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VOTING RIGHTS & CITY-COUNTY CONSOLIDATIONS

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I. INTRODUCTION

The current movement towards more regional forms of government through city-county consolidation raises interesting implications for those concerned with the interplay between race, power, and political equality. As cities stretch their boundaries through the annexation of suburban territory, the definition of urban America expands with it. As local governments consolidate and borders merge, we are now bearing witness to the birth of sprawling and expansive metropolitan areas. The push towards regionalization in the form of city-county consolidations and annexations has tremendous appeal in that it often affords struggling urban areas and other impoverished communities the opportunity to tap into desperately needed social capital and fiscal resources that are often underutilized and readily available. For an inner city beset by a failing economy and plagued by problems such as poverty, homelessness, and joblessness, city-county consolidations have certain understandable fiscal and political appeal.

The consolidation of a city and county government, also called regionalization, is essentially a vehicle used to redistribute the costs associated with urban governance to outlying suburban communities that derive some benefit or gain from their association with these inner cities.[1] Suburban neighborhoods are generally bound by a set of common characteristics that place them in stark contrast to urban neighborhoods[2] including relatively well-performing public

1. *See* DAVID Y. MILLER, THE REGIONAL GOVERNING OF METROPOLITAN AMERICA 109 (2002) (discussing how fiscal regionalism creates an "authority to distribute benefits" across a region as well as creating an approach allowing "for a more equitable distribution of both costs and benefits").

2. Mary Jo Wiggins, *Race, Class, and Suburbia: The Modern Black Suburb as a 'Race-Making Situation,'* 35 U. MICH. J.L. REFORM 749, 749–50 (2002) (stating that suburban communities have common characteristics, including "peripheral location to urban areas, low density, architectural similarity, economic and social homogeneity, and easy accessibility," while urban communities have opposing characteristics).

schools,[3] lower crime rates,[4] economic prosperity, thriving area businesses,[5] and social homogeneity.[6] This Article does not aim to provide a detailed description of the regionalization movement that currently preoccupies the attention of government reform zealots. Rather, this Article considers the specific problems that arise when regionalization efforts are undertaken through the consolidation of city and county governments. Often, though not always, when governments consolidate their functions and power, there are considerable gains and significant losses that are evident along racial lines. This Article explores the extent of those losses by focusing on the impact of consolidation on racial minorities and other insular communities impacted by this type of government reform and reorganization. Specifically, I argue that consolidation must be undertaken with more exacting scrutiny in areas where there are stark racial and demographic differences between respective urban and suburban communities.[7] I consider the impact that city-county consolidations have on the voting power of racial minorities while examining the effect that such reorganizational shifts have on the political equality and self-determination of these groups. I illustrate some of the problems with reorganization through an empirical analysis of a recent large-scale city-county consolidation. Further, I offer a proposal on how the Voting Rights Act might be used as a tool to challenge

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3. *See generally* MYRON ORFIELD, METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY 39 (1997) (noting suburban schools tend to place a high value on academic achievement while urban schools in areas of concentrated poverty inhibit academic achievement).

4. *See* DETIS T. DUHART, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, URBAN, SUBURBAN, AND RURAL VICTIMIZATION, 1993–98 (2000) (comparing the percentage of suburban residents victimized by crime to the percentage of suburban residents in the general population and noting that the percentage of suburban and rural residents victimized by crime was "lower than their percentages in the population").

5. *See* ORFIELD, *supra* note 3, at 27 (discussing how increased poverty in urban areas leads to middle class "flight," which in turn leads to decreases in both business investment and property value).

6. Wiggins, *supra* note 2, at 749.

7. For an alternative perspective on the differences between urban and suburban communities, see John A. Powell, *Opportunity-Based Housing*, 12 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 188, 188 (2003) (noting that "metropolitan regions are divided by both race and income" and classifying the dichotomy as no longer city and suburb, but as "one of access to opportunity versus isolation from opportunity"). *See also* DAVID RUSK, INSIDE GAME/OUTSIDE GAME: WINNING STRATEGIES FOR SAVING URBAN AMERICA 71 (1999) (stating that "in a typical metro area, . . . three out of four poor whites lived in middle-class, mostly suburban neighborhoods" while, "[b]y contrast, three out of four poor blacks and one out of two poor Hispanics lived in inner-city 'poverty neighborhoods'").

regionalization efforts that impair political equality. Finally, I suggest alternative tools and governance models that governments might adopt in order to avoid or alleviate any resulting impact on minority voting strength.

The intellectual question and practical problem posed when jurisdictions undertake a city-county consolidation is whether and how such reforms should be adjusted and contoured to the demographic realities and racial differences that often exist between cities and their respective surrounding suburban communities.[8] On first impression, it may seem wholly illegitimate for jurisdictions to seek to preserve city boundaries and urban political power where these cities are economically failing and when doing so may result in the preservation of racially isolated communities.[9] But, as I argue in this Article, the racial differences that exist between suburbs and cities cannot be ignored. Among the difficulties necessarily endured by those seeking to produce regional change and growth is that they must balance a desire for economic growth and administrative efficiency with sensitivity towards the impact that consolidations have on the political power of racial minorities who disproportionately represent the face of American cities.[10] Whether city-county consolidation and other increasingly popular forms of regionalization dilute minority voting strength in violation of the Voting Rights Act is a question that can no longer be ignored.

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8. *See* Scott A. Bollens, *In Through the Back Door: Social Equity and Regional Governance*, 13 HOUSING POL'Y DEBATE 631, 631–32 (2003), *available at* http://www.fanniemaefoundation.org/programs/hpd/pdf/hpd_1304_bollens.pdf.

9. Racial isolation is generally considered to be a negative value in considerations of housing and educational policy. *See, e.g.*, DAVID RUSK, CITIES WITHOUT SUBURBS 2 (2d ed. 1995) (arguing the level of racial segregation is critically important for the success of cities, in general, regardless of the level of relative wealth).

However, Justice Clarence Thomas suggests that persisting forms of racial isolation in the educational arena may reflect individual preferences to live in homogenous communities. *See* Missouri v. Jenkins, 515 U.S. 70, 116 (1995) (Thomas, J., concurring) ("The continuing 'racial isolation' of schools after *de jure* segregation has ended may well reflect voluntary housing choices or other private decisions."). In this Article, I explore racial isolation, to a certain extent, as a theme in shaping political decisions and reforms. I consider whether consolidation may frustrate the efforts and attempts of insular minority groups to form their own political communities.

10. *See* ORFIELD, *supra* note 3, at 169 ("Regionalism, if misperceived, threatens the power base of officials elected by poor, segregated constituencies.").

II. THE MECHANICS AND THEORETICAL UNDERPINNINGS OF CITY-COUNTY CONSOLIDATIONS

Consolidations between cities and counties have generally been extremely rare in the latter part of the twentieth century.[11] There have been approximately 148 proposed city-county consolidation referendums since 1921, with only 28 having been successfully passed by voters.[12] Moreover, a survey of government reorganizations over the last half century reveals that the only significant consolidations involving 250,000 or more people have been the two-tier metropolitan government system established in Miami-Dade County, Florida, and the city-county consolidations of Nashville-Davidson County, Tennessee; Jacksonville-Duval County, Florida; Indianapolis-Marion County, Indiana; and Louisville-Jefferson County, Kentucky.[13]

Annexations and city-county consolidations are becoming increasingly popular tools that jurisdictions use to alter city boundaries in order to redistribute sources of political and fiscal prosperity.[14] Because consolidations result in a greater level of

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11. *See* JOHN J. HARRIGAN & RONALD K. VOGEL, POLITICAL CHANGE IN THE METROPOLIS 352 (6th ed. 2000) (pointing out that only nine consolidations occurred from 1980–99 and discussing their common occurrence in the nineteenth century).

12. *See* Nat'l Ass'n of Counties, City-County Consolidation Proposals, 1921–Present, *available at* http://www.naco.org [hereinafter List on City-County Consolidation] (on file with the Houston Law Review) (detailing all proposals, their locations, and whether the proposal passed or failed).

13. As an example, the Jacksonville-Duval Consolidated Government (established in 1968) is comprised of a nineteen-member council that has fourteen single-member districts and five at-large council members. G. ROSS STEPHENS & NELSON WIKSTROM, METROPOLITAN GOVERNMENT AND GOVERNANCE: THEORETICAL PERSPECTIVES, EMPIRICAL ANALYSIS, AND THE FUTURE 78 (2000). By contrast, the Metropolitan Government of Nashville and Davidson County has a forty member council that is comprised of thirty-five single-member districts and five at-large council members. *Id.* at 73–74. Indianapolis-Marion County Unigov (established in 1970) is comprised of a twenty-nine member city-county council of whom twenty-five are elected from single-member districts and four are elected at-large. *Id.* at 81, 83. The Lexington-Fayette Urban County Government is comprised of fifteen council members of which twelve are from single-member districts, three are elected at-large, and one is elected as Vice Mayor. *See* Lexington-Fayette Urban County Council, http://www.lfucg.com/council/council_whole.asp (last visited Sept. 22, 2006).

14. For a discussion regarding the concept of the "elastic cities"—those which annex new suburban development to grow populations, increase tax bases, and improve fiscal health—and the growth-constrained "inelastic cities," see generally David Rusk, *America's Urban Problem/America's Race Problem*, 19 URB. GEOGRAPHY 757 (1998). Rusk attributes the concentration of low-income minorities, greatest in inelastic cities, as the basis for major disparities in income parity between cities and surrounding suburbs. *Id.* at 759. Rusk is also critical of federal government efforts to deal with poverty in inner cities, noting that the prevailing approach has been to use "community development" programs, including Community Development Block Grants, enterprise zones, and empowerment communities, to raise residents and neighborhoods out of poverty. *Id.* at 761. Rusk concludes that these programs have not worked, and thus favors more

government reorganization, they are the focus of this Article. City-county consolidations generally entail the merging of a densely populated urban area with a more suburban or rural county population.[15] To varying degrees, such consolidations often result in the creation of one unified governing structure that assumes the responsibility for managing and governing both the city and county.[16] The most significant of the changes that result when a city and county consolidate is the expansion of the composition of the electorate and the creation of a single, centralized body.[17] Depending on the particular circumstances surrounding the adoption of the consolidation, service districts for the large, urban areas are also merged with those of the county, resulting in the creation of single police, fire, and/or sanitation departments.[18] In addition, other governmental departments, including the library, park, water, and social service offices may also be merged into single units.[19] The theoretical cross-boundary benefit of consolidation is facilitation of service delivery and resource-sharing between cities and their surrounding suburban communities.[20]

A. Common Justifications for Seeking to Consolidate City and County Governments

Jurisdictions offer a variety of reasons for pursuing consolidation as a form of government reorganization, ranging from declining inner-city populations, which diminish city

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regionally-based solutions to inner-city development. *Id.* at 762.

15. *See* RUSK, *supra* note 9, at 95 (identifying a typical consolidation as occurring between a municipal government and its surrounding county government).

16. *See* HARRIGAN & VOGEL, *supra* note 11, at 351 (describing consolidation resulting in one government for the central city and county as "very appealing").

17. An example of this significant change resulting from a consolidation is illustrated in Indianapolis where the African-American community's voting strength became diluted after the consolidation. The black voters, prior to the consolidation, enjoyed political leverage within the Democratic Party, but lost that influence after the consolidation when Republicans solidified their control over the government. *See* STEPHENS & WIKSTROM, *supra* note 13, at 86.

18. *See, e.g.*, *id.* at 79 (providing an example of how the city of Jacksonville and Duval County unified police and fire departments and upgraded the regional sewer system).

19. *See, e.g.*, *id.* (noting how the City of Jacksonville and Duval County expanded recreational programs, improved drainage systems, and constructed a number of public use facilities).

20. *See* HARRIGAN & VOGEL, *supra* note 11, at 355 (discussing the historical problem of the disparate quality of public services and costs to citizens through taxation, and providing examples of how various consolidated governments have dealt with those problems).

revenues, to the need for greater administrative efficiency.[21] Other justifications have included the desire for an expanded tax base and improving the quality of service delivery to inner cities.[22] Despite the myriad of policy justifications offered for consolidations, this form of government reorganization often exacts certain costs on minority political and social capital that tends to be concentrated in urban centers.[23] Oftentimes, consolidation may mean elimination of the sole political vehicle, whether that be a city council, Board of Aldermen, or city commission, through which minority voters have garnered significant political clout or forged meaningful political alliances.[24]

City-county consolidations may present racially heated ballot issues where the jurisdiction is unwilling to consolidate all of the corresponding service districts or governmental units that exist within the region.[25] For example, some city-county consolidations require the selective dismantling and elimination of the city council of the urban center but retention of separate police and fire districts.[26] The maintenance of separate police and fire departments between the urban and suburban communities may be a concession necessary to gain the support of resistant suburban communities who are concerned about evening out disparate salaries or having those suburban service departments take on the additional burdens that accompany policing of an

21. *See, e.g.*, ABEL A. BARTLEY, KEEPING THE FAITH: RACE, POLITICS, AND SOCIAL DEVELOPMENT IN JACKSONVILLE, FLORIDA, 1940–1970, at 123–24 (2000) (providing various reasons for the City of Jacksonville's consolidation with Duval County such as a crumbling economic base, urban core population decline, inadequate services, and reduced tax revenue).

22. *See, e.g.*, STEPHENS & WIKSTROM, *supra* note 13, at 76 (illustrating reasons why the City of Jacksonville and Duval County consolidated such as an inadequate tax base and insufficient public services including police, fire, and sewage).

23. *Id.* at 86 (giving another example from a past successful consolidation: "It is clear, however, that the establishment of [Indianapolis and Marion County consolidated government] diminished the political and economic interests of the African-American community").

24. *See* H.V. Savitch & Ronald K. Vogel, *Suburbs Without a City: Power and City-County Consolidation*, 39 URB. AFF. REV. 758, 780 (2004) (illustrating the relative loss of political influence within the new Louisville consolidated government by pointing out that after the merger black representation on the Board of Alderman decreased from 33% to 23%, which is comparable to the loss of power blacks suffered from the Indianapolis-Marion County consolidation).

25. *See, e.g.*, John A. Powell, *Addressing Regional Dilemmas for Minority Communities*, *in* REFLECTIONS ON REGIONALISM 218, 236 (Bruce Katz ed., 2000) (noting the decision to not unite the local school districts during the Indianapolis-Marion County consolidation was made based on political concerns that the white suburbs would refuse to support consolidation otherwise).

26. *See, e.g.*, *id.* (observing that during the Indianapolis-Marion County consolidation both the fire and police departments were left under local control).

urban area.[27] Where a jurisdiction undertakes a consolidation that results in the uneven merger of government functions, it is important to determine whether the privileged suburban communities are opting out for race-driven reasons or for race-neutral reasons that, nevertheless, have an impact that can be measured along racial lines. The safeguards that can be set in place to even out the impact of racially driven exceptions to full-scale regionalization reforms are explored in Section V's analysis of remedies.

Former state legislator and theorist Myron Orfield has written about the dynamics surrounding the "favored quarter" in metropolitan regions—the region with a broad, rich property tax base, comparatively few socio-economic needs, and recipients of a disproportionate amount of metropolitan budget allocations.[28] Given the inherent inequalities between urban and suburban entities, can urban cores anticipate equitable treatment given the powerful, wealthy, organized status of suburban communities? How does racial difference between these communities exacerbate existing inequalities? I argue that suburban communities are unlikely to consent to resource sharing where the export of capital and services to urban cores will come at their expense. The favored quarter inherited its privileged status, in part, from self-interested policymaking and deliberate geographic isolation from the urban core.[29] Indeed, Orfield marshals significant empirical evidence to suggest that favored quarters cannot be expected to undertake their fair share of costs and burdens under a regionalized system.[30] This is particularly problematic in regions where racial minorities are expected to abandon a degree of political autonomy in the urban core to become part of a regionalized metropolitan system where

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27. *See* Louisville-Jefferson County Crime Comm'n, Feasibility Study on Local Police Consolidation III-15, III-17 (1998) [hereinafter Feasibility Study] (providing the results of inter-department surveys at both Louisville Police Department and Jefferson County Police Department about each department's approval of a possible consolidation and describing personnel concerns over pay disparities and a host of other issues).

28. *See* ORFIELD, *supra* note 3, at 5 (defining the "favored quarter" as the geographic area dominating economic growth, receiving a disproportionate share of public infrastructure, and having low-density housing, low service requirements, and a higher tax base per household).

29. *See id.* at 6 (explaining how affluent, developing areas use "economic power and local authority" to effectively zone out less expensive single-family lots and apartment developments).

30. *See id.* at 5–6 ("These quarters—developing suburban areas—have mastered the art of skimming the cream from metropolitan growth while accepting as few metropolitan responsibilities as possible."); *see also* Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2003–04 (2000) (summarizing Orfield's discussions about favored quarters).

suburban communities can selectively opt out of resource and burden sharing.[31]

B. The Authoritarian Threat Posed by the Consolidation of Government Layers

Although this Article focuses on the racial implications of regionalist reforms, some scholars have written about the tendency of certain democratic regimes to move towards more authoritarian structures.[32] Despite the need to explore periodic government reform, a central task is to ensure that "democratic politics remain robustly and appropriately competitive."[33] By eliminating layers of government and consolidating functions and powers, state legislative bodies are, in effect, manipulating the rules to the benefit of certain interests and preferences and to the exclusion of minority voters.[34] The elimination of government layers also reduces competition in the political marketplace. Indeed, "[p]olitics shares with all markets a vulnerability" to trend towards antidemocratic behavior, thus necessitating vigilance in the sphere of government reform.[35] Although this

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31. *See generally* Powell, *supra* note 25, at 219–20, 222 (noting regionalism is generally not supported by minorities who fear a loss of political control and recounting an interview with a minority city administrator who refused to trust white suburban voters based on his belief they would use any regionalization effort to shift power away from the city).

32. *See* Richard H. Pildes, *The Inherent Authoritarianism in Democratic Regimes*, *in* OUT OF AND INTO AUTHORITARIAN LAW 125, 126 (András Sajó ed., 2003) (pointing out "the tendency of the partisan forces that gain temporary democratic control to attempt to leverage that control into more enduring and effective political domination"). Although Pildes' thesis focuses on the development of new constitutional democracies in Eastern and Central Europe, I believe that this thesis is helpful in considering government reforms in the United States.

33. *Id.* at 127.

34. *See generally* H.V. Savitch & Ronald K. Vogel, *Merger in Louisville/Jefferson*, *in* CASE STUDIES OF CITY-COUNTY CONSOLIDATION 272, 280–82 (Suzanne M. Leland & Kurt Thurmaier eds., 2004) (illustrating numerous instances where business leaders and the media used their influence to manipulate perceptions surrounding the need for consolidation and its effects on the minority population).

35. *See* Pildes, *supra* note 32, at 127 (comparing "anti-competitive" market behavior with the manipulation of political rules, which leads to imperfect political accountability); *see also* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 246 (2003) (explaining that political markets have the same basic constraints and provide the same basic incentives as economic markets); Samuel Issacharoff & Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 645 (1998) (contrasting "individualistic conceptions of harm" with "questions about the essential political structures of governance"); Daniel R. Ortiz, *From Rights to Arrangements*, 32 LOY. L.A. L. REV. 1217, 1218 (1999) (noting that election-law scholarship has moved "away from a largely rights-based, individual-centered view of politics, to a more pragmatic and structural view of politics as a matter of institutional arrangements"); Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1609 (1999) (illustrating this trend by highlighting how the Democratic party in the Southern states

Article does not explore the authoritarian threat posed by regionalist reforms in great length, I highlight this issue here as further illustration of the dangers that flow from the unfettered pursuit of city-county consolidation at the expense of minority interests.

The United States has earned its reputation as a model democracy, in part because of its system of checks and balances and by providing voters real access to their elected officials and to the legislative process generally.[36] Our democratic structure provides multiple ways for citizens to shape the political process through local, county, state, and federally-elected bodies. In addition, micro-level structures such as school boards, water districts, utility districts, and transit commissions provide even greater opportunities for citizens to meaningfully impact political life in their communities. By removing these layers of government, we reduce political competition, thus leaving political decisions and capital to be handled by an exclusive set of individuals.[37] If we continue to encourage consolidation and thereby continue to reduce the size of government, our democratic system will eventually become vulnerable to the type of authoritarian threat that Professor Richard Pildes has so carefully examined and documented.[38] Thus, addressing the voting rights implications of city-county consolidation and other reforms is a way to ensure that our democratic system both preserves political equality and maintains sufficient levels of structural competition.

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held a monopoly on political power through exclusionary voting rules).

36. *See generally* JOHN HASKELL, DIRECT DEMOCRACY OR REPRESENTATIVE GOVERNMENT 2 (2001) (describing one group of political observers' view that the public has enough access to elected officials to make the officials "excessively responsive" to the public); Rafael La Porta et al., *Judicial Checks and Balances*, 112 J. POL. ECON. 446 (2004) (discussing generally the importance of checks and balances); Gary L. Rose, *A Presidential Selection Process in Crisis*, *in* CONTROVERSIAL ISSUES IN PRESIDENTIAL SELECTION 1 (Gary L. Rose ed., 1991) (discussing the "image of the United States as the world's model democracy").

37. STEPHENS & WIKSTROM, *supra* note 13, at 117 (identifying arguments that would support a polycentric government, including that "multiple governments provide more opportunities for citizens to become involved in government").

38. As stated previously, consolidation efforts have resulted in a virtual monopoly of power in one party that diminishes minority political influence. *See id.* at 86 (observing one effect of consolidation was the Republican party taking control of Unigov Indiana, which diminished African-American political influence); Pildes, *supra* note 32, at 125–26 (noting that the monopoly of political power by a single party is a form of authoritarianism that can lead to an accretion of anticompetitive electoral laws); *see also* STEPHENS & WIKSTROM, *supra* note 13, at 118 (discussing how proponents of a more decentralized governance approach, "public choice," argue a decentralized approach provides a larger number of opportunities for political participation in the democratic process and avoids inefficient monopolistic government structures).

III. RACIAL GEOGRAPHY, MINORITY ELECTORAL OPPORTUNITY, AND URBAN REFORM

City-county consolidations pose an interesting dilemma for those racial minorities who are concentrated within the urban core of a particular region. What is to come of the political power of those minorities who reside within an urban region that is extending its borders or consolidating its functions with those in an outlying suburban regime? How can a consolidated form of government preserve pre-existing levels of minority voting strength when areas with disparate racial make-ups are being merged? A proposed solution to this quandary will be offered in Section IV. This Section attempts to identify and describe the problems that emerge where urban areas that have been the sites of minority electoral success are merged with areas where the demographics are such that preexisting levels of electoral success can no longer be expected. What impact does regionalization have on minority voting strength where an urban core with a sizeable minority population is merged with a suburban community that is different in racial make-up and political priorities? This Section also addresses the problems that emerge where urban areas that have been the sites of minority electoral success are merged with areas where such levels of success can no longer be expected because of persisting evidence of racially polarized voting. Of the various regional reforms that a jurisdiction might undertake, this Article focuses on city-county consolidations because of the extensive changes that are generally brought about through the elimination of a city's governing body.[39]

Many consolidation referendums passed by voters in the past several years were in jurisdictions with large cities containing fairly sizeable and growing minority populations.[40] In addition, a review of a number of consolidations that failed over the same period reveals a similar pattern of large cities with substantial minority populations and counties where minorities represented a smaller percentage of the overall population.[41] A

39. Future works will consider the impact that annexations and boundary changes have on minority political power and voting strength.

40. HARRIGAN & VOGEL, *supra* note 11, at 369 (noting that the cities of Jacksonville and Nashville achieved the most success in getting African Americans to support the consolidation efforts even though the African-American wards narrowly rejected the plan in Nashville).

41. For example, in 2004, voters rejected the consolidation of Des Moines City and Polk County Iowa. *See* List on City-County Consolidation, *supra* note 12. In 2000, Des Moines was 8.1% African-American and Polk County was 4.8% African-American. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en

March 1997 referendum that would have authorized the consolidation of the City of Griffin and Spalding County, Georgia, failed.[42] The population of the City of Griffin around that time was 49.9% African-American as compared to the county which was only 31.1% African-American.[43] Similarly, a referendum aimed at consolidating the City of Hawkinsville and Pulaski County, Georgia, failed in a 2000 vote.[44] While the City of Hawkinsville had a population that was at a tipping point of 49% African-American, by comparison, the county was only 34% African-American.[45] A 1994 attempt to consolidate the City of Metter and Candler County, Georgia, also proved unsuccessful with the city's African-American population at 41.8% compared to 32.5% county-wide.[46] That same year, an attempt to consolidate the City of Douglasville and Douglas County, Georgia, proved unsuccessful with the city's African-American population at 30.2% compared to 9% county-wide.[47]

(search "Get a Fact Sheet for your community" for "Des Moines city, Iowa"; then click "2000" tab) (last visited Sept. 22, 2006); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Polk County, Iowa"; then click "2000" tab) (last visited Sept. 22, 2006). Likewise, a consolidation proposal between Topeka and Shawnee County, Kansas, failed in 2005. *See* List on City-County Consolidation, *supra* note 12. In 2000, Topeka was 11.7% African-American, and Shawnee County was only 9% African-American. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Topeka, Kansas"; then click "2000" tab) (last visited Sept. 22, 2006); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Shawnee County, Kansas"; then click "2000" tab) (last visited Sept. 22, 2006).

42. *See* List on City-County Consolidation, *supra* note 12.

43. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Griffin city, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Spalding County, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006); 1999 COUNTY AND CITY EXTRA: ANNUAL METRO, CITY, AND COUNTY DATA BOOK 216 (Deirde A. Gaquin & Mark S. Littman eds., 8th ed. 1999) (providing the percentage of blacks in the population of Spalding county).

44. *See* List on City-County Consolidation, *supra* note 12.

45. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Hawkinsville, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006).

46. *See* List on City-County Consolidation, *supra* note 12; THE SOURCEBOOK OF COUNTY DEMOGRAPHICS 11-A (7th ed. 1994) (listing the percentage of blacks in the population of Candler county).

47. *See* List on City-County Consolidation, *supra* note 12; THE SOURCEBOOK OF COUNTY DEMOGRAPHICS 11-A (7th ed. 1994) (listing the percentage of blacks in the population of Douglas County). However, there are instances in which proposed consolidations would likely have a race-neutral impact. For example, the proposed consolidation of Kansas City and Wyandotte County, Kansas, involved a city that was 29% African-American and a county that was 27% African-American. Census Bureau,

Referendum efforts aimed at establishing city-county consolidation study committees also suggest that consolidation is more likely entertained by jurisdictions where racial minorities disproportionately represent the population of the urban core.[48] In 1999, the Georgia legislature authorized the creation of a charter commission aimed at studying the possibilities for consolidating the city and county governments of Fitzgerald and Ben Hill County, Georgia.[49] The 2000 census revealed that the City of Fitzgerald is 49.3% African-American compared to Ben Hill County which is only 32.6% African-American.[50] A proposal to establish a consolidation study committee was rejected by voters in the City of Rome and Floyd County, Georgia, in November 1998.[51] According to the 2000 Census, the City of Rome has a population that is 27.7% African-American[52] compared to

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American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Kansas City, Kansas"; then click "2000" tab) (last visited Sept. 22, 2006); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Wyandotte county, Kansas"; then click "2000" tab) (last visited Sept. 22, 2006) (providing the estimated total population and the African-American population in Wyandotte County).

48. *See* Richard C. Feiock, *Institutional Choice, Collective Action, and Governance*, *in* CITY-COUNTY CONSOLIDATION AND ITS ALTERNATIVES: RESHAPING THE LOCAL GOVERNMENT LANDSCAPE 291, 304 (Jered B. Carr & Richard C. Feiock eds., 2004) [hereinafter CITY-COUNTY CONSOLIDATION] (noting that city residents generally support these proposals while county residents do not and mentioning that there is speculation about how the racial composition of jurisdictions accounts for the rejection by county voters). For a more concrete example, one can look at the 1992 failure to consolidate between Tallahassee and Leon County, Florida. *See* List on City-County Consolidation, *supra* note 12; *see also* Linda S. Johnson, *Revolutionary Local Constitutional Change*, *in* CITY-COUNTY CONSOLIDATION, *supra*, at 155, 171 (noting that Tallahassee's black voters supported consolidation efforts during the initial agenda-setting phase). In 2000, Tallahassee was 34.2% African-American, and Leon County was only 29.1% African-American. *See* Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Tallahassee, Florida"; then click "2000" tab) (last visited Sept. 22, 2006); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Leon county, Florida"; then click "2000" tab) (last visited Sept. 22, 2006).

49. *See* H.R. 896, 145th Gen. Assem., Reg. Sess. (Ga. 1999).

50. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Fitzgerald, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Ben Hill county, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006).

51. *See* H.R. 1737, 144th Gen. Assem., Reg. Sess. (Ga. 1998).

52. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Rome, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006).

the county which is only 13.3% African-American.[53] Most recently, city-county consolidation has been debated in Memphis, which is located in Shelby County, Tennessee, and in Pittsburgh, located in Allegheny County, Pennsylvania.[54]

To best illustrate the racial impact of consolidation and annexation efforts, I offer the following hypothetical that is based on a set of extremes. According to 2000 Census data, Washington, D.C., has a population that is 60% African-American in composition.[55] Imagine if Washington's City Council were eliminated and its African-American mayor stripped of power.[56] Imagine if Washington's governmental structure were completely eradicated and merged with that of nearby Arlington and Fairfax Counties in Virginia. Arlington with a population that is nearly 69% white[57] and Fairfax County with a population that is nearly 70% white are dramatically different areas from urban Washington, D.C.[58] Arlington County has a median income of $63,001, and 60.2% of its residents hold a bachelor's degree.[59] Fairfax County has a median income of $81,050, and 54.8% of its residents hold a bachelor's degree.[60] Washington, D.C., on the other hand, has a median income of only $40,127, and only 39.1%

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53. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Floyd County, Georgia"; then click "2000" tab) (last visited Sept. 22, 2006).

54. *See* Kate Miller, *Search Is on for Benefits of Consolidation*, MEMPHIS BUS. J., Mar. 8, 2002; James C. Roddey, *City/County Consolidation's Time Has Come*, PITTSBURGH TRIB.-REV., Dec. 29, 2004.

55. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Washington, District of Columbia"; then click "2000" tab) (last visited Sept. 22, 2006).

56. This hypothetical does not fit squarely with the city-county consolidation of Louisville and Jefferson County, Kentucky. The hypothetical involves a merger that crosses state boundaries while the Louisville and Jefferson County example involves an intra-county merger.

57. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Arlington, Virginia" and follow "Arlington County, Virginia" link; then click "2000" tab) (last visited Sept. 22, 2006).

58. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Fairfax, Virginia" and follow "Fairfax County, Virginia" link; then click "2000" tab) (last visited Sept. 22, 2006).

59. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Arlington, Virginia" and follow "Arlington County, Virginia" link; then click "2000" tab) (last visited Sept. 22, 2006).

60. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Fairfax, Virginia" and follow "Fairfax County, Virginia" link; then click "2000" tab) (last visited Sept. 22, 2006).

of residents hold a bachelor's degree.[61] In addition to these socio-economic differences, Washington, D.C., must contend with a series of other unique challenges including having one of the lowest ranked public school systems,[62] highest poverty rates,[63] and highest incidences of HIV/AIDS of all cities in the country.[64] It is difficult to imagine the more privileged communities of nearby Arlington and Fairfax willing to make the political and fiscal choices necessary to deal with these unique urban challenges. Moreover, it would be virtually impossible for Washington, D.C.'s black electorate to maintain a commensurable level of voting strength under this hypothetical consolidation scheme.

The empirical evidence regarding the racial impact of city-county consolidation efforts serves two purposes. The first purpose is to demonstrate that regionalization reforms, when undertaken in areas where racial minorities represent a disproportionate percentage of the population in the urban core, might be a tool used to bring about residential integration. If whites in the suburbs must contend with the problem and resource issues faced by blacks and others in the cities, then one might assume that the two groups would be more likely to view their fates as intertwined.[65] Suburban communities might

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61. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Washington, District of Columbia"; then click "2000" tab) (last visited Sept. 22, 2006).

62. *See generally* RANKINGS & ESTIMATES: RANKING OF THE STATES 2004 & ESTIMATES OF SCHOOL STATISTICS 2005, at 12–13 (2005), *available at* http://www.nea.org/newsreleases/2005/nr050623a.html (last visited Sept. 22, 2006) (noting Washington, D.C., ranks fortieth in average daily attendance as a percentage of enrollment and lowest overall in percentage change in number of high school graduates over a ten-year period—showing a decrease in the number of high school graduates).

63. *See* Dataplace: Area Overview—Washington, D.C., http://www.dataplace.org/area_overview/?place=p261.124794 (last visited Sept. 22, 2006) (noting that Washington, D.C., has the highest poverty rate at 20% in the U.S.).

64. Susan Levine, *D.C. Faulted for Weak Response to AIDS Crisis*, WASH. POST, Aug. 10, 2005, at B5 (estimating the HIV/AIDS rate in D.C. is probably the worst in the U.S.).

65. *But see* ROBERT C. SMITH & RICHARD SELTZER, CONTEMPORARY CONTROVERSIES AND THE AMERICAN RACIAL DIVIDE 135–36 (2000) (using survey data and poll results as evidence of only a narrow difference in the views between blacks and whites on a broad range of subjects including the Rodney King trial, the Million Man March, the O.J. Simpson verdict, the Marion Barry affair, the Gulf War, and the Clarence Thomas/Anita Hill controversy). Smith and Seltzer also focus their analysis on sets of issues directly tied to local governance, such as government spending. *Id.* at 26. The authors note that when asked whether they agreed that spending is either adequate or too low on social security, 71% of blacks agreed and 49% of whites agreed. *Id.* The authors conclude that within black America, "there is a kind of 'historical cultural-structural liberalism' that bridges class and status differences to foster an ideologically homogenous or monolithic community." *Id.* at 29.

abandon some of their self-interested political claims for more communally-oriented policymaking. For example, suburban communities might come to view themselves as stakeholders in the fate of urban city residents. This fate-sharing approach to policymaking could lead to increased levels of support from suburban residents for affordable housing programs that might ultimately attract residents from the urban core and result in higher levels of residential integration. For those concerned about the effects and costs of racial segregation and isolation, regionalization might be deemed an effective government-sponsored approach to integration.[66]

However, the second purpose of highlighting the racial impact of consolidation efforts is to assess the impact on the political power and social capital of marginalized communities. The Voting Rights Act of 1965[67] ("the Act") serves as a federal statutory tool to ensure that the voting strength of racial minority groups is not impaired by changes to electoral practices and procedures.[68] Thus, this assessment serves as a starting point in efforts to ensure that regionalization efforts, such as city-county consolidation, are achieved without violating the Act's guarantees. Consolidating governments without regard for the racial consequences to the urban core may not only trigger liability under the Act but also reverse gains in African-American political standing while raising concerns for those concerned with cultivating a thriving, participatory democracy.

A. Preserving African-American Political Gains in Urban Cores

The late 1960s and early 1970s ushered in an unprecedented era of black electoral success that was largely concentrated in some of America's major cities.[69] Political scientists and

66. For the most recent seminal work on racial segregation in the United States, see DOUGLAS S. MASSEY & NANCY A. DENTON, AMERICAN APARTHEID (1993) (discussing the manufacturing, depth, effects, and likelihood of change in segregation in the United States).

67. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437.

68. Don Edwards, *The Voting Rights Act of 1965, As Amended*, *in* THE VOTING RIGHTS ACT 3, 5 (Lorn S. Foster ed., 1985) (discussing how Section 2 of the Voting Rights Act prohibited procedures designed to abridge the right to vote as well as how Section 5 required Southern jurisdictions to submit proposed changes of voting laws to the U.S. Attorney General or the U.S. Court of Appeals for the District of Columbia).

69. The first black mayors of major American cities were Carl Stokes, who served as mayor of Cleveland, Ohio, between 1967 and 1972, and Richard Gordon Hatcher, who served as mayor of Gary, Indiana, between 1966 and 1987. *See* Jeffrey S. Adler, *Introduction*, *in* AFRICAN-AMERICAN MAYORS 1, 1 (David R. Colburn & Jeffrey S. Adler eds., 2001) [hereinafter AFRICAN-AMERICAN MAYORS] (stating these two men became "the first African Americans elected to urban executive positions in the history of the United

historians attribute this era's rise in black electoral success to a variety of factors including the Civil Rights movement, which resulted in Congressional enactment of significant federal legislation formally ending an era of Jim Crow segregation and state-sponsored disenfranchisement of African Americans.[70] The Civil Rights movement also successfully brought about heightened levels of political consciousness and electoral participation among blacks and sympathetic whites.[71] Most significantly, black electoral success is also directly linked to geographic patterns brought about by white flight to the suburbs following riots in the 1960s, which left behind a concentrated black population and political power base in many major cities.[72] Indeed, the exodus of whites to outlying suburban areas significantly increased the possibilities for black political success in urban areas.[73] Although these residential patterns have shifted over the years, whites continue to disproportionately represent the face of suburban America, and blacks disproportionately represent the face of urban America.[74] In 2000, 53.1% of African Americans lived inside central cities compared with only 22% of whites.[75] Given this geographic dispersion, contemporary efforts

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States"); *see also* David R. Colburn, *Running for Office: African-American Mayors from 1967 to 1996*, *in* AFRICAN-AMERICAN MAYORS, *supra*, 25–26 (listing the years of service of the two mayors). In the 1970s and 80s, numerous black mayors were elected in major cities throughout the country, including Coleman Young of Detroit, Harold Washington of Chicago, Ernest Morial of New Orleans, Lionel Wilson of Oakland, Sharpe James of Newark, Walter Edward Washington of Washington, D.C., Thirman Milner of Hartford, Richard Arrington of Birmingham, and Wilson Goode of Philadelphia. *Id.* The first black mayor of a major southern city was Maynard Jackson, who was elected mayor of Atlanta, Georgia, in 1973. *Id. See* MANNING MARABLE, BLACK LEADERSHIP 127 (chronicling the life of Harold Washington, Chicago's first black mayor, who was elected in 1983); Adolph Reed, *The Black Urban Regime: Structural Origins and Constraints*, 1 COMP. URB. & COMMUNITY RES. 1 (1988); *see also* Cameron McWhirter, *Black Vote Gave Rise to Leaders,* DETROIT NEWS, Feb. 14, 2000, at 4A (pointing out Carl Stokes was the first African-American mayor).

70. *See generally* BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 16 (1992) (describing protections afforded under Section 2 of the Voting Rights Act such as outlawing procedures designed to "'deny or abridge the right of any citizen of the United States to vote on account of race or color'").

71. *See id.* at 21 ("By the end of 1967, more than half a million new black voters had been listed in the seven covered states.").

72. *See* Adler, *supra* note 69, at 5 (explaining how white population decreased and black population "comprised a growing proportion" of the overall lessening population of the city, providing "surging political power").

73. *Id.* at 4 (noting the migration of whites out of the cities reinforced black political power in cities).

74. GOVERNANCE AND OPPORTUNITY IN METROPOLITAN AMERICA 25 (Alan Altshuler et al. eds., 1999) ("[C]entral cities are disproportionately the home of minorities, and suburbs are disproportionately the home of whites.").

75. *See* Eric Schmitt, *Whites in Minority in Largest Cities, the Census Shows*, N.Y. TIMES, Apr. 30, 2001, at A1; Joint Center: DataBank, Residence & Region,

to regionalize will result in many of those whites who decisively opted to flee the inner city now having control and influence over city affairs.

Although not impossible, consolidation of local governments can rarely be undertaken without consequences that are evident along racial lines.[76] Thus, government reformists need to consider how the extension of boundaries impacts the long-standing distribution of political power in urban areas.[77] To date, consideration of the impact that regionalization has on minority voting strength has not been extensively explored in scholarship surrounding regionalism, nor has it been a significant part of the calculus for jurisdictions undertaking this type of reform.[78] My argument is not that consolidations and annexations should be avoided where they result in significant shifts in the racial make-up of the urban electoral base. Rather, my argument is that reformists need to find ways to reform but not at the expense of minority voting strength and political clout in the urban cores.

The possibilities for continued black electoral success are likely to be stifled should jurisdictions around the country continue moving to merge city governments with those of outlying suburban jurisdictions.[79] Further, the possibility that these merged electorates would result in the selection of African-American or other minority candidates is highly unlikely where evidence of strong racial bloc voting persists.[80]

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http://www.jointcenter.org/DB/printer/resident/htm (last visited Sept. 22, 2006) (detailing statistics on distribution of population by region and residence).

76. *See* Powell, *supra* note 25, at 236–37 (showing that consequences of the Indianapolis-Marion County consolidation in an area of racial segregation can exacerbate the problem and lead to further concentration of minority poverty and dilution of minority voting power).

77. Although I do not discuss the impact that regionalism might bear on rural communities, the arguments offered in this Article could extend to these communities as well. For discussion on the socioeconomic and legal realities that rural communities must contend with, see Debra Lyn Bassett, *Ruralism*, 88 IOWA L. REV. 273, 340 (2003), noting that the rural reality relegates many rural dwellers to a decidedly second-class status under the law, under government benefits and policies, and, indeed, under all things that truly matter. *See also* Powell, *supra* note 25, at 242 ("Minorities have cause to be wary of regional solutions to the problems of segregation and concentrated poverty. What little political power they wield seems at risk of dilution if the regional framework created ignores their interests.").

78. Suzanne M. Leland & Gary A. Johnson, *Consolidation as a Local Government Reform: Why City-County Consolidation Is an Enduring Issue*, *in* CITY-COUNTY CONSOLIDATION, *supra* note 48, at 25, 31 (highlighting that many consolidation arguments tout the benefits to minority representation as being conclusive statements but stating "broader empirical comparisons are necessary" to make real conclusions).

79. *See* STEPHENS & WIKSTROM, *supra* note 13, at 56 (noting consolidation between cities and suburban electorates keeps African-American residents in central cities from wielding much political influence).

80. *See* LANI GUINIER, THE TYRANNY OF THE MAJORITY 87 (1994) (analyzing the

IV. USING THE VOTING RIGHTS ACT AS A STATUTORY TOOL TO REGULATE REGIONALIZATION EFFORTS

Voting claims under the Voting Rights Act are generally divided into three types. "First generation" voting claims are aimed at increasing access to the ballot box and dismantling historical barriers such as poll taxes, literacy tests, understanding clauses, and grandfather requirements.[81] "Second generation" claims under the Act are aimed at tackling "qualitative vote dilution," in which the votes of some minority voters are accorded less weight, perhaps because of the barriers imposed by an at-large election system or racially polarized voting.[82] "Third generation" claims are aimed at policing those "legislative voting rules whereby a majority consistently rigs the process to exclude a minority."[83] In this Article, I articulate an expansive theory regarding a hybrid of "second" and "third generation claims" that arise under the Voting Rights Act. The identification of this novel hybrid claim can be used to guide future regionalist reforms or develop effective litigation strategies aimed at tackling an untouched layer of voting discrimination, which persists in the United States.

Perhaps reflecting the success on the part of the Voting Rights Act of 1965 in overcoming many of the barriers to full and equal voter participation,[84] we are now witnessing the emergence of unchecked regionalization as a form of voting discrimination that can, in operation, restrict full and equal participation in the political process.[85] These new violations pose unique challenges to

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argument that minorities can be an influence where liberal whites will support candidates, which occurs only if voting is not racially polarized and strong bloc voting is not diluting the minority vote).

81. *Id.* at 7 (explaining the first generation sought access to the ballot and outlawed literacy tests and provided for administrative review of local registration procedures by federal registrars).

82. *Id.* (noting that Southern states used at-large elections to allow "a unified white bloc to control all the elected positions" and for that reason second generation claims aimed to prohibit "qualitative vote dilution").

83. *Id.* at 8.

84. *See* Pamela S. Karlan, *The Impact of the Voting Rights Act on African Americans: Second- and Third-Generation Issues*, *in* VOTING RIGHTS AND REDISTRICTING IN THE UNITED STATES 121, 139 (Mark E. Rush ed., 1998) (praising the Voting Rights Act for the success in creating and retaining gains in black voter participation, and for ending practices which limited minority voting strength).

85. For an analysis of historical barriers to the ballot box, see *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) ("The Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."). For a comprehensive and historical account of minority disenfranchisement since the Civil War, see GROFMAN ET AL., *supra* note 70, at 4–15.

scholars, government reformers, and practitioners interested in continuing use of the Voting Rights Act as an effective statutory tool to guarantee and preserve access to the political process.[86] Indeed, regionalist reforms often amount to restrictive barriers to full political participation largely because jurisdictions have failed to consider potential liability under the Voting Rights Act where such reforms dilute the voting strength of minority voters.[87]

This new expansive hybrid voting claim entails complete reconfiguration of the political infrastructure and creation of a new reorganized system that often disadvantages minority voters.[88] By completely dismantling and reorganizing the political system, jurisdictions sidestep the guarantees of the Voting Rights Act by making it difficult to compare or gauge voting opportunities afforded under the old system with the opportunities afforded under the new system.[89] Instead, the jurisdiction sets in place a fresh system in which minority voting opportunities are to be measured by determining whether racial minority voting strength is fairly reflected based on the composition of the new electorate without any regard for levels of

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86. Most recent debates regarding the efficacy of the Voting Rights Act have concerned the renewal of Section 5 of the Act. This particular provision of the Act was renewed by Congress on July 20, 2006. *See* Fannie Lou Hamer, Rosa Parks, and Correta Scott King Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, 120 Stat. 577. Congress made significant revisions to Section 5 to address the impact of recent Supreme Court rulings that reduced the effectiveness and scope of the preclearance provision. As Section 5 is a distinct provision of the Act, separate and apart from Section 2, this Article will not weigh in on that debate. However, it is worth noting that proponents who helped achieve the recent renewal of the Act successfully argued that voting discrimination and racial polarization persist in many of the covered jurisdictions, and thus there is a continuing need to ensure that these jurisdictions do not enact changes, practices, or procedures which might retrogress minority voting strength. *See* LAUGHLIN MCDONALD & DANIEL LEVITAS, AM. CIVIL LIBERTIES UNION, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT 9 (2006), *available at* http://www.aclu.org/pdfs/votingrightsreport20060307.pdf (stating that racially polarized voting still exists and therefore there is a need for Section 5). *But see* Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1712 (2004) (noting it might be "perverse" to extend Section 5 due to tremendous political progress achieved by minorities).

87. *See* D. Andrew Austin, *Politics vs. Economics: Evidence from Municipal Annexation*, 45 J. URB. ECON. 501, 502 (noting the Voting Rights Act of 1965 barred annexation where the intent was to dilute minority voting strength); *see also id.* at 528 (noting that results show annexation was used to "increase the proportion of white voters" thereby diluting minority voting strength).

88. *See* STEPHENS & WIKSTROM, *supra* note 13, at 86 ("It is clear . . . that the establishment of [a consolidated government] diminished the . . . interests of the African-American community.").

89. *See* Holder v. Hall, 512 U.S. 874, 883–84 (1994) (stating Section 5 cases are to be determined by comparing the proposed changes against the baseline status of the district, which is the existing state of representation).

pre-existing minority voting strength.[90] However, the difficulties which arise in comparing voting opportunities in the pre- and post-regionalization periods do not warrant ignoring the guarantees of Section 2 of the Voting Rights Act.[91]

The problems presented by city-county consolidations are unique and have not yet been fully confronted by any court in the context of a Section 2 claim.[92] In a disproportionate number of those jurisdictions where city-county consolidations have thus far been considered or implemented, the cities represent the power base and political core for the region's racial minorities.[93] Cities represent the areas where racial minorities have developed and garnered political power.[94] In these urban centers, African Americans have learned how to effectively wield and utilize their political capital whether through coalition-building or by some other feature of the political bargaining process.[95] Eliminating city governments and their respective electoral bodies often thrusts racial minorities into the wind—to immerse their votes, their voices, and their interests into a larger, suburban pool.[96]

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90. *Id.* (extending the holding one step further because there is no longer an existing state if the government is completely restructured).

91. *See* HASKELL WARD, FINAL REPORT OF THE GRIFFIN-SPALDING COUNTY CHARTER AND UNIFICATION COMMISSION: "FINDINGS, CONCLUSIONS, AND RECOMMENDATIONS" 6–7 (1996) (mentioning the concern of the Commission for the impact on the African-American community and commenting on the need for a special committee to consider the protections of the Voting Rights Act of 1965 prior to redrawing districts).

92. Although vote dilution has been considered in light of district lines in consolidated cities, the dilutive effect of a city-county consolidation itself has not yet been considered by the courts. *See, e.g.*, Baird v. Consol. City of Indianapolis, 976 F.2d 357 (7th Cir. 1992) (considering dilution of black voting strength in the consolidated city of Indianapolis).

93. *See, e.g.*, WIS. POLICY RESEARCH INST., COOPERATION NOT CONSOLIDATION: THE ANSWER FOR MILWAUKEE GOVERNANCE 16 (2002), http://www.wpri.org/Reports/Volume15/Vol15no8.pdf.

94. *See* Joint Center: DataBank, Residence and Region, http://www.jointcenter.org/DB/factsheet/resident.htm (last visited Sept. 22, 2006) ("In 2000, 88% of the 34.7 million African Americans in the United States resided in metropolitan areas and 53.1% lived inside central cities."). These numbers are in stark contrast to those for whites; 77.4% of the white population reside in metropolitan areas and a mere 22% of the white population reside in central cities. *Id.* "The majority of whites (56.2%) instead live[] outside the central cities, in the suburbs of metropolitan areas." *Id.; see also* Matthew E. Kahn & Patrick Bajari, Why Do Blacks Live in the Cities and Whites Live in the Suburbs? 1 (Mar. 2001) (unpublished manuscript, *available at* http://ssrn.com/abstract=263049) (noting that "the average middle class African-American household lives in the center city"); MASSEY & DENTON, *supra* note 66, at 67 ("The most salient feature of postwar segregation is the concentration of blacks in central cities and whites in suburbs.").

95. *See* John Charles Boger, Essay, *Race and the American City: The Kerner Commission in Retrospect—An Introduction*, 71 N.C. L. REV. 1289, 1343 (1993) ("In no area has black progress during the past twenty-five years been more dramatic than in the attainment of urban political power.").

96. JOHN J. HARRIGAN, POLITICAL CHANGE IN THE METROPOLIS 238 (1976) (noting

Proponents of consolidation might argue that the elimination of city governments results in greater cross-racial cooperation as city dwellers are forced to contend with suburban nonminority interests. However, the boundaries of the city are not imaginary lines, and they remain intact for all practical purposes.[97] The city remains an entity unto itself with a whole set of unique challenges and concerns—concerns that are likely not shared by those residing in the more monolithic and homogenous environment of the suburbs.[98]

A. City-County Consolidations: A Hybrid Second and Third Generation Claim Under the Voting Rights Act

The first generation of voting rights claims dealt with formal impediments which restricted minority access to the ballot box.[99] Litigation and legislation leading to and following the adoption of the Voting Rights Act in 1965 proved extremely successful in dismantling these formal barriers that had been used historically to lock racial minorities out of the political process.[100] Over time,

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that consolidations and the "[c]reation of metropolitan governments [have] had an immediate and apparently negative impact on the voting *potential* of central city blacks" because "their percentage of the populations [are] considerably reduced").

97. This Article outlines a Section 2 claim that is based on the results standard. However, see *Gomillion v. Lightfoot*, 364 U.S. 339, 340–41 (1960), which struck down proposed boundary alteration plan for Tuskegee, finding that if petitioner's allegation—that a proposed boundary alteration plan for Tuskegee had the effect of removing black but not white voters—remained uncontradicted upon remand, then the conclusion would be "tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing [black] citizens out of town." *Id.* The court noted that the Alabama state legislature changed the city boundaries of Tuskegee "from a square to an uncouth twenty-eight-sided figure" with the alleged effect of exclusively removing black voters from the city limits. *Id.*

98. *See generally* HARRIGAN, *supra* note 96, at 127–32, 181–84 (discussing the differing challenges, concerns, and governmental structures between cities and suburbs); *see also supra* note 7 (listing works that examine the differences between suburban and urban communities).

99. *See* Lorn S. Foster, *Political Symbols and the Enactment of the 1982 Voting Rights Act*, *in* THE VOTING RIGHTS ACT, *supra* note 68, at 85–88 (analyzing the shift in the discussion of vote discrimination following the 1965 enactment of the Act from issues of disenfranchisement—first generation claims—to issues of vote dilution—second generation claims); Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1424 (1991) (describing "first-generation" cases as "formal challenges to the right to vote" that "attempted to establish rules that are formally fair at the level of voting").

100. *See* U.S. CONST. amend. XXIV, § 1 (abolishing the poll tax); 42 U.S.C. § 1973aa (2000) (abolishing literacy tests); Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (upholding an invalidation of poll taxes under the Equal Protection Clause of the Fourteenth Amendment); Katzenbach v. Morgan, 384 U.S. 641, 646–47 (1966) (forbidding discriminatory testing requirements under the Voting Rights Act); Louisiana v. United States, 380 U.S. 145, 151–53 (1965) (striking down Louisiana's attempt to require black voters to interpret a section of the state or federal constitutions as a "plan to deprive

this form of voting discrimination has proven easy for courts to digest, as often these barriers were erected with a clear and traceable history of discriminatory purpose.[101] Indeed, many of these barriers had been erected by Southern states seeking to invalidate new rights that had been conferred upon African Americans following adoption of the Reconstruction Amendments.[102] These legal obstacles were often accompanied by

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Louisiana [blacks] of their right to vote"); *Gomillion*, 364 U.S. at 340–42, 346 (holding that state legislatures could not racially gerrymander); Smith v. Allwright, 321 U.S. 649, 660–66 (1944) (finding the all-white primary election system to be unconstitutional); United States v. Classic, 313 U.S. 299, 322–24 (1941) (same); Lane v. Wilson, 307 U.S. 268, 274–77 (1939) (striking down procedural hurdles impeding access to the ballot); Nixon v. Herndon, 273 U.S. 536, 540–41 (1927) (finding all-white primary elections to be unconcstitutional); Guinn v. United States, 238 U.S. 347, 363–65 (1915) (invalidating "grandfather clauses"); Myers v. Anderson, 238 U.S. 368, 375–80 (1915) (same); Alabama v. United States, 304 F.2d 583 (5th Cir. 1962) (invalidating a voting questionnaire meant to prevent Alabama blacks from voting); United States v. McElveen, 180 F. Supp. 10, 13–14 (E.D. La. 1960), *aff'd in part sub nom.* United States v. Thomas, 362 U.S. 58 (1960) (declaring improper voter registration roll challenges null and void); Davis v. Schnell, 81 F. Supp. 872, 877–80 (S.D. Ala. 1949) (invalidating as unconstitutional a state provision requiring prospective voters to explain a part of the constitution because it was used to discriminate against black voters).

For further discussion, see generally SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 546–671 (rev. 2d ed. 2002) (discussing preclearance and the Voting Rights Act); ALEXANDER KEYSSAR, THE RIGHT TO VOTE 111 (2000) (discussing various methods employed to exclude African-American voters from the guarantees provided by the Fifteenth Amendment, including "poll taxes, . . . literacy tests, secret ballot laws, lengthy residence requirements, elaborate registration systems, confusing multiple voting-box arrangements, and eventually, Democratic primaries restricted to white voters").

101. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 617–18 (1982) (noting that the intent to dilute votes of racial minority groups in violation of the Fifteenth Amendment may be inferred from "'such circumstantial and direct evidence of intent as may be available'" (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977))); *Arlington Heights*, 429 U.S. at 268 ("The legislative or administrative history may be highly relevant [in determining whether discriminatory intent existed], especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports."). Note that Congress amended Section 2 of the Act in 1982 to establish a results standard for determining whether a particular voting practice impairs minority voting strength. 42 U.S.C. § 1973a (2000) (replacing "[n]o voting qualification . . . or procedure shall be imposed . . . to deny or abridge the right . . . to vote on account of race or color" with "[n]o voting qualification . . . or procedure shall be imposed . . . in a manner which *results* in a denial or abridgement of the right . . . to vote on account of race or color" (emphasis added)); Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat 131, 134 (making the alteration to the Act); Thornburg v. Gingles, 478 U.S. 30, 35 (1986) ("Congress substantially revised § 2 to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the 'results test.'"). Congress' clear intent was to reverse *Mobile v. Bolden* and its progeny. *Id.* ("The amendment was largely a response to this Court's . . . opinion in *Mobile v. Bolden*."); *see also* City of Mobile v. Bolden, 446 U.S. 55, 60–62 (1980) (holding that the Fifteenth Amendment—and by extension, section 2, whose language was identical—could not be violated without discriminatory purpose).

102. BERNARD GROFMAN, LISA HANDLEY & RICHARD G. NIEMI, MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 4–10 (1992) (discussing the

the outright use of violence as a means of locking out minority voter access to the ballot box.[103]

Traditionally, second generation voting rights claims have been tailored to address efforts to undermine the voting power of racial minorities through redistricting or through the maintenance of an at-large system.[104] Indeed, redistricting claims and challenges to at-large systems represent the most common second generation claims that have been brought under the Act in recent years.[105] These second generation claims have pushed governmental bodies to revamp those political institutions that had imposed structural and systemic limitations on the ability of minority voters to effectively exercise their electoral potential.[106]

The third generation of voting rights claims is prospective in nature in that it focuses on the political process following an

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various tactics used in Southern states to disenfranchise black voters after the passage of the Reconstruction Amendments).

103. *Id.* at 5–8 (describing formal impediments used by the Southern states to disenfranchise black voters and noting that "[i]n addition to all of these measures, local white supremacisists used intimidation and violence against blacks wishing to vote").

104. *See* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093–95 (1991) (describing the need for and development of the second generation voting claims); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838–39, 1853 (1992) (stating that "[t]he 'first generation' of voting rights challenges forced the removal of the open barriers to black registration and the casting of ballots," and noting that second generation challenges to multimember election systems "consider[] almost exclusively actual voting patterns to determine the validity of at-large election systems under the Voting Rights Act"); Karlan, *supra* note 84, at 121–23 (discussing the "'second generation' of voting rights activity[, which] addressed the problem of racial vote *dilution* rather than outright disenfranchisement").

105. *See* Karlan, *supra* note 84, at 123 (describing contemporary litigation under the Voting Rights Act as involving the second generation issues of at-large elections, multimember districts, and most recently, affirmative and defensive redistricting claims).

106. *Id.* at 124 ("The direct effect of the Voting Rights Act's second-generation litigation . . . is quite tangible. Liability and the threat of liability under amended section 2 and the denial of preclearance and the threat of objections under section 5 were directly responsible for the creation of literally thousands of new majority-black single-member districts . . . [, which] is the major explanation for the huge increase in the number of black elected officials."); *id.* at 139 ("With regard to the second-generation question of vote dilution, the [Voting Rights] Act was a major catalyst for the abandonment of at-large elections and multimember districts, electoral practices that tended to submerge minority voting strength."); Penda D. Hair & Pamela S. Karlan, Advancement Project, *Redistricting for Inclusive Democracy: A Survey of the Voting Rights Landscape and Strategies for Post-2000 Redistricting* 8 (2000), *available at* http://www.advancementproject.org/RFD.pdf ("The campaign to eliminate at-large elections when their use diluted minority voting strength gained momentum during the early and mid-1970s, as many states, counties, and localities were forced, either by Voting Rights Act litigation or by pressure from the United States Department of Justice, to switch to single-member districts.").

election.[107] Thus, third generation claims deal with those practices that directly affect the ability of minority voters to exercise the full extent of their political potential after representatives have been selected.[108] These claims recognize that "it is sometimes not enough simply to ensure that minorities have a fair opportunity to elect someone to a legislative body" and seek to address those "unusual circumstances, [when] it may be necessary to police the legislative voting rules whereby a majority consistently rigs the process to exclude a minority."[109] Indeed, this "third generation" of voting rights claims deals directly with questions of post-electoral representation and the actual exercise of political power within elective bodies.[110]

Thus far, the prevailing understanding of the scope of Section 2's vote dilution standard fails to address those instances in which an elected body, a state legislature, or a jurisdiction seeks to adopt regionalist reforms by way of city-county consolidation: by abolishing a governmental body and building a new one in its place to the exclusion or disadvantage of minority voters.[111] The problems surrounding city-county consolidation do not fit neatly into any of the prevailing conceptions of voting discrimination that currently exist.[112] City-county consolidations represent a hybrid of second and third generation voting claims. Consolidations constitute a second generation violation where the elimination of the city government undermines minority voting strength and results in dilution where the region's racial

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107. *See* Karlan, *supra* note 84, at 125 (noting that the "'third generation' of voting rights issues focuses on questions of governance" as opposed to formal impediments to voting or vote dilution).

108. *See* Scott D. Gerber, *Justice Clarence Thomas and the Jurisprudence of Race*, 25 S.U. L. REV. 43, 64 n.92 (1997) (noting that *Presley v. Etowah County Commission*, 502 U.S. 491 (1992), "is [an example of] a 'third-generation' voting rights case because what was at issue [was] the ability of Blacks to *govern* effectively, not simply to *vote* (first-generation cases) or to *elect* candidates of their choosing (second-generation cases)"); Guinier, *supra* note 99, at 1481–82, 1494–95 (describing the types of claims that can be characterized as the third generation of voting rights suits, noting particularly that "marginalization . . . expands the definition of vote dilution to include any set of techniques used to dilute or nullify the *effects* of votes case by minorities" and the third generation voting right is essentially "the right to elect representatives who have the same opportunity as other representatives to influence the legislative process by casting a 'decisive' vote" (emphasis added)).

109. *See* GUINIER, *supra* note 80, at 8.

110. *See id.* (defining "third-generation" claims).

111. *See* Hiroshi Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C. L. REV. 189, 221–32 (1983) (reviewing the case law regarding preclearance review of annexations and consolidations).

112. *See, e.g.*, *supra* notes 100–101 and accompanying text (surveying traditional voting discrimination measures and corresponding litigation).

minorities are concentrated in the city.[113] Consolidations also constitute a third generation violation when undertaken as part of a regionalist reform package that includes no response to or remedies for the resulting racial dilution.[114] Where minorities are concentrated in the region's urban core and the resulting dilution is a foreseeable consequence of the adoption of regionalist reforms, jurisdictions are obligated to set in place rules that would allow minorities to sustain a commensurate level of power and voting strength. Where the jurisdiction fails to do so, a third generation violation arises.

Thus, courts need to adopt a more expansive view of voting rights claims to include those regionalization reforms that typically evoke concerns under both second and third generation conceptions of voting claims. These claims have been difficult for both litigators and courts to conceptualize because there is no baseline; there is no way to neatly compare the new resulting system with the old system where the old system has been eliminated. However, where this occurs, courts should assess the effect of the new system vis-à-vis those minority voters impacted by the dismantling and creation of the new system. Where the new system results in dilution of minority voting strength in the urban core and the jurisdiction fails to set in place remedies for that dilution, the jurisdiction should be held liable under the Act.[115]

B. The Politics of Consolidation: A Recent Large-Scale City-County Merger

The recent merger of the City of Louisville and Jefferson County, Kentucky provides an example of the most recent large-scale consolidation to take place in the United States.[116] In addition, this particular city-county consolidation illustrates the potentially negative impact that consolidations have on minority

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113. *See supra* notes 104–106 and accompanying text.

114. *See supra* notes 105–108 and accompanying text.

115. This Article focuses on vote dilution claims by analyzing the effect of consolidation on minority voting strength. Although this Article does not emphasize claims based on discriminatory purpose, courts should also carefully assess the purpose behind the erection of the new system searching for those pretextual justifications that are often advanced to legitimize the dismantling of the old system. *See, e.g.*, *supra* notes 21–24 and accompanying text (discussing common justifications for seeking to consolidate city and county governments, as well as the costs of consolidation on the minority political and social capital in the city).

116. Suzanne M. Leland & Kurt Thurmaier, *Introduction*, *in* CASE STUDIES OF CITY-COUNTY CONSOLIDATION, *supra* note 34, at 3, 24 (listing Louisville/Jefferson County, Kentucky, as the most recent consolidation).

voting strength, as the city represents the site where the vast majority of the region's racial minorities reside.[117] My analysis also sets out to challenge prevailing conceptions of voting rights violations.

In November 2000, a county-wide referendum was held on the question of merging the city and county governments of Louisville and Jefferson County.[118] With a slim majority of the vote, the referendum passed,[119] authorizing the establishment of the Greater Louisville Metropolitan Council[120] that today is comprised of twenty-six members elected from single-member districts.[121] Each council member is elected in partisan elections

117. *See infra* notes 161–63 and accompanying text.

118. The question of consolidation submitted to voters on the November 2000 ballot read as follows: "Are you in favor of combining the City [of Louisville] and [Jefferson] County into a single government with a mayor and legislative council, keeping all other cities, fire protection districts and special districts in existence?" KY. REV. STAT. ANN. § 67C.137(2) (LexisNexis 2004).

119. Savitch & Vogel, *supra* note 34, at 286 ("The merger passed by 55 percent 'yes,' and 45 percent 'no.'").

120. KY. REV. STAT. ANN. § 67C.103(1) (vesting the legislative authority of the newly consolidated local government, except as otherwise specified in §§ 67C.101 to 67C.137, in the consolidated local government council).

121. *Id.* ("The members of the council shall be nominated and elected by district. There shall be only one (1) council member elected from each council district."); § 67C.103(2) ("There shall be twenty-six (26) council districts."). The Metropolitan Council assumes all duties formerly held by the Louisville Board of Aldermen and has traditional legislative powers including the power to review county budgets and to enact county-wide laws and ordinances. § 67C.103(13) ("All legislative powers of [the] consolidated local government are vested in the consolidated local government council. The term 'legislative power' . . . include[s] the power to: (a) Enact ordinances . . . [and] (b) Review the budgets of and appropriate money to the consolidated local government."). The laws, ordinances, and regulations for Louisville and Jefferson County were combined. § 67C.115(1) (providing that "all ordinances and resolutions of [Louisville] and all ordinances and resolutions of [Jefferson County] shall become effective ordinances and resolutions of the consolidated local government until repealed, modified, or amended"). Registered voters in Jefferson County also now elect a metro mayor who serves a four-year term and assumes all duties formerly held by the City of Louisville Mayor and the Jefferson County Judge Executive. § 67C.105(2) ("The mayor shall be nominated and elected in partisan elections for a term of four (4) years."); § 67C.105(4) (stating that the mayor has all the power and authority that the mayor and the county executive exercised prior to the consolidation); § 67C.105(5) (listing the specific duties of the mayor). Certain officials whose offices remained in existence at the time of the consolidation include the county court clerk, the county attorney, the sheriff, the assessor, the surveyor, and the coroner. § 67C.121(1) (stating that upon the consolidation of the city with its county, these offices remain in existence). In addition, all subsidiary agencies and departments of the City of Louisville and Jefferson County Government report to the new consolidated government. The Courier-Journal: Questions and Answers: Guide to Merged Government (Jan. 6, 2003), http://www.courierjournal.com/kyguide/merger03/qa.html. Upon merger, "[m]ost agencies answer to the metro government, including the Health Department, the Air Pollution Control District, the Planning Commission, the Human Relations Commission, Metro Parks and the Louisville Free Public Library. Independent agencies such as the Metropolitan Sewer District and the Transit Authority of River City are slightly affected by merger because the metro mayor appoints more of their board members." *Id.*

to serve four-year staggered terms representing districts with roughly 25,000 citizens.[122] The vast majority of African-American voters opposed consolidation while the majority of whites supported it.[123] Although the City of Louisville continues to exist as a formal, incorporated entity, its former governing body, which consisted of the Louisville Board of Aldermen and a mayoral seat, has been eliminated under the merged system.[124] In place of the Louisville Board of Aldermen stands the Metropolitan Council now elected from single-member districts on a county-wide basis.[125]

In this Section, I will analyze the historical context underlying merger attempts in this region and examine the impact that consolidation has on minority voting strength in the City of Louisville through dissenting narratives. I will then attempt to address whether the elimination of the Louisville Board of Aldermen and the creation of the Greater Louisville Metropolitan County Council impairs the ability of African-American voters to participate equally and meaningfully in the political process in violation of the guarantees of Section 2 of the Voting Rights Act.

C. Maintaining Participatory Democracy in Urban Cores

An overview of the narratives that characterized historical considerations of consolidation between Louisville and Jefferson County reveals concern for the principles of participatory democracy.[126] Participatory democracies provide possibilities for

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122. § 67C.103(4) (providing that the council members shall serve four year staggered terms); § 67C.103(5) (providing that the council members "shall be nominated and elected from the district in which they reside in partisan elections"); BROOKINGS INST. CTR. ON URBAN & METRO. POLICY, BEYOND MERGER: A COMPETITIVE VISION FOR THE REGIONAL CITY OF LOUISVILLE 4 (2002), *available at* http://www.greaterlouisvilleproject.org/pdf/LVL01_11.pdf (stating that each member of the Metro Council is "elected from a single district with about 25,000 residents").

123. *See* Savitch & Vogel, *supra* note 24, at 764 (noting that blue-collar status and race accounted for over half of the variance in voting disparities between different census tracts in Louisville).

124. § 67C.101(1) ("The governmental and corporate functions vested in [Louisville] shall . . . be consolidated with the governmental and corporate functions of [Jefferson County]. This single government replaces and supersedes the governments of the pre-existing city of [Louisville] and [Jefferson County].")

125. *See generally* § 67C.101 (reciting the powers of the County Metro Government, the consolidated local government).

126. *See, e.g.*, Interview with Dr. Joseph McMillan, President, Rainbow/PUSH Coalition, in Louisville, Ky. (July 2005) (identifying broad opposition to the Louisville consolidation attempts in the 1980s and the impossibility of electing a black mayor in post-consolidation Louisville).

meaningful and broad political participation by all groups.[127] Theorist John Hart Ely identifies participation as key to constructing successful democracies that act to protect core constitutional values.[128] Thus, one might argue that regionalization runs counter to the goals of fostering participatory democracy where it results in the creation of centralized sites of power that are too far removed from insular minority groups. For example, the narratives of black opposition to consolidation in the City of Louisville reveal concern for the loss of the ability to meaningfully impact political decision-making.[129] These narratives convey concern that the reduction in the proportion of blacks in the electorate would essentially marginalize the position of African Americans in the political process.[130] Black electoral success, it is argued, helps improve overall political morale and the desire for active civic participation.[131] Thus, consolidation, by significantly reducing the political clout of minority communities, can result in unhealthy levels of apathy, disengagement, and democratic anemia.[132]

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127. *See* CRAIG A. RIMMERMAN, THE NEW CITIZENSHIP: UNCONVENTIONAL POLITICS, ACTIVISM, AND SERVICE 19 (1997) ("Proponents of participatory democracy argue that increased citizen participation in community and workplace decisionmaking is important if people are to recognize their roles and responsibilities as citizens within the larger community. . . . In a true participatory setting, citizens do not merely act as autonomous individuals pursuing their own interests, but instead, through a process of decision, debate, and compromise, they ultimately link their concerns with the needs of the community.").

128. *See* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 181 (1980) (remarking that the "representation-reinforcing theory of judicial review" concerns itself only with participation when reviewing the Constitution's open-ended provisions).

129. *See* Rick McDonough & Thomas Nord, *Series Merger; The Case Against . . . Five Influential Groups Could Short-Circuit Any Plan*, COURIER-J. (Louisville, Ky.), July 4, 1999, at A10 (discussing African-American concerns that a city-county merger would lead to a "dominat[ion] [of] suburban interests more likely to be white than black," and would limit the political representation of blacks).

130. *Id.*

131. Ellen D. Katz, *Resurrecting the White Primary*, 153 U. PA. L. REV. 325, 368 (2004) ("Black candidates and legislators may be essential to energize black voters and ensure that they turn out on election day.").

132. *See* KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 92–93 (1989) (discussing voting rights as an assertion of membership and belonging to a political community); Guinier, *supra* note 104, at 1119–24 (questioning capacity for deliberation without equality of participants); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 5 (1991) (noting that voting "announces that the voter is a full member of the political community"); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.–C.L. L. REV. 173, 179–82 (1989) (discussing the relationship between notions of civic inclusion and black electoral success); Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE & L. 389, 456

Maurice Sweeney of the Louisville Branch of the NAACP opposed the 1982 merger proposal because it would have led to "inadequate representation for African-Americans."[133] Another African-American resident noted that "African Americans worked hard to achieve their current level of representation," and thus, questioned the "benefits to the African American community of diluting their voting strength."[134] Reverend William H. Bell felt merger would be illegal because it would eliminate minority representation and that African-American minority vote would be diluted to the point that their voices would be lost and denied legislative voice.[135] Finally, Representative Aubrey Williams noted "[r]eorganization is part of a recognizable effort nationwide since the 1930's to dilute the political power of African Americans."[136]

Despite the defeat of the 1982 effort at consolidation and despite vociferous opposition from the African-American community, a referendum on city-county consolidation was placed on the general ballot once again in 1983.[137] The 1983 merger attempt failed with 51.8% voting against the referendum and 48.1% voting in favor of the referendum.[138] In 1985, Louisville again revisited the issue of consolidation.[139] However, after a number of meetings and deliberative sessions, a Special Task Force decided not to recommend city-county consolidation

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(1999) (discussing the undermining impact of excluding discrete and insular minorities on the legitimacy of government, general public cynicism, and the integrity of the democratic system); Terry Smith, *Autonomy Versus Equality: Voting Rights Rediscovered*, 57 ALA. L. REV. 261, 263–64 (2005) (discussing the concept of minority political autonomy and noting that the term can be understood to mean "forms of self-determination that allow a numerically inferior, racially or culturally identifiable group to make certain decisions . . . that [will not be] subject to the approbation of the majority").

133. *See* 1983 Charter Comm'n, Public Meeting at the Parkland Boys Club, July 19, 1983, at 1. During the meeting, Sweeney read a resolution that had been passed by the local NAACP chapter, which detailed several reasons that the group was opposed to the merger proposal. *Id.* The resolution highlighted a number of issues including concerns that the "plan is based on inadequate study, alternative forms of reorganization were not considered, loss of CD funds, no proof of economic benefits of reorganization, executive branch too powerful, disproportionate tax burden for city residents, City services may decline, inadequate representation for African Americans." *Id.*

134. *Id.* at 2–3.

135. *Id.*

136. *Id.* at 4.

137. H.V. Savitch & Ronald K. Vogel, *Metropolitan Consolidation Versus Metropolitan Governance in Louisville*, 32 ST. & LOC. GOV'T REV. 198, 200 (2000) (reporting that "[t]he 1982 and 1983 merger plans were defeated by an alliance of African Americans").

138. List on City-County Consolidation, *supra* note 12.

139. Savitch & Vogel, *supra* note 137, at 200 ("In 1985 the Louisville Board of Alderman sought to annex all of the remaining unincorporated area of Jefferson County.").

"because it would be divisive and it would diminish black voting strength."[140]

During the months preceding the successful adoption of the 2000 merger proposal, concerns and questions were again raised about the impact that city-county consolidation would have on African-American electoral opportunity.[141] State Senator Gerald Neal noted his concerns about "minority representation in the new government" given studies showing that "the Black minority did not fare well under [other] merged governments." Keith Hunter noted that the merger plan, as constructed, would result in "less minority representation" because the plan called for giving the mayor, who would be elected county-wide and likely white, "unlimited power."[142] Finally, Bill Warner, a local lawyer and member of the Republican Party, opposed the 2000 merger because he felt that "[m]uch of what was driving merger was a desire to crush African-American aspirations."[143] In Warner's assessment, merger was an attempt to "dilute [black] political power and voices" as many whites felt that blacks "had too much influence and stand in the way of things that they consider progress."[144] Warner noted that the discussion and debate surrounding merger was extremely racialized and that merger proponents often used inflammatory language or other coded words to describe African Americans.[145]

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140. Interview with Dr. Joseph McMillan, *supra* note 126.

141. Minutes of the Seventh Meeting of the Special Task Force on Local Government in Counties Containing a City of the First Class 5 (May 7, 1999) (on file with author) (noting some concerns and questions regarding representation and political clout of African Americans on the new City Counsel).

142. *Id.*

143. *Id.*

144. *Id.*

145. Analysis of the impact of the use of racially derogatory or racially charged language is an issue that often arises in the employment discrimination context. My argument here is not that these isolated instances of degrading comments are evidence that consolidation was enacted with an explicitly discriminatory purpose. Any such leap would be unreasonable. However, these statements form a racial subtext that warrants further analysis of the arguments put forward by proponents in favor of consolidation. Several cases provide additional discussion of the use of racial slurs within the employment discrimination context. *See, e.g.*, Ziv v. Valley Beth Shalom, No. 97-55357, 1998 WL 482832, at *2–3 (9th Cir. Aug. 11, 1998) (finding the use of racial slurs sufficient to state a claim of hostile environment and that racial slurs may constitute "'extreme and outrageous conduct'"); see also Filipovic v. K & R Express Sys., Inc., 176 F.3d 390, 393, 398 (7th Cir. 1999) (determining that four ethnic slurs made over the course of a year were part of the normal work environment and insufficient to constitute a hostile environment); Torres v. County of Oakland, 758 F.2d 147, 152 (6th Cir. 1985) (holding that "a single incident of using derogatory language, which is not in itself racially or ethnically charged, does not constitute unlawful employment discrimination," although it may be used as evidence of discriminatory intent).

At a special meeting of the Kentucky House State Government Committee, Rev. Louis Coleman noted that consolidation was "an attempt to disenfranchise the residents of the West End"—a move that would ultimately "diminish the voting strength" of blacks in the City of Louisville.[146] Citizens Organized in Search of the Truth (COST), a coalition of local civil rights groups, unions, and civic organizations opposed to the city-county consolidation formed to help educate the public about the impact of merger on local governance, helped shape the county-wide debate regarding the impact of consolidation on African-American voting strength.[147] Opponents stressed the importance of understanding merger in a context in which there was "growing concern that African-Americans might assume key leadership positions in the City."[148] In addition to strong African-American opposition, the 2000 merger bill was rejected by a number of advocacy groups including the League of Women Voters.[149] Deborah Kent, President of the League, expressed concerns that the merger plan would lead to racial divisiveness and under-representation of African Americans in government.

A survey of citizen reaction and response to consolidation indicated that many African-American residents within the City of Louisville anticipated reductions in the quality of urban service delivery including police and fire protection and trash collection services as a result of city-county consolidation.[150] In addition, many African-American residents anticipated that gains in the area of local civil rights legislation would be lost once

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146. Audio tape: House State Government Committee Meeting of the 2000 Regular Session, Feb. 16, 2000 (statements of Rev. Louis Coleman) (on file with the Houston Law Review).

147. Some of the organizations operating under the Citizens Organized in Search of Truth (COST) coalition include the NAACP, League of Women Voters, Interdenominational Ministerial Alliance, Fairness, and Kentucky Rainbow Coalition. *See* Savitch & Vogel, *supra* note 24, at 767 (stating that COST's membership consisted of "volunteer fire organizations, the county Fraternal Order of Police (FOP), labor unions (e.g., teamsters), neighborhood organizations, civil rights groups (Blacks, gays), the Green Party, small-city mayors, most members of the Board of Aldermen, and county commissioners").

148. Interview with Darryl Owens, President, NAACP Voter Fund, in Louisville, Ky. (July 6, 2005); *see also* Raoul Cunningham, *Merger and Minorities; Is the Districting for the Merged Metro Council Fair to African Americans?*, COURIER-J. (Louisville, Ky.), June 23, 2001 (stating that because the proposed district lines did not account for factors such as voting age population, minority representation would be diluted and "African Americans would loose representation on a merged metro city[-]county council").

149. *See supra* note 147 (discussing COST); Savitch & Vogel, *supra* note 34, at 281–82 (noting that the League of Women Voters opposed the merger proposal).

150. *See* Savitch & Vogel, *supra* note 24, at 781.

the city was submerged within the majority white suburban population of the county.[151]

D. The Racial Subtext Underlying Consolidation Efforts in the Louisville Metropolitan Area

The opposition to the merger referendum included women's and gay and lesbian organizations whom, together with African-American groups, forged a coalition responsible for several pieces of progressive legislation in the City of Louisville over the years.[152] African Americans within the City of Louisville maintained a growing influence over city politics from the early 1980s.[153] The city's political climate suggested that there had been growing potential for election of the City's first African-American mayor.[154] With African Americans routinely forging viable political coalitions with other minority groups in the area and the emergence of strong African-American leadership,[155] many predicted that the city was on the brink of electing its first black mayor.[156] Further, shifting demographics within the region strongly suggested that Louisville was moving towards becoming a majority-minority city in coming years.[157]

Consolidation resulted in the submergence of the city's expanding African-American electorate into the majority white and suburban population of Jefferson County.[158] While requiring

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151. *See generally supra* note 31 and accompanying text (remarking on the loss of minority political autonomy resulting from city-county consolidations).

152. *See, e.g.*, *supra* note 147 and accompanying text (discussing COST and its efforts toward progress in voting rights).

153. Interview with Dr. Joseph McMillan, *supra* note 126 (noting that Black voters, immediately prior to the consolidation, were in a position to elect a Black mayor in the City of Louisville, but that this possibility was eliminated following the consolidation).

154. *See id.*; *see also* Editorial, *The Future Mayor of Louisville*, LOUISVILLE DEFENDER, June 4, 1998 (noting that in coming years Louisville could have its first African-American mayor).

155. Anne Braden, *Why White Liberals Should Oppose Merger*, COURIER-J. (Louisville, Ky.), Oct. 29, 2000 (noting that "throughout local history, African Americans have organized skillfully and effectively to win power by building leverage as a minority" and that African Americans have recently built political bases which "won white allies and totally changed power relationships in city government").

156. *E.g.*, *The Future Mayor of Louisville*, *supra* note 154 (noting that in coming years Louisville could have its first African-American mayor).

157. *See* Chris Poynter, *City's Youths Mostly Minorities: Demographic Shift May Carry Political Change*, COURIER-J. (Louisville, Ky.), May 12, 2001, at B1 (noting that the "2000 census reports that the number of white, non-Hispanic youth slipped to 48 percent of the city's total juvenile population" and that "Louisville eventually could become a city largely populated by minorities").

158. *See* Savitch & Vogel, *supra* note 24, at 769 ("As a result of its new boundaries, consolidated Louisville would dramatically change its geography, its social composition, and its politics. . . . By combining with mostly White suburbs, the proportion of African-

the dismantling of the Board of Aldermen in the City of Louisville, the consolidation plan oddly allowed all eighty-four other cities within the county, the majority of which contain predominantly white populations, to preserve their respective governing bodies.[159] Micro-level, fact-intensive analysis must play an important role in determining whether a potential Section 2 claim might be constructed to challenge a particular consolidation. Here, the consolidation was undertaken through a plan that selectively required the elimination of the local government of the City of Louisville alone, permitting all eighty-four other cities within the county to maintain some degree of self-governance. Regionalist proponents failed to advance any objective or legitimate reasons for selectively eliminating the Louisville Board of Aldermen while allowing the governments of smaller jurisdictions to remain intact.[160]

Census data helps reveal the extent of the racial impact of this particular feature of the plan. Data from the 2000 Census indicates that Jefferson County has a total population of 693,604 persons of whom 130,928 (18.9%) are African-American.[161] The same data shows that 64.6% of Jefferson County's African-American population currently resides within the city limits of Louisville, while 70% of Jefferson County's white population resides beyond those city limits.[162]

Thus, under this particular consolidation plan, there are eighty-four small cities, comprised mostly of whites that retain

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Americans was cut from nearly 33% to approximately 15%.").

159. KY. REV. STAT. ANN. § 67C.111(1) (LexisNexis 2004) (requiring that all other cities in Jefferson County remain incorporated and continue to exercise the powers and perform the functions permitted by law). However, recent Census data indicates that of these eighty-four cities, only six have populations that are at or near the percentage of African Americans in pre-consolidated Louisville. *Cf.* Savitch & Vogel, *supra* note 137, at 199 (stating the number of remaining cities as eighty-five and emphasizing the small percentage of minorities in Jefferson County but outside of Louisville).

160. *See* City of Richmond v. United States, 422 U.S. 358, 375 (1975) (requiring a showing of proof that an annexation was solely for discriminatory reasons before finding an annexation violated Section 2 of the Voting Rights Act).

161. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Jefferson County, Kentucky"; then click "2000" tab) (last visited Sept. 22, 2006).

162. *Id.* (listing 536,721 as the white population of Jefferson County and 130,928 as the African-American population of Jefferson County); Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Louisville city, Kentucky"; then click "2000" tab) (last visited Sept. 22, 2006) (listing 161,261 as the white population of Louisville city and 84,586 as the African-American population of Louisville city). Therefore, the percent of Jefferson County's African-American population residing within Louisville city is 64.6 (84,586 ÷ 130,928 = .646) and the percent of Jefferson County's white population residing beyond Louisville city is 70 ((536,721 – 161,261) ÷ 536,721 = .70).

their local governments,[163] while the City of Louisville, home to the overwhelming majority of the county's African-American population, is the only incorporated entity required to eliminate its local government.[164] This feature of the consolidation has a very uneven impact on voters in the region and the unevenness is evident along racial lines.

To understand the significance of the Board of Aldermen, it is important to examine its role and function. As Louisville's central legislative body, the Board of Aldermen was the site of local legislation and policymaking.[165] The Board of Aldermen was empowered to enact ordinances, approve resolutions, review zoning matters, appropriate funds, and review the city's contracts.[166] Since a quorum consisted of seven or more of the Board of Alderman's twelve members, the four African-American Aldermanic members, elected from majority-minority districts, had been able to forge effective voting coalitions by aligning themselves with three or more members of the Board.[167] The possibilities for real alliance-building on the new county-wide council are substantially more difficult with African Americans now comprising a viable majority in a smaller proportion of the twenty-six districts.[168] Moreover, a quorum on the metropolitan council now requires a total of at least thirteen votes.[169]

Anecdotal statements from African-American elected officials, and others opposed to consolidation, highlight concerns about the uneven impact of the plan on city vs. county and black vs. white residents.[170] For example, former county commissioner

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163. KY. REV. STAT. ANN. § 67C.111 (LexisNexis 2004) (stating that all cities other than Louisville will remain incorporated).

164. *See* Sheldon S. Shafer & Michael Quinlan, *Merger Bill Clears House, Goes to Patton; Well-Financed Campaign Will Try to Defeat Plan*, COURIER-J. (Louisville, Ky.), Mar. 22, 2000, at A1 (quoting Louisville's Second Ward Alderman Barbara Gregg who "called the legislation 'a very, very bad bill' because Louisville is the only city that would be dissolved under the plan").

165. Sheldon Shafer, *Election 2002: County Clerk Faces Challenge from Longtime Alderman*, COURIER-J. (Louisville, Ky.), Oct. 27, 2002, at B1 (describing the Aldermen as a "strong legislative body independent of the mayor").

166. Under the preconsolidated system, Jefferson County was governed by a four-member Fiscal Court. Three of the four judges on the fiscal court were elected district-wide in the primary and also elected at-large in the general election. The fourth member, the County Judge Executive, was elected at-large in both the primary and general elections.

167. Each Alderman represented a specific geographic section, or ward, of the city.

168. *See* Shafer & Quinlan, *supra* note 164 (stating that, at the time the consolidation was initially put into place, six of the proposed twenty-six council districts have been drawn so they have at least a 50% minority population).

169. KY REV. STAT ANN. § 67C.103(9) (LexisNexis 2004).

170. *See, e.g.*, McDonough & Nord, *supra* note 129, at 10A (recounting the fears of African-American leaders prior to consolidation).

Darryl Owens indicated that residents within the "small cities would not have supported [the] merger unless they got to retain their city councils."[171] Alderman Barbara Gregg indicated that one of the primary reasons she opposed the consolidation plan was because it "[was]n't [a] merger" given that Louisville's government alone would be dissolved while eighty-four other suburban cities' governments remained intact.[172] In addition, Gregg expressed concern that the current level of services and taxes would not be maintained on a council dominated by suburban interests.[173]

A vote dilution problem emerges where a city-county consolidation results in certain constituents having greater forms of access to the political process. Voting power and political clout are unevenly impacted, resulting in county residents having two sites to express concerns regarding policymaking, legislation, quality of life, and other concerns.[174] For those county residents who find the metropolitan form of governance too detached and far removed, an alternative avenue of relief is provided through their respective local city councils and local mayors.[175] However, former residents of the City of Louisville are afforded a single avenue of relief, raising concerns about political inequity and the maldistribution of political power.[176] Local activist Dr. Joseph McMillan recognized the resulting structural inequities, commenting that "residents of suburban cities have two voices in government, while residents in the city of Louisville . . . will only have one voice in government."[177]

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171. Interview with Darryl Owens, County Comm'r, Dist. C, in Louisville, Ky. (July 2005).

172. *See* Sheldon S. Shafer, *Election 2000: Abramson, Gregg Debate Need for City-County Merger*, COURIER-J. (Louisville, Ky.), Oct. 20, 2000, at B1.

173. *Id.* In Gregg's opinion, growth was possible "without the drastic extreme of destroying" the current governmental structure in the city of Louisville. *Id.* Former Alderman Gregg's views suggest that there is no legitimate or objective basis for the consolidation at issue.

174. *See* Stephen L. Percy et al., *Creating Metropolitan/Regional Government: The Tales of Five Cities*, U. WIS. MILWAUKEE RES. & OPINION, May 2002, at 2 (discussing the "federated approach" to consolidation, in which two-tier consolidated governments retain individual municipal governments).

175. *See* Shafer, *supra* note 172 (reporting that the government of Louisville alone will be dissolved while eighty-five suburban cities remain intact).

176. *See id.* (relating the fears of Barbara Gregg that city services and taxes would suffer post-merger).

177. *See* Joseph H. McMillan, *Guest Commentary On Merger: Deja vu*, LOUISVILLE DEFENDER, Nov. 2, 2000, at A4.

E. A Structural Analysis: The Impact of Consolidation on City and County Service Districts

In the initial stages of the consolidation, city and county fire, police, and emergency medical service districts were not merged and remained independent political units.[178] Although these departments remained separate entities, budgetary and fiscal control over them had been delegated to the Metropolitan Council under the consolidation plan.[179] Many African Americans in the City of Louisville articulated concerns about the unfavorable consequences that would likely result from their diminished voting strength and, in turn, reduced control over the way these important local entities operate.[180]

Police officers in the county initially opposed the merger because of the perceived complexities of policing an urban area.[181] Early resistance to the merger of the police and fire districts remained a central point during early debates

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178. *But see* Rick McDonough & Sheldon S. Shafer, *Merger; Experiences Elsewhere Show Taxes Don't Jump, Services Aren't Lost*, COURIER-J. (Louisville, Ky.), Oct. 15, 2000 at A1 (discussing skepticism that changes in fire and police services would occur during the initial stages of merger).

179. KY. REV. STAT. ANN. § 67C.103(13) (LexisNexis 2004).

180. In particular, community residents expressed concern that consolidation will likely reduce police and fire protection within city limits. *See, e.g.*, Shafer, *supra* note 173. The city of Louisville has twice the number of police officers per resident and nine times the number of police officers per square mile as unincorporated Jefferson County. *See* Feasibility Study, *supra* note 27, at I-9 to I-10 (noting that Louisville has 2.71 police officers per 1000 citizens and Jefferson County has only 1.3 police officers per 1000 citizens). A consolidated government will not provide African-American voters the opportunity to exercise budgetary and fiscal control over the fire and police departments, instead assigning this authority to a Metropolitan Council that is dominated by white, suburban interests. *See id.* at I-9 (spelling out the demographics of Louisville and Jefferson County and noting the disparity in the proportion of minorities between Louisville and unincorporated Jefferson County); *see also supra* text accompanying note 140 (discussing how consolidation would diminish minority voting strength).

181. An editorial in the Courier-Journal illustrates the perceived differences that the predominantly white county police force holds of policing in the city of Louisville:

> [t]he Louisville force deals every day with urban crime; drugs, gangs, shootings, racial tensions. It has experience and expertise in these areas. And, for the most part, officers have been sensitive enough to avoid turning the arrest or shooting of a suspect into a riot. . . . County officers deal with urban crime, too, of course. But that's not their main focus. This is still basically a suburban police force, one that deals more with burglaries and car thefts than with armed street gangs.

See Editorial, *Metro Police*, COURIER-J. (Louisville, Ky.), Aug. 12, 1997, at A10. J.W. Clark, Chairperson of the Jefferson County Fire Trustees Association, circulated a letter to local officials indicating that "all 21 fire districts will oppose any plan, which does not guarantee explicitly the continued existence of the fire districts in Jefferson County." *See* Letter from J.W. Clark, Jr., Chairperson of the Jefferson County Fire Trustees Association (Mar. 31, 1999).

surrounding the 2000 merger bill.[182] Indeed, local officials recognized that fire and police unions were important organized interests and ensured that the final merger bill would respond to their goal of maintaining separate, distinct service districts.[183] Public surveys highlighted the tensions between the city and county fire and police unions, noting that 80% of city police officers favored merger while 85% of their counterparts in the county opposed it.[184] Analysis of prevailing community attitudes revealed that the predominantly white police units within the county were concerned that the large African-American population of the city presented onerous policing burdens.[185] There were also concerns about potential financial liability that may result from pending lawsuits over police brutality and misconduct in the City of Louisville.[186] In an effort to insulate themselves from any resulting financial liability that may have resulted from these pending lawsuits, white county residents and the county police unions maintained initial resistance to the concept of consolidating the city and county police forces.[187] Some information suggested that county police officers harbored racialized stereotypes about city crime and city policing, which made them resistant to merger of the city and county police units. [188]

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182. *See* McDonough & Shafer, *supra* note 178 (discussing reasons behind merger of police and fire departments being unlikely in that the current system is working fine and a merger of the system would face political opposition).

183. *See* KY. REV. STAT. ANN. § 67C.113.

184. Rick McDonough and Sheldon S. Shafer, *Residents Favor Police Merger: Officers' Opinions Are Split, Survey Shows*, COURIER-J. (Louisville, Ky.), Sept. 15, 1998, at A1; *see also* Feasibility Study, *supra* note 27, at III-15. Of the personnel within the Louisville Police Department, 79.5% were in favor of a merger, and 84.5% of the personnel within Jefferson County Police Department were opposed. Feasibility Study, *supra* note 27, at III-15.

185. *See* Feasibility Study, *supra* note 27, at III-16 (stating 65.6% of Jefferson County Police officers in predominantly white Jefferson County believed the cost of running the department would rise if it were merged with the Louisville Police Department); *see also supra* note 181 and accompanying text.

186. *See, e.g.*, Jessie Halladay, *Newby Family Can Pursue Mattingly Suit; Undercover Officer Fatally Shot Teen*, COURIER-J. (Louisville, Ky.), Apr. 6, 2006 (describing the federal civil suit against a Louisville police officer who shot a teen after the criminal charge against the officer ended in acquittal).

187. *See* Feasibility Study, *supra* note 27, at IV-28 (addressing concerns that sovereign immunity might not apply after merger).

188. Editorial, *supra* note 181, at A10. In addition, the Jefferson County Fire Trustees Association was concerned with any threat that merger might pose to the present boundaries, political autonomy, and regulatory authority of the current fire districts. In particular, the Association feared that merger of the city and county fire districts would result in significant economic loss, given that county fire fighters receive higher salaries and benefits on average.

F. Balancing Competing Federal Interests: Special Considerations When Merging City and County School Districts

City and county school boards in Jefferson County were consolidated in the early 1970s as a result of a court-ordered school desegregation plan.[189] Thus, the recent city-county consolidation had no impact on the configuration of pre-existing school districts.[190]

On April 1, 1975, a State Board of Education plan for merging both the Louisville and Jefferson County school systems was adopted, resulting in a pattern of stubbornly slow desegregation over the following years.[191] At the time of that micro-level consolidation, community resistance to desegregation efforts in Jefferson County was "extremely intense, and this transition was one of the most difficult experienced by any city at the height of the desegregation era."[192] The consolidation of the city and county school districts also sparked a pattern of "white flight" and resistance.[193] As a result, many African-American parents with children in the public school system became discouraged about the possibilities for real integration and began to focus greater attention on issues concerning access to quality

189. *See, e.g.*, Robert A. Sedler, *Implementing* Brown*: A Lawyer's View*, 50 WAYNE L. REV. 835, 839–40 (2004) (commenting that Louisville "did not do much" after *Brown* in the way of desegregating their school district and chronicling the Sixth Circuit decision in 1973 which ruled that Louisville was "*de jure* segregated" and ordered desegregation across school district lines).

190. In a future article, I will consider the voting rights quandary that emerges when cities and counties merge their school districts as part of a school desegregation strategy as well as how jurisdictions should balance competing federal interests of equal significance, as many of the concerns raised in this Article also arise in the school consolidation context.

191. The court-ordered desegregation plan required cross-county busing. Newburg Area Council, Inc. v. Bd. of Educ. of Jefferson County, 489 F.2d 925, 932 (6th Cir. 1973). The plan set a range of 12% to 40% for the African-American population of elementary schools and 12.5% to 35% in middle and high schools. Cunningham v. Grayson, 541 F.2d 538, 540 (6th Cir. 1976). Under the plan, African-American students were to be bused up to nine of their twelve years in school while white students were bused up to two of their twelve years. *Id.* In 1978, a judge ended the court's active supervision of the desegregation plan but left much of the desegregation decree in place. Boyce F. Martin, Jr., *Fifty Years Later, It's Time to Mend* Brown*'s Broken Promise*, 2004 U. ILL. L. REV. 1203, 1213 (recalling that, "[i]n 1978, the Sixth Circuit ended its active supervision of the plan, but left some portions of the desegregation decree intact").

192. *See* Michal Kurlaender & John T. Yun, *Is Diversity a Compelling Educational Interest?: Evidence from Louisville*, *in* DIVERSITY CHALLENGED: EVIDENCE ON THE IMPACT OF AFFIRMATIVE ACTION 111, 116 (Gary Orfield ed., 2001).

193. *See* Gary Orfield & David Thronson, *Dismantling Desegregation: Uncertain Gains, Unexpected Costs*, 42 EMORY L.J. 759, 775 (1993) (describing the white flight as temporary with "extraordinary stability [being] achieved a few years" after the initial consolidation).

education.[194] Thus, white flight and fierce resistance to desegregation created an atmosphere in which many African-American parents were unwilling to sacrifice their concerns about access to the pursuit of greater desegregation beyond that which had already been achieved.[195]

Consolidation of school districts has taken place in jurisdictions around the country for the last several decades with little regard for the resulting impact that this change has on minority voting strength.[196] However, consolidation, even in this unique context, must account for any resulting impact on minority voting strength.

V. APPLICATION OF SECTION 2 OF THE VOTING RIGHTS ACT TO A CITY-COUNTY CONSOLIDATION

No court has ever addressed the question as to whether Section 2 of the Voting Rights Act extends to or how it would be applied to a city-county consolidation.[197] Thus, this Article

194. *Id.* at 786.

195. *See id.* at 786–87 (noting a 1991 survey showing strong opposition to ending a sixteen-year busing effort).

196. *See, e.g.*, J. Steven Farr & Mark Trachtenberg, *The Edgewood Drama: An Epic Quest for Education Equity*, 17 YALE L. & POL'Y REV. 607, 672 (1999) (outlining Texas Speaker of the House Gib Lewis's attempt to consolidate over 1000 Texas school districts into less than 200 for tax purposes, without considering voting interests).

197. This Article sets out a potential challenge to a city-county consolidation scheme utilizing Section 2's vote dilution standard. However, one might also conceivably weave in evidence of discriminatory intent, where available, to further bolster the strength of any such claim. I have not compiled sufficient evidence of discriminatory intent in the merger of the governing bodies of Louisville and Jefferson County to propose attachment of such a claim. Nonetheless, a brief discussion is warranted to discuss the type of evidence required to develop an intent-based claim.

Case law makes clear that while proof of racially discriminatory intent is not necessary to establish a Section 2 violation, such proof would be necessary to establish a constitutional violation. *See* Voinovich v. Quilter, 507 U.S. 146, 158–60 (1993) (reversing the district court's finding that race-conscious redistricting violated the Fifteenth Amendment because no discriminatory intent was established). Indeed, the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." *See id.*; S. REP. NO. 417 (1982), *reprinted in* 1982 U.S.C.A.A.N. 177, 207. Determining whether the adoption of a particular voting practice or system was motivated by invidious discriminatory purposes "'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" Rogers v. Lodge, 458 U.S. 613, 618 (1982) (quoting Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977)). Although a Fourteenth or Fifteenth Amendment challenge does not turn on disproportionate racial impact alone, "[t]he impact of the official action—whether it 'bears more heavily on one race than another'—may provide an important starting point" in this type of inquiry. *Arlington Heights*, 429 U.S. at 266.

In addition, where an intent-based claim is made, courts will generally consult a variety of evidentiary sources in order to determine whether the jurisdictions acted with discriminatory motive, including (1) "[t]he historical background of the decision;" (2) "[t]he specific sequence of events leading up to the challenged decision;" (3) "[d]epartures from

addresses a question of first impression by offering a theory as to how litigators might frame such a challenge, and how courts might assess this novel claim. Indeed, city-county consolidation, as an increasingly popular form of regionalization, presents a new type of voting rights claim, necessitating that we consider the multiple ways in which minority voting strength is restricted and limited.

A. Congressional Intent and City-County Consolidation

Federally-commissioned studies have long identified and recognized that consolidation and government reorganization are tools that can be manipulated and used to dilute African-American voting strength.[198] "[A]n 18-month study on the operation of the Voting Rights Act by the United States Civil Rights Commission, [indicated] that gerrymandering and boundary changes had become prime weapons for discriminating against [African-American] voters."[199] The Report indicated that "the passage of the Voting Rights Acts and the increased African-American registration that followed" had resulted in the development of new strategies aimed at preserving white control of the political process.[200] "These measures have taken the form of switching to at-large elections where [African-American] voting strength is concentrated in particular election districts . . . redrawing the lines of districts to divide concentrations of [African-American] voting strength," and

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the normal procedural sequence;" (4) substantive departures from "factors usually considered important by the decisionmaker," particularly where such factors favor an outcome contrary to the one reached; and (5) the legislative and administrative history and/or minutes of meetings or reports particularly where contemporary statements by members of the decisionmaking body are available. *Id.* at 267–68. In addition, courts will also consider (1) whether there is historical discrimination in the state; (2) whether the practice or decision at issue "bears more heavily on one race than another"; (3) whether the laws and practices in a jurisdiction, although neutral on their face, serve to maintain the status quo; (4) whether local officials are unresponsive and insensitive to the needs of the minority community; (5) whether the political process is not equally open to minorities, including the existence of discriminatory appointment policies and practices; and (6) whether socioeconomic conditions of the minority community are depressed. *Rogers*, 458 U.S. at 618, 625–27. Whether these *Arlington Heights* factors yield evidence of discriminatory purpose is key to any intent-based claim. Further, the evidence must show that the governmental entity "selected or reaffirmed a particular course of action at least in part 'because of,' and not merely 'in spite of,' its adverse effects upon" minority voters. Pers. Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979).

198. *See* Perkins v. Matthews, 400 U.S. 379, 389 (1971) (discussing the results of a study conducted by the Civil Rights Commission).

199. *Id.*

200. *Id.* (citations omitted).

"facilitating the consolidation of predominantly [African-American] and predominantly white counties."[201]

Congressional statements regarding the intended scope and breadth of the Voting Rights Act confirm that the Act was intended to reach practices such as city-county consolidation where the practice is used to restrict or dilute African-American voting power. One Congressman who had supported the 1965 Act observed:

> When I voted for the Voting Rights Act of 1965, I hoped that 5 years would be ample time. But resistance to progress has been more subtle and more effective than I thought possible. A whole arsenal of racist weapons has been perfected. Boundary lines have been gerrymandered, elections have been switched to an at-large basis, counties have been consolidated, elective offices have been abolished where blacks had a chance of winning, the appointment process has been substituted for the elective process, election officials have withheld the necessary information for voting or running for office, and both physical and economic intimidation have been employed.[202]

Thus, legislative history provides empirical evidence indicating that the city-county consolidations are the types of "devices" that were intended to fall within the broad reach of Section 2.[203]

B. Identifying the Status Quo: Examining Political Power in the City of Louisville Prior to Consolidation

In order to determine whether a consolidation of city and county governments has had any adverse impact on minority voting strength that might trigger liability under the Voting Rights Act, some assessment must be made of existing political power among the city's minority residents. Only through careful analysis of this preexisting system can one begin to gauge whether a consolidation has reduced the voting strength of the city's minority voters.

Demographics of the city and general levels of minority representation on the Louisville Board of Aldermen offer a starting point for this analysis. According to 2000 Census data, the City of Louisville had a total population that was

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201. *Id.*

202. *Id.* at 389 n.10 (quoting Hearings on Voting Rights Act Extension Before Subcomm. No. 5 of the H. Comm. on the Judiciary, 91st Cong. 3–4 (1969) (statement of Rep. McCulloch)).

203. *Id.*

approximately 33% African American.[204] The proportion of African Americans within the city's population had been somewhat commensurate with the level of minority representation on the Board of Aldermen, with African Americans holding approximately four of twelve seats on the Board.[205]

African-American political power in the City of Louisville had largely been realized through inroads that the minority community had made through the Louisville Board of Aldermen. The Board of Aldermen is a legislative body comprised of twelve members.[206] In part, because Louisville is a city with heavy Democratic registration rates, real competition for seats on the Board of Aldermen takes place district-wide at the primary level.[207] Because the majority of voters in the city are Democrats, the at-large general elections merely act as a "rubberstamp" for Democratic nominees.[208] A survey of voting patterns and electoral

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204. Census Bureau, American FactFinder, http://factfinder.census.gov/home/saff/main.html?_lang=en (search "Get a Fact Sheet for your community" for "Louisville city, Kentucky") (last visited Sept. 22, 2006).

205. *See* Shafer & Quinlan, *supra* note 164, at 1A (stating that four of twelve Aldermen are African-American). Although the Voting Rights Act does not require proportional representation, I highlight these figures to demonstrate that Louisville's Board of Aldermen was not itself vulnerable to a Section 2 vote dilution challenge under the Voting Rights Act. The Board of Aldermen provided minority voters in the City of Louisville a reasonable opportunity to elect minority candidates. African Americans represented slightly less than a third of the city's population and about a third of the seats on its governing body. *Cf.* 42 U.S.C. § 1973(b) (1988) ("[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."). The Assistant Attorney General for Civil Rights in the Carter Administration, Drew Days, stated: "[A]ssume . . . that no fairly drawn redistricting plan will result in minority control of one district because of dispersed minority residential patterns, for example. The department's response [is] not . . . to demand that the jurisdiction adopt a . . . gerrymandered districting plan to ensure proportional minority representation." Drew S. Days III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act*, *in* MINORITY VOTE DILUTION 167, 171 (Chandler Davidson ed., 1984).

206. *See* Sheldon S. Shafer, *Bentley Positioned to Lead Aldermen; 8 Colleagues Say They Plan to Back Her for Presidency*, COURIER-J. (Louisville, Ky.), Dec. 4, 2001, at B1.

207. Indeed, a majority of the electoral outcomes in Louisville elections over the last fifteen years reveals that the general elections merely reproduce the outcome of the primary elections. As a result of this political reality, the Republican Party is extremely weak in the City of Louisville. *See generally* Cheryl Devall, *Democratic Aldermen Retain a 16-year Reign on Board*, COURIER-J. (Louisville, Ky.), Nov. 9, 1983 (reporting on the sixteen-year hold enjoyed by Louisville Democrats on the Board of Aldermen and noting that the six Republican challengers trail in the polls after election day). On the rare occasion when the party endorses candidates during an election, such candidates are poorly supported and inadequately financed. Indeed, because the majority of Louisville's voters are Democrats and because campaigning for the Board of Aldermen is focused on the district level, the nominees of the Democratic Party invariably prevail in the citywide general elections.

208. *See supra* note 207.

outcomes illustrates that voting in the City of Louisville is racially polarized, with black candidates unlikely to garner any significant level of white crossover support. Prior to consolidation, four of the twelve wards in the city of Louisville were majority-minority in composition and African Americans had been consistently elected from only these districts over the last two decades. African-American efforts to run in any of the other eight wards in the City of Louisville had proven unsuccessful, in large part because white voters had historically been unwilling to support black candidates.

C. Vote Dilution Resulting from City-County Consolidation

Section 2 of the Voting Rights Act bars jurisdictions from imposing any "standard, practice or procedure" which "results in a denial or abridgement of the right . . . to vote on account of race or color."[209] Section 2 prohibits all forms of voting discrimination that "result in the denial of equal access to any phase of the electoral process for minority group members."[210] Further, Section 2 of the Voting Rights Act was designed to prohibit voting practices that "minimize or cancel out the voting strength and political effectiveness of minority groups."[211] In other words, Section 2 insures that minority voters are free from any electoral scheme "which operate[s], designedly or otherwise" to deny them the same opportunity to participate in all phases of the political process which other citizens enjoy.[212] In this Section, I consider application of the vote dilution principle to city-county consolidation while addressing the legal hurdles that must be overcome to develop a viable claim.

A violation of Section 2 is established where,

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[213]

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209. 42 U.S.C. § 1973(a) (2000).

210. S. REP. NO. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207.

211. *Id.* at 28.

212. *Id.*

213. 42 U.S.C. § 1973(b) (2000); *see also* France v. Pataki, 71 F. Supp. 2d 317, 322–23 (S.D.N.Y. 1999) (applying the statutory language).

In considering whether Section 2 should be used to challenge a particular city-county consolidation, the critical question that must be asked is whether the consolidation "results in members of a protected group having less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[214] Thus, the critical question is whether the city-county consolidation denies minority voters equal access to the political process.

A single court has entertained a challenge to a consolidated system under Section 2 of the Voting Rights Act, although no decision on the merits was rendered.[215] The Supreme Court has recognized that "manipulation of district lines can dilute the voting strength of politically cohesive minority group members . . . where a bloc-voting majority can routinely outvote them."[216] Nonetheless, Section 2 challenges to a jurisdiction's decision to consolidate its city and county governments have been rare, in part, because consolidations of large size and scale have generally been unsuccessful since the passage of the Act in 1965.[217] Moreover, the prevailing conceptions of second and third generation claims under the Voting Rights Act are too narrow in scope to reach consolidations.[218] However, increasing numbers of jurisdictions are now studying or proposing consolidation; thus, confronting the issue of the Voting Rights Act's application to consolidation can no longer be avoided.[219]

D. City of Richmond *Does Not Bar a Section 2 Claim*

Although there are no cases directly on point which address whether a city-county consolidation can violate the vote dilution provisions of the Voting Rights Act, existing case law with respect to annexations and deannexations presents challenges to framing and developing this kind of claim. Perhaps the most

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214. Thornburg v. Gingles, 478 U.S. 30, 63 (1986).

215. *See* Anthony v. Michigan, 35 F. Supp. 2d 989, 1006–07 (E.D. Mich. 1999) (plaintiff's challenge to merger of the Detroit Recorder's Court with the Wayne County Circuit Court unsuccessful under the Voting Rights Act for failure to satisfy one of the *Gingles* preconditions).

216. Johnson v. De Grandy, 512 U.S. 997, 1007 (1994).

217. *See* List on City-County Consolidation, *supra* note 12 (reflecting that since 1965, only 22 of 124 proposed consolidations have been approved by voters).

218. *See supra* notes 104–108, 111–114 and accompanying text (discussing the difficulty of classifying the effects of city-county consolidations on second and third generation claims).

219. Suzanne M. Leland & Kurt Thurmaier, *Introduction*, *in* CASE STUDIES OF CITY-COUNTY CONSOLIDATION, *supra* note 34, at 1 (citing reasons for renewed consideration in city-county consolidations).

difficult of the Supreme Court's rulings concerning the concept of regionalism is *City of Richmond v. United States*.[220] In *City of Richmond*, the Court approved annexations that lowered the percentage of minority voters within the city after the city changed from an at-large to ward method of election.[221] The Court concluded that even though the postannexation population of Richmond was lowered to 42% African-American as compared with 52% prior to annexation, the annexation did not deny or abridge the right to vote within the meaning of Section 5.[222] The Court reasoned that a different city council and an enlarged city were involved after the annexation and that the post-annexation voting scheme fairly reflected the strength of the black community as it existed in the postannexation context.[223] Opponents of the thesis outlined in this Article could argue that the *City of Richmond* ruling represents the Supreme Court's endorsement of the concept of granting jurisdictions flexibility and discretion with respect to government reorganization. However, I argue that the *City of Richmond* ruling does not prohibit challenges to voting practices that disturb the requirements of Section 2 of the Voting Rights Act. *City of Richmond* involved factual circumstances and legal analyses that are wholly distinguishable from the facts surrounding the consolidation of Louisville and Jefferson County.

The annexation challenged in *City of Richmond* can be distinguished in several respects from the city-county consolidation at issue in Louisville and Jefferson County. First, the *City of Richmond* case involved the retrogression provisions of Section 5 of the Voting Rights Act.[224] Analysis of this ruling and its progeny reveal no intent for *City of Richmond* to have application beyond the Section 5 context.[225] Indeed, there has been no Section 2 case in which *City of Richmond* has been cited as guiding authority on the interpretation, application, or reach of the results standard. In addition, Section 5 matters such as those at issue in *City of Richmond* establish an analytical

220. City of Richmond v. United States, 422 U.S. 358 (1975).

221. *Id.* at 378 (stating that annexation reducing the relative political strength of the minority race in the enlarged city as compared with what it was before the annexation is not a statutory violation as long as the post-annexation electoral system fairly recognizes the minority's political potential).

222. *Id.* at 372.

223. *Id.* at 371.

224. *Id.* at 367–79.

225. *Id.*; *see also* City of Port Arthur v. United States, 459 U.S. 159, 163–67 (1982) (applying *City of Richmond* to a Section 5 argument); City of Pleasant Grove v. United States, 479 U.S. 462, 467 (1987) (same).

framework quite distinct from that used in Section 2 matters. For example, in Section 5 cases such as *City of Richmond*, the defendants bear the burden of proving that a particular change to the electoral process will not have a retrogressive effect, while in Section 2 cases, plaintiffs bear the burden of proving that the defendants have violated the provisions of the Act.[226]

Second, case law makes clear the distinction between claims brought under Section 5, such as that brought in *City of Richmond* and claims brought under Section 2 of the Act.[227] In particular, the Supreme Court's most recent Section 5 ruling in *Georgia v. Ashcroft* highlights the differences between the two sections and makes clear that preclearance offers no protection to a proposed plan from a Section 2 claim.[228] Although Congress recently clarified normative principles that have long defined Section 5's retrogression standard that had been distorted by the Court's ruling in *Georgia v. Ashcroft*, the Court appropriately makes clear that it has consistently understood Section 2 to combat different evils and noted that Sections 2 and 5 "'differ in structure, purpose, and application.'"[229] Further, under the

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226. *See* City of Lockhart v. United States, 460 U.S. 125, 134 & n.10 (1983) (declaring a plan that merely preserves current minority voting strength is entitled to Section 5 preclearance); Voinovich v. Quilter, 507 U.S. 146, 157 (1993) (discussing the plaintiffs' burden of proving that a multimember district unconstitutionally operates to dilute or cancel the voting strength of racial or political elements); *Pleasant Grove*, 479 U.S. at 479 ("[The Court] normally presume[s] that state actors respect the guarantees of the Constitution and require[s] an individual who alleges otherwise to *prove* the existence of purposeful discrimination."); Georgia v. United States, 411 U.S. 526, 538 (1973) (declaring that in a declaratory judgment action under Section 5, the burden of proof is on the plaintiff).

227. *See* Georgia v. Ashcroft, 539 U.S. 461, 478 (2003) (stating that a violation of Section 2 is not an independent reason to deny preclearance under Section 5). Note that Congress recently reauthorized the expiring provisions of the Voting Rights Act. *See supra* note 86. As part of that reauthorization, Congress made significant revisions to the language of Section that clarify the retrogression standard in light of the negative impact of the *Georgia v. Ashcroft* ruling. In particular, the *Georgia* Court articulated that districts that provide minority voters an opportunity to elect candidates of choice in covered jurisdictions could be replaced by "influence districts." The Court defined influence districts as those "where minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." Congress's response to the *Georgia v. Ashcroft* ruling as reflected in the reauthorized bill helped restore important and long-standing features of Section 5 retrogression analysis.

228. *Id.* (citing Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 477 (1997)) (noting that a Section 2 vote dilution violation is not an independent reason to deny Section 5 preclearance, because that "would inevitably make compliance with [Section] 5 contingent on compliance with [Section] 2" and thereby replace Section 5 retrogression standards with those for Section 2).

229. *Id.* (quoting Holder v. Hall, 512 U.S. 874, 883 (1994) (plurality opinion)). Worth noting is the interesting scholarly debate that has emerged regarding Section 5's retrogression standard in the wake of the Supreme Court's ruling in *Georgia v. Ashcroft*. Some scholars, including Pamela Karlan, have argued that the Court significantly

Section 5 retrogression standard, a Section 2 violation is not itself sufficient to require a denial of preclearance under Section 5.[230] Equally so, preclearance does not insulate a plan from liability under Section 2.[231] Thus, a jurisdiction that adopts a plan deemed nonretrogressive for purposes of Section 5, might still be liable under the broad vote dilution provisions of Section 2. [232] Moreover, there was nothing barring the *City of Richmond* plaintiffs from challenging the annexation scheme that was at issue as violative of the results standard of Section 2 once they had exhausted their claims under Section 5.[233]

Third, the *City of Richmond* case predates both the 1982 amendments to the Voting Rights Act and *Thornburg v. Gingles*.[234] Prior to the 1982 amendments, the law was unclear as to whether discriminatory purpose was a required element for a claim of impermissible racial vote dilution.[235] Ultimately, the law was clarified due to a series of events triggered by the Court's 1980 ruling in *City of Mobile v. Bolden*,[236] which held that Section 2 and vote dilution claims raised under the Constitution require

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reduced the burden of proof placed on jurisdictions, thus weakening Section 5 as an effective statutory tool. *See* Pamela S. Karlan, Georgia v. Ashcroft *and the Retrogression of Retrogression*, 3 ELECTION L.J. 21, 22 (2004) (noting that the *Georgia* ruling "engages in the kind of noncomparative purpose analysis that *Bossier II* seemed to reject, in a fashion that dramatically undercuts the statutory burden of proof, a burden born of long, bitter, and all-too-recent experience with covered jurisdictions' indifference and hostility toward the political aspirations of minority voters"); *see also* Heather K. Gerken, *Lost in the Political Thicket: The Court, Election Law, and the Doctrinal Interregnum*, 153 U. PA. L. REV. 503, 531–39 (2004) (discussing new uncertainty in Voting Rights Act cases created by *Georgia v. Ashcroft*); Grant M. Hayden, *Refocusing on Race*, 73 GEO. WASH. L. REV. 1254, 1268–69 (2005) (describing the Court's new standards for identifying retrogression following *Georgia v. Ashcroft*).

230. *Georgia*, 539 U.S. at 478.

231. *See, e.g.*, Boddie v. City of Cleveland, Miss., 297 F. Supp. 2d 901, 908 (N.D. Miss 2004) ("Once a plan has been precleared pursuant to Section 5, however, such preclearance is no impediment to the imposition of proceedings in this court in order to challenge the plan under Section 2.").

232. *Id.* However, litigation resulting from the most recent 2000 decennial redistricting spawned litigation that some scholars have argued blurs the long-standing distinction between Section 2 and Section 5 of the Act. *See, e.g.*, Michael J. Pitts, Georgia v. Ashcroft*: It's the End of Section 5 As We Know It (And I Feel Fine)*, 32 PEPP. L. REV. 265, 300–01 (2005) (describing the changes recent litigation will create in future Section 5 litigation).

233. *See supra* text accompanying note 231.

234. City of Richmond v. United States, 422 U.S. 358 (1975); Thornburg v. Gingles, 478 U.S. 30 (1986).

235. *See* Taylor v. Haywood County, Tenn., 544 F. Supp. 1122, 1134 (W.D. Tenn. 1982) (noting earlier cases allowed plaintiffs to win upon a showing that minorities were denied equal access to the electoral process—a "results test"—and were not required to prove discriminatory purpose).

236. City of Mobile v. Bolden, 446 U.S. 55 (1980).

proof of invidious intent, not just harmful effects.[237] Thus, it was not until Congress amended Section 2 in 1982 that the law surrounding vote dilution claims was clarified to establish an effects-based standard.[238] Cases prior to the 1982 amendments, such as *City of Richmond*, must be analyzed in a context in which the doctrinal framework for analyzing vote dilution claims was both unsettled and unclear. Had the plaintiffs in *City of Richmond* had the benefit of the 1982 amendments at the time when they raised their claims, perhaps they would have pursued Section 2, as opposed to Section 5, as the preferred avenue to relief.

Nonetheless, *City of Richmond* has been cited broadly for the principle that jurisdictions must be given room to grow and expand through government reorganization, annexation, and so forth.[239] However, where those efforts to grow and expand invoke strong discriminatory purpose and result evidence, the voting practice becomes subject to scrutiny under Section 2 of the Voting Rights Act.[240] In the consolidation model discussed in this Article, the justifications advanced by proponents of this city-county consolidation have proven both capricious and tenuous, particularly in light of the fact that a preexisting City-County Compact has permitted growth and the development of effective

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237. *Taylor*, 544 F. Supp. at 1134 (declaring that the amendment to the language of Section 2 represented the Congressional response to the United States Supreme Court's 1980 decision in *City of Mobile v. Bolden*). In *Bolden*, a sharply divided Court rejected a challenge to at-large elections in Mobile, Alabama. *Bolden*, 446 U.S. at 58, 61–62, 66, 80. The plurality held that proof of discriminatory purpose is required to establish both a statutory violation of Section 2 of the Voting Rights Act and a constitutional violation of the Fourteenth and Fifteenth Amendments. *Id.* at 58, 62, 66.

238. *Taylor*, 544 F. Supp. at 1134 (construing the 1982 amendments to Section 2 of the Voting Rights Act to require only a discriminatory effect on minority voting power based on the totality of the circumstances).

239. *See, e.g.*, Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 330 (2000). *But see* City of Pleasant Grove v. United States, 479 U.S. 462 (1987). The City of Pleasant Grove, Alabama, sought preclearance under Section 5 of the VRA of two annexations: The first involving a 40-acre parcel of land that included "an extended white family" and the second involving a 450-acre uninhabited parcel of land. *Id.* at 465–66. At the time the annexations were put into effect, there were no registered black voters in Pleasant Grove, the covered jurisdiction. *Id.* at 470–71. Thus, officials on behalf of Pleasant Grove argued that because there were no black voters to begin with, the city could not have acted with a retrogressive purpose because the annexations in question could not dilute minority voting strength when there were no minority voters to begin with. *Id.* This case seems to suggest that the Court will examine annexations with more exacting scrutiny when there is evidence of retrogressive purpose. However, Section 5 also prohibits changes that result in a retrogressive effect.

240. *See, e.g.*, *Taylor*, 544 F. Supp. at 1134 (granting a preliminary injunction because the evidence was clear that the "plaintiff [had] a substantial chance of success on the merits under either the intent test of the Fourteenth and Fifteenth Amendments or the results test of the Voting Rights Act").

economic policy in the region for almost two decades.[241] Finally, the consolidation that has been authorized in Jefferson County does not resemble the broad annexation at issue in *City of Richmond*. This consolidation abolished the local government structure in the municipality containing the largest percentage of African Americans while allowing the governing structures of the remaining majority white municipalities to remain intact.[242] These facts call for a type of results analysis that cannot be adequately provided for by the one-dimensional annexation claim at issue in *City of Richmond*.

E. Establishing the Appropriate Frame of Reference in a Consolidation Challenge

In *Rural West Tennessee African-American Affairs Council v. Sundquist*, the Sixth Circuit upheld a district court ruling which found that Tennessee's 1994 reapportionment of its State House districts violated Section 2 of the Act.[243] The *Sundquist* ruling helped refine the elements required to demonstrate racial bloc voting in a Section 2 cause of action.[244] In so doing, the court established that analysis of black-white contests are more probative than other contests in establishing racial bloc voting.[245]

More importantly, the *Sundquist* court indicates that there is flexibility in establishing a proper frame of reference for analyzing Section 2 claims.[246] Thus, the circuit court held "that neither over-proportionality in one area of the State nor

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241. *See* Savitch & Vogel, *supra* note 137, at 201 (noting that the Compact began in1985).

242. *See* Savitch & Vogel, *supra* note 24, at 769–70 (discussing the cut in African-American population from about 33% premerger to 15% afterward and the accompanying weakening of political power).

243. Rural W. Tenn. African-Am. Affairs Council v. Sundquist, 209 F.3d 835, 844 (6th Cir. 2000) (affirming the trial court's ruling that a Section 2 violation had been proven given the voting demographics and results of elections).

244. *See id.* at 840 (reasoning that white-white elections should not be weighted equally to black-white elections when attempting to determine if "'minority-preferred candidates, whatever their race, usually lose'" (quoting Cousin v. Sundquist, 145 F.3d 818, 825 (6th Cir. 1998))).

245. *See, e.g.*, Clarke v. City of Cincinnati, 40 F.3d 807, 812 (6th Cir. 1994) (indicating the court's willingness to focus on the ability of African Americans to elect other African Americans when examining racial bloc voting); Nipper v. Smith, 39 F.3d 1494, 1539 (11th Cir. 1994) (holding that white-white elections may be considered, but are less probative than those involving African-American candidates).

246. Johnson v. De Grandy, 512 U.S. 997, 1022 (1994) (stating that "we have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on the appropriate geographical scope for analyzing the alleged § 2 violation and devising its remedy"), *quoted in Sundquist*, 209 F.3d at 843.

substantial proportionality in the State as a whole should ordinarily be used to offset a problem of vote dilution in one discrete area of the State."[247] This standard will be particularly useful in a case where the Section 2 challenge is being framed with respect to African-American voters in a discrete region (e.g. the City of Louisville). *Sundquist* can be used to argue that the appropriate frame of reference in a Section 2 consolidation challenge must be African-American voters in the discrete region of the City of Louisville, as opposed to looking at whether the proposed districting scheme of the Greater Louisville Metropolitan Council fairly reflects the proportion of minority voters in the new county-wide population. Indeed, some opponents to my argument will claim that so long as the new council fairly reflects the proportion of African-American voting strength county-wide, then there can be no Section 2 claim.[248] However, extending the court's logic in the *Sundquist* case suggests that proportionality in the consolidated city-county system, if any, would not offset any vote dilution claim that exists with respect to blacks in the City of Louisville.[249]

F. The Compactness Prong Does Not Bar a Challenge to City-County Consolidation

In *Thornburg v. Gingles*, the Supreme Court set forth three preconditions that must be satisfied in order to raise a viable Section 2 claim.[250] In this section, I will discuss application of the first *Gingles* precondition, what I will call the compactness prong, as this factor presents the greatest hurdle in developing a challenge to city-county consolidation. The compactness prong states that "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[251]

Application of the compactness prong to a claim involving a city-county consolidation must be done in a manner that is analytically distinct from the more generic brand of Section 2

247. *Sundquist*, 209 F.3d at 843.

248. *See, e.g.*, *De Grandy*, 512 U.S. at 1021–22 (addressing differing views on the frame of reference that should be applied when examining proportionality of minority voters).

249. *See Sundquist*, 209 F.3d at 843–44 (illustrating a dilution of minority voting rights in one area of the state is not offset by strengthening minority voting rights in a different part of the state).

250. *See* Thornburg v. Gingles, 478 U.S. 30, 50–51 (1986); *see also Sundquist*, 209 F.3d at 838–39 (detailing the three preconditions created by the Supreme Court in *Gingles*).

251. *Gingles*, 478 U.S. at 50.

cases involving challenges to single-member, multi-member, or at-large districting schemes.[252] In the majority of such claims brought under Section 2, the purpose of the compactness prong is to determine whether a remedy is available and whether there is the "possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice."[253] For example, in a viable challenge to an at-large election scheme, the compactness prong can be addressed by demonstrating that a remedy exists.[254] Such a remedy might entail the creation of single-member districts which can generally be constructed if minority voters reside in geographically compact sections of the region under dispute.[255]

However, application of the compactness prong to a city-county consolidation is not for the purposes of determining whether the single-member districting scheme devised for the Greater Louisville Metropolitan Council dilutes minority voting strength. Rather, the purpose of the first *Gingles* factor is to determine whether the challenged voting practice or procedure, which in this case is the consolidation of the city and county governments and the subsequent elimination of the Louisville City Council, is the cause of the alleged vote dilution and whether there is an available and identifiable remedy.[256] Analysis

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252. In challenges to single-member, multimember, or at-large districting schemes, plaintiffs satisfy the first *Gingles* precondition by demonstrating that "the African-American voting age population in a judicial district [would] constitute more than 50% of the population of at least one single-member district." Mallory v. Ohio, 38 F. Supp. 2d 525, 569 (S.D. Ohio 1997); *see also* Clarke v. City of Cincinnati, 40 F.3d 807, 811 (6th Cir. 1994) (identifying the *Gingles* preconditions). In addition, evidence is also presented that would help "establish that the minority population is geographically compact enough to be included within the same hypothetical single-member district." *Mallory*, 38 F. Supp. 2d at 569 (citing Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386, 1398 (S.D. Miss. 1992)).

253. *De Grandy*, 512 U.S. at 1008.

254. *See Mallory*, 38 F. Supp. 2d at 569 (stating the first prong of *Gingles* is satisfied when a group of minority voters lives close enough together to make up 50% of the voting population in a hypothetical single-member district); *see also Gingles*, 478 U.S. at 50 n.17 (addressing the necessity of an injury in order to bring a claim under Section 2 of the Voting Rights Act).

255. *See* Rogers v. Lodge, 458 U.S. 613, 616 (1982) (suggesting minority voting power can be enhanced by replacing at-large, multimember districts with single-member districts).

256. *See Gingles*, 478 U.S. at 50 n.17; *see also* Nipper v. Smith, 39 F.3d 1494, 1530 (11th Cir. 1994) (noting that a district court must determine as part of the *Gingles* threshold inquiry whether it can fashion a permissible remedy in the particular context of the challenged system); Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1988) (noting the purpose behind the compactness inquiry is to determine whether minority voters can claim injury, which is directly connected to whether the minority group holds "'the *potential* to elect representatives in the absence of the challenged structure or practice'" (quoting *Gingles*, 478 U.S. at 50 n.17)); S. REP. NO. 97-417, at 5–6 (1982),

of the consolidation examined in this Article demonstrates that a remedy does exist as reasonably compact single-member districts can be drawn within the City of Louisville that can provide, and have provided in the past, a reasonable opportunity for the minority community to elect candidates of choice.

Under the preconsolidated system, the City of Louisville was governed by a twelve-member Board of Aldermen that helped provide a reasonable level of African-American electoral opportunity during the two decades preceding the merger.[257] To satisfy a showing of compactness in the context of the challenged city-county consolidation, one would need to show whether some remedy provides African Americans with a fair opportunity to elect representatives of their choice.[258] I explore the universe of possible remedies to the resulting dilution brought about through consolidation in Section V.

In framing a Section 2 claim against any city-county consolidation, it is important to note that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim."[259] An inflexible rule would run counter to the textual command of Section 2: that the presence or absence of a violation be assessed "based on the totality of circumstances."[260] "The need for such 'totality' review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power."[261] Experience has shown that jurisdictions have "substantially moved from direct, over[t] impediments to the right to vote to more sophisticated devices that dilute minority voting strength."[262] Courts have recognized

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reprinted in 1982 U.S.C.C.A.N. 177, 182–83 (noting that if a contested electoral mechanism operates to dilute a minority group's voting power, the Voting Rights Act vests the court with the equity power to shape a remedy which will ensure members of the protected class equal access to the political process). *See generally* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.–C.L. L. REV. 173, 202 (1989) ("To the extent that courts have read *Gingles* to elevate the ability to create a district with a majority-black electorate into a threshold requirement for establishing liability in all vote dilution litigation, they have improperly applied one particular theory of liability to other distinct types of vote dilution.").

257. *See generally supra* notes 153–159 (discussing the impact on African-American politics post-consolidation).

258. *See supra* notes 252–256 (examining the compactness prong under *Gingles*).

259. Voinovich v. Quilter, 507 U.S. 146, 158 (1993).

260. 42 U.S.C. § 1973(b) (2000).

261. Johnson v. De Grandy, 512 U.S. 997, 1018 (1994).

262. S. REP. NO. 97-417, at 10 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 187; *cf. also* Thornburg v. Gingles, 478 U.S. 30, 46 (1986) ("[T]he results test does not assume the existence of racial bloc voting; plaintiffs must prove it."); Growe v. Emison, 507 U.S. 25, 41 (1993) (agreeing that courts are precluded from assuming minority bloc voting).

that "[a]s facts beyond the ambit of the three *Gingles* factors loom correspondingly larger, factfinders cannot rest uncritically on assumptions about the force of the *Gingles* factors in pointing to dilution."[263]

In *Dillard v. Baldwin County Board of Education*, the court adopted an expansive view of the compactness prong finding that "the plaintiffs' lay testimony revealed that there is a strong sense of community among black neighborhoods in Baldwin County, and that blacks throughout the county are generally unified behind and strongly support one political organization, . . . a black state political organization."[264] This testimony, demonstrating a strong sense of community among the county's black residents, was used to satisfy the compactness prong.[265] The *Dillard* court was focused less on shape and physical attributes of the district and more focused on the proposed plan's ability to connect voters who share a community of interest.[266] Extending the *Dillard* court's expansive reading of the compactness prong could assist efforts to challenge a city-county consolidation scheme by illustrating that the thrust of the compactness prong involves an inquiry that extends beyond physical shape and attributes of districts. By challenging the prevailing limited reading of the compactness prong, Section 2 can be used to reach consolidations and other potential forms of voting discrimination that have continued unchecked.

G. Viable Challenge Also Requires Evidence of Political Cohesion

Beyond the compactness prong, a viable Section 2 challenge to a city-county consolidation would also need to provide evidence of the remaining two *Gingles* preconditions: a politically cohesive minority group and evidence of racial bloc voting.[267]

Political cohesiveness can be established by evidence of racial bloc voting. The purpose of inquiring into the existence of racially polarized voting is two-fold: to ascertain whether minority group members constitute a politically cohesive unit

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263. *De Grandy*, 512 U.S. at 1013.

264. Dillard v. Baldwin County Bd. of Educ., 686 F. Supp. 1459, 1465 (M.D. Ala. 1988).

265. *Id.* at 1465–66.

266. *See id.* (remarking that a sense of community among voters is more important than whether the shape of a proposed district is aesthetically pleasing).

267. *Gingles*, 478 U.S. at 51. The third precondition specifically states that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate." *Id.* (citation omitted).

and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates. "Thus, the question whether a given district experiences legally significant racially polarized voting requires discrete inquiries into minority and white voting practices."[268]

The second *Gingles* precondition requires evidence showing that the minority community within the challenged jurisdiction is politically cohesive.[269] Thus, a meritorious challenge to city-county consolidation would also include evidence of strong cohesion. "'Political cohesion' is generally when the members of a protected minority group tend to vote . . . consistently or regularly . . . [for] a 'clear candidate of choice.'"[270] Political cohesion can be evidenced through both statistical analysis of voting patterns and through anecdotal evidence provided by local individuals who have a personal knowledge of electoral patterns and trends.[271]

Anecdotal testimony proffered by community leaders confirms that there is generally a strong consensus regarding the candidate of choice among African-American voters in Louisville.[272] Expert analysis of endogenous and exogenous elections in the City of Louisville would likely confirm strong political cohesion among African-American voters.[273] There is also a consensus regarding preferred policy positions as evidenced by the nearly unanimous opposition on the part of African Americans to the November 2000 merger referendum.[274]

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268. *Id.* at 56.

269. *Id.* at 51; Rural W. Tenn. African-Am. Affairs Council v. Sundquist, 209 F.3d 835, 839 (6th Cir. 2000).

270. Mallory v. Ohio, 38 F. Supp. 2d 525, 537 (E.D. Ohio 1997) (citations omitted); *see also* Allan J. Lichtman & J. Gerald Hebert, *A General Theory of Vote Dilution*, 6 LA RAZA L.J. 1, 5 (1993) (drawing upon the second prong in *Gingles* to conclude that "plaintiffs need to demonstrate a usual, but not a uniform, pattern of minority cohesion in past elections").

271. *See, e.g.*, *Dillard*, 686 F. Supp. at 1464–65 (recognizing the plaintiff's statistical and lay witness testimony evidence supported a finding of political cohesion).

272. *See generally supra* notes 133–136, 141–148.

273. *Gingles*, 478 U.S. at 52–53 & n.20 (indicating that both extreme case analysis and bivariate ecological regression analysis have been recognized as standard and acceptable methods of determining political cohesion); *see also* Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496, 501–02 (5th Cir. 1987) (emphasizing that political cohesion under *Gingles* can be shown where a "significant number" of minority voters prefer the same candidate, and suggesting that data showing that anywhere from 49% to 67% of the members of a minority group preferred the same candidate established cohesion); Clarke v. City of Cincinnati, 1993 WL 761489, at *8 (S.D. Ohio 1993) (noting that "[t]he extreme case analysis also called the homogeneous precinct analysis and bivariate regression analysis are accepted methods of analyzing racial voting patterns").

274. *See generally supra* Part III.C (summarizing African-American opposition to consolidation).

H. Viable Claim Requires Evidence of Racial Bloc Voting

An examination aimed at determining whether racially polarized voting is present looks to the degree to which African-American and white voters, as groups, vote differently.[275] The analysis of racial bloc voting addresses the final two *Gingles* preconditions: the "political cohesion" of the minority group and the degree of white bloc voting.[276] Racial bloc voting can be demonstrated through statistical evidence of racial voting patterns.[277] Racial bloc voting patterns would mean that African-American candidates are unlikely to receive white crossover votes necessary to retain meaningful and long-standing electoral opportunity under the consolidated system.

I. Contextualizing the Analysis of City-County Consolidations

In analyzing whether a particular practice violates Section 2, the case law is clear that satisfaction of the three *Gingles* preconditions is a necessary prerequisite, but the inquiry does not stop there.[278] Challenges raised to city-county consolidations must also look more broadly to the "totality of circumstances" surrounding the adoption of the consolidation.[279] The Senate factors are aimed at looking beyond the particular voting practice at issue in order to explore the full extent of the barriers that stand in the way of minority voter access to the political process.[280] Here, the Senate Report accompanying the 1982 extension of the Voting Rights Act provides guidance regarding the proof required to establish a violation under Section 2.[281] The Senate factors include:

> (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the

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275. *See* Mallory v. Ohio, 173 F.3d 377, 384 (6th Cir. 1999) (reasoning the third precondition of *Gingles* is not met unless majority bloc voting prevents minorities from electing candidates).

276. *Id.*

277. *See id.* at 383–84 (finding the lack of statistical evidence of racial bloc voting as justification for ruling that the class had not met its burden); *see also* LULAC v. Clements, 986 F.2d 728, 788 (5th Cir. 1993) (relying on both statistical analysis and anecdotal evidence to find political cohesion among minority voters).

278. Johnson v. De Grandy, 512 U.S. 997, 1011 (1994) (declaring courts must consider circumstances in addition to the three preconditions and that existence of the preconditions does not by itself constitute dilution of voting power).

279. Clarke v. City of Cincinnati, 40 F.3d 807, 811 (6th Cir. 1994) (noting that after plaintiffs have satisfied the three *Gingles* preconditions, the courts court proceeds to the totality of the circumstances analysis).

280. Thornburg v. Gingles, 478 U.S. 30, 43–46 (1986).

281. S. REP. NO. 97-417 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177.

> members of the minority group to register, to vote, or otherwise to participate in the democratic process; (2) the extent to which voting . . . is racially polarized; (3) the extent to which [the jurisdiction uses] . . . voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) [the existence of any] . . . exclusionary candidate slating process . . . ; (5) the extent to which [minority voters] . . . 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 . . . racial appeals; and (7) the extent [of minority electoral success].[282]

The Senate also recognized that additional factors may, in some cases, provide probative value as part of plaintiffs' evidence to establish a Section 2 violation, including "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 consideration of "whether the policy underlying . . . voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous."[283] The Senate Report states that "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution."[284] Indeed, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."[285] Instead, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'"[286] Any Section 2 challenge to a city-county consolidation would thus be bolstered by stark evidence of a number of the Senate factors.

1. History of Official Discrimination. An extensive history of discrimination would suggest that a contested electoral practice, such as a consolidation, would have a particularly egregious impact on minority voting opportunities. Indeed, Kentucky has a deeply rooted history of official discrimination against its African-American citizens.[287] Indeed, a pervasive

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282. *Id.* at 28–29 (footnotes omitted).

283. *Id.* at 29 (footnotes omitted).

284. *Id.*

285. *Id.*

286. *Id.* at 30 (quoting White v. Regester, 412 U.S. 755, 769–70 (1993)).

287. *See generally* GEORGE C. WRIGHT, RACIAL VIOLENCE IN KENTUCKY 1865–1940 (1996).

pattern of discrimination by state, county, and local officials stretches back as far as the mid-nineteenth century.[288] Notwithstanding the removal of many formal barriers to democratic participation, the residual effect of past discrimination coupled with persistent racial bloc voting patterns and depressed voter registration rates indicate that African Americans still have less opportunity than other members of the electorate to participate in the electoral process.[289] Thus, the purpose of examining this history is to help understand how consolidation might interact with other patterns of pervasive discrimination to place minority voters in a position of exacerbated political disadvantage.[290]

Throughout the latter half of the nineteenth century, many cities throughout the Commonwealth of Kentucky amended their local charters to require payment of a poll tax before voting.[291] In reaction to adoption of the Fifteenth Amendment, some cities throughout Kentucky such as Lexington and Louisville moved the elections for local offices to earlier dates to create confusion and lengthened the terms of office to help ensure and protect the offices of white incumbents.[292]

African Americans were not welcomed as candidates for local or state offices.[293] A.D. Woodford, the first African American elected to the Louisville School Board in 1958, indicated that many of the political parties within Jefferson County used intimidation and other exclusionary devices as vehicles for influencing the outcomes of local elections while locking African-American candidates out.[294] White-controlled political parties

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288. *Id.*

289. *Id.*

290. *See generally* S. REP. NO. 97–417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206–07 (noting several factors that may indicate a barrier to the minority's ability to elect candidates of choice); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1260–62 (1989) (emphasizing the importance of various factors when attempting to prove minority vote dilution).

291. *See* KY. COMM'N ON HUMAN RIGHTS, KENTUCKY'S BLACK HERITAGE: THE ROLE OF THE BLACK PEOPLE IN THE HISTORY OF KENTUCKY FROM PIONEER DAYS TO THE PRESENT 46 (1971). Although poll taxes were used in many local communities to keep African Americans from voting, other illegal restrictions such as grandfather clauses and literacy tests were not widely used throughout the Commonwealth of Kentucky. *Id.* A number of historians have theorized that this was probably because there were not sufficient numbers of African-American voters who could coalesce to pose a significant threat to white lawmakers who were already in office.

292. *Id.*

293. *See generally* Interview with A.D. Woodford, Former Member, Louisville Sch. Bd., in Louisville, Ky. (Mar. 12, 2004) (discussing the political climate for African-American candidates in the 1950s).

294. *Id.*

would instruct white poll workers to tell white voters which candidates they should vote for.[295] As a result of the complete exclusion of African Americans from the activities of the dominant political parties, African Americans in Jefferson County formed the short-lived Lincoln Independent Party.[296] The party aimed to address the lack of African-American representation in government and the exclusion of African Americans from positions of employment with the local government.[297] Woodford recalled that in an effort to extinguish any influence the organization might have on electoral outcomes, many white "poll workers [during this time] threw ballots from [majority] Black precincts in the Ohio River."[298]

Beyond the electoral arena, there is also evidence of a number of instances of official discrimination throughout the Commonwealth of Kentucky and within Jefferson County. The Day Law, which was passed in 1904, banned desegregated private education in Kentucky and remained in effect until 1950.[299] Public schools in Jefferson County maintained a policy of racial segregation until the late 1970s.[300]

The Civil Service Board refused to change its discriminatory hiring practices for years until a newly elected Mayor Andrew Broaddus declared that all civil service jobs in the city would be filled without regard to race.[301] The University of Louisville remained segregated until 1951.[302] Throughout the 1960s, civil

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295. *Id.*

296. GEORGE C. WRIGHT, LIFE BEHIND A VEIL, BLACKS IN LOUISVILLE, KENTUCKY 1865–1930, at 246, 249–50 (1985) (recounting the political struggles and political "[i]nsurgency" experienced by blacks in the first half of the twentieth century).

297. *Id.* at 250 (discussing the platform adopted by members of the Lincoln Independent Party).

298. Interview with A.D. Woodford, *supra* note 293; *see also* WRIGHT, *supra* note 296, at 246 (noting that though black candidates were "easily defeated," the Lincoln Independent Party's ability to organize blacks forced city officials to be "more responsive" to their concerns).

299. *See* JOHN A. HARDIN, FIFTY YEARS OF SEGREGATION: BLACK HIGHER EDUCATION IN KENTUCKY, 1904–1954, at 11–13, 100–01 (1997) (narrating the history of segregation in Kentucky's public and private schools).

300. *See Timeline: Desegregation in Jefferson County Public Schools*, COURIER-J. (Louisville, Ky.), Sept. 4, 2005, *available at* http://www.courier-journal.com/apps/pbcs.dll/article?AID=2005509040428 (reciting the major events involving the desegregation of public schools in Jefferson County from the early 1970s); *see also Trouble in Schools: Will It Get Worse?*, U.S. NEWS & WORLD REP., Sept. 22, 1975, at 17 (discussing violent antibusing protests and Louisville in 1975).

301. *See* Bruce Tyler, Kentucky Desegregation: An Abstract of Events, http://www.louisville.edu/a-s/history/tyler/kentuckyriots.html (last visited Sept. 22, 2006) (digesting desegregation in Louisville beginning in 1941).

302. The University of Louisville, A Brief History of the University of Louisville, http://www.louisville.edu/about/history.html (last visited Sept. 22, 2006) (detailing the

rights organizations called on the state General Assembly to pass a public accommodations bill and civil rights laws to prohibit widespread discrimination in public accommodations and segregation.[303] In 1966, after strong resistance, the General Assembly responded by passing a civil rights ordinance that prohibited discrimination in employment and public accommodations.[304]

Jefferson County has also been the site of a number of intense battles over housing segregation.[305] One of Louisville's white community leaders, Anne Braden, was involved in a local struggle aimed at dismantling de facto and de jure housing segregation in Louisville.[306] In 1954, she bought a house in a white suburb of Louisville for Andrew Wade and his wife, an African-American couple, which resulted in violent acts of white resistance.[307] A cross was burned nearby, shots were fired into it, and finally, the Wade home was bombed.[308] Further illustrating the persisting problem of housing segregation within Jefferson County, a federal district court recently indicated that the county's current "racial housing patterns are probably a complex result of pre-1917 racial zoning restrictions, pre-*Shelley* racially restrictive covenants, decisions about geographic placement of public housing, 'white flight' after the school's initial 1956 desegregation, numerous socio-economic factors, and personal

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history of the university, including the desegregation movement that followed World War II).

303. *See generally* 2 GEORGE C. WRIGHT, A HISTORY OF BLACKS IN KENTUCKY: IN PURSUIT OF EQUALITY, 1890–1980, at 218–19 (1992) (explaining that members of the civil rights movement in Kentucky recognized the importance of the state legislature in desegregating all parts of Kentucky and acted accordingly).

304. Kentucky's African-American Heritage: A Timeline, http://history.ky.gov/Teachers/AATIMELINE.pdf [hereinafter Heritage Timeline] (last visited Sept. 22, 2006).

305. *See, e.g.*, *id.* (noting an NAACP lawsuit in 1955 regarding segregation in Louisville municipal housing and various demonstrations in Louisville calling for fair housing); *see also, e.g.*, WRIGHT, *supra* note 303, at 219–21 (discussing the challenges that blacks faced when buying homes in white neighborhoods due to unspoken restrictive covenants).

306. Sheryl Edelen, *State Marker to Note 1954 Racial Attack: Black Family's House in Shively Was Bombed*, COURIER-J. (Louisville, Ky.), June 25, 2004, at B1 (describing the events that took place shortly after Anne Braden bought a home for Andrew Wade and his wife in a white neighborhood); Kentucky Educational Television, A Kentucky Civil Rights Timeline, http://www.ket.org/civilrights/timeline.htm [hereinafter Civil Rights Timeline] (last visited Sept. 22, 2006).

307. *See* Edelen, *supra* note 306; Civil Rights Timeline, *supra* note 306.

308. Edelen, *supra* note 306.

choice."[309] Housing segregation persisted within the City of Louisville until close to the 1970s.[310]

Most recently, in *Batson v. Kentucky*, the Court found that unconstitutional selection procedures that purposefully exclude African-American persons from juries, as those employed by the Circuit Court of Jefferson County, violate the Equal Protection clause and undermine public confidence in the fairness of the state's justice system.[311] In addition to the entrenched history of official discrimination, there was also stark evidence of local discrimination by way of private clubs with exclusive membership rules. One of the key consolidation spokespersons, Douglas Cobb, was both a former head of the local chamber of commerce and a visible and active member of Pendennis Club, a local institution with a history of excluding African Americans from its membership.[312]

2. Unusually Large Election Districts, Majority Vote Requirements, Anti-Single Shot Provisions, or Other Voting Practices that Enhance Opportunity for Discrimination. Both the Louisville Board of Aldermen and the Jefferson County Fiscal Court have been elected through hybrid systems that include district-wide primaries and at-large general elections.[313] However, the at-large system had not been perceived as particularly threatening to African Americans in the area because there had been few occasions in which viable white candidates had mounted challenges against African-American incumbents in the city's majority-minority wards.

3. Socio-Economic Discrimination. The fifth Senate factor requires an examination into "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

309. Hampton v. Jefferson County Bd. of Educ., 102 F. Supp. 2d 358, 373 (W.D. Ky. 2000).

310. In 1967, the "Louisville Board of Aldermen passed a broad, enforceable ordinance against discrimination in housing." Heritage Timeline, *supra* note 304.

311. Batson v. Kentucky, 476 U.S. 79, 84–87 (1986) (reaffirming the principle that purposeful or deliberate exclusion of African Americans from participation as jurors based on race violates the Equal Protection Clause).

312. *Id.* (noting the outrage of the African-American community after Douglas Cobb, President and CEO of the local chamber of commerce, hosted a luncheon at the Pendennis Club).

313. *See* KY. REV. STAT. ANN. § 83.440 (LexisNexis 1995) (describing the election process for the Board of Alderman as at-large, but once elected each member represents a particular ward of the city); KY. REV. STAT. ANN. § 67.050 (LexisNexis 2004) (indicating the same system of at-large election but representative governing for fiscal court judges).

the political process."[314] There is overwhelming evidence that demonstrates that African Americans in the City of Louisville suffer from more depressed socio-economic conditions than whites thus, resulting in lower minority voter participation rates.

Analysis of 1990 Census survey data reveals that African Americans continue to suffer significant socio-economic disparities resulting from past discrimination. These disparities are significant generally because they evidence factors which inhibit levels of political participation among minority voters.[315] Indeed, courts have found that socio-economic status is one factor which impacts the possibility for effective political participation. Courts generally regard evidence of socio-economic disparities between minority citizens and whites as "evidence of a Voting Rights Act violation [where] it is coupled with proof that participation in the political process is in fact depressed among minority citizens."[316]

A review of economic variables reveals that African Americans suffer from tremendous economic disparities with regard to income and poverty on both the city and county levels. According to 1990 Census data, per capita income for African Americans in the City of Louisville was $7,022 compared to $13,532 for whites.[317] County-wide, per capita income for African Americans was $8,072 compared to $15,324 for whites.[318] Nine percent of African-American families are below the poverty line compared to three percent of white families in the City of Louisville.[319] Similarly, 8% of African-American families are

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314. S. REP. NO. 97-417, at 28–29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205–06.

315. *See* Census Bureau, American FactFinder, 1990 Census of Population and Housing, http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_1990_STF3_&-CONTEXT=dt&-mt_name=DEC_1990_STF3_P115A&-tree_id=101&-redoLog=false&-all_geo_types=N&-caller=geoselect&-geo_id=01000US&-search_results=16000US211230&-format=&-lang=en (last visited Sept. 22, 2006).

316. Johnson v. Mortham, 926 F. Supp. 1460, 1477 (N.D. Fla. 1996) (explaining that a Voting Rights Act violation requires depressed participation among minority citizens because the Act and the Fifteenth Amendment apply to racial discrimination and not discrimination based on socioeconomic factors); *see also, e.g.*, Rural W. Tenn. African-Am. Affairs Council v. Sundquist, 209 F.3d 835, 842 (6th Cir. 2000) (affirming district court finding that "as a result of . . . ongoing violations, African-Americans had suffered disadvantages in such areas as education, employment, and health").

317. Census Bureau, American FactFinder, 1990 Census of Population and Housing http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_1990_STF3_&-CONTEXT=dt&-mt_name=DEC_1990_STF3_P115A&-tree_id=101&-all_geo_types=N&-geo_id=05000US21111&-geo_id=16000US211230&-search_results=16000US211230&-format=&-_lang=en (last visited Sept. 22, 2006).

318. *Id.*

319. Census Bureau, American FactFinder, 1990 Census of Population and Housing http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_1990_

below the poverty line compared to 2% of white families county-wide.[320] Finally, city-wide unemployment rates are 15.5% for African Americans compared to 5.7% for whites.[321] Additionally, county-wide unemployment rates are 13.6% for African Americans compared to 4.8% for whites.[322]

Further, African Americans throughout the Commonwealth of Kentucky are disadvantaged with regard to certain socio-economic variables which directly impact access to the ballot box and depress the possibility of effective political organization. For example, 16% of African-American housing units in the City of Louisville have no vehicular access compared to 7.2% of white housing units.[323] Similarly, county-wide data reveals that 13% of African-American housing units lack access to a vehicle as compared to only 3.8% of whites.[324] While 7.5% of African-American housing units lack access to a telephone, only 3.0% of white housing units lack such access. Similarly, 12.2% of African-American housing units in Jefferson County lack access to a telephone compared to 3.5% of whites.

Finally, a mere 58.4% of African Americans in the City of Louisville have a high school degree or higher compared to 70.3% of whites.[325] Similarly, 64.3% of African Americans in Jefferson

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320. *Id.*

321. Census Bureau, American FactFinder,1990 Census of Population and Housing, http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&ds_name=DEC_1990_STF3_&-CONTEXT=dt&-mt_name=DEC_1990_STF3_P071&-tree_id=101&-redoLog=true&-all_geo_types=N&-geo_id=05000US21111&-geo_id=16000US211230&-geo_id=NBSP&-search_results=16000US211230&-format=&-_lang=en&search_map_config=|b=40|l=en|t=101|zf=0.0|ms=sel_90dec|dw=1.9557697048764706E7|dh=1.4455689123E7|dt=gov.census.aff.domain.map.LSRMapExtent|if=gif|cx=-1159354.4783500005|cy=7122022.5|zl=10|pz=10|bo=593:591:590:600:594|bl=438:437:436:435:443|ft=416:470:469:413:412:431:430|fl=450:461:449:460:489:462:484|g=05000US21111 (last visited Sept. 22, 2006).

322. *Id.*

323. Census Bureau American FactFinder, 1990 Census of Population and Housing, http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_1990_STF3_&-CONTEXT=dt&-mt_name=DEC_1990_STF3_P008&-mt_name=DEC_1990_STF3_H039&-tree_id=101&-redoLog=false&-all_geo_types=N&-geo_id=05000US21111&-geo_id=16000US211230&-search_results=16000US211230&-format=&-_lang=en (last visited Sept. 22, 2006).

324. *Id.*

325. Census Bureau, American FactFinder, 1990 Census of Population and Housing, http://factfinder.census.gov/servlet/DTTable?_bm=y&-context=dt&-ds_name=DEC_1990_STF3_&-CONTEXT=dt&-mt_name=DEC_1990_STF3_P008&-mt_name=DEC_1990_STF3_P058&-tree_id=101&-redoLog=true&-all_geo_types=N&-geo_id=05000US21111&-geo_id=16000US211230&-search_results=16000US211230&-format=&-_lang=en (last

County have a high school degree or higher compared to 75.8% of whites.[326] In addition, demographic data indicates that Jefferson County is an extremely racially segregated region.

4. History of African-American Electoral Success. Discussion of African-American electoral success among African Americans in Louisville does not bear on the merits of the claim proposed in this Article. This factor generally deals with typical bread and butter Section 2 claims under the Voting Rights Act that have largely included challenges to at-large systems. The history of minority voters' electoral success helps determine whether the system being challenged truly operates to the detriment of minority voters. For example, if there is a substantial history of African-American electoral success in a city with an at-large election scheme, a Section 2 challenge to that scheme would likely be unsuccessful.

The theoretical Section 2 challenge outlined in this Article illustrates a consolidation that diminished African-American voting strength by lowering rates of African-American electoral success as compared to rates of electoral success under the nonconsolidated system.[327] Indeed, African-American voters enjoyed a more meaningful level of political representation under the preconsolidated system in which African Americans consistently elected candidates of choice from the four majority African-American wards within the City of Louisville.

5. Lack of Responsiveness on Part of Elected Officials. Discussions with community contacts reveal that there is a history of unresponsiveness and "benign neglect" on the part of nonminority Aldermanic members.[328] For example, there is a long history of unremedied, micro-level environmental discrimination against African Americans in Jefferson County.[329] In 1992, former Mayor James Abramson proposed placement of a waste incendiary site in the West End of the city that would have resulted in the daily haul of trash into the area. The West End is currently home to a disproportionate number of the city's poor, African-American residents.[330] Efforts to move the trash site into

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visited Sept. 22, 2006).

326. *Id.*

327. *See generally supra* Part IV (applying the facts of the Louisville consolidation to the elements of a section 2 claim).

328. Interview with A.D. Woodford, *supra* note 293.

329. *See generally* WRIGHT, *supra* note 287 (discussing discrimination faced in Louisville in the early twentieth century).

330. Savitch & Vogel, *supra* note 24, at 764.

the residential area were ultimately defeated as a result of intense community mobilization; a recycling plan was also developed for the entire city as a result of these efforts.

In 1996 and 1997, there was a lawsuit in which African-American officers sued the City Police Department over discrimination in its hiring practices.[331] African-American drivers were pulled over for arrest warrants at twice the rate of white drivers in the more than 1,600 Louisville police traffic stops studied by Louisville's Courier-Journal. Overall, the newspaper's study of city police stops on 30 randomly selected days found that 44% of the drivers stopped and checked for warrants were African-American.[332] "The city's driving-age population is estimated to be 27% [African-American]."[333]

6. Tenuousness of Policy Underlying Merger. The Senate factor addressing the tenuousness of the policy underlying the practice or procedure being challenged bears special significance. There is strong evidence that suggests proponents of the merger rushed through the development of a reorganization plan, without allowing sufficient time to address concerns raised regarding the impact that the merger would have on minority voting strength.[334] Moreover, there was also little assessment or analysis of the policy arguments advanced by proponents in support of the merger. Although the prevailing policy justifications may be questionable, such evidence does not necessarily bear the markings of discriminatory purpose.[335]

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331. Problems with respect to employment discrimination have been recurring throughout Louisville's history. In 1979, an action was brought by a number of African-American police officers who alleged discrimination in the recruitment, testing, selection, and hiring of police officers. Louisville Black Police Officers Org., Inc. v. City of Louisville, 511 F. Supp. 825, 828 (W.D. Ky. 1979).

332. *Id.*

333. Mark Pitsch, *2001 Kentucky General Assembly; Senate Approves Racial-Profiling Ban*, COURIER-J. (Louisville, Ky.), Mar. 2, 2001, at A1.

334. *See* McMillan, *supra* note 177 (asserting that the Louisville business leaders were "trying to push 'merger' down the throats of thousands of little people" and accusing them of "ramrod[ing]" the merger through the legislature).

335. *See* McMillan v. Escambia County, 748 F.2d 1037, 1045 (5th Cir. 1984) (stating that "a tenuous explanation for at-large elections is circumstantial evidence [of] . . . discriminatory purposes and . . . a discriminatory result"); Jordan v. City of Greenwood, 599 F. Supp. 397, 404 (N.D. Miss. 1984) (concluding that a policy at odds with electoral structure throughout the state is tenuous); Cross v. Baxter, 604 F.2d 875, 884–85 (5th Cir. 1979) (stating that the purpose of a *Zimmer* state-policy inquiry is to determine whether the challenged practice is racially motivated); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248, 254 (5th Cir. 1978) ("The gravamen of state policy issue is whether a sufficient state interest . . . negate[s] . . . discriminatory purposes."); Nevett v. Sides, 571 F.2d 209, 224 (5th Cir. 1978) ("[T]he state policy behind the districting plan is an evidentiary

Nevertheless, where the justifications in favor of consolidation prove tenuous, such evidence may suggest that a particular consolidation is inherently unfair. To that end, this Section will outline the significant role that this type of evidence plays when seeking to determine whether a consolidation presents problems under the Voting Rights Act.

a. Economic and Fiscal Policy Justifications for Merger. Various elected officials and community leaders outlined several policy justifications for merging city and county governments, all of which lack a readily apparent coherence. Former City of Louisville Mayor David Armstrong and former County Judge-Executive Rebecca Jackson, the original proponents of a merger, claimed that government reorganization would (1) create a single CEO and legislative body to speak for the entire community, (2) open a vast array of economic opportunities through image enhancement and streamlining of government interaction with business, and (3) improve service delivery by leveraging city and county departments and creating administrative efficiencies.[336] However, other merger proponents argued that one of the central policy justifications for consolidation was that the former three-member Fiscal Court was both ineffective and inefficient.[337]

In addition, merger proponents argued that there would be greater efficiency in the delivery of services as a result of consolidation.[338] However, there have been no indications from Jefferson County residents or through public surveys that indicate that there is any deprivation of major service delivery or crisis in urban service delivery.[339] Further, the merging of city and county agencies and the creation of joint agencies have been brought about short of full-scale consolidation of Louisville and Jefferson County governments.[340]

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consideration . . . to determine whether the plan is improperly motivated."); Wallace v. House, 515 F.2d 619, 633 (5th Cir. 1975) (stating that "tenuous state policy . . . is a good indication that the scheme is intended to dilute the vote of minority interests").

336. *See generally* Sheldon S. Shafer, *Merger Backers Launch Campaign; Unity Is Theme of Officials from Both Parties*, COURIER-J. (Louisville, Ky.), Aug. 22, 2000, at B1 (reporting on the campaign platform of merger proponents in Louisville, Kentucky); Percy, et al., *supra* note 174, at 6 (examining the rationale and outcomes of the merger of metropolitan and regional governments in five cities).

337. *See* Shafer, *supra* note 172 (summarizing a debate on the merger in which supporter Jerry Abramson characterized the Fiscal Court system as "costly" and not "'a represenatative democracy'").

338. *But see supra* Part III.C (discussing the African-American community's fears that services may suffer post-merger).

339. *See supra* note 178 and accompanying text (indicating that little change in services actually occurred post-merger).

340. "The Louisville and Jefferson County Job Training Partnership Agency is

Proponents of consolidated city-county governments have argued that a merger would bring about economic development.[341] However, there are a number of studies and reports that indicate that there is no strong correlation between higher levels of economic development and merged governments. A controlled study of eighteen consolidated city-counties examined annual growth rates in manufacturing, retail, and service industries and found no evidence linking reorganization and economic development.[342] In addition, the study compared the growth rates for the consolidated city-county with that of other counties and found no correlation between the two.[343]

Proponents of the merger claim that city-county consolidation will result in a larger tax base and improved credit ratings for the consolidated government.[344] However, analysis suggests that there is no correlation between tax credit ratings and merger.[345] Moreover, an alternative to a merger was already in place, in the form of the Louisville and Jefferson County Cooperative Compact (the Compact).[346] The Compact governs current economic arrangements between the city and county.[347] Under the Compact, the City of Louisville and Jefferson County have, both pre- and post-consolidation, a unified economic development structure and an arrangement for sharing occupational tax revenue.[348]

The Compact was primarily designed to resolve conflicts and disagreements between the City of Louisville and Jefferson County over issues such as annexation, joint-agency finance, and operation and competition for economic development.[349] The success of the Compact over the past two decades demonstrates that Jefferson County has been able to develop plans for growth

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a . . . joint agency providing employment and job-training services to city and county residents alike." United States Conference of Mayors, Best Practices Database, City of Louisville/Jefferson County, Kentucky: Promoting a Competitive Workforce, http://www.usmayors.org/uscm/best_practices/bp97/12_1997_Promoting_A_Competitive_Workforce.htm (last visited Sept. 22, 2006) (discussing the Agency and its functions in the City). "The city and county are one service delivery area under the Job Training Partnership Act." *Id.*

341. *See* Shafer, *supra* note 336 (quoting merger proponents).

342. Savitch & Vogel, *supra* note 24, at 774–75.

343. *Id.*

344. *Id.* at 761.

345. *Id.* at 774.

346. *Id.* at 764–65 (discussing the Louisville and Jefferson County Cooperative Compact (the Compact) and its terms).

347. *Id.* (noting that the Compact called for the city and county to share fiscal resources).

348. *Id.*

349. *Id.*

and development, achieve partial merger of certain service districts, resolve annexation and land disputes and create effective formulas governing revenue sharing without full-scale city-county consolidation.[350] The success of the Compact provides strong evidence of the tenuousness of the policy underlying merger as many of the proponents' arguments in favor of consolidation have been largely achieved and accomplished through the pre-existing City-County Compact. The Compact has been considered one of the primary mechanisms governing possibilities for economic development and expansion between Louisville and its surrounding county areas.[351] The Compact, which was negotiated under Mayor Jerry Abramson and Judge-Executive Harvey Sloane in December 1985, took effect in 1986 after receiving authorization from the Board of Aldermen, the Fiscal Court, and the State Legislature.[352] The Compact has been credited with resolving long-standing battles over annexation and reducing place-wars over business location between the city and county.[353]

The Compact establishes a formula to govern revenue-sharing and division of occupational taxes between the city and county.[354] Under current guidelines, there is an occupational tax split of 58% for the city and 42% for the county.[355] Merger proponents have contended that one of the reasons why the Compact is ineffective is because it essentially results in an arrangement whereby the county subsidizes growth in the city and leaves the county no possibility for real expansion.[356] However, this pronouncement is largely pretextual given that the tax sharing formula is equitable and mirrors what actual tax-sharing figures would look like absent the Compact. For example, in 1995, the occupational taxes collected respectively from both

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350. *Id.* at 765.

351. FRANK GAMRAT & JAKE HAULK, ALLEGHENY INST. FOR PUB. POL'Y, MERGING GOVERNMENTS: LESSONS FROM LOUISVILLE, INDIANAPOLIS, AND PHILADELPHIA 4 (2005), *available at* http://www.alleghenyinstitute.org/reports/05_04.pdf ("The main reason given for consolidation was to enhance economic development.").

352. Savitch & Vogel, *supra* note 24, at 764; Savitch & Vogel, *supra* note 137, at 201–02.

353. Savitch & Vogel, *supra* note 24, at 764 (noting that the Compact "put an end to annexation wars").

354. *Id.* Separate formulas apply where necessary to account for inflation and new growth areas. *Id.* at 765 ("[The formulas] eliminate[ed] incentives for destructive competition.").

355. *Id.*

356. Researchers have found "no evidence that consolidated city-counties have greater economic growth than unconsolidated ones." Savitch & Vogel, *supra* note 137, at 209.

the city and county reveal that the city would have received 55.2% and the county 44.8% of the occupational tax base were the Compact not in place.[357]

In addition, the Compact placed a moratorium on new municipalities and annexations by any city.[358] This provision of the Compact helped resolve a long-standing battle between the city and county with respect to Louisville's efforts to annex unincorporated sections of the county.[359] Finally, the Compact also contained provisions governing the merger of city and county agencies, the creation of new regional offices and the reassignment of various service responsibilities.[360] Under its provisions, the Air Pollution, Health, Crime Commission and Planning Agencies were reassigned to the county.[361] The Human Relations Commission, Zoo, Museum of Science, and Disaster and Emergency Services were reassigned to the city.[362] The Library, Parks, Transit and Sewer units remained joint agencies.[363] Further, the Compact led to the creation of a new joint Office of Economic Development.[364] In addition, the Compact called on the county to take on an additional $1 million in service burdens under the rearrangement of service delivery as compensation to the city for not pursuing future annexation plans and also to reflect overall population increases in the county.[365]

In 1998, the state legislature granted a ten-year extension of the Compact in which many of its key provisions remained intact.[366] The Resolution, which outlines the provisions contained within the Compact, incorporates language illustrating the

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357. *Id.* at 202.

358. *See* KY. REV. STAT. ANN. § 81A.010(2) (LexisNexis 1995) ("The boundaries of any city of the first class which has in effect a compact with the county . . . shall remain as established by law unless changed pursuant to the procedure set out [by statute].").

359. Savitch & Vogel, *supra* note 24, at 764–65 (describing the "annexation wars" in Jefferson county prior to the Compact).

360. LEGIS. RES. COMM'N, COUNTY GOVERNMENT IN KENTUCKY, NO. 115 (2003), *available at* http://www.e-archives.ky.gov/Pubs/LRC/infobull/IB115.pdf. Kentucky Statutes create "a joint city/county riverport authority, a metropolitan sewer district, an air pollution control board, a regional housing authority, a mass transit authority, a planning commission, a board of adjustments, and a local air board." *Id.* (citations omitted). The Compact also governs parks, libraries, and the County Board of Health. *Id.*

361. Savitch & Vogel, *supra* note 24, at 785 n.1.

362. *Id.*

363. *Id.*

364. *Id.*

365. H.V. Savitch & Ronald K. Vogel, *Louisville: Compacts and Antagonistic Cooperation*, *in* REGIONAL POLITICS 130, 144 (H.V. Savitch & Ronald K. Vogel eds., 1996).

366. Savitch & Vogel, *supra* note 137, at 203.

political, economic, and social benefits derived from operation of the Compact. The Resolution notes that the Compact

> launched an unprecedented era of cooperation for the City of Louisville and Jefferson County that resulted in major benefits to the community as a whole, . . . the tax sharing formula in the Compact provides a strong incentive for the City and County to work together on economic development, ... the amicable sharing of governmental responsibilities outlined by the Compact has brought efficiency, cooperation and a community-wide vision to the services joint agencies provide, . . . the Compact brought an end to the protracted and divisive and acrimonious annexation battles looming on every front twelve (12) years ago.[367]

Public support for the City-County Compact and the strong endorsement that the Compact has received from various public officials lends strong support to the argument that the policy justifications offered for current consolidation are both tenuous and insubstantial.[368] Thus, endorsement for the Compact will factor into evidence presented that the policy justifications for merger serve as mere pretext for intent to dilute and diminish growing African-American voting strength in the City of Louisville.[369]

It is worth noting that original discussions to extend the Compact included proposals for creating a Metro Mayor who would serve as the single executive governing both the city and county.[370] However, this proposal received strong opposition from African-American community members, who expressed concerns about shifting African-American voters from a city to county electoral pool in which the percentage of potential African-American voters, at that time, would fall from approximately 30% to 17%.[371] In particular, concerns from the minority community focused on the impact that this proposal would have on the opportunity to elect an African-American mayor.[372] Indeed,

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367. *See* Res. No. 63, Series 1998, A Resolution Authorizing the County Judge/Executive to Enter into a Cooperative Compact with the City of Louisville Pursuant to 1998 Kentucky Acts Chapter 104 [hereinafter Cooperative Compact Resolution].

368. *See generally supra* Part IV.I.7 (advancing the "tenuousness of the policy underlying merger").

369. *See supra* notes 160–177 and accompanying text (discussing vote dilution and the possible effects upon African Americans in Louisville).

370. *See* Darryl Owens, *Paper on Metro Mayor*, Oct. 21, 1997, at 4.

371. *Id.*; Savitch & Vogel, *supra* note 24, at 769.

372. The leading opposition group, COST, was concerned about increased taxes, voting rights, fairness to minorities (such as African Americans and gay Americans), and

proposals for the creation of a Metro Mayor during this time period were motivated in large part to the increasing potential for the election of the first African-American mayor in the City of Louisville.[373] Individuals such as former county commissioner Darryl Owens were deemed strong, viable candidates for the position at that time.[374] Ultimately, proposals for incorporating a Metro Mayor into the provisions of the Compact were abandoned after key public officials withdrew their endorsement of the idea.[375]

b. Disparate Treatment of Small Cities. Finally, a further illustration of the tenuous justification underlying the consolidation of Louisville and Jefferson County is the uneven impact of the consolidation on cities within the region. Indeed, any potential Section 2 claim in this area need rely, in part, on the fact that this consolidation requires elimination of the local government of the City of Louisville and not that of any of the other eighty-four small cities within the county.[376] Proponents of consolidation failed to provide any empirical evidence demonstrating the necessity of keeping these smaller cities intact and also failed to advance any "objectively verifiable, legitimate reasons" for the selective manner in which the consolidation was carried out.[377] As discussed above, the plan eliminates the nucleus of Black leadership within the urban core of the region, without altering the status of the local governments of the majority-white, smaller cities throughout the county.[378]

VI. REMEDIES, RACE, AND REGIONALIZATION

This Article does not seek to make the argument that city-county consolidations, an increasingly popular form of regionalization, are a per se violation of Section 2 of the Voting Rights Act. Rather, jurisdictions need to consider the voting

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erosion of local democracy. Savitch & Vogel, *supra* note 24, at 767.

373. *See generally* Interview with Dr. Joseph McMillan, *supra* note 126 (expressing doubt that an African-American mayor could be elected post-merger).

374. *See* Savitch & Vogel, *supra* note 24, at 767–68 (noting that Owens was one of the leaders of COST).

375. *See* Rick McDonough, *"Metro Mayor" Idea Suffers Quiet Demise: Judge-Executive Changes Mind, Says Public Was Left Out*, COURIER-J. (Louisville, Ky.), May 11, 1997, at B1 (summarizing the rise and fall of the new, merged post).

376. Savitch & Vogel, *supra* note 24, at 771.

377. *See* City of Richmond v. United States, 422 U.S. 358, 375 (1975) (requiring a showing of proof that an annexation was *solely* for discriminatory reasons before finding an annexation violated Section 2 of the Voting Rights Act).

378. *See supra* notes 161–65 and accompanying text.

rights implications of their proposed reforms in order to determine whether those reforms impair the voting strength of a clearly defined and cohesive group of minority voters. Although elected officials are entitled to consider legislative change and institutional reform, the Voting Rights Act imposes limits and constraints that, more often than not, tend to be ignored.[379] I have made the argument that African Americans in the City of Louisville represent a politically cohesive and clearly defined group of voters and argued that the voting strength of these voters was impaired by the recent city-county consolidation in that region.[380] Thus, the key question is what remedy might a court impose, or what actions could a jurisdiction take, to alleviate the impact of city-county consolidation on minority voters.

Perhaps the least creative but most assured way to address any resulting vote dilution that results from regionalization would be reverting back to the status quo—putting back the system that had already been in place. This proposal may lack certain appeal in a jurisdiction that is determined to implement major systemic and institutional reform. However, there may be instances where there is no way to remedy or address resulting vote dilution, thus forcing jurisdictions to pursue alternative mechanisms to achieve their political ends. It is clear that the preconsolidation system in Louisville provided minority voters a reasonable opportunity to elect candidates of choice and thus, raised no readily apparent concerns under Section 2 of the Voting Rights Act.[381] However, there may be instances in which city-county consolidations can be pursued while adequately addressing the resulting impact on minority voting strength.[382] Alternatively, there may be other types of governmental reforms that can help jurisdictions achieve their objectives without impairing minority voting strength.[383] These alternatives are explored in further detail below.

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379. *See supra* notes 199–201 and accompanying text (discussing the ways in which gerrymandering and redistricting have diluted minority voting rights).

380. *See supra* notes 272–274 and accompanying text (describing the voting habits of African Americans in Louisville).

381. 42 U.S.C. § 1973(b) (2000) ("A violation of . . . this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by . . . this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.").

382. *See infra* Part VI.B (discussing an alternative plan that would have "preserv[ed] existing electoral opportunities for African Americans").

383. *See infra* Parts VI.C–F (discussing various governmental reforms and their

A. Cooperative Compacts and Agreements

Cooperative compacts are contracts or agreements that jurisdictions enter into that govern a range of issues including tax sharing, service delivery, and development issues.[384] Compacts have come to be viewed as a hallmark of a good governance approach and are widely praised among political scientists.[385] Many jurisdictions throughout the country currently employ compacts as a means of negotiating and delineating cross-border functions. For example, the Menominee Indian Tribe of Wisconsin has entered into a number of compacts with neighboring cities and counties to deal with issues of gaming, service delivery, and revenue sharing.[386] Miami-Dade County and the City of Miami recently entered into an Education Compact to deal with issues including improvement of academic programs, meeting capital and infrastructural needs, and expanding community involvement.[387]

Prior to consolidation, economic arrangements between Louisville and Jefferson County were governed by a cooperative compact.[388] Under the Compact, the City of Louisville and Jefferson County had negotiated a unified economic development structure and a sharing arrangement for distribution of occupational tax revenue.[389] As discussed above, the Compact had long been considered an important vehicle to help resolve economic development and expansion issues between Louisville and its surrounding suburban communities.[390] The Compact produced such positive results that the state legislature extended the compact for another ten years in 1998.[391]

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effect on minority voting).

384. *See generally* Savitch & Vogel, *supra* note 365, at 145–51 (reviewing the benefits and criticisms of the Louisville Compact).

385. Savitch & Vogel, *supra* note 137, at 198 ("The compact is a hallmark of the governance approach and has been widely praised in the community and scholarly circles.").

386. Steve Schultze, *Kenosha Casino Plan Revived*, MILWAUKEE J. SENTINEL, Jan. 7, 2004.

387. Press Release, Miami-Dade County Public Schools, Miami-Dade County Public Schools, County Forge Compact to Benefit Students and Taxpayers (Feb. 15, 2006), *available at* http://news.dadeschools.net/releases/rls06/174_compact.htm (describing the unprecedented Compact as a "partnership between the school system and the City of Miami").

388. Savitch & Vogel, *supra* note 24, at 764–65 (discussing the Compact's focus on the sharing of fiscal resources and its effect of quelling "annexation wars" in Louisville).

389. *Id.*; *see also supra* notes 351–352 and accompanying text.

390. Savitch & Vogel, *supra* note 24, at 764–65; *see also supra* notes 351–352 and accompanying text.

391. *See supra* text accompanying note 366.

Clearly, cooperative compacts and agreements provide an example of the type of reform that provides a vehicle for cities and counties to negotiate and resolve cross-border issues and problems. This type of regional reform could be undertaken with little impact on existing levels of minority voting strength.

B. Two-Tier and Other Models of Governance

Two-tier metropolitan government involves a metropolitan government responsible for certain macro-level functions that operate alongside local governments, each with their taxing and spending authority responsible for micro-level functions.[392] The driving principle of two-tier regional governance is providing for small-community input as well as region-wide management.[393] For insular community issues, citizens would turn to local council representatives while broader issues such as regional transportation, regional development planning, and economic growth are dealt with at the regional level.[394] In 1957, Dade County created a modified two-tier system of government called Metropolitan Dade County.[395] Under this system, residents in the unincorporated portions of Dade Country receive both micro- and macro-level service delivery from a single, upper-tier of government, while citizens in the remaining incorporated cities receive services from both their city (the lower tier) and county (the higher tier) governments.[396] The challenge with two-tier models of governance is determining what functions and responsibilities should be retained at the local level and which should be delegated to the regional body. However, two-tier governments might provide a vehicle to preserve minority voting rights by giving minority voters the opportunity to negotiate and define significant local rights. That set of defined rights would thus continue to be handled at the local level by local legislators

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392. Ronald K. Vogel, *Metropolitan Government*, *in* HANDBOOK OF RESEARCH ON URBAN POLITICS AND POLICY IN THE UNITED STATES 185, 186–87 (Ronald K. Vogel ed., 1997) (noting that the first tier, consisting of neighborhood governments or municipalities, provide local services while county or metropolitan governments, the second tier, provide areawide or regional services).

393. *See* H.V. Savitch & Ronald K. Vogel, *Paths to New Regionalism*, 32 ST. & LOC. GOV'T REV. 158, 162–63 ("A tiered approach is more agile than consolidation, because it allows for some problems to be managed at their most appropriate and most local level and for regional problems to be addressed by a metropolitan authority.").

394. Vogel, *supra* note 392, at 186 (providing examples of the functions of the tiers).

395. *See generally* Genie Stowers, *Miami: Experiences in Regional Government*, *in* REGIONAL POLITICS, *supra* note 365, at 185–205 (H.V. Savitch & Ronald K. Vogel eds., 1996) (describing Miami's two-tiered form of government).

396. *Id.* at 195. Miami regional government provides parks and recreation, zoning enforcement, and garbage collection. *Id.* It also provides 60% of fire protection services. *Id.*

while all other rights and responsibilities would be delegated to a regional governing body.

During debates leading up to previous consolidation attempts in Louisville, several alternative proposals were offered that would have resulted in an alternative model of government.[397] One such proposal included a twenty-seven member council that would have resulted in a limited, smaller-scale merger of the City of Louisville with unincorporated areas of the county alone.[398] Under this plan, the legislative council would have been comprised of twelve Aldermanic districts in the urban core, twelve districts from unincorporated areas outside the urban core, and three at-large districts. Under this plan, only city residents would vote for city representatives thus, preserving existing electoral opportunities for African Americans. This model would have resulted in some dilution but not the extent of dilution that results from a broader city-county merger.

C. Cumulative Voting

Alternative voting strategies also provide a mechanism that might allow jurisdictions to adopt city-county consolidation while addressing any resulting vote dilution. For example, Jefferson County is now governed by a twenty-six member council elected from single member districts.[399] Under a hypothetical system of cumulative voting, each voter could be given the opportunity to cast twenty-six votes. Those votes could be allocated strategically, providing minority voters in the urban core the opportunity to back and selectively support their candidates of choice. Minority voters in the urban core could also coalesce with minority voters in the county to selectively support a group of candidates that convey commitment to their interests despite geographic location. The opportunity to forge cross-border alliances between urban and suburban interest groups could also produce long-term benefits that extend to the legislative and policymaking processes. Minority voters who can strategically wield significant influence over the political process can encourage competition among legislators to develop policies that speak to the interests of broader constituencies. Attaching cumulative voting to a regionalist reform package is a way to both minimize wasteful voting while providing relief to those

397. Savitch & Vogel, *supra* note 137, at 200 (listing and describing "past efforts at metropolitan consolidation").

398. *Id.*

399. LEGIS. RES. COMM'N, *supra* note 360, at 113.

minority voters who lose out from the elimination of their local governing body.

D. Changing the Rules: Supermajority Requirements

Professor Lani Guinier has argued that where minority legislators find themselves consistently marginalized within legislatures, advocates may need to alter the rules by which legislatures enact public policies into law.[400] As a potential solution to this issue, she has proposed supermajority requirements to provide greater "bargaining power to all numerically inferior or less powerful groups, be they black, female, or Republican."[401] Thus, alternative voting rules also provide a vehicle to address the resulting impact of city-county consolidation on minority voters. Supermajority requirements for legislators on the metropolitan council could result in greater levels of coalition building and cross-racial cooperation in the legislative process. The enactment of a supermajority requirement could minimize the resulting impact that consolidation might have on minority voters.

E. Creating Special or Urban Service Districts

Urban Service Districts and other special districts designate areas within which certain services are available, and outside of which services are not.[402] These districts provide simplified delivery of urban services, equalize costs among residents, and establish a defined urban or other boundary that recognizes the distinct characteristics of certain communities.[403]

In Louisville, some concerned about the impact that consolidation would have on minority voters in the city proposed

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400. GUINIER, *supra* note 80, at 36 ("A meaningful right to vote contemplates minority participation in post-election legislative policymaking.").

401. *Id.* at 16–17.

402. *See* Templeton v. Metro. Gov't of Nashville & Davidson County, 650 S.W.2d 743, 748 (Tenn. Ct. App. 1983) ("The attendant government services are higher in the urban services district than for those areas outside thereof, including fire, police, garbage collection and street lighting. In return for the higher police protection and other services, those within the urban services district pay a higher tax rate than those in the general services district.").

403. Under the merger, the city of Louisville will become an urban services district. Alan Greenblatt, *Louisville: Anatomy of a Merger*, GOVERNING MAG., Dec. 2002, *available at* http://www.governing.com/archive/2002/dec/louis.txt ("In the beginning, city, suburbs and unincorporated areas will receive essentially the same services they are receiving now. The old city will retain its boundaries as an 'urban service district,' with higher taxes and more services. Whether people outside the former city limits will come to expect more services, and will be willing to pay more in taxes for them, remains to be seen.").

creation of a special "urban service district."[404] This special district would have provided a response, albeit limited, to concerns regarding diminished minority voting strength over the budgetary and fiscal policy of the Louisville Police and Fire Departments.[405] This kind of district would have also ensured that tax money collected inside the city would go into a special account that could only be used for expenditures on city services.[406] Ultimately, special service districts could have helped preserve preconsolidation levels of service delivery while ensuring that decisionmaking authority over the taxes paid by city residents were not unfairly delegated to a new Metropolitan Council dominated by white, suburban interests.[407] In addition, special service districts would have reduced the impact that consolidation has on African-American voting strength by providing African-American residents within the City of Louisville a reasonable opportunity to control and influence policy concerning insular issues and key local institutions.

F. Urban Renewal

Among the chief objectives sought by consolidation proponents is economic development.[408] Here, I argue that jurisdictions seeking economic expansion and development through government reforms may also find success through urban renewal programs.[409] Instead of adopting government reforms, these jurisdictions could enlist the assistance of Community Development Corporations, which are entities that forge partnerships with local governments, businesses, and nonprofit organizations to help build houses, apartments and shopping centers in depressed areas. Further, the Community Reinvestment Act, which requires banks to include troubled neighborhoods in their lending activities, might also provide a vehicle for expansion.[410] Many, if not all, of these urban renewal

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404. Savitch & Vogel, *supra* note 24, at 769–70.

405. *Id.* Such a district would be taxed at a different rate and allow a regional control over services. *Id.*

406. *See id.* at 770 (discussing the differentiated tax structures).

407. *Cf. id.* ("[T]he former City of Louisville could be established as an 'urban service district' whereas other areas of the county could petition their voters to establish 'taxing discticts' also to be managed by appointed boards."). These taxing districts could "eliminate fragmentation and equalize services across newly consolidated territory," although in Indianapolis they had the opposite effect. *Id.*

408. GAMRAT & HAULK, *supra* note 351, at 4 ("The main reason given for consolidation was to enhance economic development.").

409. *But see* Rusk, *supra* note 14, at 761–62.

410. PAUL S. GROGAN & TONY PROSCIO, COMEBACK CITIES: A BLUEPRINT FOR URBAN

programs can be pursued without impacting or disturbing existing levels of minority voting strength.

VI. CONCLUSION

As we look beyond Congress's recent renewal of the expiring provisions of the Voting Rights Act, there is indeed much to celebrate, but there remains significant cause for concern. Although the Act has certainly been a tremendously effective federal statutory tool in helping to combat voting discrimination while inching us closer to the goal of real political equality, significant challenges lie ahead. In this Article, I have provided a practical road map for scholars, litigators, and local officials interested in using Section 2 of the Act to address a hybrid second and third generation form of voting discrimination which persists today. The consolidation of city and county governments, although not a per se violation of Section 2 of the Act, presents real concerns when undertaken in areas where racial minorities represent a sizeable proportion of those in the area's urban core. Numerous jurisdictions around the country have entertained or are currently debating the costs and benefits associated with the mergers of city and county governing bodies.[411] Too often, the impact that such mergers have on minority voting strength is excluded from that calculus.

In many contexts, consolidations are a legitimate and necessary means of improving the economy and quality of life of a municipality. However, this Article has attempted to outline the ways in which consolidated systems can work to impair minority voting strength where the consolidation strips away the ability of minority group members to participate equally in the political process. The legal argument outlined in this Article suggests that the scope of Section 2 litigation can and should be expanded to reach unconventional mechanisms, such as city-county consolidations, that result in dilution of minority voting strength. By adopting a more expansive view, Section 2 of the Voting Rights Act can be used to address instances when a jurisdiction seeks to eliminate and rebuild its entire political infrastructure with little regard for the negative impact that such reorganizations might bear on minority voting strength.

NEIGHBORHOOD REVIVAL 120 (2000).

411. *See generally* WIS. POLICY RESEARCH INST., COOPERATION NOT CONSOLIDATION: THE ANSWER FOR MILWAUKEE GOVERNANCE 3–12 (2002), http://www.wpri.org/Reports/Volume15/Vol15no8.pdf (discussing the various jurisdictions that have adopted consolidated governments and their varied results).