The Primary Runoff: Racism's Reprieve

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NOTES

The Primary Runoff: Racism's Reprieve?

During his 1984 bid for the presidency, the Reverend Jesse Jackson focused national attention on primary runoffs;[1] his insistent challenge to this electoral device highlighted the potential for discrimination inherent in majority vote requirements. Currently, ten southern states require runoffs between the top two candidates in primaries if the leading vote-getter fails to obtain a majority of the votes.[2] This mechanism often forces black candidates into head-to-head confrontations against white candidates, maximizing the impact of racially polarized voting.[3] This dual primary system thus denies black candidates the

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1. A number of states have primary runoff systems, under which the top two vote-getters in the initial primary run against each other in a second primary if neither received a majority of the votes in the first primary. *See infra* notes 2-3 and accompanying text. Reverend Jackson pressed the attack on runoffs throughout his campaign. *See, e.g.*, Jackson, *Moving to the Common Ground*, Wash. Post, Mar. 25, 1984, at C7, col. 2. At times he appeared to condition his continued support for the eventual Democratic ticket on the adoption of a platform plank calling for the elimination of second primaries. *See, e.g.*, Roberts, *Concern Over Jackson Runoff Stand*, N.Y. Times, Apr. 16, 1984, at A18, col. 3. After a bitter fight at the Democratic Convention, however, Reverend Jackson and his followers accepted a platform including only a promise to study dual primaries and to seek the elimination of those with discriminatory effects. *See* Weaver, *Mondale Meets with Rivals on Unity Bid*, N.Y. Times, July 17, 1984, at A13, col. 1.

2. *See* COUNCIL OF STATE GOVERNMENTS, THE BOOK OF STATES 1985-1986, at 206 (1986). The following states require runoff primaries: ALA. CODE § 17-16-36 (West Supp. 1986); ARK. STAT. ANN. § 3-110(a) (1976); FLA. STAT. ANN. § 100.091 (West 1982); GA. CODE ANN. § 21-2-501 (Supp. 1985); N.C. GEN. STAT. § 163-111 (1982); OKLA. STAT. ANN. tit. 26, § 1-103 (Supp. 1985); S.C. CODE ANN. §§ 7-11-10, -13-50, -17-600, -17-610 (Law. Co-op 1976 & Supp. 1985); TEX. ELEC. CODE ANN. § 172.003, -.004 (Vernon 1986). Mississippi also requires a second primary; however, the history behind Mississippi's requirement is confusing. Mississippi apparently tried on a number of occasions to enact an open primary system. In 1982, however, these efforts were repealed and a primary runoff system was enacted. *See* Act of Apr. 22, 1982, ch. 477, §§ 1, 7, 1982 Miss. Laws 626, 628 (adopting the primary runoff system and repealing a 1979 effort to adopt an open primary system).

Louisiana has a unique "open primary" in which candidates from both parties participate in a general election, followed by a runoff if no candidate wins a majority. LA. REV. STAT. ANN. §§ 18:451 to :483 (West 1979 & Supp. 1986); *see* Theodoulou, *The Impact of the Open Elections System and Runoff Primary: A Case Study of Louisiana Electoral Politics 1975-1984*, 17 URB. LAW. 457, 459 (1985). Prior to 1975 Louisiana held primaries featuring majority vote requirements similar to those in most southern states. *Id.*

New York City requires candidates to win 40% of the primary vote before receiving the nomination for citywide office. In Butts v. City of New York, 614 F. Supp. 1527, 1548-50 (S.D.N.Y.), *rev'd*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3335 (1986), a federal judge found that this rule violated both the federal Voting Rights Act and the fourteenth amendment to the United States Constitution. However, the United States Court of Appeals for the Second Circuit subsequently reversed the district court's holding. *Butts*, 779 F.2d at 143, 151. For a discussion of *Butts*, see *infra* notes 155-61 and accompanying text; text accompanying notes 183-93.

3. The second primary accentuates the effect of racial bloc voting by minimizing ideological differences between white candidates and emphasizing the race factor. Those white voters who are blinded by racist sentiments can vote for the candidate of their choice in the opening primary and rely on the probability that they will still be able to vote against the black candidate in the runoff. This segment of the white population is, in effect, given a veto over black nominations.

Although a majority vote requirement disadvantages any cohesive voting minority, the runoff most often operates against blacks because it currently exists only in the South. In Texas and Florida, however, sizeable hispanic communities also confront this electoral barrier. *See, e.g.*, White v. Regester, 412 U.S. 755, 767 (1973). Even though women are not a minority, many commentators

benefit of an ideological split among white voters and gives racism a second chance to thwart the political aims of black candidates and their supporters.

Examples of runoffs between black and white candidates illustrate the discriminatory results of majority vote requirements. In 1978 James Clyburn, Commissioner of the South Carolina Human Affairs Commission, won forty-three percent of the vote in the Democratic primary for South Carolina's Secretary of State.[4] Despite this strong support, he lost the nomination to a white opponent in the ensuing runoff.[5] In 1982 H. M. (Mickey) Michaux, a former state representative and United States attorney, led the first primary for the Democratic nomination for the Second Congressional District of North Carolina with forty-four percent of the vote;[6] his effort to gain election as North Carolina's first black congressman since 1902 ended in a racially polarized runoff against his white adversary.[7] In contrast, Harold Washington, a former congressman, defeated Richard Daly and incumbent Jane Byrne by a plurality in the Democratic primary and in 1983 became Chicago's first black mayor.[8]

This Note discusses the history behind majority vote requirements and primary runoffs, and considers the role played by these electoral schemes in southern politics. The first section of the Note traces the development of majority vote requirements. Section II chronicles the lack of systematic studies of the impact majority vote requirements have on the political influence of minorities. Sections III and IV discuss potential legal challenges to such requirements under the United States Constitution and the Federal Voting Rights Act, respectively. Section V considers various arguments put forth in support of primary runoffs and discusses political considerations involved in the debate over their continued existence. The Note argues that, notwithstanding arguments to the contrary, majority vote requirements and primary runoffs were created as a means of stifling black political influence in the South. Moreover, it contends that arguments in support of the continued use of primary runoffs are unpersuasive. The Note also suggests that majority vote requirements and primary runoffs may be vulnerable to legal challenges; particularly to challenges brought under the Voting Rights Act. However, the Note concludes that federal legislation prohibiting majority vote requirements is necessary before blacks can participate fully in the political process.

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also argue that women must overcome heightened sexism in runoffs against male opponents. *Voting Rights Act: Runoff Primaries and Registration Barriers: Oversight Hearings before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 293 (1984) [hereinafter *Hearings*] (Eleanor Smeal Report).

4. *Hearings*, *supra* note 3, at 58 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).

5. *Hearings*, *supra* note 3, at 58 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).

6. McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 URB. LAW. 429, 432 (1985).

7. *Id.*

8. *See* Preston, *The Election of Harold Washington: Black Voting Patterns in the 1983 Chicago Mayoral Race*, 16 POL. SCI. 486, 486-88 (1983) (noting that Washington was the first black elected mayor of Chicago and discussing his margin of victory in the primary and the general election).

I. MAJORITY VOTE REQUIREMENTS AND PRIMARY RUNOFFS: A HISTORICAL BACKGROUND

Majority vote requirements originated during the Post-Reconstruction Period as a component of the white primary.[9] Because the runoff developed by party rule before being codified, it is difficult to pinpoint the precise dates of its genesis. However, certain dates are known. Louisiana held the first primary in 1892.[10] South Carolina experimented with a primary in the 1892 gubernatorial race, and in 1896 the South Carolina Democratic Party established a rule providing for primaries featuring runoffs.[11] In 1902 Mississippi became the first state to pass legislation requiring primaries and runoffs.[12] By 1903 a majority of southern states held primaries, and these primaries generally included majority vote requirements.[13] Statutes requiring runoffs, most of which simply enacted pre-existing party rules, soon followed.[14]

During the years immediately preceding the emergence of the dual primary, southern states frantically sought to circumvent the fifteenth amendment[15] by calling constitutional conventions, amending their constitutions, or passing statutes to disenfranchise blacks through such mechanisms as the literacy test and the poll tax.[16] Consequently, it has been argued that majority vote requirements were not intended to discriminate against blacks because efforts to disenfranchise blacks had already proven successful.[17]

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9. *See* McDonald, *supra* note 6, at 430; *see also* Kousser, *The Historical Origins of the Run-off Primary*, 91 THE CRISIS 392, 393 (1984) (indicating that runoffs emerged as part of primaries and, like primaries, were developed initially by party rules), *reprinted from* JOINT CENTER FOR POL. STUDIES, INC., FOCUS, October 1984.

10. Kousser, *supra* note 9, at 392.

11. C. WOODWARD, A HISTORY OF THE SOUTH, ORIGINS OF THE NEW SOUTH, 1877-1913, at 372 n.11 (1966); Kousser, *supra* note 9, at 393.

12. *E.g.*, Kousser, *supra* note 9, at 393.

13. C. WOODWARD, *supra* note 11, at 372. Woodward provides the following dates of establishment for primaries in the South: South Carolina, 1896; Arkansas, 1897; Georgia, 1898; Florida and Tennessee, 1901; Alabama and Mississippi, 1902; Kentucky and Tennessee, 1905; Louisiana, 1906; Oklahoma, 1907; Virginia, 1913; and North Carolina, 1915. *Id.* at 372 n.11. Woodward does not distinguish between those primaries created by party rule and those established by statute.

Under a majority vote requirement a second primary is held between the top two vote-getters in the initial primary if the winner receives less than 50% of the vote.

14. Professor V. O. Key, Jr., gives the following dates of enactment for runoff statutes: Mississippi, 1902; North Carolina and South Carolina, 1915; Georgia, 1917; Texas, 1918; Louisiana, 1922; Florida, 1929; Alabama, 1931; and Arkansas, 1933 (abandoned in 1935 and reenacted in 1939). V. KEY, SOUTHERN POLITICS IN STATE AND NATION 417 n.18 (1st ed. 1949). *But see* Kousser, *supra* note 9, at 394 (indicating that Louisiana's runoff statute was first adopted in 1906).

15. U.S. CONST. amend. XV. The fifteenth amendment provides that "the right of citizens . . . to vote shall not be denied or abridged by . . . any State on account of race, color, or previous condition of servitude." *Id.*

16. Disenfranchise, or disfranchise, means "to deprive of any franchise, as of the right of voting in elections . . . ." BLACK'S LAW DICTIONARY 420 (5th ed. 1979). Disenfranchising constitutional conventions were held in the following states and years: Mississippi, 1890; South Carolina, 1895; and Louisiana, 1898. C. WOODWARD, *supra* note 11, at 321. Disenfranchising constitutional amendments were adopted in the following states and years: North Carolina, 1900; Alabama, 1901; Virginia, 1901-02; Georgia, 1908; and Oklahoma, 1910. *Id.* Tennessee, Florida, Arkansas, and Texas passed the poll tax by statute. *Id.*

17. *See Hearings*, *supra* note 3, at 4, 14 n.1 (testimony of Lorn Foster, Senior Fellow, Joint Center for Pol. Studies) (citing Julian Bond as a "leading proponent" of the view that majority vote requirements were not intended to discriminate against blacks). *But see* C. WOODWARD, *supra* note

One commentator maintains that primary runoffs were created without racial motivation, arguing that the "prime considerations in the adoption of the run-off have been attachment to the abstract idea of majority nomination . . . ."[18] Attributing the impetus for the primary runoff to progressive reform, others point to the overwhelming success of the literacy test and the poll tax in removing blacks from voter lists.[19] In Louisiana, for example, 130,344 blacks, or 44% of the electorate, were registered to vote in 1897.[20] By 1900 that number had tumbled to 5320, or 4% of the electorate.[21] Given the success of these measures, black voters presented little threat to white Democrats—at any rate, not enough to spark a reaction such as creating the dual primary system. Moreover, Democratic primaries, from the outset, were intended for whites only.[22]

The primary, like the recall[23] and the initiative,[24] embodies the Populists'[25] and later, the Progressives'[26] effort to democratize American politics by taking power away from party machines, political bosses, and monopoly capitalists and restoring it to the people.[27] According to Professor V. O. Key, Jr., the primary originated in the South because of the domination of politics by white Demo-

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11, at 372 (describing the primary as an "implied pledge of the disfranchisers that once the Negro was removed from political life the white men would be given more voice in the selection of their rulers").

18. V. KEY, *supra* note 14, at 422.

19. *See, e.g.*, *Hearings*, *supra* note 3, at 4, 14 n.1 (testimony of Lorn Foster, Senior Fellow, Joint Center for Pol. Studies) (noting this argument and citing Julian Bond as one of its leading proponents).

20. C. WOODWARD, *supra* note 11, at 342.

21. C. WOODWARD, *supra* note 11, at 342.

22. C. WOODWARD, *supra* note 11, at 342.

23. A recall is a process by which voters are able to remove an elected official prior to the completion of his or her "term of office by a vote of the people . . . taken on the filing of a petition signed by [the] required number of qualified voters." BLACK'S LAW DICTIONARY 1139 (5th ed. 1979).

24. An initiative is a process by which voters are able to bypass the legislative branch and enact laws or amend state constitutions by voting directly on measures initiated by petition of a sufficient number of registered voters. *See id.* at 705.

25. A series of agricultural depressions beginning in the late 1860s, combined with monopoly control of services essential to farmers, spawned various farmer organizations dedicated to political and economic reform. *See* 2 S. MORISON, H. COMMAGER & W. LEUCHTENBURG, A CONCISE HISTORY OF THE AMERICAN REPUBLIC 428-437 (2d ed. 1983) [hereinafter S. MORISON]; C. WOODWARD, *supra* note 11, at 176-204. These alliances led to the development of a new political party—the Populists. *See* S. MORISON, *supra*, at 435-39; C. WOODWARD, *supra* note 11, at 235-45. The Populist party emerged in the 1890s as farmers and laborers sought to wrest power from various special interests that had accumulated vast wealth and influence during the nineteenth century. *See* S. MORISON, *supra*, at 437-449; C. WOODWARD, *supra* note 11, at 235-50; *see also infra* notes 53-67 and accompanying text (discussing the rise and fall of the Populist movement in the South).

26. The Progressives were middle-class reformers who sought to solve the social problems afflicting the United States during the late nineteenth and early twentieth centuries by regulating economic monopolies and by restoring popular control over political monopolies. *See* S. MORISON, *supra* note 25, at 499-510; *see also* C. WOODWARD, *supra* note 11, at 369-77 (discussing the Progressive movement in the South). The Progressive movement began in the 1890s and grew strong as the Populist wave subsided. *See* C. WOODWARD, *supra* note 11, at 369-74. In general, the Progressives differed from the Populists in that they adopted a less radical approach to reform and attracted their members from the urban middle class. *See id.*

27. *See* C. WOODWARD, *supra* note 11, at 372-74.

crats.[28] Professor Key has noted that "[u]nder one-party conditions, the logic of majority decision makes the run-off primary a concomitant of the direct primary."[29] Thus, when one party dominates the political scene to such an extent that its nominees invariably win election, democratic principles arguably demand that candidates be "nominated" by primaries and not by conventions or caucuses controlled by a powerful few. It is unclear, however, that similar reasoning applies to majority vote requirements.

The opposing position perceives the second primary as a device designed to "strengthen the primary itself as a means of solidifying the southern Democratic parties against opposition, and particularly opposition by blacks or through appeals to blacks."[30] As noted previously, two related conclusions concerning southern political history during the period in which the runoff emerged anchor the arguments that deny racial motivation in the development of majority vote requirements. First, that the South's status as a one-party region had become irreversibly entrenched, and second, that the spectre of black political power had been eliminated by the poll tax and the literacy test. However, Professor J. Morgan Kousser, one of the leading proponents of the view citing racism as the source of the second primary, marshals strong historical evidence to loosen these moorings.[31]

In 1890 a majority of black males voted in nine of the eleven ex-Confederate states.[32] In ten of those states a majority of blacks voted Republican.[33] Any significant white support for Republicans resulted in defeat for white Democrats.[34] In this manner blacks acted as "arbiter between white factions" and exercised considerable political leverage during the late nineteenth century.[35] To illustrate this political influence Professor Kousser points to Virginia where a coalition of black Republicans and disaffected Democrats controlled the state from 1879 to 1883.[36] In North Carolina, George White, a black Republican, was elected to Congress in 1898.[37]

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28. V. KEY, *supra* note 14, at 416.

29. V. KEY, *supra* note 14, at 417. Arguably, democracy demands nomination by primaries in the context of one-party politics. It is unclear, however, that the same logic dictates majority vote requirements. Plurality rule, not majority control, arguably represents the true American tradition. *See id.*; *Hearings*, *supra* note 3, at 57 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).

30. Kousser, *supra* note 9, at 394.

31. Kousser, *supra* note 9, at 392-94; *see also* McDonald, *supra* note 6, at 430-32 (also finding discriminatory motives behind the adoption of primary runoffs).

32. Kousser, *supra* note 9, at 392.

33. Kousser, *supra* note 9, at 392.

34. Kousser, *supra* note 9, at 392.

35. C. WOODWARD, *supra* note 11, at 347.

36. Kousser, *supra* note 9, at 392-93.

37. M. BARONE & G. UJIFUSA, THE ALMANAC OF AMERICAN POLITICS 1984, at 875 (1983). Blacks also continued to exercise political influence in South Carolina. In 1900, four years after South Carolina Democrats had adopted a primary runoff by party rule, a black, J.W. Bolts, was elected to the South Carolina House of Representatives. *See* Kousser, *supra* note 9, at 394 (providing date of South Carolina's first runoff provision); McDonald, *An Aristocracy of Voters: The Disfranchisement of Blacks in South Carolina*, 37 S.C.L. REV. 557, 568-69 (1986); *see also* G. TINDALL, SOUTH CAROLINA NEGROES 1877-1900, at 309-10 app. (1952) (listing black members of South Carolina General Assembly after Reconstruction).

Even after disenfranchisement a significant number of blacks managed to retain their voting rights. In Mississippi nine percent of blacks were registered in 1896;[38] in South Carolina and Virginia between fourteen and fifteen percent of blacks remained on voter lists in 1904.[39] According to Professor Kousser, blacks in Mississippi continued to shift the balance between warring white factions as late as 1900.[40]

During the period in which the runoff entered the political scene, "the perceived fragility of the disenfranchisement settlement"[41] prevented white Democrats from relaxing their efforts to stifle black political power.[42] Moreover, during the time that dual primaries arose white supremacists could not be certain that the United States Supreme Court would be so acquiescent to the South's concerted effort to skirt the commands of the fifteenth amendment.[43] Although the poll tax and the literacy test continued to deprive blacks of the right to vote until 1966,[44] the grandfather clause[45] fell to constitutional challenge in 1915.[46] In addition, the Supreme Court in 1927 held that Texas' white primary statute[47] was unconstitutional.[48]

White fear of Republican power—fueled by black votes—continued long after the Compromise of 1877[49] ended Republican domination of the South and

38. Kousser, *supra* note 9, at 393.

39. Kousser, *supra* note 9, at 393.

40. *See* Kousser, *supra* note 9, at 393.

41. Kousser, *supra* note 9, at 393.

42. Kousser, *supra* note 9, at 393.

43. *See* Kousser, *supra* note 9, at 393.

44. *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (holding that poll tax violates equal protection clause of fourteenth amendment); South Carolina v. Katzenbach, 383 U.S. 301 (1966) (affirming congressional power to suspend use of literacy tests); *see also* Oregon v. Mitchell, 400 U.S. 112 (1970) (validating Congress' nationwide suspension of literacy tests); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.) (affirming invalidation of a literacy test including an "understanding" clause), *aff'd per curiam*, 336 U.S. 933 (1949).

45. To prevent literacy tests and poll taxes from disenfranchising significant numbers of white voters, southern Democrats devised the "grandfather clause," which "exempted from the literacy and property tests those entitled to vote on [a date when only whites were eligible to vote], together with their sons and grandsons." C. WOODWARD, *supra* note 11, at 334.

46. Guinn v. United States, 238 U.S. 347 (1915) (holding that grandfather clause violates fifteenth amendment).

47. White primaries typically were established by "formal rules passed pursuant to statutory delegations of the power to prescribe qualifications for voting in primaries, [by which] the Democratic party limited participation in them to white voters . . . ." Marshall, *The Rise and Collapse of the "White Democratic Primary,"* 26 J. NEGRO EDUC. 249, 249-50 (1957).

48. Nixon v. Herndon, 273 U.S. 536, 540-41 (1927) (white primary statute held unconstitutional under fourteenth amendment). In Nixon v. Condon, 286 U.S. 73, 84-89 (1932), the Supreme Court held that the exclusion of blacks from primaries by a committee of a state political party (as opposed to the party convention), when carried out with authority delegated by statute, violated the fourteenth amendment. In Grovey v. Townsend, 295 U.S. 45, 53 (1935), the Supreme Court allowed a white primary mandated by party rule, finding no state action. However, the Court reversed itself in Smith v. Allwright, 321 U.S. 649, 663-66 (1944), holding that a white primary, even if mandated by party rule, violates the fifteenth amendment.

49. The 1876 presidential election between Republican Rutherford B. Hayes and Democrat Samuel J. Tilden ended in a hopelessly disputed deadlock. *See* S. MORISON, *supra* note 25, at 354-55; *see also* C. WOODWARD, REUNION & REACTION (1966) (discussing the election in considerable detail). Four states returned two sets of ballots, each naming different victors. S. MORISON, *supra* note 25, at 355. The outcome thus depended on whether the Republicans or the Democrats controlled the ballot counting. *Id.* Southern Democrats agreed to allow the Republicans to manipulate

after disenfranchising schemes reduced the number of black voters.[50] In 1900 Mississippi Governor Thomas Longino, rallying support for a mandatory primary, reminded legislators of black political influence during Reconstruction and of the potential for its re-emergence due to white factionalism.[51] After noting the "importance of intelligent supremacy in the government" and its "[dependence] upon white political unity," Governor Longino argued: "if we would perpetuate white political union, the time appears opportune for the passage of a uniform compulsory primary . . . with a provision that only qualified electors [*i.e.*, white males] shall vote in the primary . . . ."[52]

Moreover, even as Republican power waned, another means of black political leverage spread. Organized southern farmers burst on the political scene in the 1880s. Working within the Democratic party, by 1890 the Southern Alliance[53] controlled eight state legislatures and had elected six governors and fifty congressmen.[54] By 1892 a genuine third party had emerged.[55] The Populists sought to bring monopoly power in financial markets, railroads, and communications under governmental control and to inflate the money supply:[56] an agenda that appealed to poor farmers.[57]

The Populists actively pursued black support. Tom Watson, one of the foremost southern Populists, argued that "the accident of color can make no difference in the interest of farmers, croppers, and laborers."[58] Addressing mixed audiences, he said: "You are kept apart that you may be separately fleeced of your earnings."[59] Southern Populists included blacks in their party organizations and at political rallies, and they "denounced lynch law and the

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the vote count to declare Hayes president in return for the Republicans' promise to end federal enforcement of Reconstruction and to allow white southern Democrats to dominate blacks in the South. *Id.* at 355-56.

50. *See* C. WOODWARD, *supra* note 11, at 42-46.

51. *Hearings, supra* note 3, at 24-25 (testimony of Victor McTeer, Center for Constitutional Rights) (quoting Governor Thomas Longino, address to the Mississippi Legislature, regular session, January, February, March, 1900, Tuesday June 16, 1900).

52. *Hearings, supra* note 3, at 24-25 (testimony of Victor McTeer, Center for Constitutional Rights).

53. The Southern Alliance was a powerful political organization of southern farmers that grew out of the economic hardships afflicting farmers throughout the post-Civil War era. *See* S. MORISON, *supra* note 25, at 437. The development of the Southern Alliance paralleled the development of similar organizations in the Midwest and West. *See id.* at 431-37. In the West farmer organizations established a third political party beginning in 1890. *Id.* at 437. In the South, however, the Southern Alliance initially sought political influence through the Democratic party. *See* C. WOODWARD, *supra* note 11, at 235. When this strategy stalled the Southern Alliance disintegrated, and the Populist party moved into the South as southern farmers joined forces with organized labor. *Id.* at 234-47.

54. C. WOODWARD, *supra* note 11, at 235.

55. C. WOODWARD, *supra* note 11, at 245.

56. C. WOODWARD, *supra* note 11, at 250.

57. C. WOODWARD, *supra* note 11, at 246-47. The Populists also aligned with the labor movement. *Id.* at 252-53.

58. C. WOODWARD, *supra* note 11, at 257 (quoting Tom Watson). Woodward cautions that progress in race relations within the Populist party are easily exaggerated. *Id.* at 258. The extent of black political power within the Populist party, however, was not nearly as important as was the perception among white Democrats of the threat of black political leverage. The Populist party undoubtedly helped foster such fear.

59. C. WOODWARD, *supra* note 11, at 257 (quoting Tom Watson).

convict lease and called for the defense of the Negro's political rights."[60]

Although the Populists achieved a degree of success in the 1892 elections,[61] by 1894 Republicans and Populists in North Carolina, Alabama, Georgia, Louisiana, and Arkansas had agreed to join forces in "Fusion" movements.[62] Shortly thereafter similar coalitions were formed in Virginia and Texas.[63] In 1894 Alabama Fusionists elected four members to Congress and loosened the Democratic stranglehold on the legislature.[64] Georgia Fusionists elected five state senators and forty-seven representatives to the legislature.[65] In North Carolina Fusionists controlled the state legislature from 1894 to 1898—this power enabled them to select both of the state's senators.[66] However, the Populists' power was short lived. In 1898 the intense nationalism ignited by the Spanish-American War consumed the Populists' fire in most of the South.[67]

Historians Key and Woodward argue that the decline of the Populist party and the resulting return of the South to one party politics explain the motivations behind the direct primary.[68] It is equally plausible, however, that by ensuring Democratic unity, the primary—bolstered by a majority vote requirement—helped guarantee that the Populist party would never completely recover from its 1898 setbacks. Moreover, the existence of any potential avenue for black political influence supports the argument that the primary runoff was designed to discriminate against blacks. The Republican-Populist Fusion movement created an avenue for such influence, and this movement clearly was fresh in the minds of those who developed the majority vote requirement.

Those who tie the creation of the direct primary and the runoff to progressive reform point out that these mechanisms allow competing factions to settle their differences within the party and without hopelessly dividing the party's rank and file.[69] In the context of southern political history, this justification appears to be an apology for a device designed to prevent appeals by white Democrats to black voters and to unify Democrats against the Fusionist opposition. In 1899 after surveying opinions in three states that had disenfranchised blacks,

60. C. WOODWARD, *supra* note 11, at 256-57.

61. C. WOODWARD, *supra* note 11, at 258-63.

62. C. WOODWARD, *supra* note 11, at 276.

63. C. WOODWARD, *supra* note 11, at 276.

64. C. WOODWARD, *supra* note 11, at 277.

65. C. WOODWARD, *supra* note 11, at 278.

66. *See* Gingles v. Edmisten, 590 F. Supp. 345, 359 (E.D.N.C. 1984) (discussing Fusionists' control of the North Carolina General Assembly), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986); C. WOODWARD, *supra* note 11, at 377 (discussing the Fusionists' ability to select the state's senators).

67. C. WOODWARD, *supra* note 11, at 369. *But see* Gingles v. Edmisten, 590 F. Supp. 345, 359 (E.D.N.C. 1984) (attributing Fusionists' loss of control of the North Carolina General Assembly in 1898 to white Democrats' depiction of Populists as dominated by blacks), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

68. *See* V. KEY, *supra* note 14, at 416; C. WOODWARD, *supra* note 11, at 372-73. It should be noted, however, that Key relies on the dates of the statutes to determine the dates of the various runoff provisions. V. KEY, *supra* note 14, at 417 n.18. The fallacy of this argument lies in the fact most majority vote requirements were developed under party rules before being enacted as statutes. *See* Kousser, *supra* note 9, at 393.

69. V. KEY, *supra* note 14, at 423.

a North Carolina editor wrote, " 'without the legal primary, division among white men might result in . . . a return to the deplorable conditions when one faction of white men call upon the Negroes to help defeat another faction.' "[70] The chief proponent of Mississippi's runoff statute wrote: " 'White supremacy could be maintained only by the members of that race, remaining together politically, otherwise comparatively few Negroes who are qualified to vote might wield the balance of power.' "[71]

Woodward argues that the direct primary and the majority vote requirement result from a "paradoxical combination of white supremacy and progressivism."[72] However, an alternative argument can be made. Under this argument only the primary itself should be regarded as an example of enlightened reform. The majority vote requirement, in contrast, should be recognized as a discriminatory device designed to overwhelm black political influence—whether exercised independently through Republican-Populist combinations or used as a lever to obtain concessions from white Democrats willing to seek black support. The majority vote requirement relates more directly to the goal of guaranteeing white unity than it does to the objective of conferring control of a party on its rank and file.

II. Lack of Systematic Studies in This Area

In addition to the highly publicized Michaux and Clyburn contests, there are many examples of promising black candidates winning pluralities in primaries but losing to white opponents in runoffs.[73] In 1968 Charles Evers lost a runoff to a white candidate after leading the first primary for the Third Congressional District of Mississippi.[74] Similarly, in 1974 James Meredith won a plurality in the Fourth Congressional District Democratic primary in Mississippi, but dropped out of the race, rather than face a runoff, after the Mississippi Supreme Court refused to allow him to run as an independent.[75] Running for the same seat in 1980, Henry Curtsy led the first primary, but lost to a white candidate in the second primary.[76] Armand Derfner, a civil rights attorney, reportedly has unearthed over fifty similar incidents in Mississippi.[77] In North Carolina Howard Lee won a plurality in the 1976 Democratic primary for lieutenant governor

70. Kousser, *supra* note 9, at 393 (quoting a North Carolina editor who surveyed public opinion in 1899).

71. Kousser, *supra* note 9, at 394 (quoting Edward F. Noel, chief sponsor of 1902 Mississippi law adopting primary election with runoff requirement).

72. C. Woodward, *supra* note 11, at 373. In the South the "irony" of political "reforms" that diminish the voting rights of blacks is all too familiar. McDonald, *supra* note 6, at 431 & n.14 (pointing to Justice Marshall's frequent recognition of this theme).

73. *See supra* text accompanying notes 4-7.

74. *See* McDonald, *supra* note 6, at 432 n.15.

75. *Hearings*, *supra* note 3, at 46 (testimony of Victor McTeer, Center for Constitutional Rights).

76. *Hearings*, *supra* note 3, at 46 (testimony of Victor McTeer, Center for Constitutional Rights).

77. *See* Roberts, *supra* note 1 (reporting Derfner's findings at more than 50). *But see* McDonald, *supra* note 6, at 433 & nn.6, 17 (placing the same findings at over 100).

before being eliminated by a white opponent in the subsequent primary.[78] Significantly, majority vote requirements also have a disparate impact on female participation in the political process. Eleanor Smeal analyzed sixty congressional and gubernatorial elections that involved women in nine states with majority vote requirements. She found that women lost to male opponents in six of the eight runoffs involving a male candidate and a female candidate.[79] In all six defeats the female candidate had won a plurality in the initial primary.[80]

Although the numerous examples of minorities winning primaries by pluralities and then losing to white candidates in runoffs illustrate the potentially discriminatory results of majority vote requirements, few systematic studies have examined the overall effects of second primaries.[81] Steve Suitts, Executive Director of the Southern Regional Council, explains that state election officials do not maintain data on primary returns and that local newspapers provide the only source of the necessary data.[82] Similarly, Charles Bullock and Loch Johnson, political scientists at the University of Georgia, report that lists of minority candidates are unavailable.[83]

Some studies have been conducted, however. Bullock and Johnson analyzed 215 runoffs held in Georgia between 1965 and 1982 for governor, lieutenant governor, secretary of state, the state legislature, and the United States Congress.[84] They found that only seven runoffs involved head-to-head confrontations between black and white candidates.[85] Of the three runoffs in which black candidates who had led the initial primary participated, the leader prevailed in two of the second primaries.[86] This finding is consistent with the study's conclusions regarding front-runners in general; sixty-eight percent of the primary leaders went on to win in the runoffs.[87] Females won ten of the eleven runoffs that they entered after winning a plurality in the initial primary.[88]

The Georgia study is subject to criticism on several fronts. First, as the authors recognized, the size of the sample is too small to provide reliable conclusions.[89] Further, the fact only seven runoffs involved black-white confrontations may be due in part to the reluctance of black politicians to run for office knowing that they may be forced to overcome an expensive, racially charged runoff to win nomination. This fact may also be explained, in part, by the date chosen to begin the study—1965, a time when black political power in Georgia was mini-

78. Lanier, *The Runoff Primary: A Path to Victory*, N.C. INSIGHT, June 1983, at 18, 22 (1983).

79. *Hearings*, *supra* note 3, at 293-94 app. 2 (Eleanor Smeal Report).

80. *Hearings*, *supra* note 3, at 293-94 app. 2 (Eleanor Smeal Report).

81. *E.g.*, *Hearings*, *supra* note 3, at 67 (testimony of Steve Suitts, Executive Director, Southern Regional Council).

82. *Hearings*, *supra* note 3, at 67-68 (testimony of Steve Suitts, Executive Director, Southern Regional Council).

83. Bullock & Johnson, *Runoff Elections in Georgia*, 47 POL. SCI. 937, 944 n.6 (1985).

84. *Id.* at 940.

85. *Id.* at 944.

86. *Id.*

87. *Id.* at 940.

88. *Id.* at 944.

89. *Id.*

mal.[90] Second, the authors did not indicate the racial composition of the districts in which the runoffs won by black candidates took place. If any of these three contests were held in a majority black district, the relevant conclusions would change drastically because a majority vote requirement operates to the detriment of the minority race, whatever its color. Third, the authors also neglected to analyze their own data fully. They omitted the most important comparison: that between the success rate of black candidates who won pluralities in initial primaries in black-white runoffs in majority white districts and the success rate of white front-runners in all-white runoffs in majority white districts. This comparison would better isolate the racial factor. The authors indicated that no black candidate won any of the four black-white runoffs following a primary won by a white candidate, but they did not contrast this finding with the fact a white runner-up won one of the three black-white runoffs following primaries won by a black candidate.[91] Although the size of the sample makes this data inconclusive, white runners'-up success rate of thirty-three percent is substantially better than that of black runners'-up: zero. Rather than consider this fact, the authors chose to compare the black front-runners' success rate of sixty-six percent to the success rate of the leaders—black and white—of primaries preceding black-white runoffs: eighty-six percent.[92] This comparison obviously mutes the relevant conclusion by offsetting the success of one white runner-up against the failures of all black runners-up. Moreover, a quantitative analysis, although certainly relevant, can be somewhat misleading. The majority vote requirement's disincentive effect is immeasurable. Thus, the real inquiry concerns the existence, not the extent, of a racially discriminatory impact. Most states requiring runoffs have not elected blacks to Congress or to statewide office since disenfranchisement. Against this background a disparate impact of any size is substantial.

At least one study has looked at the operation of second primaries in North Carolina.[93] Although this study focused on the respective results of various legislative proposals before the North Carolina General Assembly,[94] the racial consequences of runoffs in North Carolina can be gleaned from the work. The

90. *Id.* at 940.

91. *Id.* at 944.

92. *Id.*

93. *See* Lanier, *supra* note 78, at 22.

94. Lanier, *supra* note 78, at 18. Legislative proposals that would change the majority vote requirement to rules requiring between 40% and 50% of the vote have been introduced but rejected in North Carolina. *Id.* In 1983 the North Carolina General Assembly considered five proposals to modify the majority vote requirement. These proposals recommended lowering the threshold requirement for winning nomination from 50% to a lower percentage, and some included a specified margin of victory. The proposals were: (1) a 40% requirement; (2) a 42% requirement; (3) a 45% requirement combined with a 15% margin of victory; (4) a 40% requirement combined with a 5% margin of victory; and (5) a 41% requirement combined with a 3% margin of victory. *Id.* at 19.

In 1986 black legislators in North Carolina again launched a campaign to lower the percentage of votes necessary to avoid a runoff from 50% to 40%. *See* Christensen, *Primary runoff change draws support, criticism*, News and Observer (Raleigh, N.C.), May 27, 1986, at 1A, col. 1 (reporting efforts to rally support for proposal prior to start of legislative session); *see also Blacks Still Pushing to Change Runoffs*, News and Observer (Raleigh, N.C.), June 14, 1986, at 1A, col. 1 (reporting on lobbying efforts during legislative session). The Democratic leadership in the general assembly initially supported the efforts to reduce the vote requirement, *see* Christensen, *supra*; however, the

study examined the effects of the majority vote requirement in elections for the general assembly, Congress, and statewide offices;[95] however, this Note's analysis is limited to the results of runoffs for Congress and statewide office because of the difficulty in determining the race of candidates for other offices. In North Carolina two black candidates for congressional or statewide office have been involved in runoffs—H. M. (Mickey) Michaux, Second Congressional District, and Howard Lee, lieutenant governor.[96] In both instances the black candidate won a plurality in the first primary, but lost to a white opponent in the runoff.[97] The only other related runoff for major office in North Carolina occurred in 1984 when a female, Susan Green, lost the Democratic nomination for the Ninth Congressional District in a runoff after winning a plurality in the initial primary.[98] The North Carolina study also illustrates that the runoff allows racism to prevail even in runoffs between white candidates. Frank Porter Graham, former president of the University of North Carolina who had been appointed to fill a vacancy in the United States Senate, lost a runoff to Willis Smith in the 1950 Senate primary after winning more than forty-nine percent of the votes in the initial primary.[99] Graham, a renowned progressive, was hurt by his position on civil rights in a campaign remembered for open appeals to racist sentiments.[100]

Notwithstanding the studies discussed above, there is a lack of thorough analysis in this area. No study has analyzed fully the disparate impact majority vote requirements have on the political influence of blacks. This lack of analysis only serves to perpetuate that disparate impact. An inability to prove disparate impact or discriminatory effect makes it difficult to challenge such electoral schemes successfully. Moreover, the lack of thorough analysis in this area ensures that the general public remains ignorant of the problem.

III. CONSTITUTIONAL CHALLENGES TO THE MAJORITY VOTE REQUIREMENT

The fifteenth amendment to the United States Constitution provides, in part, that a citizen's right to vote "shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servi-

proposed change died in committee. *See* Christensen, *Panel blocks move to change primary runoffs*, News and Observer (Raleigh, N.C.), June 20, 1986, at 1A, col.1.

95. *See* Lanier, *supra* note 78, at 20. Lanier indicates that between 1976 and 1982 no black or female candidates for the North Carolina General Assembly lost in a runoff after winning 40% or more of the initial primary votes. *Id.* at 22.

96. Lanier, *supra* note 78, at 22.

97. Lanier, *supra* note 78, at 22.

98. Interview with Mark Lanier (Nov. 27, 1985).

99. Lanier, *supra* note 78, at 22. Lanier reports that Smith won the runoff by only two percent and that "in every county . . . , voter turnout dropped." *Id.*

100. *See* Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986); Lanier, *supra* note 78, at 22. In another study, Stella Theodoulou has analyzed the effect of Louisiana's open primary system, which includes candidates from both parties in an initial primary followed by a runoff if no candidate achieves a majority. *See* Theodoulou, *supra* note 2, at 459. However, Louisiana's open primary is sufficiently different from other dual primaries to make this study inapplicable to the runoffs in existence throughout the rest of South. Thus, Louisiana's unique method of election is beyond the scope of this Note.

tude."[101] The fourteenth amendment to the Constitution provides, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[102] Because of the arguably disparate impact majority vote requirements have on blacks' political power, such requirements are open to attack under both of these constitutional provisions. The purposes underlying majority vote requirements took on additional importance after the Supreme Court's decision in *City of Mobile v. Bolden*.[103] In *Bolden* a plurality of the Court held that electoral schemes violate the fifteenth or fourteenth amendments only if they were " 'conceived or operated' " for racially discriminatory purposes.[104]

A. *Overview*

Before analyzing the majority vote requirement under the fourteenth and fifteenth amendments, it is necessary to review briefly the history of constitutional voting rights litigation. In *Baker v. Carr*[105] the United States Supreme Court first entered the "political thicket"[106] of voting rights claims involving a practice other than outright denial of access to the polls.[107] In *Baker* the Court held that a claim that Tennessee's refusal to reapportion its legislative districts to reflect changes in the distribution of its population presented a justiciable claim under the fourteenth amendment.[108] In *Reynolds v. Simms*,[109] decided two years after *Baker*, the Supreme Court entrenched the principle of one person, one vote—holding that apportionment of Alabama's legislature violated the equal protection clause because population differences between districts gave inordinate clout to the votes of those citizens in the smaller districts.[110] The principle of vote dilution, central to modern voting rights litigation, thus emerged from these decisions.

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101. U.S. CONST. amend. XV.

102. U.S. CONST. amend. XIV.

103. 446 U.S. 55 (1980).

104. *Id.* at 70 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)).

105. 369 U.S. 186 (1962).

106. *See* Colegrove v. Green, 328 U.S. 549, 556 (1946). In *Colegrove* the Court refused to decide an apportionment issue because it presented a nonjusticiable political question. *Id.*

107. In Gomillion v. Lightfoot, 364 U.S. 339 (1960), the Supreme Court held that the deliberate redrawing of municipal boundaries to exclude black citizens violated the fifteenth amendment. The decision in *Gomillion* foreshadowed the decision in *Baker*; however, *Gomillion* presented a claim of complete denial of access to voting whereas *Baker* involved a claim that particular votes carried less weight than others.

108. *Baker*, 369 U.S. at 237.

109. 377 U.S. 533 (1964).

110. *Id.* at 565-68. Prior to *Reynolds* the Supreme Court, in Gray v. Sanders, 372 U.S. 368, 379-81 (1963), held that Georgia's method of counting votes violated the fourteenth amendment because it weighted rural votes more heavily than urban votes. In *Gray* the Court said, "The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote." *Id.* at 381. In Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964), the Supreme Court held that Georgia's congressional districting scheme violated U.S. CONST. art. I, § 2, which requires that House members be elected "by the people of the several states." The Georgia scheme left some voters represented by representatives responsible to fewer voters than representatives from other districts; some votes thus carried less influence than other votes. In *Reynolds* the Supreme Court made clear that the equal protection clause of the fourteenth amendment provided the source of the "one person, one vote" principle. *Reynolds*, 377 U.S. at 565-66.

In *White v. Regester*[111] the Supreme Court analyzed at-large elections in light of the vote dilution concept. In *White* minority voters from two legislative districts in Texas contended that placing sizeable black and hispanic communities within white dominated, multimember districts overwhelmed the political leverage of the minority communities.[112] Addressing these claims, the Court announced that the constitutional inquiry concerned whether the "political processes leading to nomination and election were . . . equally open to participation by the group in question—that its members had . . . [equal] opportunity to participate in the political process and to elect legislators of their choice."[113]

The Supreme Court relied on a number of factors to hold that the particular multimember districts in question diluted the vote of blacks in Dallas County and hispanics in Bexar County.[114] The Court approved the district court's finding that a majority vote requirement and a numbered seat provision that led to head-to-head confrontations "enhanced the opportunity for racial discrimination."[115] Further, the Supreme Court recognized a "history of official racial discrimination which at times in Texas touched the right of Negroes to register and vote and to participate"[116] and noted that since Reconstruction only two blacks from Dallas County had served in the state legislature.[117] The Court thus approved findings of a lack of responsiveness on the part of white politicians for the concerns of the black community and of a reliance on racial campaign tactics.[118] The Court also approved the lower court's finding that blacks had not been allowed to participate in the slating process selecting candidates for the primaries.[119]

With respect to the hispanic community in Bexar County, the Court pointed to the "residual impact" of a history of discrimination in education, employment, economics, health, and politics that contributed substantially to low registration and low voter participation.[120] The Court noted that only five Mexican-Americans had been elected to the state legislature since 1880 and that Bexar County's representatives were not responsive to the needs of the hispanic community.[121] Affirming the lower court's decree ordering the creation of single-member districts, the Court added that the lower court's findings of past and

111. 412 U.S. 755 (1973).

112. *See id.* at 756.

113. *Id.* at 766 (citing Whitcomb v. Chavis, 403 U.S. 124, 149, 150 (1971)).

114. *Id.* at 765. The factors approved by the Court included the following: Official discrimination affecting minority voting rights; existence of majority vote requirements in primaries and residency requirements in at-large elections; minorities' lack of electoral success; exclusion of minorities from candidate-selecting organizations; white officials' failure to address the political concerns of minority communities; the resort to racist appeals in political campaigns; and the residual impact of societal discrimination on minorities. *Id.* at 766-69.

115. *Id.* at 766. The lower court had indicated that neither provision, standing alone, discriminated against blacks and hispanics. *Id.*

116. *Id.*

117. *Id.* at 766-67.

118. *Id.* at 767.

119. *Id.* at 766-67.

120. *Id.* at 768-69.

121. *Id.*

present discrimination were based on "the totality of the circumstances"—cautioning that it did not establish a constitutional right to proportional representation.[122] The factors identified by the *White* court were further developed by the United States Court of Appeals for the Fifth Circuit in *Zimmer v. McKeithen*.[123] Until 1980 lower courts[124] relied on the *Zimmer-White* factors to hold that at-large electoral systems, as operated in particular localities, violated both the fourteenth amendment and the Voting Rights Act.[125]

B. *The Intent Requirement*

In 1980 the Supreme Court in *Bolden* overturned a district court's invalidation of Mobile, Alabama's method of electing its commissioners from the city at large.[126] The lower court had based its decision on an analysis of the factors developed in *White* and *Zimmer*. The lower court's analysis did not establish that these circumstances proved discriminatory intent in either adopting or maintaining the electoral system.[127] A plurality of the Court found that the lower court had relied primarily on the lack of black elected officials and on the commissioners' lack of concern for the needs of the black community.[128] The plurality held that discriminatory intent was a necessary component of any voting rights claim—whether based on the fourteenth or fifteenth amendment, or the Voting Rights Act—and that plaintiffs had failed to establish the requisite intent.[129] The Court further noted that blacks in Mobile registered and voted

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122. *Id.* at 769.

123. 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam). In *Zimmer* the United States Court of Appeals for the Fifth Circuit carefully analyzed the "panoply of factors" relied on by the Supreme Court in resolving vote dilution claims. *Id.* at 1305. The court then identified the circumstances and factors to which minorities must point to support a vote dilution claim. In addition to an inability to elect officials in proportion to their numbers in the population, the *Zimmer* court noted that minorities must point to additional factors. The court noted that if minorities can point to

> lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.

Id. (footnotes omitted). The *Zimmer* court also noted that a vote dilution claim could be maintained without proof of all of the factors. *Id.*

124. *See, e.g.*, Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976), *aff'd*, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

125. 42 U.S.C. § 1973 (1982).

126. *Bolden*, 446 U.S. at 55.

127. *Id.* at 71.

128. *Id.*

129. *Id.* at 65-70. The *Bolden* Court noted that § 2 of the Voting Rights Act "adds nothing to the appellees' [black voters in Mobile, Alabama] complaint." *Id.* at 60.

A seriously divided Supreme Court decided *Bolden*. Justice Blackmun agreed with the result, finding that the district court's decree ordering Mobile to switch from a commission form of government to a mayor-council system raised substantial constitutional questions. *Id.* at 81 (Blackmun, J., concurring in result). Justice Blackmun left open the question whether a vote dilution claim required proof of purposeful discrimination, but he indicated that the lower court's findings supported an inference of discriminatory intent. *Id.* at 80 (Blackmun, J., concurring in result).

Justice Stevens approved the rejection of the *Zimmer* analysis, but disagreed with the plurality's

without hindrance.[130] The *Bolden* plurality stated that discrimination in employment and in providing public services did not relate to voting and that a history of racial discrimination was of limited help in proving present discriminatory intent.[131] The Court added that although the majority vote requirement "[disadvantaged] any voting minority," its existence did not prove "purposeful discrimination."[132] As it did in its earlier *White* decision, the Court emphasized that no political groups were entitled to proportional representation.[133]

In *Rogers v. Lodge*[134] the Supreme Court softened the implications of *Bolden* by approving a district court's finding that an at-large electoral system,[135] combined with a majority vote requirement and anti-single-shot provisions,[136] had been maintained for discriminatory purposes.[137] The lower court relied on the *White-Zimmer* factors to find that Burke County, Georgia, had maintained its method of electing county commissioners for discriminatory purposes.[138] Justices Powell and Rehnquist dissented, noting that the lower court based its conclusions on the same factors considered inadequate in *Bolden*.[139]

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focus on the subjective intent of the lawmakers. *Id.* at 90 (Stevens, J., concurring in judgment). Justice Stevens argued that the inquiry should concern "the objective effects of the political decision." *Id.* Justice Stevens suggested that only those election laws with a substantial "adverse impact" on political groups and without "any legitimate justification" violated the Constitution. *Id.* at 90-92 (Stevens, J., concurring in judgment).

Justice White found that the evidence supported an inference of purposeful discrimination. *Id.* at 99 (White, J., dissenting). Justice Marshall characterized the plurality opinion as holding that absent proof of discriminatory intent, "the right to vote provides the politically powerless with nothing more than the right to cast meaningless ballots." *Id.* at 104 (Marshall, J., dissenting). Justice Marshall stated that "[w]hatever may be the merits of applying motivational analysis to the allocation of constitutionally gratuitous benefits [such as jobs], that approach is completely misplaced where, as here, it is applied to the distribution of a constitutionally protected interest." *Id.* at 121 (Marshall, J., dissenting). Justice Marshall also argued that disparate impact on racial minorities was sufficient to invalidate election laws under the fourteenth and fifteenth amendments, as well as the Voting Rights Act. *Id.* at 141 (Marshall, J., dissenting). Justice Brennan joined the dissenting opinions of both Justice White and Justice Marshall. *Id.* at 94 (Brennan, J., dissenting).

130. *Id.* at 73.

131. *Id.* at 73-74.

132. *Id.* at 74.

133. *Id.* at 79-80.

134. 458 U.S. 613, *reh'g denied*, 459 U.S. 899 (1982).

135. Under an at-large electoral scheme voters elect officials from the political unit as a whole rather than from districts within the political unit. *See id.* at 616. The *Rogers* Court identified the potential discriminatory impact of such an electoral system:

> At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority, whether it be a racial, ethnic, economic, or political group, may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts.

Id.

136. Minorities may offset the dilutive effect of at-large elections by voting for only a few of the seats up for election to avoid providing the winning margin for less favored candidates. Such efforts are referred to as single-shot voting. *See* City of Rome v. United States, 446 U.S. 156, 183-84 & n.19 (1980) (citing U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 206-07 (1975)). Anti-single-shot provisions appear in different forms. However, they all share an essential feature—they all require voters to vote separately for each seat up for election. *See id.* at 185 & n.21 (discussing operation of numbered posts, residency requirements, and staggered terms).

137. *Rogers*, 458 U.S. at 627.

138. *Id.* at 620-22.

139. *Id.* at 628 (Powell, J., and Rehnquist, J., dissenting).

C. *Discriminatory Intent in Adoption*

Proof of purposeful discrimination in the adoption of second primaries presents an elusive target. Until recently historians simply have not investigated specifically the motivations underlying the creation of majority vote requirements.[140] Further, detailed legislative history is either unavailable or inconclusive.[141] Professor Kousser reports that newspapers of the times focused on the general principles of primaries, but not specifically on the majority vote requirement.[142] He adds, however, that proponents of the primary emphasized the complementary goals of strengthening the Democratic party and "[shifting] control toward 'the people'—loyal white Democrats."[143] These objectives support the argument that the purpose behind the majority vote requirement was to stifle black political influence.

Although direct proof of intentional discrimination in the development of majority vote requirements has been difficult to uncover, strong circumstantial evidence does exist. This evidence is illustrated by examining when and where runoffs first appeared. Professor Kousser has noted that the states with the largest black populations were the first to use second primaries.[144] In South Carolina the dual primary emerged within a year of South Carolina's disenfranchising convention.[145] Similarly, Alabama Democrats implemented a primary runoff provision in 1902—one year after a new constitution, which disenfranchised blacks, was enacted.[146]

Runoff statutes in some states allow municipalities to decide whether to require a majority vote for nomination in local elections.[147] Since the passage of

140. Kousser, *supra* note 9, at 394.

141. Kousser, *supra* note 9, at 394.

142. Kousser, *supra* note 9, at 394.

143. Kousser, *supra* note 9, at 394.

144. Kousser, *supra* note 9, at 394.

145. Kousser, *supra* note 9, at 394; *Hearings*, *supra* note 3, at 57 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).

146. *See* Hunter v. Underwood, 471 U.S. 222, 228-31, (1985); C. WOODWARD, *supra* note 11, at 372. The history behind Alabama's majority vote requirement provides circumstantial evidence of a discriminatory intent underlying its adoption. In *Hunter* the Supreme Court upheld the invalidation of a provision in Alabama's Constitution that disenfranchised individuals convicted of crimes believed by the framers of the Constitution to be most often committed by blacks. The Supreme Court approved the lower court's findings that the provision was adopted for discriminatory purposes during Alabama's 1901 Constitutional Convention, convened to disenfranchise blacks. *Hunter*, 471 U.S. at 228-29. Alabama sought to justify the 1901 provision by arguing that the measure was designed to exclude "poor whites as well as blacks." *Id.* at 230. The Court explained the argument as follows: "The Southern Democrats . . . sought in this way to stem the resurgence of Populism which threatened their power . . . ." *Id.* Although the Supreme Court reached no conclusions concerning the validity of the historical argument, the Court did find that the argument conceded that the provision in question would not have been adopted but for "racially discriminatory motivation." *Id.* at 231. The *Hunter* Court's opinion thus suggests that the historical evidence necessary to support a constitutional attack on Alabama's majority vote requirement may already exist.

147. *See* Butler, *The Majority Vote Requirement: The Case Against its Wholesale Elimination*, 17 URB. LAW. 441, 446 (1985); *see also* McDonald, *supra* note 6, at 429, 433 (citing the city of Americus, Georgia, which implemented a majority vote requirement after a sharp increase in black voter registration).

the Voting Rights Act,[148] a number of local governments have attempted to switch from plurality rules to majority vote requirements.[149] Because such a change would be discussed publicly, evidence of intentional discrimination probably would be easier to develop in such a situation. Most areas within states requiring runoffs, however, are covered by section five of the Voting Rights Act, which mandates that all changes in election laws be screened by either the Justice Department or the United States District Court for the District of Columbia for retrogressive effects on minorities' voting rights.[150] To date this preclearance provision has obviated the need for constitutional attacks on second primaries enacted by municipalities; between 1975 and 1980 the Justice Department rejected sixty-six attempts to establish majority vote requirements.[151]

D. *Maintained for Discriminatory Purposes*

Even if sufficient support for a claim of purposeful discrimination in the promulgation of a particular runoff cannot be uncovered, convincing evidence of a discriminatory intent in maintaining dual primaries would support a constitutional challenge.[152] However, not only is it difficult to ascertain the motivation behind legislative *action*, it is also difficult to establish the motivation behind legislative *inaction*. Nevertheless, the arguments of the proponents of second primaries support a contention that racial bias motivates the maintenance of dual primaries.

Supporters of majority vote requirements contend that runoffs ensure that a party's nominee has broad support within the party.[153] Because minority groups, by definition, make up less than a majority in most electoral districts, this justification amounts to a statutory requirement that minority candidates

148. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973a-p (1982)).

149. McDonald, *supra* note 6, at 433 (providing examples of two Georgia cities that changed to majority vote requirements with "predictable" discriminatory results).

150. *See* 42 U.S.C. § 1973c (1982). Section five of the Voting Rights Act provides, in part:

> Whenever a State or political subdivision . . . to which the prohibitions set forth in . . . this title [apply] . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on [November 1, 1964, 1968, or 1972, depending on which prohibitions apply to the State], such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . , and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if [it] has been submitted . . . to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made.

Id.

151. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 69 (1981).

152. *See Rogers*, 458 U.S. at 623-27.

153. *See* Roberts, *supra* note 1.

receive a certain number of white votes. The number of white votes received by a minority candidate depends on the extent of racially polarized voting. In the context of the racial bloc voting prevailing in the states requiring runoffs,[154] the second primary all but guarantees that no minority will ever be elected to any office representing a predominantly white constituency.

In *Butts v. City of New York*[155] the United States District Court for the Southern District of New York recognized the racial bias inherent in the position that runoffs fulfill the "necessary" function of providing that a party's nominee can attract a majority of the votes cast in a primary.[156] In *Butts* the district court held that New York City's rule setting a forty percent threshold for nomination in citywide elections violated both the fourteenth amendment and section two of the Voting Rights Act.[157] The United States Court of Appeals for the Second Circuit, however, disagreed with the district court and found that the New York City forty percent requirement violated neither the Constitution nor the Voting Rights Act.[158] Even had it not been reversed, the district court's constitutional holding, based on legislative intent in adopting the forty percent rule, would be of limited relevance to most runoffs in the South because New York's statute had been enacted in 1972.[159] The court, however, did analyze

154. *See* City of Port Arthur v. United States, 459 U.S. 159, 167 (1982) (discussing racial bloc voting in Texas); *Rogers*, 458 U.S. at 623 (discussing racial bloc voting in Georgia); Gingles v. Edmisten, 590 F. Supp. 354. 367 (E.D.N.C. 1984) (discussing racial bloc voting in North Carolina), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

155. 614 F. Supp. 1527 (S.D.N.Y.), *rev'd*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 106 S. Ct. 3335 (1986).

156. *Id.* at 1553.

157. *Id.* at 1548. Section two of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State . . . in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color . . . .
>
> (b) A violation of subsection (a) 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 . . . 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. The extent to which members of a protected class have been elected to office in the State . . . is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

158. *Butts*, 779 F.2d at 143.

159. *Butts*, 614 F. Supp. at 1528. "[A]n unprecedented showing by a Hispanic candidate for mayor," Herman Badillo, sparked New York City's superplurality rule. *Id.* at 1547. The bill was "known in Albany legislative circles as the 'Badillo bill,' or perhaps more properly the 'anti-Badillo bill.'" *Id.* at 1530. Sponsors of the statute sidestepped charges that the law would prevent minority candidates from winning citywide elections in New York City and focused instead on the need to reduce the possibility of candidates winning pluralities without the support of a majority of the party members. *Id.* at 1553. The court rejected this justification, noting that, in the context of racial bloc voting, devices intended to strengthen majority influence are designed to reduce minority power. *Id.* at 1553. The court also rested its decision on the fact the threshold level of 40% was significantly higher than the percentage of minority voters in New York City and higher than the highest percentage won by a minority candidate in a citywide race. *Id.* at 1554.

In North Carolina Ken Spaulding introduced a bill that would have amended North Carolina's majority vote requirement to a rule mandating only 40% of the initial primary votes for nomination. Lanier, *supra* note 78, at 19. Opponents of the bill, much like the antagonists of the New York

certain arguments advanced by supporters of the second primary that are similar to those relied on by southern Democrats. The district court's analysis of these arguments remains relevant despite the ultimate outcome of the case. One of the sponsors of the New York statute had argued that without the forty percent minimum " 'individuals would prevail in these primary contests who are not truly representative of the *majority* of the members of a particular party.' "[160] Addressing this contention, the court pointed out that it was merely

> another way of saying that . . . the voting power of the minority would be diluted, for the power of a majority cannot be enhanced without taking away from that of a minority, and that minority might likely be racial or ethnic, rather than of a specific philosophical bent. . . . As polarized voting increases this likelihood becomes greater.[161]

James Clyburn has characterized this justification for majority vote requirements as follows: " '[W]hite people are in the majority and . . . are supposed to rule.' "[162]

Supporters of the runoff argue that its elimination would strengthen the Republican party in the South. Bill Youngblood, chairman of the South Carolina Democratic party, has said that abolishing the majority vote requirement would " 'hand the Republicans on a silver platter something we don't have now in our state—a grassroots organization.' "[163] Congressman Ed Jenkins of Georgia has estimated that allowing nomination by plurality would allow the election in Georgia of " 'between fifteen and twenty-five Republicans and only a couple or three blacks.' "[164] Bert Lance, Georgia Democratic chairman, has agreed, arguing that " '[dropping the second primary] would [only] help elect Republicans at every level.' "[165] These contentions assume that eliminating the runoff would increase black nominations, which would in turn lead to defection by white Democrats. An apparent willingness to sacrifice black candidacies for the sake of maintaining the Democratic status quo clearly lurks beneath these justifications. Similarly, these arguments suggest great reluctance on the part of the southern Democratic establishment to commit its political support and financial backing to black nominees.

In the final analysis, however, an effective constitutional assault on dual primaries based on discriminatory intent in maintaining a majority vote requirement would rest on the type of circumstantial evidence identified in *White* and *Zimmer*.[166] A strong showing of the *White-Zimmer* factors, combined with

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statute, "privately . . . [referred] to the Spaulding proposal as the 'Michaux' bill." *Id.* at 22. The difficulty of proving such allegations against a sufficient number of legislators highlights the problems inherent in an intent requirement. *See Bolden*, 446 U.S. at 104-141 (Marshall, J., dissenting).

160. *Butts*, 614 F. Supp. at 1553 (quoting State Senator Bloom).

161. *Id.*

162. *Hearings*, *supra* note 3, at 108 (quoting from a panel discussion on the impact of primary runoffs on minority political influence).

163. Gailey, *Runoff Issue Puts Democrats on Spot*, N.Y. Times, May 3, 1984, at B13, col. 4 (quoting Bill Youngblood).

164. Roberts, *supra* note 1 (quoting Ed Jenkins).

165. Gailey, *supra* note 163 (quoting Bert Lance).

166. *See Rogers*, 458 U.S. at 621-22.

careful analysis demonstrating their operation on the runoff to produce discriminatory results, would allow an inference that the legislators maintained the second primary for the purpose of diluting the votes of minorities.[167]

IV. CHALLENGES UNDER THE VOTING RIGHTS ACT

Although majority vote requirements and primary runoffs are subject to constitutional challenges, such challenges are likely to fail. The Supreme Court's holding in *Bolden* established that such election schemes will fail only if it can be proved that they were enacted, or are maintained, with discriminatory intent. As discussed previously, proof of such discriminatory intent will be difficult to establish. Because the Voting Rights Act prohibits discriminatory effects irrespective of discriminatory intent, litigation attacking majority vote requirements and primary runoffs should focus on section two of the Voting Rights Act.[168]

In 1982 Congress amended the Voting Rights Act "to make clear that proof of discriminatory intent is not required to establish a violation of Section Two."[169] The Senate Report accompanying the amendment criticized the Supreme Court's decision in *Bolden* for "[placing] an unacceptably difficult burden on plaintiffs" and for "[diverting] the judicial inquiry from the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives."[170] Congress explicitly outlawed electoral schemes that disadvantage minorities and established "the legal standards . . . by codifying *White v. Regester*."[171]

The Senate Report identifies those factors to be considered in determining whether minorities "have an equal opportunity to participate in the political processes and to elect candidates of their choice."[172] The Senate Report provides that:

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

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167. *Id.*

168. *See* 42 U.S.C. § 1973 (1982). For the language of § 2, see *supra* note 157.

169. S. REP. NO. 417, 97th Cong., 2d Sess. 2, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 179; *see* Act of June 29, 1982, Pub. L. No. 97-205, 96 Stat. 134 (amending 42 U.S.C. § 1973).

170. S. REP. NO. 417, 97th Cong., 2d Sess. 16, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 193.

171. *Id.* at 2, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 193.

172. *Id.* at 28, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 206.

shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

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;

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[173]

The Senate Report makes clear that the enumeration of factors is not exhaustive and that no particular number or combination of factors must be shown to establish a violation of the Voting Rights Act.[174]

In *Thornburg v. Gingles*,[175] a case decided in 1986, the Supreme Court applied the 1982 amendment to section two of the Voting Rights Act for the first time.[176] The Court noted, "The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."[177] Although the Court recognized the relevance of all the factors enunciated in the Senate Report,[178] it identified racial bloc voting and the extent of minority representation as the critical factors to be considered.[179] The Court held that to challenge a multimember district successfully, minority voters had to establish that "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group."[180]

The Supreme Court, however, carefully limited its interpretation of section two to claims that particular at-large electoral schemes impaired minority vot-

173. *Id.* at 28-29, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 206-07 (footnotes omitted).

174. *Id.* at 29, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 207.

175. 106 S. Ct. 2752 (1986).

176. *Id.* at 2758.

177. *Id.* at 2764-65.

178. *Id.* at 2765-66 & n.15. The Court noted, "If present, the other factors . . . are supportive of, but *not essential to*, a minority voter's claim." *Id.* at 2766 n.15.

179. *Id.* at 2765-66 & n.15.

180. *Id.* at 2766.

ers' ability to elect their chosen candidates.[181] This qualification is important because whether minorities are geographically cohesive has little bearing on whether a specific majority vote requirement unduly enhances the potential for discrimination existing within the voting unit. In the context of a multimember districting scheme, unless minority voters are concentrated in sufficient numbers to allow a single-member district to be drawn for their advantage, the at-large system cannot be blamed for minorities' inability to elect candidates.[182] On the other hand, second primaries may operate in a specific setting to accentuate the voting strength of majorities impermissibly—at the expense of minorities' electoral influence—even if the electoral unit is substantially integrated.

In *Butts* the district court assessed New York City's forty percent requirement in light of the factors articulated in the Senate Report.[183] The court found the following: a history of discrimination in voting; racially polarized voting; lingering effects of discrimination in education, employment, and health—reflected in lower socio-economic status—that meant that the potential necessity of winning two primaries rather than one bore more heavily on minority candidates; racial appeals in political campaigns; the absence of victories by blacks or hispanics in citywide campaigns; and a tenuous state policy—preventing nomination of minority candidates.[184] Based on these findings the court held that under the totality of the circumstances the New York statute had a disparate impact on minority voters and therefore violated section two of the Voting Rights Act.[185] The court carefully noted that it harbored no misconceptions concerning the existence of a right to proportional representation.[186]

Because the district court's holding in *Butts* was later reversed, it offers little direct support for challenges to majority vote requirements in the South. However, the district court's analysis and reasoning should assist parties in de-

181. *Id.* at 2764-65 n.12. The Court did not consider whether § 2 applies to challenges based on an inability to influence, contrasted with determining the outcome of an election. *Id.* The Court also emphasized that it did not decide the standard to be applied to other types of electoral practices or procedures. *Id.*

182. *Id.* at 2766-67. The Court offered the following explanation: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Id.* In a multimember district minorities either have or lack the potential to elect candidates of their choice from single-member districts carved from the larger unit. *See id.* The situation differs when minorities are diffused evenly throughout the electoral unit. Under such circumstances minorities' potential political influence exists along a continuum and depends on the percentage of minority voters, the extent of bloc voting, as well as the operation of various electoral schemes. In different settings minorities may have more or less political influence, but it cannot be said that they either have or lack electoral power merely because they live in an integrated area.

183. *Butts*, 614 F. Supp. at 1542-48.

184. *Id.*

185. *Id.* at 1548. The United States Court of Appeals for the Second Circuit rejected the district court's finding that the New York law violated the Voting Rights Act. The court of appeals first conceded that "[i]t is possible that the run-off law may make it harder for the preferred candidate of a racial minority . . . to win a party's nomination . . . ." *Butts*, 779 F.2d at 149. The court noted further, however, that the Voting Rights Act "is concerned with the dilution of minority participation and not the difficulty of minority victory." *Id.* Although noting that it was unnecessary for it to do so, the court of appeals also considered, and rejected, the district court's application of the factors contained in the Voting Rights Act. *Id.* at 150-51.

186. *Butts*, 614 F. Supp. at 1548.

veloping such challenges—despite the subsequent reversal. A fifty percent hurdle, as imposed by most southern runoff statutes, obviously submerges minority voting strength more effectively than a forty percent threshold. More importantly, the district court in *Butts* found that the New York statute operated with discriminatory results despite the fact no minority candidate had ever won a plurality in the initial primary only to lose in the runoff.[187] In the South, however, many minorities have been defeated in runoffs against white opponents who finished second in the initial primary.[188]

In general, strong evidence of official discrimination touching the right to vote should exist in any state that requires a majority vote for nomination.[189] In *Rogers* the Supreme Court recognized that past discrimination in voting contributes to the present low rates of minority voter registration.[190] Even after substantial success in registering blacks during the 1984 elections, the rate of black registration in the South is still ten percent less than that of white registration.[191] In *Butts* the court found that New York's superplurality rule enhanced the effect of lower rates of registration attributed to official discrimination in voting.[192] Lower rates of minority registration require minority candidates to win higher percentages of white votes. In the context of the racially polarized voting common in the South,[193] lower rates of registration among blacks heighten the discriminatory impact of second primaries.

Moreover, racial bloc voting persists throughout those states that require runoffs.[194] The presence and strength of this factor are at the heart of those claims that runoffs dilute the votes of minorities. When white voters consistently refuse to support black candidates, the majority vote requirement guarantees that no minority will ever win nomination.

Although *Butts* is the first decision to consider a direct challenge to a runoff provision,[195] many courts have recognized that majority vote requirements en-

187. *See id.* at 1529. The court of appeals, however, was not willing to ignore this fact. The court noted that "the bill has not yet had any negative effect on a minority candidate; indeed, it is not at all clear which way the law will cut—it may *help* a minority candidate to win nomination." *Butts*, 779 F.2d at 149.

188. *See supra* notes 1-8 and accompanying text; text accompanying notes 73-80.

189. *See Rogers*, 458 U.S. at 624; *White*, 412 U.S. at 766; *Zimmer*, 485 F.2d at 1301; Gingles v. Edmisten, 590 F. Supp. 354, 359 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

190. *Rogers*, 458 U.S. at 624.

191. *Hearings*, *supra* note 3, at 135 (testimony of Lani Guinier, Assistant Counsel, NAACP Legal Defense & Educ. Fund, Inc.).

192. *Butts*, 614 F. Supp. at 1544-45. The court of appeals, however, rejected the district court's findings with respect to past discrimination in voting rights on the part of New York. Rather, the court noted that "New York has ensured to black citizens the right to vote on the same terms as whites since 1824 [and that the city had] taken affirmative steps since 1975 to encourage minority voting . . . ." *Butts*, 779 F.2d at 150.

193. *See* City of Port Arthur v. United States, 459 U.S. 159, 167 (1982); *Rogers*, 458 U.S. at 623; Gingles v. Edmisten, 590 F. Supp. 354, 367 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

194. *See* City of Port Arthur v. United States, 459 U.S. 159, 167 (1982); *Rogers*, 458 U.S. at 623; Gingles v. Edmisten, 590 F. Supp. 354, 367 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

195. *But see* Bond v. Fortson, 334 F. Supp. 1192 (N.D. Ga.), *aff'd*, 404 U.S. 930 (1971) (dismissing challenge to Georgia's majority vote requirement for lack of case or controversy). The

hance the impact of racially polarized voting. In *City of Port Arthur v. United States*[196] the Supreme Court approved a lower court order that conditioned its approval of a plan creating a combination of at-large and single-member districts for city council elections on elimination of a majority vote requirement for the at-large seats.[197] The Supreme Court stated:

> As the District Court well understood, the majority-vote rule . . . would always require the black candidate in an at-large election, if he survived the initial round, to run against one white candidate. In the context of racial bloc voting prevalent in Port Arthur, the rule would permanently foreclose a black candidate from being elected to an at-large seat.[198]

In *Gingles v. Edmisten*[199] the United States District Court for the Eastern District of North Carolina noted that majority vote requirements reduce the likelihood that any candidate representing "identifiable voting [minorities]" would win.[200] The court then stated: "This generally adverse effect on any cohesive voting minority is . . . enhanced for racial minority groups if . . . racial polarization in voting patterns also exists."[201]

The Senate Report lists the majority vote requirement as one of several "voting practices . . . that may enhance the opportunity for discrimination."[202] The operation of second primaries in combination with the other procedures enumerated—unusually large election districts and anti-single-shot provisions[203]—adds to the discriminatory impact of runoffs. Although voting rights litigation and preclearance review have reduced the use of these devices, large districts and anti-single-shot devices still exist in many parts of the South.[204]

Exclusion of minorities from candidate slating processes accentuates the discriminatory results of dual primaries.[205] Without the active support of the

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decision in *Bond* is best explained by the failure of plaintiffs to make adequate offers of proof. Plaintiffs in *Bond* relied solely on Georgia's history of racial discrimination, congressional findings of continuing voting discrimination, the date of the runoff statute—1964, and the "patently" discriminatory effects of runoffs in making their case. *Id.* at 1193. Plaintiffs failed to offer evidence supporting these conclusions, nor did they even allege discriminatory impact. *Id.* at 1194. In Jackson v. Allain, No. GC 84-42-LS-0 (N.D. Miss.), plaintiffs challenged Mississippi's runoff provision. *See* McDonald, *supra* note 6, at 435 & n.30. The case, however, never went to trial—court records show the case closed as of August 28, 1986. Telephone conversation with the Clerk of Court's office, United States District Court for the Northern District of Mississippi (Nov. 10, 1986).

196. 459 U.S. 159 (1982).

197. *Id.* at 167.

198. *Id.*; *see also* City of Rome v. United States, 446 U.S. 156, 183-84 (1980) (court approved the adoption of a similar condition before approval of an electoral plan).

199. 590 F. Supp. 345 (E.D.N.C. 1984), *aff'd in part and rev'd in part sub nom.* Thornburg v. Gingles, 106 S. Ct. 2752 (1986).

200. *Id.* at 363.

201. *Id.*

202. S. REP. No. 417, 97th Cong., 2d Sess. 28, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206.

203. *Id.*

204. *See City of Port Arthur*, 459 U.S. at 162; City of Rome v. United States, 446 U.S. 156, 188 (1980) (Blackmun, J., concurring); *White*, 412 U.S. at 762; *Gingles*, 590 F. Supp. at 350; U.S. COMM'N ON CIVIL RIGHTS, *supra* note 151, at 69.

205. The term "candidate slating" refers to endorsements by influential political organizations. *See White*, 412 U.S. at 766-67 & n.11. Given the prevalance of racial bloc voting, *see supra* text

white political establishment, few inroads against racial bloc voting can be expected. The majority vote requirement forces minority candidates to attract substantial percentages of white votes to win nomination. Thus, denying minority candidates access to slating procedures places another group of potential voters beyond the reach of black and hispanic politicians. It is conceivable that in some districts the number of voters who rely on endorsements by slating organizations, when combined with the number of white voters who simply refuse to vote for any minority candidate, is so high that a majority vote requirement is all that is required to lock minorities out of political office.

Minorities in the South have also been relegated to a lower socio-economic status as a result of years of open, hostile, and state-sponsored racism. In *Rogers* the Supreme Court upheld findings that black citizens in Burke County, Georgia, earned lower incomes, worked in less favorable jobs, lived in poorer housing, and received less education than their white peers.[206] The Court noted that this "depressed socio-economic status" reflected "the lingering effects of past discrimination."[207] In *Gingles* the district court made extensive findings regarding the present effects of a history of North Carolina discrimination "in public and private facility uses, education, employment, housing and health care."[208]

These socio-economic consequences hinder political participation, and the runoff doubles the discriminatory impact. In *Gingles* the district court found that "[t]his lower socio-economic status gives rise to special group interests" and "operates to hinder the group's ability to participate effectively in the political process and to elect representatives of its choice as a means of seeking government's awareness of and attention to those interests."[209] The key problem associated with this generally lower status, as it relates to the runoff, lies in the fact black candidates have fewer economic resources to draw on.[210] The dual primary forces candidates to finance two primary campaigns, and black candidates must rely primarily on a poorer segment of the population to finance those campaigns. Basil Paterson, a black politician in New York who has served as a state senator, Deputy Mayor of New York City, and Secretary of State of New York has estimated that an additional 500,000 dollars is necessary for a successful runoff campaign for a citywide office in New York City.[211] In *Butts* the district court found that the "burdens associated with campaigning and winning in two primaries instead of one are likely to have a disproportionately unfair impact on minority voters . . . ."[212]

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accompanying notes 193-94, and the fact blacks form a majority in few political units, *see infra* text accompanying notes 310-11, the exclusion of blacks from the endorsement process by influential groups among white voters may make it impossible for black candidates to overcome majority vote requirements in certain voting districts.

206. *Rogers*, 458 U.S. at 626-27.

207. *Id.* (noting the findings of the district court).

208. *Gingles*, 590 F. Supp. at 360-63.

209. *Id.* at 365.

210. *See Hearings*, *supra* note 3, at 31 (testimony of Victor McTeer, Center for Constitutional Rights) (discussing additional problems faced by candidates with limited resources).

211. *Butts*, 614 F. Supp. at 1536.

212. *Id.* at 1548. The court of appeals apparently accepted this contention; however, the court

In the South additional logistical problems are created by the depressed socio-economic status of minorities. Lani Guinier, a civil rights attorney for the National Association for the Advancement of Colored People Legal Defense Fund, has noted that much of the South consists of "large rural counties with no public transportation, [that] one-third of the black households have no access to a car, truck or van, [and that] one-fourth of the black households have no telephone . . . ."[213] Registration and polling sites are often located far away from black communities.[214] Past discrimination in education means that higher percentages of black voters need assistance in voting.[215] The dual primary system doubles the burden of getting black voters to the polls and aiding undereducated voters.[216] These considerations not only cause the second primary to weigh more heavily on minorities, but they often discourage black candidates from running for political office.[217] Moreover, these circumstances intensify the impact of the generally lower voting patterns of members of lower socio-economic classes who are disproportionately minorities.[218]

Racist campaign tactics, another factor identified by the Senate Report, continue to plague southern politics.[219] Although racial appeals themselves "lessen . . . the opportunity of black citizens to participate effectively in the political processes and to elect candidates of their choice,"[220] head-to-head confrontations between black and white candidates in runoffs arguably enhance the effectiveness of such tactics.[221] Herman Badillo, testifying in *Butts*, noted that it is difficult to predict the effect of appeals to racism in multicandidate fields.[222] Arguably, the use of racist campaign tactics hurts both the black candidate and the candidate relying on such ploys. In relatively short runoff campaigns black candidates often do not have time to hold white opponents accountable for authorizing blatantly racist campaign materials.[223] Racial campaigns heighten ra-

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rejected the notion that this fact supported a finding that the New York law violated the Voting Rights Act. The court noted:

> The district court suggested that the added expense of a run-off would inevitably hurt minority candidates, who have more difficulty raising campaign funds. We note, however, that the run-off in the 1977 primary for City Council President allowed Carol Bellamy—who seemed something of an "outsider" at the time—to overtake incumbent Paul O'Dwyer.

Butts, 779 F.2d at 150.

213. *Hearings, supra* note 3, at 136 (testimony of Lani Guinier, Assistant Counsel, NAACP Legal Defense & Educ. Fund, Inc.) (testifying on registration barriers).

214. *Hearings, supra* note 3, at 136 (testimony of Lani Guinier, Assistant Counsel, NAACP Legal Defense & Educ. Fund, Inc.) (testifying on registration barriers).

215. *See Hearings, supra* note 3, at 47 (testimony of Victor McTeer, Center for Constitutional Rights).

216. *See Hearings, supra* note 3, at 47 (testimony of Victor McTeer, Center for Constitutional Rights).

217. *See* Guinier, *The Runoff Primary: Threat to Our Rights*, ESSENCE, July 1984, at 16.

218. *See Butts*, 614 F. Supp. at 1548.

219. *See White*, 412 U.S. at 767; *Gingles*, 590 F. Supp. at 364.

220. *Gingles*, 590 F. Supp. at 364.

221. *Butts*, 614 F. Supp. at 1545.

222. *Id.* at 1532.

223. *Id.* at 1531-32. The court of appeals in *Butts* found there was no evidence of racist appeals in prior New York City elections. *Butts*, 779 F.2d at 150.

cially polarized voting, and the dual primary system enhances the discriminatory impact of both.

The Voting Rights Act establishes also that lack of electoral success is a relevant circumstance in assessing the operation of electoral schemes.[224] At the 1984 Democratic Convention the Reverend Jesse Jackson remarked: "Nineteen years [after passage of the Voting Rights Act] we're locked out [of] the Congress, the Senate, and the Governor's mansion."[225] The majority of states with runoff provisions have not elected blacks to Congress since Reconstruction.[226] Texas and Georgia currently are the only states that require a majority vote for nomination which are represented in Congress by a black person.[227] In contrast, Virginia, a state that nominates by caucuses instead of primaries, recently elected the South's first black lieutenant governor.[228] Of course, the Voting Rights Act expressly provides that it does not establish a right to proportional representation.[229] In *Rogers*, however, the Supreme Court recognized that "[b]ecause it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion."[230] Furthermore, it is clear that the lack of black political representation in the South results, at least in part, from the racism that pervades the entire United States. Moreover, the very existence of dual primaries may deter black candidacies.[231] The lack of political representation by black citizens illustrates that the runoff dilutes black political power; second primaries are an essential component of the obstacles keeping blacks out of political office in the South.

In many parts of the South, minority voters may be able to establish that white elected officials consistently ignore the particularized needs of minority

224. 42 U.S.C. § 1973(b) (1982 & Supp. 1985).

225. *Excerpts from Jackson Appeal to Convention Delegates for Unity in Party*, N.Y. Times, July 18, 1984, at A18, col. 4 [hereinafter *Jackson*] (speech presented July 17, 1984).

226. Among the states that require runoffs, the author has found only two states—Georgia and Texas—that have elected blacks to Congress in modern times. *See Hearings*, *supra* note 3, at 44 (testimony of Victor McTeer, Center for Constitutional Rights); U.S. COMM'N ON CIVIL RIGHTS, *supra* note 151, at 89; Stekler, *Electing Blacks to Office in the South—Black Candidate, Bloc Voting and Racial Unity Twenty Years After the Voting Rights Act*, 17 URB. LAW. 473, 475-78 (1985); *see also* M. BARONE & G. UJIFUSA, *supra* note 37 (containing biographical information on elected officials from the various states and demographical data on the states and congressional districts; published annually).

227. *See generally* M. BARONE & G. UJIFUSA, *supra* note 37 (containing biographical information on elected officials from the various states and demographical data on the states and congressional districts; published annually). On November 4, 1986, John Lewis, a black, won election in the Fifth Congressional District of Georgia. *See* Lin, *Blacks Key to Fowler victory, takeover of Senate by Democrats, leaders say*, Atlanta Constitution, Nov. 7, 1986, at 9A, col. 1 (noting Lewis' victory); *see also* Thurston & Secrest, *Candidates in Congressional races keep campaign trail hot on last day*, Atlanta Constitution, Nov. 4, 1986, at 23A, col. 1 (discussing the final day of Lewis' campaign, and noting his bitter battle with Julian Bond—also a black—in the Democratic primary).

228. Epps, *Can Virginia Really Teach Us How to be Progressive?*, N.C. Independent, Nov. 22-Dec. 5, 1985, at 15, col. 1.

229. 42 U.S.C. 1973b (1982).

230. *Rogers*, 458 U.S. at 623-24.

231. *See Hearings*, *supra* note 3, at 30-31 (tesitmony of Victor McTeer, Center of Constitutional Rights) (testifying that because of anticipated discriminatory result of a runoff, James Meredith dropped out of a race for congressional seat in Mississippi after winning a plurality in opening primary; discussing additional financial and logistical burdens associated with dual primaries).

communities. Such a lack of responsiveness to the needs of minorities is another factor identified by the Senate Report. In *Rogers* plaintiffs were able to establish discriminatory road paving, desegregation of schools and grand juries only after successful litigation, and public support of private schools.[232] The Supreme Court approved reliance on these circumstances to prove purposeful discrimination in maintaining an at-large electoral system.[233] Strong evidence of a lack of responsiveness to minority concerns demonstrates that the political influence of minorities has been diluted so effectively that elected officials can overlook their needs without fear of political repercussion; majority vote requirements help provide such a sense of security. It is at the local level that such a lack of responsiveness can most easily be established. Proof of indifference towards the political interests of minorities would be easier to develop in municipalities than in congressional districts or statewide offices; disparate distribution of governmental services—typically provided by local governments—is more susceptible of proof than indifference of congressmen or state officials to minority concerns.

In sum, convincing evidence of most, if not all, of the factors developed in *White* and *Zimmer* and enacted by Congress in the Voting Rights Act should be available in every state that operates dual primaries. These circumstances create the conditions for the discriminatory results of majority vote requirements. In turn, the runoff enhances the racially disparate impact of these factors on minority voting rights. Under the totality of circumstances existing in each state that holds second primaries, the majority vote requirement arguably denies minorities "an equal opportunity to participate in the political processes and to elect candidates of their choice."[234]

Moreover, the fundamental justification for maintaining majority vote requirements appears to rest on the alleged necessity of nominating candidates who have received a majority of the primary votes of party members.[235] In *Butts* the district court found this a tenuous state policy because racial bloc voting resulted in ensuring majority support only at the expense of minority political power, and because preserving the power of the Democratic establishment was an improper subject for state legislation.[236]

The above discussion suggests that challenges to majority vote requirements can be brought successfully under the Voting Rights Act. However, the Second Circuit's holding in *Butts* suggests that even this avenue of attack presents serious obstacles to those who might seek to challenge majority vote requirements.

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232. *Rogers*, 458 U.S. at 626.

233. *Id.*

234. S. REP. NO. 417, 97th Cong., 2d Sess. 28, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206.

235. *See* Roberts, *supra* note 1.

236. *Butts*, 614 F. Supp. at 1547-48. The court of appeals rejected the district court's finding of a tenuous state policy. The court first noted that it had rejected the district court's finding that the New York law was enacted with a discriminatory intent. *Butts*, 779 F.2d at 151. The court then reasoned that its finding cast serious doubt "as to the district court's finding of tenuous state policy." *Id.* The court of appeals also noted that the New York law "was enacted with the motive of improving the workings of the party system in New York . . . ." *Id.*

V. PRIMARY RUNOFFS AND POLITICAL CONSIDERATIONS

Apart from questions surrounding legal challenges to second primaries, a number of questions arise concerning the political expediency of eliminating majority vote requirements. These questions center around the stability of the traditional coalition between white and black Democrats and the ability of black Democrats to win general elections after being nominated with less than a majority of the primary votes. Additional factors for consideration include the effect of eliminating runoffs in majority black election districts, as well as the ability of white politicians to join forces to avoid splitting the vote to the advantage of black candidates.

A. *Blacks and Political Affiliation*

As black citizens in the South regained the right to vote, most supported the Democratic party.[237] The Democratic agenda appeared more attractive to blacks, and until relatively recently, the Democratic party provided the only path to political power in the South.[238] Southern Democrats' strength now depends largely on blacks and rural whites.[239] In turn, the residual effect of the South's one-party status leads many white Democrats to support the Democratic party in name and the Republican party in spirit.[240] As a result, the Republican party has done well in the South in recent presidential elections and enjoys southern support on national issues; at the same time, the Democratic establishment has managed to retain its power base by "[straddling] the racial fence" on divisive issues.[241]

Supporters of primary runoffs argue that the majority vote requirement encourages coalitions between white and black Democrats because candidates realize that eventually they will have to put together fifty percent of the primary vote to win nomination.[242] Many southern Democrats consequently fear that eliminating dual primaries will end the black-white coalition supporting Democratic control of the South.[243] A related concern is that reducing the incentive to form coalitions in primaries could intensify the racial polarization already entrenched throughout the South.[244]

It is unclear, however, that the runoff actually encourages coalitions. Because white politicians can rely on the high probability that any black candidate can be defeated in a runoff against a white opponent, the majority vote requirement discourages white Democrats from seeking black support whenever serious black candidates enter primaries. Moreover, real political alliances might de-

237. *See* Lamis, *The Runoff Primary Controversy: Implications for Southern Politics*, 17 POL. SCI. 782, 783-84 (1984).
238. *See id.*
239. *Id.* at 784.
240. *See id.*
241. *Id.*
242. *See* Butler, *supra* note 147, at 450.
243. Butler, *supra* note 147, at 450.
244. Butler, *supra* note 147, at 450.

velop if the power structure within the Democratic party gave its support and financial resources to black candidates who win primaries by pluralities.[245] This, in turn, could weaken racial bloc voting by encouraging white Democrats who would vote against black candidates in party runoffs to overcome their prejudices rather than support a Republican.[246] Efforts by black Democrats to appeal to mainstream Democrats in general elections would accelerate this process.

B. *Majority Vote Requirements and Extremist Candidates*

Another argument put forth by the primary runoff's backers points to examples of progressive Democrats winning nomination in runoffs after finishing second to conservative opponents in opening primaries[247] and argues that the majority vote requirement benefits minorities by eliminating right-wing Democrats hostile to minority interests.[248] Victories by Mississippi Governor William Winter and South Carolina Governor Richard Riley,[249] and losses by Orval Faubus in Arkansas and Lester Maddox in Georgia are often cited in support of this argument.[250] It is exceedingly difficult to verify these observations—one person's moderate is another person's conservative. In all likelihood, examples of liberal candidates defeated because of the majority vote requirement can be found for every conservative eliminated in a similar fashion; Frank Porter Graham's defeat in the 1950 North Carolina senatorial primary is a noteworthy example.[251] Most importantly, the argument that dual primaries should be retained so that white progressives can advance the interests of minorities "fails to address the discriminatory impact of the rule upon" minorities.[252] In addition to its paternalistic tone, the argument falters because it fails to recognize that fair election systems should not force minorities to rely on members of other races to represent their political interests.[253] As Tom Wicker has noted, "it's hard . . . to tell blacks that they should forego their own political ambition lest they polarize the white majority against them."[254]

Southern Democrats also argue that second primaries serve as a "moderating force" necessary to prevent the nomination of extremist candidates.[255] Without a majority vote requirement, the argument goes, large numbers of weak candidates competing in a primary could result in the emergence of a candidate

245. *See* Guinier, *supra* note 217, at 16.
246. Guinier, *supra* note 217, at 16.
247. *See* Wicker, *The Runoff Issue*, N.Y. Times, May 1, 1984, at A31, col. 1.
248. *See* Lamis, *supra* note 237, at 783.
249. *See* Wicker, *supra* note 247.
250. *See* Lamis, *supra* note 237, at 783.
251. *See* Lanier, *supra* note 78, at 22; *see also supra* note 99 and accompanying text (briefly discussing Graham's defeat).
252. *Hearings*, *supra* note 3, at 41 (testimony of Victor McTeer, Center for Constitutional Rights).
253. *Hearings*, *supra* note 3, at 41 (testimony of Victor McTeer, Center for Constitutional Rights).
254. Wicker, *supra* note 247.
255. Roberts, *supra* note 1.

representing only a narrow ideological wing of the party. However, this argument is unpersuasive. If the nominee proves incapable of attracting the support of a broader segment of the party, his or her defeat in the general election should discredit that particular faction of the party, thereby preventing further nominations. Furthermore, this possibility is an inevitable consequence of electoral politics that arguably can strengthen parties. The nomination of fringe politicians sometimes injects a stagnant status quo with fresh new ideas. The adoption of Populist ideas by Progressive politicians provides an analogous example of such an effect.[256]

Moreover, the circumstances that create the possibility of nominating extremist candidates also result in more black nominations. It is in this manner that eliminating the primary runoff would boost the political strength of black voters. The support of party officials and resources would help diffuse the irrational racial fears of many white voters and reduce bloc voting.[257] As black politicians seek to attract sufficient votes to win general elections, they may even be able to disprove the media's crippling, but inevitable, label: "black candidate."[258] More black nominees would increase black political influence by encouraging voter participation. Reverend Jackson's recent presidential campaign, for instance, stimulated unprecedented increases in black voter registration and turnout.[259] Conversely, harsh feelings engendered by racially divisive runoffs are likely to reduce turnout among the losers' supporters—offsetting any gains associated with enhancing the nominee's mandate.[260]

C. *Elimination of Majority Vote Requirements: Help for the Republican Party?*

Two recent elections demonstrate that Democratic party resources and support can overcome racial bloc voting even when black candidates have not won a majority of primary votes. In Chicago Harold Washington won nomination by only a plurality and then defeated his Republican opponent in a racially divisive general election to become the city's first black mayor.[261] Chicago, like most of the South, is a Democratic stronghold.[262] Further, racism is by no means

256. *See, e.g.*, C. WOODWARD, *supra* note 11, at 369-95.

257. *See* Wicker, *supra* note 247; *see also* Guinier, *supra* note 217, at 16 (pointing out that party leaders, forced by custom to remain neutral in primaries, would be able to exercise their influence on behalf of black candidates in general elections, thereby discouraging crossover voting by disenchanted white voters).

258. In *Butts* the district court recounted Percy Sutton's expression of his dismay at being "labelled a 'Black' candidate expected to gain only the 'Black' vote" after 12 years of successful participation in Democratic party politics. *Butts*, 614 F. Supp. at 1535. Reverend Jackson encountered the same label in his 1984 presidential bid. *See Jackson Assesses Low White Vote*, N.Y. Times, Mar. 22, 1984, at B8, col. 1.

259. *See* Herbers, *The New South Warms to Northern Orthodoxies*, N.Y. Times, Mar. 18, 1984, at § 4, col. 3.

260. *See* Kenney & Rice, *The Effect of Primary Divisiveness in Gubernatorial and Senatorial Elections*, 46 J. POL. 904, 914 (1984) (finding that party's chance for success declines as level of primary divisiveness rises).

261. *See* Lanier, *supra* note 78, at 22.

262. *See* Lanier, *supra* note 78, at 22.

trapped in the southern states.[263] One commentator has noted that the fact Washington's Republican opponent made such a strong showing in heavily Democratic Chicago illustrates that Washington would have had a difficult time defeating incumbent Jane Byrne in a runoff.[264] In Virginia, a state that nominates by caucus instead of by primary, Douglas Wilder relied on the support of the Democratic establishment to become, in 1985, the South's first black lieutenant governor since Reconstruction.[265] Wilder's victory is more impressive when one considers that, unlike most of the South, Virginia has traditionally harbored a powerful Republican party.[266]

Nevertheless, many southern Democrats contend that eliminating dual primaries would strengthen the Republican party in the South.[267] Aside from the fact this view acknowledges that eliminating majority vote requirements would at least increase the number of black nominations, the argument hardly excuses the discriminatory effects of this device. It is by no means inevitable that Democratic candidates better serve the interests of minorities. Furthermore, if a black candidate enters a primary, the majority vote requirement allows white Democrats to ignore black interests until after the primary. And because Democrats assume that they can rely on minority support, there is little incentive for Democratic candidates to address minority concerns actively.[268] As James Clyburn has noted, perhaps the Democratic establishment should concern itself with the possibility of an "all-white Democratic party."[269] In light of such attitudes, blacks may find it necessary to seek alternative political outlets. In Mississippi a number of black candidates have sought to escape the discriminatory consequences of second primaries by running as independents.[270] Minorities in other states may consider similar strategies, or alternatively, they may exchange their political support for concrete political concessions from Republican candidates. In any event, competition between Democrats and Republicans would force both parties to contend seriously for black political support. In short, abolishing runoffs could bring a return to the political situation existing at the time before the development of runoffs—black political leverage exerted

263. *See* Lanier, *supra* note 78, at 22; *see also Butts*, 614 F. Supp. at 1544 ("Contrary to the popularly held belief that racial discrimination only takes place within the Fifth and Eleventh Circuits, plaintiffs' [evidence supports] the finding that Black and Hispanic voters in New York City have been the subject of various procedures and/or statutes in the recent past which have had the effect of abridging their voting rights."). *But see Butts*, 779 F.2d at 150 (rejecting the district court's finding of past voting rights discrimination against minorities in New York).

264. Lanier, *supra* note 78, at 22.

265. *See* Epps, *supra* note 228.

266. *See* Epps, *supra* note 228; *see also* V. KEY, *supra* note 14, at 420 (referring to the atypical—for the South—strength of the Republican party in Virginia).

267. *See, e.g.*, Roberts, *supra* note 1.

268. *See* Lamis, *supra* note 237, at 785 (explaining the "fence straddling" skills of southern Democrats on racial issues).

269. *Hearings*, *supra* note 3, at 58 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).

270. *Hearings*, *supra* note 3, at 32 (testimony of Victor McTeer, Center for Constitutional Rights); *see also* Lamis, *supra* note 237, at 785 (noting that Charles Evers ran as an independent and Mississippi subsequently elected its first Republican Senator since Reconstruction; Evers responded to criticism by noting that Mississippi Democrats had not earned black support).

through a swing vote role.[271]

Most important, if the Democratic party truly stands for legitimate attention to minority political interests, it should encourage the swift flight of those Democrats who would vote Republican solely because the Democratic nominee happens to be from a different race. As the Reverend Jackson reminded delegates at the 1984 Democratic Convention, "you cannot hold someone in the ditch unless you linger there with them . . . ."[272]

D. *Alternative Means of Stifling Blacks' Political Influence*

Many commentators note that white politicians can achieve the same result as a majority vote requirement by agreeing in advance on a single white candidate to run against any black candidates in a primary.[273] Politicians in Thompson, Georgia, recently provided an extreme demonstration of this point.[274] After a black and two whites announced their intent to run for mayor, the city tried to establish a majority vote requirement.[275] After the Justice Department rejected the change under section five of the Voting Rights Act, each white candidate selected twelve persons to represent them in a meeting to determine which of the white politicians would contest the black candidate.[276] The candidate selected withdrew after the other politician failed to abide by the decision.[277] The white candidate then prevailed in the general election.[278]

Without doubt, such "pre-primary brokering"[279] will take place if runoffs are discarded. Nevertheless, procedures designed to achieve similar results have no place in a fair electoral system. Instead, politicians willing to resort openly to such racist schemes should be forced to slither through their own bigotry. As the South grows accustomed to the profound changes initiated by the Civil Rights movement, and as the time approaches when most southern voters will have been educated in integrated schools, one can only hope that such tactics will soon lead to the defeat of those politicians willing to stoop so low. In addition, as the Thompson display demonstrates, the political egos of politicians are often greater than their prejudices: the candidate rejected by the clique ignored its decision. In fact, fear "that the self-interest of opposition politicians might, as it had during Reconstruction and the Populist eras, overcome their devotion to white supremacy" led to the development of the runoff in the first place.[280]

E. *Nominating Consensus Candidates*

Proponents of second primaries also contend that the device helps parties

271. *See supra* text accompanying notes 34-35.
272. *Jackson*, *supra* note 225.
273. *See* Lanier, *supra* note 78, at 23; McDonald, *supra* note 6, at 435.
274. *See* McDonald, *supra* note 6, at 435.
275. McDonald, *supra* note 6, at 435.
276. McDonald, *supra* note 6, at 435.
277. McDonald, *supra* note 6, at 435-36.
278. McDonald, *supra* note 6, at 436.
279. Lanier, *supra* note 78, at 23.
280. Kousser, *supra* note 9, at 393.

select consensus candidates.[281] In a recent Texas senatorial primary, only 2024 votes separated the top 3 candidates.[282] A recent New Jersey primary ended after Thomas Kean defeated James Florio by less than one percent of the vote.[283] These examples demonstrate that primaries decided by pluralities often do not necessarily indicate the candidate favored by most party members. However, a majority vote requirement does not guarantee this end. A runoff conceivably could be decided by one vote; how could a nominee so selected be considered a more decisive winner than a victor in a close race decided by a plurality? Most importantly, because turnout typically drops in a runoff,[284] it sometimes happens that a candidate finishing second in an initial primary wins the runoff with fewer votes than his or her opponent received in the initial primary. In North Carolina's 1978 Democratic primary for the United States Senate, John Ingram finished second in the first primary and then won the runoff with 16,000 fewer votes than Luther Hodges had received in the initial primary.[285] The marginal—and questionable—benefits associated with enhancing the winning margin of a party's nominee do not justify the runoff's discriminatory impact.

Many opponents of the majority vote requirement suggest lowering the percentage of votes needed to win nomination from fifty percent to forty percent.[286] This proposal, offered in a spirit of political compromise, placates several concerns held by southern Democrats: the desirability of presenting strong candidates in the general election, the related need to attract the support of a substantial percentage of party members, and the goal of ascertaining the party's choice.[287] Even assuming that the runoff is necessary to meet these ends or that these goals are so important that they must be pursued at the expense of black political power, lowering the threshold of support necessary for nomination from fifty to forty percent would not reduce the discriminatory consequences of the runoff enough to justify its retention. Certainly, a forty percent rule would have altered the outcome in the most egregious instances of the majority vote requirement's discriminatory results. As the district court recognized in *Butts*, however, any threshold requirement that is significantly higher than the percentage of minorities in the election district severely hinders minority candidates—

281. *See, e.g., The Reason for Runoffs*, N.Y. Times, May 11, 1984, at A30, col. 1 (arguing that the runoff prevents narrow ideological factions from nominating candidates unacceptable to majority of party members).

282. *Id.*

283. *Id.*

284. In the 23 runoffs for Congress or for statewide elections held in North Carolina between 1950 and 1982, voter turnout dropped in 18 of the second primaries. Lanier, *supra* note 78, at 21. In these 18 runoffs, turnout averaged 82.5% of that in the initial primaries. *Id.* It should be noted, however, that confrontations between black and white candidates often stimulate higher turnout. *See Butts*, 614 F. Supp. at 1545; Bullock, *Racial Cross-Over Voting and the Election of Black Officials*, 46 J. POL. SCI. 238, 245 (1984).

285. Lanier, *supra* note 78, at 21.

286. *See Hearings*, *supra* note 3, at 59 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).

287. *See Hearings*, *supra* note 3, at 101, 105 (recounting general debate regarding threshold percentage).

so long as racially polarized voting persists.[288] The study of runoffs in North Carolina concluded that only a return to a "plurality system . . . [would] reduce barriers to the nomination of blacks and females in a significant way."[289] Furthermore, as one commentator has noted, a threshold requirement is inherently suspect because the percentage device operates without reference to the number of eligible voters who may participate in a given election.[290] No one seriously suggests ignoring the outcome of elections "because only 25 percent of those who are eligible to vote go out and vote."[291]

F. *Majority Vote Requirements and At-Large Elections*

Most commentators regard the at-large method[292] of election as the most serious impediment to black political power.[293] Voting rights litigation has therefore focused on this procedure, and the remedy following successful suits is generally the creation of single-member districts with black majorities.[294] In these newly established wards the majority vote requirement enhances the power of blacks at the expense of whites, just as the opposite result occurs in white majority districts. Laughlin McDonald, Director of the Southern Regional Office of the American Civil Liberties Union, argues that because whites in white majority districts could achieve the same effect as a majority vote requirement by selecting consensus candidates, and because the rule benefits blacks in black majority districts, "elimination of the rule does not emerge as a priority in the campaign against minority vote dilution."[295] He adds that "generally it is only in at-large elections where the majority vote requirement is objectionable."[296]

McDonald's position that the discriminatory effects of runoffs are felt primarily in at-large elections unnecessarily confines voting rights litigation to a straitjacket fastened by success. At-large elections are not intrinsically discriminatory;[297] rather, it is their operation in the context of anti-single-shot provi-

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288. *See Butts*, 614 F. Supp. at 1552, 1555-56.

289. Lanier, *supra* note 78, at 22.

290. *Hearings*, *supra* note 3, at 110 (testimony of Steve Suitts, Executive Director, Southern Regional Council).

291. *Hearings*, *supra* note 3, at 110 (testimony of Steve Suitts, Executive Director, Southern Regional Council).

292. *See supra* note 135 (discussing problems created by at-large voting scheme).

293. McDonald, *supra* note 6, at 439.

294. *See Rogers*, 458 U.S. at 615-16; *Hearings*, *supra* note 3, at 82 (testimony of Laughlin McDonald, Director, Southern Regional Office, ACLU).

295. McDonald, *supra* note 6, at 439; *see also Hearings*, *supra* note 3, at 90-91 (testimony of Laughlin McDonald, Director, Southern Regional Office, ACLU) (presenting same argument). McDonald nevertheless concludes that numerous examples of minorities losing in runoffs after winning pluralities in primaries suggest that majority vote requirements potentially dilute the political influence of minorities. McDonald, *supra* note 6, at 432-33 & n.15.

296. McDonald, *supra* note 6, at 439; *see also* Butler, *supra* note 147, at 442-43 (emphasizing that attention should focus on the electoral system as a whole, but noting that most commentators agree that the election unit—at-large or district—is the "most important element of the election structure in terms of its potential impact on the election of minority-supported candidates"). McDonald recognizes, however, that second primaries may be objectionable in particular congressional districts or states. McDonald, *supra* note 6, at 432 & n.15.

297. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 16, 31-33, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 193, 209-11.

sions—including majority vote requirements—that submerges the political power of minorities.[298] By contrast, second primaries always enhance whatever potential for discrimination exists in a particular electoral system.[299]

Moreover, creating majority black single-member districts is not a foolproof method of correcting vote dilution. Of eighty-six counties in the South with majority black populations, only thirteen are controlled by black politicians.[300] Almost one-half of these counties have never elected blacks to office.[301] In addition, relying solely on single-member districts may lessen the incentive to form bi-racial coalitions.[302]

Perhaps at-large elections and majority vote requirements should be regarded as components of an electoral system that disadvantages minorities. In that case, the discriminatory impact may be alleviated by alternative remedies: drawing single-member districts, eliminating majority vote requirements and other anti-single-shot mechanisms thereby enabling minorities to elect representatives in rough proportion to their numbers by relying on bloc voting for selected candidates, or creating a system that includes single-member as well as at-large positions.[303]

In certain localities political circumstances may call for either at-large elections, single-member districts, or a combination of at-large and single-member positions.[304] Tailoring the remedy for discriminatory election systems to fit local political factors provides flexibility in establishing fair electoral schemes, which in turn could result in maximum political leverage for minorities.[305] To illustrate, when political organizations capable of delivering bloc votes are in existence, at-large election might provide greater access to power for minority groups. A black political group could organize its voters behind a designated number of black candidates and then agree to align with a progressive slating organization behind particular consensus candidates. The 1985 Durham, North Carolina, city elections demonstrate the feasibility of such an approach.[306] The

298. *See Rogers*, 458 U.S. at 615-16, 627.

299. It is generally acknowledged that majority vote requirements accentuate the potential for discrimination that exists in an electoral system. *See Gingles*, 106 S. Ct. at 2752. The extent of such enhancement differs depending on local circumstances. The Supreme Court in *Gingles* emphasized that "electoral devices . . . may not be considered *per se* violative of § 2." *Id.* at 2764. Whether a particular runoff dilutes minority voters' influence depends on its operation in a specific setting. *See id.* at 2764-65.

300. Stekler, *supra* note 226, at 473 n.1.

301. Stekler, *supra* note 226, at 473 n.1.

302. *See* Thurnstrom, *"Voting Rights" Trap*, THE NEW REPUBLIC, Sept. 25, 1985, at 21, 23. McDonald argues, however, that single-member districts actually promote coalition politics by enabling minorities to enter "the political mainstream." Letter from Laughlin McDonald to the editor of THE NEW REPUBLIC (unpublished, Oct. 9, 1985) (criticizing Thurnstrom's opinion); Letter from Laughlin McDonald to William Simpson (Oct. 9, 1986) (making the same argument).

303. *See City of Port Arthur*, 459 U.S. at 167; *see also* City of Rome v. United States, 446 U.S. 156, 183-84 & n.19 (1980) (containing detailed explanation of single-shot voting).

304. *See City of Port Arthur*, 459 U.S. at 167.

305. Because of the intensely local nature of the decision, local minority voters and political leaders should determine which type of electoral system would best enable them to overcome dilutive mechanisms.

306. A 12 member city council and a mayor govern Durham. 1 DURHAM, N.C., MUN. CODE ch. II, § 5 (1982). Six council seats are at-large and six correspond to numbered wards. *Id.* Every

Durham Committee on the Affairs of Black People teamed with two white progressive organizations—the Durham Voters Alliance and the People's Alliance—to win four of six council seats up for election, as well as the mayor's post.[307] The coalition supports nine of the twelve councilmembers and the mayor;[308] five of the councilmembers are black.[309] Under similar political circumstances single-shot voting in at-large elections, combined with bi-racial coalitions, could lead to greater influence than bloc voting in single-member districts.

McDonald's conclusion that runoffs discriminate primarily in at-large elections understates the discriminatory impact of majority vote requirements in statewide elections and in most congressional districts. By definition, no state has a majority of minority citizens. Of 116 congressional districts in the South, only 4 have black majorities.[310] Fourteen districts, however, have black populations of thirty percent or more.[311] Eliminating dual primaries for statewide elections and congressional elections would enable minorities to participate more effectively in political contests in these districts.

The suggestion that majority vote requirements are somehow justifiable in majority black districts, but not in majority white districts, cannot be defended persuasively. The majority group has an inherent political advantage; fairness dictates that such advantage not be unduly emphasized at the expense of minorities—whatever their skin color. The right of citizens "to have [their votes] counted at full value without dilution or discount"[312] is too fundamental to yield to the majority's interest in further stacking the political deck in its favor. Once it is established that runoffs discriminate against racial minorities, minority vot-

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two years elections are held for mayor, for three of the numbered seats, and for three of the at-large seats. *Id.* A nonpartisan primary achieves an effect similar to that of a majority vote requirement by narrowing the field to either two for the single-member districts or to six for the at-large seats. *See* N.C. GEN. STAT. § 163-294 (1982); 1 DURHAM, N.C., MUN. CODE ch. II, § 3 (1982). Durham's method of election is not represented as a model; the effectiveness of the bi-racial coalition merely illustrates that at-large election systems enable strategies and political influence not available in single-member districts. A more flexible approach avoids writing off the political aspirations of those racial minorities and interest groups who live in districts where they do not form a majority.

307. Morris, *Durham's Biracial Coalition Makes History*, N.C. Independent, Nov. 8-21, 1985, at 5, col. 1, 12, col. 1.

308. *Id.* at 12, col. 2.

309. *Id.*

310. *Hearings*, *supra* note 3, at 71 (testimony of Steve Suitts, Executive Director, Southern Regional Council).

311. *Hearings*, *supra* note 3, at 72 (testimony of Steve Suitts, Executive Director, Southern Regional Council). Dr Martin Luther King, Jr., argued against political strategies that would isolate the black community and in favor of efforts to build coalitions. He reasoned:

> [W]e do not have to look far to see that effective political power for Negroes cannot come through separatism. Granted that there are cities and counties in the country where the Negro is in a majority, they are so few that concentration on them alone would still leave the vast majority of Negroes outside the mainstream of American political life.

M. KING, JR., WHERE DO WE GO FROM HERE: CHAOS OR COMMUNITY? 48 (1967). Dr. King also posed the following rhetorical question: "Is it a sounder program to concentrate on the election of two or three Negro Congressmen from predominately Negro districts or to concentrate on the election of fifteen or twenty Negro Congressmen from Southern districts where a coalition of Negro and white moderate voters is possible?" *Id.* at 49.

312. *Reynolds*, 377 U.S. at 555, n.29, *quoted in* S. REP. NO. 417, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 196-97.

ers seeking their elimination should be willing to forego whatever advantage the device provides in districts populated by a majority of minority voters.[313] If majority white districts are to be expected to elect the best candidate irrespective of race, majority black districts should be expected to do the same. Moreover, as is true in reverse circumstances, when a majority black community is divided between two black candidates, it cannot be said that either of the two is intrinsically preferred to a white plurality winner. As Dr. Martin Luther King, Jr., recognized, "[A]ny program that elects all black candidates simply because they are black and rejects all white candidates simply because they are white is politically unsound and morally unjustifiable."[314]

In sum, a number of political factors must be considered when discussing the elimination of majority vote requirements. Similarly, additional factors must be considered when discussing alternative solutions to the problem of the diluted political influence of blacks. Furthermore, a number of arguments have been put forth to justify the continued existence of majority vote requirements. Although many of these arguments have merit and warrant consideration, they do not present adequate justification for maintaining majority vote requirements. In light of the disparate impact such requirements have on minority voters and candidates, only very strong reasons should justify their continued existence. The reasons put forth by supporters of the primary runoff are simply inadequate.

V. CONCLUSION

After reviewing the history behind majority vote requirements, it appears that white Democrats designed them to suppress the black political power remaining after disenfranchisement and to ensure that black political influence would not resurface. Today, this discriminatory device works as well as ever. Second primaries continue to shackle black candidates and to dilute the votes of their supporters. Such runoffs enhance racially polarized voting—vesting the most racist of white Democrats with veto power over nominations of black candidates. Apologists for this electoral scheme point primarily to a "need" to enhance the inherent strength of party majorities which, in the context of persistent racial bloc voting, necessarily denies racial minorities equal access to political power.

In some states primary runoffs may be vulnerable to constitutional attack. However, the convincing evidence necessary to support a constitutional challenge will be difficult to unearth. In other states, majority vote requirements may not survive scrutiny under the Voting Rights Act. Evidence of the discriminatory impact outlawed by the Voting Rights Act is more readily available; however, the task of proving racially disparate effects for each class of elections is enormous.[315] Furthermore, the court of appeals' decision in *Butts* indicates

313. *See Hearings*, *supra* note 3, at 95-97 (expressing criticism of McDonald's proposed double standard); *see also id.* at 99-100 (testimony of Victor McTeer taking similar position).

314. M. KING, JR., *supra* note 311, at 49.

315. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 5, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 183.

just how difficult it is to challenge a primary runoff successfully under either the Constitution or the Voting Rights Act. In *Butts* the district court found that New York City's primary runoff law violated both the Constitution and the Voting Rights Act.[316] However, the court of appeals, in no uncertain terms, rejected both of the district court's holdings.[317] In short, case-by-case litigation is expensive and time-consuming and is not a proven means of eliminating "one of the oldest guarantees of southern white political domination."[318]

State legislation is one alternative to case-by-case litigation. However, this alternative is unlikely to produce more satisfactory results. A proposal to change North Carolina's majority vote requirement to a forty percent requirement died in committee.[319] This result is probably typical of the reception measures abolishing second primaries would receive in most southern states. Obviously, state legislators have managed to win election under current electoral schemes, and runoffs generally add to the incumbency advantage.[320] As a result, federal legislation may present the best solution to the problem.[321] Congress has the authority to enact such a provision,[322] and federal legislation would provide the most effective and efficient vehicle for lifting the burden of the primary runoff from minority candidates and their supporters. More importantly, such action may be necessary if a solution is to be found for the problems created by majority vote requirements.

Aristotle wrote: "If liberty and equality . . . are chiefly to be founded in democracy, they will be best attained when all persons alike share in the govern-

316. *Butts*, 614 F. Supp. at 1548-50.

317. *Butts*, 779 F.2d at 145-51.

318. *Hearings*, *supra* note 3, at 43 (testimony of Victor McTeer, Center for Constitutional Rights).

319. Lanier, *supra* note 78, at 19.

320. *See* Roberts, *supra* note 1.

321. A strategy seeking to eliminate majority vote requirements through litigation could eliminate runoffs in those electoral units in which they operate most invidiously while preserving the supposed advantages of second primaries in majority black districts. *See generally* McDonald, *supra* note 6 (concluding that runoffs benefit blacks in black majority districts and that eliminating majority vote requirements is not a priority, but recognizing that particular second primary provisions may dilute minority political power). This Note's conclusion rests on a policy determination that, given the inherent uncertainty and delay of case-by-case litigation, the potential increased influence of minority voters in districts populated primarily by bloc voting whites justifies complete abrogation of majority vote requirements—even if that means requiring black voters in majority black districts to forego the dubious advantages of second primaries. *See Hearings*, *supra* note 3, at 99 (testimony of Lorn Foster, Senior Fellow, Joint Center for Pol. Studies) (making the identical argument).

322. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966). In *Katzenbach* the Supreme Court held that the fifteenth amendment allowed Congress to suspend the use of literacy tests to qualify voters and to appoint federal examiners charged with protecting the franchise of black voters. *Id.* at 333-36. In reaching this decision the Court noted that "Congress has full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting." *Id.* at 326. The Court further noted, " 'Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but [consistent] with the letter and spirit of the constitution, are constitutional.' " *Id.* (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 321 (1819)).

On June 12, 1984, United States Representative John Conyers introduced a bill that would have amended the Voting Rights Act to prohibit majority vote requirements. H.R. 5822, 98th Cong., 2d Sess. (1984). The 98th Congress took no action on the bill, and representative Conyers reintroduced the amendment on March 28, 1985. H.R. 1785, 99th Cong., 1st Sess. (1985).

ment to the utmost."[323] Discarding dual primaries would breathe new life into this time-honored principle—a principle that southern Democrats have ignored for far too long. Furthermore, fairer electoral schemes would allow the South to benefit from the skills and services of its best leaders—regardless of their race.[324]

WILLIAM SIMPSON

323. ARISTOTLE, POLITICS, BOOK II, *quoted in Zimmer*, 485 F.2d at 1300.

324. *See Hearings*, *supra* note 3, at 61 (testimony of James Clyburn, Comm'r, S.C. Human Affairs Comm'n).