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## CANDIDATES OF THEIR CHOICE? PARADOXICAL IMPACT OF THE VOTING RIGHTS ACT IN VIRGINIA

*Mark E. Rush\**

Section 2 of the Voting Rights Act of 1965 (“VRA”) identifies two fundamental aspects of the franchise. The first is that the “political processes leading to nomination or election . . . [must be] equally open to participation.”<sup>1</sup> The second is that all voters should have an equal opportunity to elect “representatives of their choice.”<sup>2</sup> The VRA therefore prohibits electoral arrangements that give members of a class of citizens defined by race or color “less opportunity” than other citizens “to participate in the political process and to elect representatives of their choice.”<sup>3</sup> Through statistical and legal analysis, this Essay offers observations about the latter aspect of the franchise by drawing upon Virginia state legislative election data from 2001 to 2019.

Using measures of performance drawn from FairVote,<sup>4</sup> this Essay suggests that the VRA has been at best a perverse success in Virginia. As a result of decades of litigation, minority voters, at least those in districts drawn in VRA compliance, do indeed have the opportunity to elect “representatives of their choice.” But it is one that is as poor as, if not worse than, that of voters in other districts across the Commonwealth. This is due to the use and impact of the single-member district system of elections. Therefore, this Essay suggests that compliance with the VRA’s promotion of electoral choice should require dispensing with single-member districts in favor of some form of multi-member district proportional representation.

### I. SECTION 2 OF THE VOTING RIGHTS ACT AND REDISTRICTING IN VIRGINIA

Section 2 of the VRA prohibits voting laws, practices, or maps that result in the “denial or abridgement” of the franchise on account of race or color.<sup>5</sup> Despite nearly six decades of redistricting under the auspices of the VRA and constant calls for different

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<sup>1</sup> 52 U.S.C. § 10301(b).

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> FairVote is a nonpartisan election reform organization that publishes research and advocates for legislative changes. See *infra* notes 14, 37, 44.

<sup>5</sup> 52 U.S.C. § 10301(a).

electoral reforms<sup>6</sup> as part of the “perpetual crisis” of American democracy,<sup>7</sup> the single-member district remains the tool of choice for American elections.<sup>8</sup> Unlike legislatures in various other democratic systems, legislatures across the United States generally employ these districts, which contain one representative.<sup>9</sup> In contrast, multi-member districts send two or more representatives to a legislative chamber.<sup>10</sup>

In 1967, Congress enacted a law requiring states to use single-member districts to elect U.S. House members.<sup>11</sup> Previously, from 1929 to 1967, states had employed both single- and multi-member districts.<sup>12</sup> Congress’s single-member district requirement was in response to the VRA’s success. For instance, before the VRA passed, several Southern states adopted multi-member districts with winner-take-all voting in state and local elections, which served to limit the number of successful Black candidates.<sup>13</sup> Nonetheless,

<sup>6</sup> See generally DOUGLAS J. AMY, *REAL CHOICES/NEW VOICES: HOW PROPORTIONAL REPRESENTATION ELECTIONS COULD REVITALIZE AMERICAN DEMOCRACY* (2002); LEE DRUTMAN ET AL., *THE CASE FOR ENLARGING THE HOUSE OF REPRESENTATIVES*, AM. ACAD. OF ARTS & SCI. (2021), [https://www.amacad.org/sites/default/files/publication/downloads/2021\\_Enlarging-the-House.pdf](https://www.amacad.org/sites/default/files/publication/downloads/2021_Enlarging-the-House.pdf) [<https://perma.cc/22LH-5SCB>]; ANDREA BENJAMIN ET AL., *ACHIEVING MULTIRACIAL, MULTIPARTY DEMOCRACY*, UNION OF CONCERNED SCIENTISTS (2022), <https://www.ucsusa.org/sites/default/files/2022-07/achieving-multiracial-multiparty-democracy.pdf> [<https://perma.cc/8T9A-E9RF>]; Lee Drutman, *Elections, Political Parties, and Multiracial, Multiethnic Democracy: How the United States Gets It Wrong*, 96 N.Y.U. L. REV. 985 (2021).  
<sup>7</sup> Richard S. Katz, *If the Cure for the Ills of Democracy Is More Democracy, Might the Cure Be Worse than the Disease?*, 45 SCANDINAVIAN POL. STUD. 68, 68 (2021).

<sup>8</sup> See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986) (“[The] single-member district is generally the appropriate standard against which to measure minority group potential to elect.”).

<sup>9</sup> See Alex Tausanovitch, *It’s Time to Talk About Electoral Reform*, CTR. FOR AM. PROGRESS (Jan. 31, 2023), <https://www.americanprogress.org/article/its-time-to-talk-about-electoral-reform> [<https://perma.cc/R84J-9VQ6>]. See also DANIEL HAYS LOWENSTEIN ET AL., *ELECTION LAW: CASES AND MATERIALS* 157 (7th ed. 2022) (noting that while the “United States is one of numerous countries . . . that employs . . . single-member districts. . . . America is virtually alone in allowing the elected branches to design these districts.”).

<sup>10</sup> Across fifty state legislatures, 876 legislators from 7,386 seats (11.9 percent) are elected from districts with more than one member. See *State Legislative Chambers That Use Multi-Member Districts*, BALLOTPEdia, [https://ballotpedia.org/State\\_legislative\\_chambers\\_that\\_use\\_multi-member\\_districts](https://ballotpedia.org/State_legislative_chambers_that_use_multi-member_districts) [<https://perma.cc/RH6Y-VDD7>] (last visited Mar. 31, 2023).

<sup>11</sup> Pub. L. No. 90-196, 81 Stat. 581 (1967) (codified at 2 U.S.C. § 2c).

<sup>12</sup> See Christopher A. Suarez, *Democratic School Desegregation: Lessons from Election Law*, 119 PENN ST. L. REV. 747, 756 (2015).

<sup>13</sup> In practice, states drew districts large enough to ensure that white voters constituted a majority and held at-large winner-take-all elections for all seats in the district. This, in turn, locked Black voters out of representation. See Austin Plier, *Challenging Congress’s Single-Member District Mandate for U.S. House Elections on Political Association Grounds*, 61 WM. & MARY L. REV. 1719,

Congress's single-member districting requirement has had far-reaching consequences for the Nation's political health, including increased partisan polarization and decreased levels of electoral competition.<sup>14</sup>

Single-member districts, however, are not constitutionally required. Several state and numerous local legislatures still use multi-member districts.<sup>15</sup> Congress and state legislatures could change to an alternative system of elections using ordinary legislative channels. Yet, single-member districts endure despite their deleterious impact on the quality of electoral competition.

In the twenty-first century, Virginia's state-level redistricting is illustrative of the status of minority voters' rights and ongoing debates about electoral reform. In November 2020, Virginians approved a constitutional amendment that reformed the redistricting process.<sup>16</sup> The amendment transferred the constitutional responsibility of drawing electoral maps for Virginia congressional delegations, as well as the state house of delegates and senate, from the state legislature to a bipartisan commission.<sup>17</sup> During the 2021 redistricting process, however, the commission failed to approve any maps.<sup>18</sup> Under the enabling legislation and new amendment, the Supreme Court of Virginia was required to appoint two special masters to draw the maps.<sup>19</sup> Some suggest that the new state maps drafted by the court-appointed special masters "were largely free of gerrymandering" and "free of extreme partisan bias."<sup>20</sup> Still, data from the first two decades of the century

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1722–23 (2020) ("The immediate impact of the law, combined with the powerful enfranchising effect of the VRA, was undeniable: in just five election cycles after single-member districts were mandated, the number of [B]lack congressmembers elected to the U.S. House tripled from five to fifteen.").

<sup>14</sup> See *In a Politically Polarized Era, Sharp Divides in Both Partisan Coalitions*, PEW RSCH. CTR. (Dec. 17, 2019), <https://www.pewresearch.org/politics/2019/12/17/in-a-politically-polarized-era-sharp-divides-in-both-partisan-coalitions> [<https://perma.cc/NK5D-AGL5>]. See generally FAIRVOTE, MONOPOLY POLITICS 2020: THE ROOT OF DYSFUNCTION IN THE U.S. HOUSE OF REPRESENTATIVES (2020), <https://fairvote.app.box.com/s/uk2w2hklbg79maypvdX1ofntmr6jggcp> [<https://perma.cc/9A36-WKZD>] [hereinafter MONOPOLY POLITICS 2020].

<sup>15</sup> See *supra* note 9.

<sup>16</sup> See Graham Moomaw, *In Historic Change, Virginia Voters Approve Bipartisan Commission to Handle Political Redistricting*, VA. MERCURY (Nov. 4, 2020, 1:17 AM), <https://www.virginiamercury.com/2020/11/04/in-historic-change-virginia-voters-approve-bipartisan-commission-to-handle-political-redistricting> [<https://perma.cc/3EQR-SEF6>].

<sup>17</sup> V.A. CONST. art. II, § 6-A (2020).

<sup>18</sup> See Peter Galuszka, *Virginia Supreme Court Rejects Map Drawers*, VA. MERCURY (Nov. 12, 2021, 1:45 PM), <https://www.virginiamercury.com/2021/11/12/virginia-supreme-court-rejects-map-drawers> [<https://perma.cc/A75M-2C9G>].

<sup>19</sup> V.A. CODE ANN. § 24.2-304.04 (West 2020); V.A. CONST. art. II, § 6-A(g).

<sup>20</sup> Alex Keena, *2021 Redistricting in Virginia: Evaluating the Effectiveness of Reforms*, 26 RICH. PUB. INT. L. REV. 85, 104–05 (2021).

demonstrate that despite constant litigation and redrawing of district lines, legislative elections remained uncompetitive with abysmally low participation.<sup>21</sup> This is especially true for the districts drawn to comply with the VRA.<sup>22</sup>

## II. TWO DECADES OF REDISTRICTING IN VIRGINIA

In Virginia, several factors—including the VRA, other state and federal requirements mandating equipopulous voting districts, the preservation of political subdivisions and municipal boundaries, and a tradition of incumbent protection—render the redistricting process especially contentious and have resulted in extensive litigation. In 2017, seven years after the decennial census, the United States Supreme Court declared in *Bethune-Hill v. Virginia State Board of Elections*<sup>23</sup> that eleven of the twelve districts in the Virginia House of Delegates drawn to comply with Section 2 of the VRA were unconstitutional because race predominated in their construction.<sup>24</sup> The key issue for the Court was whether Virginia’s use of a 55 percent base for Black voting age population (“VAP”) in the districts indicated that race was the predominant factor in drawing the districts’ borders.<sup>25</sup> If so, these districts were violative of the Equal Protection Clause, even though Virginia used the 55 percent threshold to comply with the VRA.

With the exception of the state legislator in District 75, minority incumbents in the VRA districts argued that they could win elections with less than a 55 percent minority VAP.<sup>26</sup> Therefore, deliberately adding more Black voters to these “crossover” districts,<sup>27</sup> known as “packing,” to create a majority-minority VAP was unnecessary. Doing so indicated that race had predominated in the drawing of the district lines.

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<sup>21</sup> See *infra* Parts II, III. At the same time, however, one study analyzing the “ease of voting” across states ranked Virginia twelfth in 2020 (as compared to forty-ninth in 2016). Scott Schraufnagel et al., *Cost of Voting in the American States: 2020*, 19 ELECTION L.J. 503, 508 (2020) (noting that the state “passed an automatic voter registration law, got rid of the in-person registration deadline, and made Election Day a national holiday.”).

<sup>22</sup> See *infra* Tables 2, 3.

<sup>23</sup> 580 U.S. 178, 182–83 (2017).

<sup>24</sup> See *id.* at 196.

<sup>25</sup> See *id.* at 181.

<sup>26</sup> See Transcript of Oral Argument at 20–21, *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178 (2017).

<sup>27</sup> A “crossover district” is defined as “a district where some majority voters ‘cross over’ to vote with racial minorities to elect the minority-preferred candidate.” See *Redistricting: Key Terms*, ALL ABOUT REDISTRICTING, <https://redistricting.ills.edu/wp-content/uploads/Basics-English10.pdf> [<https://perma.cc/M269-9UCH>] (last visited Mar. 31, 2023).

In 2019, the Commonwealth hired a special master to redraw the state house districts for a single election.<sup>28</sup> The special master decreased the overall Black population of the twelve districts by 67,106 (11.6 percent).<sup>29</sup> As a result, whereas 35.6 percent of the Black population of the Commonwealth had been in the twelve VRA districts in the wake of the 2010 census, only 31.4 percent resided in them for the 2019 election.<sup>30</sup> Table 1 below shows that the Black VAP in each district decreased by as little as 0.8 percent or as much as 18.6 percent.

*Table 1: Black Voting Age Population in State House of Delegates Districts*

Virginia House District	Black voting age population, Percentage (2017)	Black voting age population, Percentage (2019)
63	59.50	47.50
69	55.20	54.40
70	56.40	52.30
71	55.30	54.00
74	57.20	54.40
75	55.40	52.40
77	58.80	40.20
80	56.30	51.40
89	55.50	54.90
90	56.60	41.90
92	60.70	53.90
95	60.00	47.40

In the ensuing 2019 election, all twelve incumbents in the VRA districts were re-elected.<sup>31</sup> And in seven of the twelve districts, the election was uncontested.<sup>32</sup> Two elections were

<sup>28</sup> See *Virginia Redistricting Process*, AM. REDISTRICTING PROJECT, <https://thearp.org/state/virginia> [<https://perma.cc/8E78-7QS7>] (last visited Mar. 31, 2023) (“After the General Assembly failed to enact a remedial state House plan pursuant to the court’s order, the court took responsibility for implementing a remedial plan and appointed a special master to assist in doing so.”).

<sup>29</sup> VA. DEP’T OF ELECTIONS, <https://www.elections.virginia.gov/index.html> [<https://perma.cc/37ZL-MATD>] (last visited Mar. 31, 2023).

<sup>30</sup> *Id.*

<sup>31</sup> *Historical Elections Database: 2019 House of Delegates*, VA. DEP’T OF ELECTIONS, [https://historical.elections.virginia.gov/elections/search/year\\_from:2019/year\\_to:2019/office\\_id:8/stage:General](https://historical.elections.virginia.gov/elections/search/year_from:2019/year_to:2019/office_id:8/stage:General) [<https://perma.cc/XBH5-M8FM>] (last visited Mar. 31, 2023).

<sup>32</sup> *Virginia House of Delegates Elections, 2019*, BALLOTPEdia, [https://ballotpedia.org/Virginia\\_House\\_of\\_Delegates\\_elections,\\_2019](https://ballotpedia.org/Virginia_House_of_Delegates_elections,_2019) [<https://perma.cc/UU2N-RLQ7>] (last visited Mar. 31, 2023).

competitive: in District 63, the incumbent Democrat won with 55.4 percent;<sup>33</sup> in District 75, the incumbent Democrat won with 51 percent.<sup>34</sup> Otherwise, the elections were decided by lopsided margins.<sup>35</sup>

The fallout from *Bethune-Hill* raises an important question: Does the ongoing use of single-member districts drawn to comply with the VRA achieve the goal set forth in Section 2? The VRA specifically protects the opportunity for minority voters to “elect representatives of their choice.”<sup>36</sup> Yet, while minority incumbents were reelected, the lack of competitive elections and lopsided victory margins belie any notion that the voters in the twelve districts had any real choice on election day.

Studies, such as FairVote’s biennial *Monopoly Politics*,<sup>37</sup> demonstrate that the single-member district, combined with partisan gerrymandering and finance laws that favor the two major parties, renders American elections lopsided, predictable, and uncompetitive. Despite critical analyses showing how single-member districts negatively impact election quality,<sup>38</sup> the single-member district remains the tool of choice for implementing the VRA in congressional and state legislative elections. The results have been mixed at best.

The use of single-member districts has positively increased the number of minority representatives in Congress and across state legislatures.<sup>39</sup> But, as the 2019 legislative election in Virginia demonstrates, it has not necessarily offered minority voters meaningful candidate choices. The 2019 legislative election was not unique. Drawing upon Virginia state legislative election data, Part III demonstrates that this same pattern of poor voter choice has persisted—especially in VRA districts—over the past two decades.

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<sup>33</sup> See *2019 House of Delegates Special Election District 63*, VA. DEP’T OF ELECTIONS, <https://historical.elections.virginia.gov/elections/view/134701> [<https://perma.cc/M3NG-FP8M>] (last visited Mar. 31, 2023).

<sup>34</sup> See *2019 House of Delegates Special Election District 75*, VA. DEP’T OF ELECTIONS, <https://historical.elections.virginia.gov/elections/view/134558> [<https://perma.cc/22CN-CJA4>] (last visited Mar. 31, 2023).

<sup>35</sup> See generally *Virginia House of Delegates Elections, 2019*, *supra* note 32.

<sup>36</sup> 52 U.S.C. § 10101(b).

<sup>37</sup> See generally MONOPOLY POLITICS 2020, *supra* note 14; FAIRVOTE, MONOPOLY POLITICS 2022 (2022), <https://fairvote.app.box.com/s/tsnhzfp3kbe3s9328bwywqtzwrw4djoz> [<https://perma.cc/G93X-TTTJ>].

<sup>38</sup> See, e.g., AMY, *supra* note 6, at 1 (“The American electoral system is outmoded, unfair, and undemocratic.”); BENJAMIN ET AL., *supra* note 6, at 4–17; Drutman, *supra* note 6, at 1014–19.

<sup>39</sup> See Plier, *supra* note 13, at 1274–75.

## III. ANALYZING VIRGINIA'S LEGISLATIVE ELECTIONS: 2001-2017

Part III's analysis draws upon results from nine elections to the Virginia House of Delegates and five to the Virginia Senate from 2001-2017. This includes five state legislative elections from the 2000 redistricting, and four from that of 2010.<sup>40</sup> In sum, the data set contains nine election results for each of the one-hundred districts in the house of delegates<sup>41</sup> and four for each of the senate districts.<sup>42</sup> The Commonwealth created twelve minority districts in the house of delegates and five senate districts.<sup>43</sup>

Part III draws upon several of the variables used by FairVote<sup>44</sup> to offer an overview of Virginia elections and a comparison between VRA districts' and other districts' performances. For each variable, this study employed a simple t-test<sup>45</sup> comparison of average results across the 900 house elections and 160 senate elections.

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<sup>40</sup> This analysis does not include the 2019 election results because that election took place in districts redrawn specifically for that one election before being redrawn again in response to the 2020 census.

<sup>41</sup> The data set contains nine election results from 2001, 2003, 2005, 2007, 2009, 2011, 2013, 2015, and 2017. See VA. DEP'T OF ELECTIONS, *supra* note 29.

<sup>42</sup> The data set contains four election results from 2003, 2007, 2011, and 2015. See *id.*

<sup>43</sup> In both rounds of redistricting, the state house districts included districts 63, 69, 70, 71, 74, 75, 77, 80, 89, 90, 92, and 95. The state senate districts included districts 2, 5, 9, 16, and 18. See *id.*

<sup>44</sup> See FAIRVOTE, DUBIOUS DEMOCRACY 2020 (2022) [https://fairvote.org/report/dubious\\_democracy\\_2020](https://fairvote.org/report/dubious_democracy_2020) [<https://perma.cc/TN22-ZAEB>]; FAIRVOTE, DUBIOUS DEMOCRACY 2020 FULL DATA SET (2022), <https://docs.google.com/spreadsheets/d/1TKIRoAXpiZWx9CvmvOj7VYFJcm7a7TkNFa4lfihahPM/edit#gid=2049902568> [<https://perma.cc/VR22-2SEM>].

<sup>45</sup> "A t-test is an inferential statistic used to determine if there is a significant difference between the means of two groups and how they are related." Adam Hayes, *T-Test: What It Is with Multiple Formulas and When to Use Them*, INVESTOPEDIA (2022), <https://www.investopedia.com/terms/t/t-test.asp> [<https://perma.cc/ZP8D-F4X3>]. The t-test produces a "t-value," which is a ratio of the difference between the mean of two sample sets (here, the "VRA Districts" and the "Other Districts") and the variation that exists with the sample sets. See *infra* Table 2.



Table 2: Virginia House of Delegates

Variable	VRA Districts (n=108)	Other Districts (n=792)	t-value (sig)
Winner's Total Vote	10,848	12,617	-3.79 (0.000)
Winner's Percentage	0.887	0.783	-7.31 (0.000)
Registered Voters	42,992	48,540	-8.24 (0.000)
Total Vote	12,473	16,788	-7.85 (0.000)
Turnout Percentage	0.289	0.345	-4.92 (0.000)

State legislative elections generally reflect the assessments made by critics of single-member districts. Turnout is uniformly low.<sup>46</sup> Yet, for each measure, the VRA districts lag in comparison to others. Indeed, across the nine elections to the house of delegates, on average some 6,000 fewer voters were registered in VRA districts than in the other districts.<sup>47</sup> Moreover, winning candidates in the VRA districts needed 1,800 fewer votes than their counterparts elsewhere.<sup>48</sup> Despite needing fewer votes to win in these “cheap seats,”<sup>49</sup> the VRA district winners experienced even greater “blowout” victories: an average winning percentage of 88.7 percent as compared to 78.3 percent in other districts.<sup>50</sup> Overall, some 4,000 fewer votes were cast in the VRA districts than in others, and turnout was 20 percent lower in the former as compared to the latter.<sup>51</sup>

<sup>46</sup> Of course, state legislative turnout varies depending on whether there is a high-profile statewide election. Nonetheless, across this dataset, the average turnout levels are unquestionably low.

<sup>47</sup> See *supra* Table 2; *Historical Elections Database: 2019 Virginia Senate*, VA. DEP'T OF ELECTIONS, [https://historical.elections.virginia.gov/elections/search/year\\_from:2019/year\\_to:2019/office\\_id:9/stage:General](https://historical.elections.virginia.gov/elections/search/year_from:2019/year_to:2019/office_id:9/stage:General) [<https://perma.cc/QA2Q-ANVH>] (last visited Mar. 31, 2023).

<sup>48</sup> See *supra* Table 2.

<sup>49</sup> JAMES E. CAMPBELL, CHEAP SEATS: THE DEMOCRATIC PARTY'S ADVANTAGE IN HOUSE ELECTIONS 39–43 (1996) (explaining that “cheap seats” are in districts where “any party whose adherents have characteristics associated with low turnout and are geographically concentrated.”).

<sup>50</sup> See *supra* Table 2.

<sup>51</sup> See *id.*

Table 3: Virginia Senate

Variable	VRA Districts (n=20)	Other Districts (n=140)	t-value (sig)
Winner's Total Vote	17,342	23,753	-4.73 (0.000)
Winner's Percentage	0.868	0.753	-3.31 (0.002)
Registered Voters	108,667	120,976	-2.98 (0.007)
Total Vote	20,296	33,074	-7.77 (0.000)
Turnout Percentage	0.186	0.273	-7.13 (0.000)

Results from state senate elections demonstrate the same pattern of underperformance in the VRA districts.<sup>52</sup> In the VRA senate districts, turnout and turnout percentage are significantly lower, seats are cheaper to win (in terms of the number of votes the winner receives), and voter registration lags.<sup>53</sup>

One last comparison highlights the plight of voters in the VRA districts. One would hope that there would be at least the same number of candidates in the VRA districts as in the other districts. Otherwise, if there are fewer, this Essay suggests that minority voters are receiving poorer candidate options. As Table 4 below indicates, elections in the VRA districts are much more likely to be uncontested than those in other districts across the state. Indeed, over the course of nine state house elections, nearly half of the contests featured candidates running unopposed.<sup>54</sup> Yet, voters in the VRA districts were nearly 40 percent more likely to vote in an uncontested election than voters in other districts.<sup>55</sup> In senate races, where more than half of the elections were uncontested, voters in the VRA districts were nearly 60 percent more likely to experience an uncontested election.<sup>56</sup>

<sup>52</sup> See *supra* Table 3.

<sup>53</sup> See *id.*

<sup>54</sup> See *infra* Table 4.

<sup>55</sup> See *id.*

<sup>56</sup> See *id.*

Table 4: Uncontested State Legislative Elections in Virginia, 2001-2017

	VRA Districts	Other Districts
Virginia Senate	13/20 (60%)	53/140 (37.8%)
Virginia House	70/108 (64.8%)	373/792 (47%)

#### IV. THE PERVERSE “SUCCESS” OF THE VOTING RIGHTS ACT IN VIRGINIA AND THE CRISIS OF DEMOCRACY

The data indicate that the use of single-member districts to implement the VRA in Virginia has been, at best, a qualified “success.” Indeed, voters in the VRA districts have candidate choices that are as poor as, if not poorer than, those for voters in other districts across the Commonwealth.<sup>57</sup> This may come as no surprise to advocates of alternative electoral systems. However, the failure of single-member districts also manifests the criticisms made long ago by Professor Lani Guinier and Justice Clarence Thomas.

Guinier had acknowledged that the use of majority-minority districts “may result in the election of more [B]lack officials”<sup>58</sup>—but meaningful voter participation entailed more than what she referred to as simply “[B]lack electoral success.”<sup>59</sup> She argued that relying on single-member districts to ensure nothing more than the election of minority representatives “ignores the [voting rights] movement’s concern with broadening the base of participation and fundamentally reforming the substance of political decisions.”<sup>60</sup> Thus, Guinier contended, majority-minority districts “may not necessarily result in more responsive government.”<sup>61</sup> Even more relevant for this analysis, Guinier argued that the focus on majority-minority districts “ignores critical connections between broad-based, sustained voter participation and accountable representation.”<sup>62</sup>

Justice Clarence Thomas echoed Guinier’s concerns in *Holder v. Hall*.<sup>63</sup> There, Justice Thomas argued that the single-member district was not constitutionally required despite its

<sup>57</sup> See *id.*

<sup>58</sup> Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1080 (1991).

<sup>59</sup> *Id.* at 1078, 1080.

<sup>60</sup> *Id.* at 1080.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> 512 U.S. 874, 891 (1994) (Thomas, J., concurring in judgment).

prevalence across American elections: “[T]here is no principle inherent in our constitutional system, or even in the history of the Nation’s electoral practices, that makes single member districts the ‘proper’ mechanism for electing representatives to governmental bodies or for giving ‘undiluted’ effect to the votes of a numerical minority.”<sup>64</sup> In criticizing the use of single-member districts, Justice Thomas rejected the notion that “members of any numerically significant minority are denied a fully effective use of the franchise unless they are able to control seats in an elected body.”<sup>65</sup> Thus, in rejecting the need to construct majority-minority districts—in favor of creating minority influence or crossover districts—Justice Thomas anticipated the issues that underpinned the litigation in *Bethune-Hill*.

While Justice Thomas and Guinier acknowledged that the notion of an “effective vote” is a contested concept,<sup>66</sup> both maintained the importance of ensuring the sort of meaningful choice embodied in Section 2 of the VRA. To that end, Guinier advocated for legislative representatives “to be elected through a system of cumulative voting from multi-member districts, rather than by plurality voting from single-member districts.”<sup>67</sup> Such a system would at least provide competitive, meaningful choices without relying on contorted electoral districts to ensure the election of minority candidates.<sup>68</sup>

Yet, ensuring that voters have a meaningful choice on election day will be merely one step towards addressing Guinier’s concerns about the relationship between legislators and constituents, or Justice Thomas’s about the meaningful *impact* of a ballot. Of course, a transition to proportional representation would come at a cost.<sup>69</sup> Grafting it onto an existing political and constitutional system without making other significant systemic adjustments

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<sup>64</sup> *Id.* at 897.

<sup>65</sup> *Id.* at 899.

<sup>66</sup> *See, e.g.,* Reynolds v. Sims, 377 U.S. 533, 555 (1964) (discussing “fair and effective representation”). As Justice Warren’s majority opinion demonstrates, “fairness” (in terms of equally-weighted voting, for example) is not the same as “effectiveness.” *See* Guinier, *supra* text accompanying notes 58–62.

<sup>67</sup> Richard Briffault, *Lani Guinier and the Dilemmas of American Democracy*, 95 COLUM. L. REV. 418, 420 (1995) (citation omitted) (citing LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* (1994)).

<sup>68</sup> *See* BENJAMIN ET AL., *supra* note 6, at 16–17. *See generally* Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. PUB. L. REV. 97 (2010).

<sup>69</sup> *See generally* Kevin St. John, *Why Proportional Representation Will Not Stem Redistricting Litigation but Will Undermine Normative Representative Values*, 21 FEDERALIST SOC’Y REV. 102 (2020). For a balanced discussion of the merits of single-member districts and proportional representation, see MARK E. RUSH & RICHARD L. ENGSTROM, *FAIR AND EFFECTIVE REPRESENTATION?: DEBATING ELECTORAL REFORM AND MINORITY RIGHTS* (2001).

would be, at best, shortsighted. Different electoral systems and laws embody various components of the contested notion of democracy. Accordingly, trading single-member districts for proportional representation would beget a different set of challenges and scholarly criticisms. Regardless, the use of single-member districts continues to undermine the goals of the VRA.

#### CONCLUSION

This Essay's analysis of twenty years of election results in Virginia confirms Professor Guinier's observations and highlights Justice Thomas's criticisms. Ensuring the success of minority elected officials has not enhanced the fortunes or the quality of elections for their constituents.<sup>70</sup> Minority voters in Virginia now have choice of candidate options that are as poor as the options presented to other voters. Sixty years of litigation have produced equality at the expense of quality.

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<sup>70</sup> See Guinier, *supra* note 58, at 1134.