A charter commission recommended, and voters this year approved, a charter change that moved the city from a five-member board, with all members selected at-large, to a seven-member board with four selected from wards and three at-large.<sup>185</sup> This change retained a substantial citywide perspective

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<sup>182</sup> See Table I.

<sup>183</sup> See Table II.

<sup>184</sup> POPULATION BY RACE, *supra* note 97, at 21; *Government*, CITY OF NEWBURGH, N.Y., <http://www.cityofnewburgh-ny.gov/gov/council.htm> (last visited Mar. 27, 2012).

<sup>185</sup> Gerald Benjamin & Joshua Simons, *CREEO: New Models for Local Districts*, NEWSDAY, Jan. 12, 2012.

on the board and, with half the city's population now of Hispanic origin, will almost surely result in the first election of one or more Hispanic council members.

But as Port Chester demonstrated, changing the local voting system, as distinct from the districting system, is a viable alternative. There are many alternative voting system options. With cumulative voting—the system Port Chester chose—an organized minority may concentrate its voting power in support of a preferred candidate. This solution allows the integration of all elements of the population in the course of the community's political process. Because there are no districts that require decennial adjustment, the process is faster and less expensive. Cumulative voting is responsive to effective political organization based on a range of factors—e.g. racial, ethnic, neighborhood, or ideology. And, arguments of opponents notwithstanding, with reasonable levels of education, ordinary voters are able to understand and use this voting system.

Interestingly, focusing on altering the voting system, rather than the districting system, provides common ground between advocates for at-large systems and minority rights proponents. For example, Professor Lani Guinier, in her landmark law review essay entitled “No Two Seats: The Elusive Quest for Political Equality” famously advocated an alternative voting system to address vote dilution as she redefined it.<sup>186</sup> She wrote that “at the local level, accountable representation focused exclusively on district-based elections . . . is too narrow,” and advocated for cumulative voting as an alternative “because it permits recognition of both the existence and intensity of minority voter preference and allows strategic voting to enforce reciprocal coalitions.”<sup>187</sup>

There is substantial experience with alternative voting systems in New York. Some of it is short and unhappy, for example the adoption of proportional representation for the selection of the New York City Council between 1938 and 1949.<sup>188</sup> But, as noted, counties' use of weighted voting and multi-member districts to

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<sup>186</sup> Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1458–59 (1991).

<sup>187</sup> *Id.* at 1457, 1463.

<sup>188</sup> *About the City Council*, N.Y.C. COUNCIL, <http://council.nyc.gov/html/about/history.shtml> (last visited Mar. 27, 2012); See Douglas J. Amy, *A Brief History of Proportional Representation in the United States*, <http://www.mtholyoke.edu/acad/polit/damy/articles/Brief%20History%20of%20PR.htm> (last visited Mar. 27, 2012).

preserve the integrity of towns in the design of their legislatures has been both unique and enduring.

New York's constitutional home rule provision makes "effective local self-government" a purpose "of the people of the state," provides that "[e]very local government, except a county wholly included within a city, shall have a legislative body elective by the people thereof," and directs the legislature to "provide for the creation and organization of local governments in such manner as shall secure to them the rights, powers, privileges and immunities granted to them by this constitution."<sup>189</sup> Pursuant to this latter directive, New York law allows villages and towns to go to referendum to alter their districting procedures.<sup>190</sup> But there is no provision of law directly addressing local discretion in the adoption of alternative voting procedures (though of course Port Chester was successful in doing this).

There is no constitutional home rule for school districts.<sup>191</sup> Moreover, local options for alternatively structuring school district governance are not provided for in New York law. Yet these districts deliver the most essential local public service, and must comply with the same federal standards for fair representation, as do general-purpose local governments.

Rapid downstate demographic changes, and the already-felt or likely-future effect of these changes on governance processes in general-purpose local governments, suggest that explicitly offering the opportunity for local choice on alternative districting and electoral systems for school districts as well as municipalities would be a wise and prudent approach.

The discussion of the state constitutional basis for home rule highlights an important federalism issue embedded in the locus of decision for remedies in voting rights matters, once a violation is found. Local government structure and process is, in general, a local/state matter in the U.S. federal system. Federal principles suggest that the involvement of the national government, which is necessary to assure compliance with the national constitution and national law, should, to the greatest degree possible, be respectful of the general preeminence of state constitutions and state law in this domain. In *United States v. Port Chester*, the

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<sup>189</sup> N.Y. CONST. art. IX, §§ 1, 1(a), 2(a).

<sup>190</sup> N.Y. ELEC. LAW § 15-110 (McKinney 2009).

<sup>191</sup> Gerald Benjamin & Joshua Simons, *Citizens' Committee for an Effective Constitution*, EFFECTIVENY.ORG, <http://effectiveny.org/issue/Home-Rule> (last visited Mar. 27, 2012).

Federal Justice Department made a number of arguments against the adoption of cumulative voting; the court rightly found these unpersuasive as this voting system assured effective participation by Hispanic voters and was not imposed by the court, but preferred by the community.<sup>192</sup> But the predisposition of federal authorities to press into this area suggests that the legal reinforcement of New York's commitment to local choice of voting systems as well as districting systems might be salutary and important going forward.

Overall, this analysis suggests that voting system alternatives, like districting alternatives, should be made generally and explicitly available to municipalities and special-purpose local governments in state law.

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<sup>192</sup> United States v. Vill. of Port Chester, 704 F. Supp. 2d 411, 448–53 (S.D.N.Y. 2010); See MacLeod, *supra* note 148, at 1686–88. MacLeod notes that the Department of Justice tried to distinguish “the approximately sixty jurisdictions where cumulative voting had been implemented as a cure” as “mostly located in Texas and other areas in the South, and applied mostly to school boards.” *Id.* at 1687. This is interesting in light of the universal use of at-large elections for school boards in New York State.