

Getting Results Under Section 5 of the Voting Rights Act

Heralded as the most important section¹ of the Voting Rights Act,² section 5³ has nevertheless failed to achieve its potential in eliminating racial vote dilution. Section 5 does provide unique procedural protection to those minority voters most likely to suffer from vote dilution. But under the Supreme Court's interpretation of the Act, courts must apply a less stringent substantive standard in section 5 cases than in cases arising under other sections of the Act.

The Voting Rights Act has three key sections: 2, 4, and 5. Section 2⁴ protects the voting rights of racial minorities throughout the country, while sections 4⁵ and 5 offer additional special protection in those jurisdictions where racial minorities have historically suffered invidious discrimination.

Section 2 received much attention in the years following the Supreme Court's decision in *City of Mobile v. Bolden*,⁶ which for the first time clearly required plaintiffs in racial vote dilution cases to prove discriminatory intent,⁷ and thereby greatly increased the difficulty of proving dilution. After *City of Mobile*, the civil rights community centered its efforts on amending the Voting Rights Act to make the test for racial vote dilution a results test, not an intent test.⁸ They succeeded, thus eliminating a

1. See, e.g., H.R. REP. NO. 196, 94th Cong., 1st Sess. 10-11 (1975) (section 5 largely responsible for gains achieved in minority political participation), cited in *McCain v. Lybrand*, 104 S. Ct. 1037, 1045 (1984); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 329, 345 (1975) [hereinafter cited as TEN YEARS AFTER] (section 5 the "centerpiece" and "cornerstone" of Voting Rights Act); McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 2 (1983).

2. The Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131, amending the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

3. Pub. L. No. 89-110, § 5, 79 Stat. 437, 439 (1965) (codified as amended at 42 U.S.C. § 1973c (1982)).

4. Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965) (codified as amended at 42 U.S.C. § 1973 (1982)).

5. Section 4 sets forth the criteria—a history of racial discrimination and low minority voter turnout—that determine which jurisdictions must preclear voting changes under § 5. Pub. L. No. 89-110, § 4, 79 Stat. 437, 438-39 (1965) (codified as amended at 42 U.S.C. § 1973b (1982)).

6. 446 U.S. 55 (1980) (plurality opinion).

7. *Id.* at 60-61, 69-73.

8. 128 CONG. REC. H3845 (daily ed. June 23, 1982) (statement of Rep. Butler) ("The principle [sic] area of disagreement during Senate debate of the act was . . . the question of intent versus effect."); see also Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 716-17 n.11 (1983) (three months of Senate hearings "focused almost exclusively on the § 2 amendment").

major obstacle—proving discriminatory intent—that had prevented minority voters from successfully challenging discriminatory election procedures.

Congress and lobbyists paid less attention, however, to the tests of section 5, which had always explicitly prohibited standards, practices, or procedures that were discriminatory either in purpose or in effect.⁹ Yet the particular effects test that the Supreme Court created for use under section 5—the retrogression test—sometimes provides less protection to racial minorities in these specially protected jurisdictions than does the effects test Congress provided for section 2—the results test.¹⁰ Because section 5 cases come to the courts via a unique procedural route, courts have not been able to apply section 2 to these cases. Thus, paradoxically, under the Supreme Court's interpretation of section 5, courts apply a less stringent effects test in precisely those jurisdictions where Congress intended to provide special protection.

This Note argues that courts should apply the more stringent results test of amended section 2 to section 5 as well. To do so would be in keeping with the legislative history of the Voting Rights Act and with the Constitution, and would make the amended provisions of the Act operate together more efficiently and coherently.

I. TWO TESTS FOR RACIAL VOTE DILUTION

A. *Section 5 and the Retrogression Test*

Section 5 embodies an extraordinary grant of federal authority. Under section 5, jurisdictions with a history of racial discrimination and low minority voter participation are required to preclear all proposed changes in

9. Section 5 provides in pertinent part:

Whenever a State or political subdivision [covered under section 4] . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting [hereinafter voting change] different from that in force or effect on [applicable date of comparison] . . . 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 [voting change] 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, or in contravention of the guarantees set forth in § 1973b of this title [section 4(f)(2), protecting certain language minorities from denial or abridgment of their right to vote], and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such [voting change]: *Provided*, That such [voting change] has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission. . . . Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such [voting change]. . . . Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.

42 U.S.C. § 1973c (1982).

10. The retrogression test looks for a diminution of preexisting minority voting strength, whereas the results test looks for social and institutional factors typical of racial vote dilution.

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voting laws or procedures with the United States District Court for the District of Columbia or with the United States Attorney General. If the proposed changes “have the purpose [or will] . . . have the effect of denying or abridging the right to vote on account of race or color [or language minority status],”¹¹ then preclearance must be denied.

Congress had never before required cities, counties, and other state and local governments to submit new laws and procedures to the federal government for approval. But as the Supreme Court noted in upholding the constitutionality of section 5, this “uncommon exercise”¹² of federal authority was essential to the success of the Voting Rights Act: States had shown ingenuity in devising new vote dilution strategies;¹³ the Department of Justice could not singlehandedly monitor voting changes throughout the country; and private suits would not adequately supplement federal enforcement resources.¹⁴

In a series of cases beginning with *Allen v. State Board of Elections*,¹⁵ the Supreme Court held that section 5 applied not only to tests or devices that could deny minority voters the opportunity to cast a ballot, but also to electoral structures that could dilute the strength of minority votes.¹⁶ This interpretation of the scope of section 5 was critical to minority voters’ hopes of becoming full participants in the electoral process. For example, in a city with an at-large electoral system¹⁷ and racially-polarized vot-

11. 42 U.S.C. § 1973c (1982). Typically, jurisdictions submit proposed changes first to the Department of Justice, which has 60 days to make the preclearance decision or to request additional information. Minority voters may not appeal a decision of the Attorney General to preclear a voting change, but may go to court to challenge the enacted practice under § 2. The submitting jurisdiction may appeal a denial of preclearance, however, by filing for a declaratory judgment in the U.S. District Court for the District of Columbia. See 28 C.F.R. § 51 (1983).

12. *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966).

13. See *id.* at 335.

14. See *Perkins v. Matthews*, 400 U.S. 379, 396 (1971).

15. 393 U.S. 544, 566–70 (1969) (right to vote must be given “broadest possible scope,” and requires preclearance of changes that may dilute votes, such as changes from district election system to at-large system or from elective to appointive system); *Perkins v. Matthews*, 400 U.S. 379, 388–89 (1971) (annexation plans subject to preclearance); *Georgia v. United States*, 411 U.S. 526, 534–35 (1973) (reapportionment plans subject to preclearance); cf. S. REP. NO. 295, 94th Cong., 1st Sess. 16–17, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 774, 782–83 (“As registration and voting of minority citizens increases, other measures may be resorted to which would dilute increasing minority voting strength . . . includ[ing] switching to at-large elections, annexations of predominantly white areas, or the adoption of discriminatory redistricting plans . . .”).

16. See generally TEN YEARS AFTER, *supra* note 1, at 204–327 (surveying techniques and instances of racial vote dilution); Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 552–60 (1973).

17. Under an at-large system, voters cast ballots not for a representative for their district but for all contested seats. The votes of any particular geographical area are thereby submerged in the votes of the entire polity, increasing the likelihood that only candidates favored by the majority will be elected. See Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U.L. REV. 85 (1979) (discussing dilutive effects of at-large systems); Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353 (1976) (same).

ing,¹⁸ blacks might number a third or more of the population but never succeed in electing a candidate of their choice,¹⁹ nor in exerting political influence in other ways, such as forming coalitions with white voters to lobby for common goals.²⁰ Providing racial minorities an equal opportunity to participate in the electoral process not only benefits minority groups,²¹ but also contributes to the stability and legitimacy of the political system,²² and has been a consistent goal of Congress at least since the original enactment of the Voting Rights Act in 1965.²³

The effects test of section 5—the retrogression test—was first set forth in *Beer v. United States*.²⁴ The Court there construed section 5 to prohibit only those changes that would have a retrogressive effect on preexisting minority voting strength, that is, an effect that reduced the ability of minority voters to elect candidates of their choice.²⁵ The Court's construction in *Beer* thus did not prohibit changes that merely “ameliorated” without fully remedying existing minority vote dilution.²⁶ Though ostensibly de-

18. Voting is racially polarized when voters vote primarily for candidates of their own race.

19. See *Kirksey v. City of Jackson*, 461 F. Supp. 1282, 1288-89 (S.D. Miss. 1978), *aff'd*, 714 F.2d 42 (5th Cir. 1983).

20. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 623 (1982) (racial bloc voting “allows those elected to ignore black interests without fear of political consequences”); Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107, 152 (1976) (“[S]tructural limitations on the political power of blacks still persist. . . . [T]hey are a numerical minority . . . the perpetual underclass . . . [and] the object of ‘prejudice’ . . . [making] it particularly difficult for them to form coalitions with others [and] . . . advantageous for the dominant political parties to hurt them”); Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1630 (1983) (“blacks differ fundamentally from other political minorities,” and are alienated, and face attempts to exclude them “from political participation and coalition building”).

21. See Howard & Howard, *supra* note 20, at 1630-31 (equal opportunity decreases alienation and increases participation); Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 YALE L.J. 974, 988 (1982) (benefits include voice in decisionmaking; decrease in “discriminatory rhetoric”; new role models for minority group members; increased “minority pride, political consciousness, participation, and identification with the government”).

22. See J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 146 (1st ed. London 1861) (“It is an essential part of democracy that minorities should be adequately represented.”); Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial “Intent” and the Legislative “Results” Standards*, 50 GEO. WASH. L. REV. 689, 738 n.311 (1982).

23. See *infra* note 119 and accompanying text. For a discussion of Congressional efforts to improve black electoral participation before 1965, see McDonald, *supra* note 1, at 15-25.

24. 425 U.S. 130 (1976).

25. For example, if a city whose at-large elections are marked by racially polarized voting annexes a large, all-white suburb, this annexation reduces the number of black voters as a percentage of all municipal voters, and thereby diminishes the influence of black voters on city elections.

The Court also noted in *Beer* that changes which were not retrogressive might still violate § 5 if the changes were so discriminatory as to violate the Constitution. 425 U.S. at 141. This comment led the lower courts, commentators, and Congress to conclude that the test under § 5 was two-pronged, one for retrogressive effects, the other for constitutional violations. Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. REV. 189, 194 (1983).

26. The logic behind the retrogression test in *Beer* might have been that, by allowing preclearance of changes that “ameliorated” minority voting strength, but did not provide a full remedy, the test would encourage jurisdictions to make ameliorative changes. 425 U.S. at 141. But when the changes a jurisdiction submits are obligatory rather than optional, such as reapportioning districts to conform to

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rived from the legislative history of the 1975 Voting Rights Act Amendments,²⁷ the retrogression test was in fact the Supreme Court's highly interpretive creation.²⁸ In establishing existing minority voting strength as the benchmark against which to measure claims of racial vote dilution, the Court laid the foundation for the central inconsistency in the Act—a change can be precleared under section 5 even though it would violate the results test of section 2.

The retrogression standard was reaffirmed and expanded in *City of Lockhart v. United States*.²⁹ Here the Court acknowledged that the existing municipal voting procedures in Lockhart, Texas might discriminate against black residents, and noted that the new procedures proposed by the city³⁰ would not ameliorate, but might actually perpetuate, that discrimination.³¹ The Court nevertheless upheld the procedures because they were not retrogressive—they would not exacerbate vote dilution in Lockhart.³² The Court's decision in *Lockhart* illustrates that, when the retro-

the one person, one vote requirement of *Reynolds v. Sims*, 377 U.S. 533 (1964), this rationale does not apply. As for optional changes, one could argue consistent with *Beer* that an ameliorative change is better than no change at all, and should therefore be precleared. This argument, while not without some force, overlooks the substantial opportunity to achieve real progress that a denial of preclearance to such changes creates. Jurisdictions that greatly desire to implement their proposed optional changes may well choose to eliminate minority vote dilution in order to do so. And in jurisdictions that decide to drop the proposed changes, the denial of preclearance will put minority voters on notice that a challenge to the existing electoral system under § 2 may well succeed.

The inconsistency of the retrogression test with the basic goals of the Act became more distinct when the Court expanded the retrogression test in *City of Lockhart v. United States*, 460 U.S. 125 (1983), to allow preclearance of changes that perpetuate, rather than ameliorate, vote dilution. The argument supporting ameliorative optional changes does not, of course, apply to changes that perpetuate racial vote dilution, since those changes make no progress whatsoever toward the Act's goals.

27. See *Beer*, 425 U.S. at 141 (quoting H.R. REP. NO. 196, 94th Cong., 1st Sess. 60 (1975)).

28. A passage in the House Report on the 1975 Amendments to the Voting Rights Act that was the source of the retrogression test criticized the Attorney General for focusing narrowly on the administration of preclearance, and stated that:

the standard [for § 5] can only be fully satisfied by determining . . . whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting *in view of the political, sociological, economic, and psychological circumstances within the community proposing the change.*

H.R. REP. NO. 196, 94th Cong., 1st Sess. 60 (1975) (emphasis added). If any test were to be derived from this passage, the results test, with its emphasis on the totality of circumstances, would be most consistent with the language emphasized above. See *infra* pp. 144–46 (describing results test). And as Justice Marshall has pointed out, nothing in this passage suggests that only changes which diminish the voting strength of minorities are to be denied preclearance. *City of Lockhart v. United States*, 460 U.S. 125, 144–45 (1983) (Marshall, J., concurring in part and dissenting in part).

29. 460 U.S. 125 (1983). In reversing the lower court, the Court made no mention of the constitutional prong that many had inferred from *Beer*, see *supra* note 25, but did apply the retrogression principle of *Beer*. *Id.* at 134 (“Although the new plan may have remained discriminatory, it nevertheless was not a regressive change. . . . Since the new plan did not increase the degree of discrimination against blacks, it was entitled to § 5 preclearance.”) (quoting *Beer*, 425 U.S. at 138).

30. See *infra* note 61.

31. 460 U.S. at 133–36.

32. *Id.* (“Although there may have been no improvement in the[] voting strength [of Lockhart's minorities], there has been no retrogression either.”).

gression test is applied, section 5 will not protect minority voters from changes that perpetuate vote dilution.³³

B. Section 2 and the Results Test

Section 2 allows citizens in any political subdivision in the country to challenge existing voting practices.³⁴ The original language of section 2 did not state whether courts were to apply a purpose or an effects test.³⁵ In *White v. Regester*,³⁶ the Court appeared to adopt an effects test that looked to the presence of certain factors indicative of racial vote dilution.³⁷ Codified by the Fifth Circuit in *Zimmer v. McKeithen*,³⁸ these factors were the standard measure of racial vote dilution (except in section 5 cases) until 1980,³⁹ when a plurality of the Supreme Court in *City of Mobile v. Bolden*⁴⁰ reversed a finding of racial vote dilution based on the *Zimmer* factors, and held that both the Fourteenth and Fifteenth Amendments as well as section 2 required plaintiffs to prove intent.⁴¹

The difficulty of successfully proving intent⁴² and the undesirability of

33. The courts cannot directly apply § 2 in these cases. Under the preclearance procedure prescribed for § 5, both the Department of Justice and the district court limit their review to issues raised under § 5.

34. 42 U.S.C. § 1973 (1982).

35. Section 2 originally spoke only of preventing practices that "deny or abridge the right of any citizen of the United States to vote on account of race or color." Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (1965).

36. 412 U.S. 755 (1973).

37. *Id.* at 766-69 (discussing "totality of circumstances" that supported district court's invalidation of multimember districts in two Texas counties).

38. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The *Zimmer* factors include:

a 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, . . . past discrimination . . . 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. at 1305 (footnotes omitted).

39. Even a case holding that plaintiffs needed to show discriminatory purpose also held that a showing of the *Zimmer* factors provided sufficient grounds from which to infer the presence of discriminatory purpose. *Neve v. Sides*, 571 F.2d 209, 217, 222-23 (5th Cir. 1978).

40. 446 U.S. 55 (1980) (plurality opinion).

41. *Id.* at 60-61, 72-73.

42. On the practical difficulty of applying an intent test, see *Rogers v. Lodge*, 458 U.S. 613, 642-650 (1982) (Stevens, J., dissenting); S. REP. NO. 417, 97th Cong., 2d Sess. 36-7, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 177, 214-15 [hereinafter cited as SENATE REPORT] (intent test "asks wrong question . . . is unnecessarily divisive . . . [imposes] an inordinately difficult burden . . . [and is vulnerable to defendants'] planting a false trail of direct evidence" of neutral purpose); *Blacksher & Menefee, From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 42 n.275 (1982) (illustrating difficult questions that "only begin the tangled inquiry into the meaning of an intent standard of unconstitutional dilution"); *Hartman, supra* note 22, at 713 (establishing legislative purpose "fraught with inadequacies"); *Karst, The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1163-66 (1978) (problems inherent in intent test undermine its effectiveness); *cf. Ely, The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-61 (1983) (inquiry into legislative

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relying exclusively on an intent standard in vote dilution cases,⁴³ prompted Congress to amend section 2 to require plaintiffs to show only that the challenged electoral practice “results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color [or language minority status].”⁴⁴ The congressional results test identifies certain social⁴⁵ and institutional⁴⁶ factors⁴⁷ that, when found to

purpose inappropriate where constitutional rights involved). *But see* Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 705-07 (1978) (effects test appropriate only for denials of access to the polls; intent test should be required to show vote dilution).

43. It is immaterial to minority voters whether election structures that abridge their voting strength exist as a result of a deliberate plan to dilute minority votes, or are simply the product of benign purposes which, when placed in a particular social context, result in vote dilution. The antidiscrimination principle, with its perpetrator perspective, *see* Freeman, *Legitimizing Racial Discrimination through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1052-57 (1978), is of limited usefulness in the voting context because structures such as at-large voting systems, majority vote requirements and anti-single-shot voting laws serve the interests of those with political power, and politicians may desire to preserve these structures for non-racist reasons. In the absence of discriminatory motive, there may still be discriminatory effects. *See* H.R. REP. NO. 227, 97th Cong., 1st Sess. 30 (1981) (“Discriminatory election structures can minimize and cancel out minority voting strength as much as prohibiting minorities from registering and voting.”); Fiss, *supra* note 20, at 141-43 (basic poverty of antidiscrimination principle stems from its failure to recognize that “facially innocent criteria” can have discriminatory effects); Howard & Howard, *supra* note 20, at 1644 (politicians discriminate against blacks for political as well as racial reasons).

In the case of redistricting, a prisoners’ dilemma complicates the problem. Every legislator individually might agree that a redistricting scheme that was drawn to fairly represent black voting strength is desirable, but no legislator will want to sacrifice his or her seat to the new plan. Although the actions are motivated not by racism but by a desire to preserve personal political power, the outcome can be the inability of blacks to elect representatives of their choice.

44. 42 U.S.C. § 1973 (1982) (emphasis added).

45. The social factors are indicative of the character of the political community and include (1) a low history of black electoral participation, (2) racially polarized voting, (3) racist campaign appeals, (4) official racial discrimination, (5) unresponsiveness of government to minority needs, and (6) social, economic and health effects of past discrimination on the minority community. *See* SENATE REPORT, *supra* note 42, at 28-29.

46. The institutional factors are the community’s voting laws and procedures. They include anti-single-shot rules, majority vote requirements, and at-large elections, *id.*, as well as “other voting practices or procedures” including residency requirements, numbered posts, and staggered terms, *id.* at 29, all of which increase the likelihood that only candidates supported by a majority of voters will win. For an explanation of these rules, *see* TEN YEARS AFTER, *supra* note 1, at 204-10.

47. The courts have considerable discretion in deciding when enough factors have been shown to establish a claim of racial vote dilution. The Senate Report neither divides the factors into the categories suggested here, *supra* notes 45-46, nor suggests that both social and institutional factors are necessary to sustain a claim of minority vote dilution. *See* SENATE REPORT, *supra* note 42, at 28-29.

While courts need flexibility to make local appraisals, courts could develop basic guidelines for evaluating the significance of a particular aggregate of factors. For example, in most cases both types of factors ought to be present to support a finding of vote dilution. Such a finding will generally not be appropriate in a community that has at-large elections or anti-single-shot voting but no history of discrimination and no racially polarized voting or other significant social factors that could lead those election procedures to have a discriminatory effect. Similarly, courts are unlikely to find vote dilution in a community that has a history of discrimination and racially polarized voting but also has a districting scheme that allows blacks to elect representatives of their choice in numbers roughly proportionate to their percentage of the voting age population. *Cf.* *City of Mobile v. Bolden*, 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting) (“The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors.”).

gether in one community, generally prevent racial minorities from participating in elections on equal footing with white voters.⁴⁸ Many of these factors were part of the *Zimmer* test.⁴⁹ By refocusing the courts' attention on these factors, Congress was apparently trying to distinguish less-than-proportionate representation due to the normal vicissitudes of politics from less-than-proportionate representation due to the effective exclusion of minorities from the political arena.⁵⁰

Thus, unlike the retrogression test of section 5, which measures the impact of a new voting practice on existing minority voting strength, the results test of amended section 2 looks simply for the presence or absence of racial vote dilution. The benchmark of the results test is voting strength roughly proportionate to the size of the minority group. But the test does not guarantee proportionate representation.⁵¹ To show "a mere disparity between the number of minority residents and the number of minority representatives"⁵² is not enough. Rather, the test guarantees equality of opportunity for minorities to elect candidates of their choice.

The results test is not perfect. As with any test that relies on balancing numerous factors, the burden of fact-gathering is heavy,⁵³ and the possibility of uneven judicial application of the test is significant.⁵⁴ But other

48. For example, where there is both racially polarized voting and an at-large election system, the classic model of majority representation breaks down. The model recognizes no problem of minority vote dilution because it presupposes that there are no permanent minorities, but only shifting coalitions, each modifying and refining its position so as to appeal to new constituents and maximize political strength. See Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 569-71 (1977). In a community marked by racial bloc voting, however, there are by definition no coalitions which cross racial lines; blacks are relegated to permanent minority status, while the politicking that matters takes place within the community of white voters. See *Rogers v. Lodge*, 458 U.S. 613, 623 (1982). With at-large elections and racially polarized voting, a city which is 30% black may exist for decades with no black representation. E.g., *Kirksey v. City of Jackson*, 461 F. Supp. 1282, 1289 (S.D. Miss. 1978), *aff'd*, 714 F.2d 42 (5th Cir. 1983).

49. Compare factors listed *supra* notes 45 & 46 with those listed *supra* note 38 (unresponsiveness of public officials to minority community, although key in *Zimmer*, is not important to results test).

50. Justice Marshall has phrased the distinction as one between instances of disproportionate minority representation attributable to racial factors and instances attributable to "mere lack of success at the polls." *City of Mobile v. Bolden*, 446 U.S. 55, 111 n.7 (1980) (Marshall, J., dissenting).

51. 42 U.S.C. § 1973 (1982) (results test does not create "a right to have members of a protected class elected in numbers equal to their proportion in the population"); cf. *White v. Regester*, 412 U.S. 755, 769 (1973) (no constitutional right of racial or political minorities to proportionate representation in state legislature); *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971) (same).

52. The language quoted is from *Zimmer v. McKeithen*, 485 F.2d at 1305; see also SENATE REPORT, *supra* note 42, at 30-31 (no right to proportionality in representation); Hartman, *supra* note 22, at 739 ("[T]he results test is not satisfied by a simple statistical demonstration that the number of minority representatives is less than the percentage of minority population."); cf. Thernstrom, *Odd Evolution of the Voting Rights Act*, 55 PUB. INT. 49, 63 (1979) ("Even the most careful drawing of ward lines does not guarantee the representation of minorities in proportion to their size.").

53. *Cross v. Baxter*, 604 F.2d 875, 879 (5th Cir. 1979) ("Perhaps in no other area of the law is as much specificity in reasoning and fact finding required, as shown by our frequent remands of voting dilution cases to district courts."), *vacated and remanded in light of amended section 2*, 460 U.S. 1065 (1983).

54. Compare *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (invalidating at-large elec-

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types of effects tests would be even more flawed in the voting context than the results test,⁵⁵ and the results test is sufficiently flexible to allow refinement over time.⁵⁶ As it stands, the results test is a reasonable way of measuring the social problem that needs measuring: determining when combinations of facially neutral institutional structures (such as at-large voting) and social factors (such as racial bloc voting) result in political disenfranchisement of racial minorities.

C. *Applying the Results and Retrogression Tests*

While many have celebrated the substitution of the results test for an intent test in section 2,⁵⁷ the relative merits of the results test and the retrogression test need further consideration. Although neither test requires proof of intent, the two are quite different. Examine, for example, the record in *City of Lockhart* against the results criteria. Although 41% of the population of Lockhart, Texas was Mexican-American,⁵⁸ only one Mexican-American candidate had ever been elected mayor or commissioner.⁵⁹ Lockhart's at-large elections were characterized by racial bloc voting⁶⁰ and by rules favoring the white majority, including anti-single-shot provisions,⁶¹ numbered

tions) with *Kirksey v. City of Jackson*, 461 F. Supp. 1282 (S.D. Miss. 1978) (upholding at-large elections), *aff'd*, 714 F.2d 42 (5th Cir. 1978); *cf.* Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 347-49 & n.120 (1982) (revealing different Supreme Court interpretations of similar vote dilution situations).

55. The test most commonly used for identifying discriminatory effects is a disproportionate impact test, under which actions affecting individual rights are prohibited if they harm the rights and interests of minorities more than the rights and interests of the majority. See Perry, *supra* note 48, at 555-62. This test is basic to employment discrimination claims under Title VII of the Civil Rights Act of 1964, see *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (showing of disproportionate impact of job-screening practices on minority applicants sufficient to invalidate practices unless employer shows practices to be job-related), and is useful also in litigation concerning discriminatory public school administration, housing, and land use, see Perry, *supra* note 48, at 574-85. This test is too strict in the voting rights context, however, since it would result in violations whenever a minority group could show simply a lack of representation proportionate to their percentage of the electorate. Lack of proportionate representation is inevitable in a majoritarian electoral system, and is not the problem that the Voting Rights Act seeks to address. The test for racial vote dilution must distinguish a single instance of minority political failure from the inability of minorities to participate in elections on an equal basis because of persistent racial discrimination and the use of certain electoral practices.

56. See Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 200-06 (1984) (different interpretation of results test needed to tackle racial gerrymandering); Note, *supra* note 21, at 998 (presence of only three factors—racial bloc voting, at-large elections, and less-than-proportionate minority representation—should be sufficient to prove discriminatory effect).

57. See Parker, *supra* note 8.

58. *City of Lockhart v. United States*, 559 F. Supp. 581, 583 (D.D.C. 1981), *rev'd*, 460 U.S. 125 (1983).

59. *Id.* at 584. This occurred because an unusually large number of white candidates split the white vote. *Id.* at 585.

60. *Id.* at 584. The one successful Mexican-American candidate received 655 votes; 660 Mexican-Americans voted in the election. *Id.* at 585.

61. *Id.* at 585. See SENATE REPORT, *supra* note 42, at 29 (anti-single-shot rule is typical dilution

posts,⁶² and staggered terms.⁶³ Applying the retrogression test, the Court held that the district court should have precleared the voting changes⁶⁴ even though they would perpetuate existing vote dilution.⁶⁵ Had the Court used the results test in *Lockhart*, the presence of so many factors indicative of racial vote dilution would most likely have led it to affirm the district court's denial of preclearance. Thus the retrogression test does not protect minority voters from vote dilution as thoroughly as does the results test.

In deciding annexation cases, the Court has implicitly abandoned the retrogression test in favor of criteria similar to those of the section 2 results test. Cities may annex white suburbs even though the annexations clearly have a retrogressive effect,⁶⁶ as long as the cities agree to abandon their at-large system in favor of a districting system that would fairly represent post-annexation minority voting strength.⁶⁷ The rationale underlying the Court's decisions seems clear: Retrogression does not make sense in the annexation context. Cities may need to annex white suburbs for non-racist reasons, even for fiscal reasons that could potentially benefit the minority population; section 5 should not prevent annexation if minorities are fairly represented after the change.

The D. C. District Court has also experienced difficulty using the existing election system as the benchmark in applying the retrogression test. In cases decided before *City of Lockhart*, the court relied on the intent test developed in constitutional vote dilution cases, rather than on the retrogression test. In one case, where the election districts were "severely malapportioned,"⁶⁸ the court used a "fairly drawn"⁶⁹ plan as a benchmark; in another, where the existing election system had never been precleared,⁷⁰ the court required plaintiffs to show that "the proposed change fairly reflects the strength of black voting power as it exists."⁷¹ In

factor). Anti-single-shot rules require voters to vote for as many candidates as positions, preventing voters from voting just for one candidate. See *City of Rome v. United States*, 472 F. Supp. 221, 244 (D.D.C. 1979), *aff'd*, 446 U.S. 156 (1980).

62. *City of Lockhart*, 559 F. Supp. at 585.

63. *Id.*

64. *Lockhart* proposed two additional seats on the city council, each numbered posts, to be elected at-large, with staggered terms.

65. *City of Lockhart v. United States*, 460 U.S. 125, 135-36 (1983).

66. *E.g.*, *City of Port Arthur v. United States*, 459 U.S. 159 (1982); *City of Rome v. United States*, 446 U.S. 156 (1980); *City of Richmond v. United States*, 422 U.S. 358 (1975); *City of Petersburg v. United States*, 354 F. Supp. 1021 (D.D.C. 1972), *aff'd mem.*, 410 U.S. 962 (1973).

67. See *City of Richmond*, 422 U.S. at 378.

68. *Wilkes County v. United States*, 450 F. Supp. 1171, 1178 (D.D.C.), *aff'd mem.*, 439 U.S. 999 (1978).

69. *Id.* at 1176.

70. *Mississippi v. United States*, 490 F. Supp. 569, 582 (D.D.C. 1979), *aff'd mem.*, 444 U.S. 1050 (1980).

71. *Id.* at 581.

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these and other cases, the court has abandoned a strict application of the retrogression test and resorted to a constitutional analysis based on factors similar to those of the section 2 results test.⁷² Yet these decisions are inconsistent with the Supreme Court's decision in *City of Lockhart*. The courts' difficulties in applying the retrogression test suggest the need to incorporate the results test of section 2 into section 5.

II. A NEW STANDARD FOR SECTION 5

Courts have yet to decide whether the 1982 amendments have altered the effects standard under section 5.⁷³ The Supreme Court explicitly declined to address this issue in *Lockhart*, preferring to have the district court consider it first.⁷⁴ As the D. C. District Court recently noted: "Whether . . . the 'results' standard of Section 2 can properly be imported into Section 5 presents a complex issue which can be decided only after a comprehensive assessment of the statutory scheme and legislative history."⁷⁵ Part II attempts this assessment.

A. Legislative History

Although as part of the 1982 amendments Congress extended the life of section 5 for twenty-five years,⁷⁶ it did not modify section 5's statutory language. Nevertheless, there is direct evidence that Congress intended the results test to apply to section 5.

The Senate Judiciary Committee's Report stated: "In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section

72. Both the intent test, used by the courts in cases involving flawed existing systems and/or annexations, and the results test derive from the same set of constitutional vote dilution factors. See, e.g., *Hale County v. United States*, 496 F. Supp. 1206, 1212-18 (D.D.C. 1980) (findings of racial bloc voting, history of discrimination, and ongoing discriminatory effects); *Wilkes County v. United States*, 450 F. Supp. 1171, 1173-76 (D.D.C. 1978) (findings of staggered terms, majority vote and residency requirements, racial bloc voting, past discrimination, and ongoing discriminatory effects); cf. *Motomura*, *supra* note 25, at 232 (noting "emerging pattern" of reliance on constitutional vote dilution factors for § 5 analysis in cases preceding *City of Lockhart*).

73. Cf. *Hartman*, *supra* note 22, at 733 n.281 (implications of 1982 amendments for § 5 unresolved).

74. 460 U.S. 133 n.9. Justices Marshall and Blackmun would have directly addressed the issue. *Id.* at 147 (Marshall, J., concurring in part and dissenting in part) ("There is no justification for the Court's refusal to consider the 1982 reenactment of § 5 and amendment of § 2."); *id.* at 149 (Blackmun, J., concurring in part and dissenting in part) ("At the very least, I would remand the case . . . to determine whether the Voting Rights Act Amendments of 1982 . . . have altered the applicable standard under § 5.").

75. *County Council v. United States*, 555 F. Supp. 694, 698 (D.D.C. 1983) (quoting from Reply Brief of the United States in *City of Lockhart v. United States*). The court ultimately did not reach the question of the applicability of the results test to § 5, since it held the proposed changes to be retrogressive. *County Council v. United States*, No. 82-0912, slip op. at 9 (D.D.C. May 25, 1984) (*per curiam*).

76. 42 U.S.C. § 1973b(a)(8) (1982).

2.”⁷⁷ While there is no further discussion of the matter in the Senate Report, this single statement is clear⁷⁸ and is not contradicted by any other statement in the Report. Moreover, both Senator Kennedy and Representative Sensenbrenner referred to this passage of the Senate Report during the floor debates, stating, “[A]s the [Senate] report points out, where there is a section 5 submission which is not retrogressive, it would be objected to only if the new practice itself violated the Constitution or amended section 2.”⁷⁹ Senator Kennedy’s statement should be accorded considerable weight, since he was one of the original sponsors of the bill,⁸⁰ and no Senator disputed his statement.⁸¹

The House Report on the 1982 Amendments also suggests that preclearance should not be granted under section 5 to a proposed voting change that, if enacted, would leave the electoral system still in violation of section 2: “Under the Voting Rights Act, whether a discriminatory practice or procedure is of recent origin affects only the mechanism that triggers relief, i.e., litigation or preclearance. The lawfulness of such a practice should not vary depending upon when it was adopted, i.e., whether it is a change.”⁸²

The debate in the House, however, was somewhat more confused than that in the Senate. Representative Edwards, another sponsor of the bill, initially concurred with Representative Sensenbrenner’s statement that proposed changes that would violate section 2 should be held to violate section 5.⁸³ Representatives Fowler and Levitas later elicited a contrary interpretation from Representative Edwards. After Representative Fowler inquired whether it was “true that the proposed amendments sent over by the other body do not change in any way section 5 of the current Voting Rights Act,”⁸⁴ Representative Edwards replied “That is correct; the

77. SENATE REPORT, *supra* note 42, at 12 n.31. Cf. McDonald, *supra* note 1, at 42 & n.248 (relying on footnote 31 of the Senate Report to assert that “[i]n 1982 Congress responded directly to *Beer*” by incorporating results test into § 5, but recognizing that Supreme Court has avoided deciding issue).

78. The wording “violate section 2,” as opposed to “violate the results test,” has, however, led to confusion over the burden of proving a results violation under § 5. See discussion *infra* pp. 156–57.

79. 128 CONG. REC. S7095 (daily ed. June 18, 1982) (statement of Sen. Kennedy); *id.* at H3841 (daily ed. June 23, 1982) (statement of Rep. Sensenbrenner).

80. Cf. *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 204 n.24 (1976) (comments of those not involved in drafting or preparing a bill “are entitled to little weight”).

81. See 128 CONG. REC. (daily ed. June 9–18, 1982); SENATE REPORT, *supra* note 42, at 88–239 (Senators Thurmond, Hatch, Laxalt, Denton, and East did not dispute Sen. Kennedy’s statement).

82. H.R. REP. NO. 227, 97th Cong., 1st Sess. 28 (1981).

83. 128 CONG. REC. H3841 (daily ed. June 23, 1982) (statements of Reps. Sensenbrenner & Edwards).

84. *Id.* at H3845 (statement of Rep. Fowler).

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preclearance provisions are not changed.”⁸⁵ A similar exchange took place between Representatives Levitas and Edwards.⁸⁶

It is not surprising that during this lengthy debate over complex issues,⁸⁷ Congress did not always speak with one voice. In deciding what weight to accord this particular colloquy in the House, however, several factors bear consideration. Representatives Levitas and Fowler posed their questions indirectly, asking not whether the results test would be applied under section 5, but simply whether there was any change to section 5. They may have done so because they had personal interests in this issue that other Representatives did not share.⁸⁸ In any case, Representative Edwards’ general responses are the only comments in the record that could be interpreted as contrary to the direct language of the Senate and House Reports and of Senator Kennedy and Representative Sensenbrenner.⁸⁹

On balance, then, the direct evidence of legislative intent favors the view that courts should now apply the results test in section 5. After considering the legislative history, the Department of Justice also has concluded that Congress intended the results test to apply to section 5.⁹⁰ This inter-

85. *Id.* (statement of Rep. Edwards).

86. *Id.* at H3844 ((statement of Rep. Levitas) (Is there “any portion of this legislation that changes section 5?”); (statement of Rep. Edwards) (“No change was made.”)).

87. The difficulty of distinguishing “results” from “effects,” for example, became evident during the 1982 hearings on the extension of the Act. *Compare Hearings on the Voting Rights Act Extension Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary, 97th Cong., 2nd Sess. 143 (1982) (statement of Archibald Cox), reprinted in SENATE REPORT, supra note 42, at 138 (“If you mean the effects test as interpreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.”) with id.* (statement of Rep. Sensenbrenner, cosponsor of bill) (“[W]e are splitting hairs in attempting to see a significant difference in a results test or an effects test.”).

88. During the debate on the Amendments, both Representative Fowler (5th Dist. Ga.) and Representative Levitas (4th Dist. Ga.), were undoubtedly aware of a pending § 5 suit involving reapportionment of their congressional districts. *See Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff’d.*, 459 U.S. 1166 (1983). One state representative had testified that, if preclearance were denied and the district lines redrawn to increase black voting strength, both incumbents would lose their seats. 549 F. Supp. at 508. *See also* POLITICS IN AMERICA: MEMBERS OF CONGRESS IN WASHINGTON AND AT HOME (A. Ehrenhalt, ed.) 282 (1982) (Rep. Fowler first non-black member of Congress from 4th District in two decades); Post-Trial Brief of Defendant-Intervenors at 11–13, *County Council v. United States*, No. 82-0912 (D.D.C. 1984) (on file with *Yale Law Journal*).

89. These comments cannot in themselves answer the question of “what was the intent of Congress”—they can at most undermine our confidence that simply reading what Congress said is sufficient to answer the question. *See Allen v. State Bd. of Elections*, 393 U.S. 544, 568–69 (1969) (single remark not conclusive when interpreting legislative history).

90. Objection letter from Assistant Attorney General W.B. Reynolds to W. Ward, Starkville, Miss. (June 17, 1983) (“Where, as here, such unlawful conduct results in so clear a discriminatory impact on a protected minority group, amended Section 2 [of] the Voting Rights Act precludes preclearance under Section 5.”); objection letter from Assistant Attorney General W.B. Reynolds to T. Lewis, Chancery Clerk, Amite County, Miss. (June 6, 1983) (“[W]e believe that the proposed plan . . . violates the substantive standard of Section 2 of the Voting Rights Act and, therefore, is not entitled to preclearance under Section 5.”); Pretrial Brief for the United States, *County Council v. United States*, No. 82-0912, 73 n.* (D.D.C. filed Jan. 24, 1983) [hereinafter cited as Pretrial Brief] (on file with *Yale Law Journal*). In the past, those construing § 5 have given special consideration to

pretation is reinforced by an assessment of the impact of this change on the Act as a whole.

B. *Assessing the Statutory Scheme*

An important alternative method of interpreting a new statute is to examine the effect of a given change on the coherence of the statutory scheme.⁹¹ This section of the Note examines the impact of adopting a results test for section 5 on the interrelation of the Act's key sections—2, 4 and 5.

Section 2 and section 5 provide different procedures for protecting minority voting rights.⁹² Notwithstanding the intrusiveness of the preclearance procedure, the substantive standard under section 5 should not be less strict than that of section 2. This is explicit in both the Senate and House Reports.⁹³ Yet, as illustrated in the earlier discussion of *City of Lockhart*,⁹⁴ the section 5 retrogression test currently makes lawful certain voting practices that would be unlawful under the section 2 results test. The use of different tests in sections 2 and 5 is thus at odds with the conception of the Act expressed in the Senate and House reports, that the individual provisions are but different procedures for enforcing the same right. Furthermore, the standard used to test for violations is integral to the meaning of the right, and the courts, as interpreters of rights, should be reluctant to vary the meaning of a right between sections of an act.⁹⁵

If the "purpose or effect" language of section 5 is broad enough to suggest a results test for section 2, it is certainly sufficient to encompass a

the opinion of the Department of Justice. See *United States v. Board of Comm'rs*, 435 U.S. 110, 131 (1977) ("[C]ontemporaneous administrative construction of the Act [by the Attorney General] is persuasive evidence of the original understanding . . .").

91. "In expounding a statute, we must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy." *United States v. Heirs of Boisdoré*, 49 U.S. (8 How.) 113, 122 (1850), quoted in *Philbrook v. Glodgett*, 421 U.S. 707, 713 (1975); see also *Weinberger v. Hynson, Westcott and Dunning, Inc.*, 412 U.S. 609, 631-32 (1973) ("It is well established that our task in interpreting separate provisions of a single Act is to give the Act 'the most harmonious, comprehensive meaning possible' in light of the legislative policy and purpose.") (citation omitted).

92. Section 2 allows citizens to challenge existing voting laws and practices; section 5 requires covered jurisdictions to preclear changes in voting laws and practices.

93. See *supra* text accompanying notes 77 & 82.

94. See *supra* notes 29-33, 58-65 and accompanying text.

95. The meaning of "the right to vote" apart from any standard used to enforce it is ambiguous. In defining the standard used to test for violations of a right, one defines the right itself. The right to vote means equally apportioned districts; the right to vote means that minority groups may not be denied "equal access to the political process" under the circumstances spelled out by the results test of section 2. Cf. Fiss, *Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 52 (1979) (arguing more broadly that the right is defined by remedy used to enforce it); Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 592 (1983) ("[R]emedial goals . . . are limited by a definition of the right—that is, what counts as a violation and as a legally relevant effect.") (emphasis added). Courts should be particularly reluctant to vary the standard and hence the meaning of a right between sections of an act designed to protect a fundamental right. See *infra* notes 123 & 124 and accompanying text.

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results test for section 5. In amending section 2 to make clear that an effects test—the results test—was applicable, Congress based its action in part on the language in section 5 mandating an effects test to enforce voting rights.⁹⁶ Since the wording of section 5 clearly allows for an effects as well as an intent test, Congress did not need to amend section 5 in order to make the results test applicable to it.

The 1982 amendments to section 4 also suggest that Congress intended the results test to apply to section 5. Section 4 of the Voting Rights Act⁹⁷ lays out both the criteria that determine whether a state or political subdivision is subject to the preclearance procedures of section 5, and the criteria that determine when a jurisdiction can bail out of section 5 coverage. The two sections are thus procedurally interdependent: One cannot work without the other.⁹⁸ But in addition to this procedural interdependence, sections 4 and 5 are also substantively interdependent. As the Senate Report states, “[The] bailout was carefully crafted to preserve the essential protections of Section 5. The provisions work as an integrated complementary whole; removing any element would seriously undermine the entire structure.”⁹⁹ The results test is needed in section 5 to ensure that these two sections operate coherently and productively.

Section 4 was completely rewritten in 1982 to make bailout available only after all voting discrimination is eliminated from a jurisdiction.¹⁰⁰ In a suit to bail out of section 5 coverage, a jurisdiction has the burden of proving that it has eliminated all “voting procedures and methods of election which inhibit or dilute equal access to the electoral process.”¹⁰¹ The

96. SENATE REPORT, *supra* note 42, at 18. The Senate Judiciary Committee argued that a results or effects test is legitimate under § 2:

It is true that [the statutory language of] Section 2 originally had no reference to a results or effects standard, while Section 5 does. But as Senator Specter noted at the hearings, that argument proves nothing, inasmuch as Section 2 is also silent as to any intent standard, and Section 5 refers to proof of both discriminatory purpose and discriminatory effect.

Id. (footnote omitted).

97. 42 U.S.C. § 1973b (1982).

98. The substantive link between these sections was first noted by Justice Harlan in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969) (Harlan, J., concurring in part and dissenting in part). Justice Harlan used the procedural linkage of § 5 and § 4 to determine the scope of voting changes properly subject to preclearance under § 5: “[Section 5] is clearly designed to march in lock-step with § 4—the two sections cannot be understood apart from one another.” *Id.* at 584 (Harlan, J., concurring in part and dissenting in part). Justice Harlan’s method remains valid, although his dissenting argument—that since § 4 dealt only with questions of access to the polls and not with vote dilution, the scope of § 5 should also be drawn to exclude vote dilution—was rendered moot by the amendments to § 4 in 1982.

99. SENATE REPORT, *supra* note 42, at 44.

100. *Id.* at 54. See generally O’Rourke, *Voting Rights Act Amendments of 1982: The New Bailout Provision and Virginia*, 69 VA. L. REV. 765, 772–91 (1983) (discussing history of bailout and describing new provisions).

101. 42 U.S.C. § 1973b(a)(1)(F)(i) (1982). This includes a showing that, for the previous ten years, it (1) has fully complied with the requirements of § 5, both to submit proposed changes on a timely basis and to receive approval from the Attorney General for all changes; (2) has had no adverse

Senate Report states unambiguously that the standard to be used to test for the elimination of such vote dilution is the results test developed for section 2,¹⁰² and that the burden of proof is on the jurisdiction seeking to bail out.¹⁰³

Given that Congress adopted the results test in section 4, the test should also be employed in section 5. First, if courts were to continue to use a retrogression test in section 5 suits, then courts deciding future section 4 suits would have to evaluate under the results test not only all of the ongoing practices never reviewed under section 5, but also all of the changes that had been precleared under the section 5 retrogression test. Such review would be confusing as well as inefficient. When attempting to prepare acceptable changes, jurisdictions would have to keep two standards in mind, one of which would not even be applicable until the jurisdiction was eligible to bring a bailout suit.

Second, by permitting jurisdictions to perpetuate vote dilution, the retrogression test allows them to remain indefinitely in a status that will not qualify them for bailout. Section 5 thus operates more as a bureaucratic hoop through which jurisdictions must jump than as an extraordinary remedy driving those jurisdictions most in need of positive voting changes to eliminate vote dilution. Using a results test in section 5 would be more consonant with the congressional objective of ensuring that jurisdictions not be covered indefinitely by the preclearance provisions of the Act.¹⁰⁴

judgments in voting rights litigation or entered into any consent decrees to abandon a challenged voting practice; and (3) has taken positive steps to increase minority participation. SENATE REPORT, *supra* note 42, at 46-53. The Senate Report elaborates on the nature of the positive steps expected:

Beyond the outright elimination of discriminatory barriers, the applicant jurisdiction must make constructive efforts to eliminate the continued effects of many years of discrimination in order to be relieved of special obligations under the Act. [It must eliminate all] discriminatory structures [and make additional] constructive efforts to eliminate intimidation and harassment . . . to enhance[] opportunity for registration . . . [and to appoint] minority election officials throughout the jurisdiction and at all stages of the political process.

Id. at 53-55.

102. The Report states:

In determining whether procedures or methods "inhibit or dilute equal access to the electoral process," the standard to be used is the results test of *White*. In other words, the test would be the same as that for a challenge brought under Section 2 of the Voting Rights Act, as amended by the Committee bill, except that the burden of proof would be on the jurisdiction seeking to bail out.

Id. at 54.

103. *Id.*

104. *See id.* at 44. The Senate Judiciary Committee took great pains to emphasize that bailout would be achievable. Congress recognized that the constitutionality of §§ 4 and 5 could well depend on a clear showing that the extraordinary mechanism of preclearance would not be imposed permanently on any state. To this end, Congress included a 25-year cap on § 5. But the main thrust of its argument that no jurisdiction need fear permanent preclearance responsibility lay in the reasonableness and achievability of the standard for bailout:

The Committee believes that the new bail-out provisions provide a balanced compromise between protecting minority voting rights and eradicating the continuing effects of past discrimination, on the one hand, and allowing jurisdictions with clear records to terminate Section

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Third, the legislative history of the amendments to section 4 further supports the proposition that courts should apply the results test to section 5. Congress deliberately chose not to incorporate a results test into the statutory language of section 4, and its reasons for doing so shed light on why it did not alter the statutory language of section 5 to include the term “results.”

The Senate rejected an amendment proposed by Senator Stevens to insert the term “results” into the statutory language of section 4,¹⁰⁵ preferring to spell out in the Senate Report what test to use.¹⁰⁶ The decisive argument against the Stevens amendment to section 4, made by both Senator Dole and Senator Kennedy, was that the Stevens amendment would effectively reverse the burden of proof in bailout suits: Suits brought under section 2 place the burden of proof on minority voters, while section 4 suits, like section 5 suits, place it on jurisdictions.¹⁰⁷ Congress may have chosen not to insert the word “results” into sections 5 and 4 to forestall any assertion that it had shifted the burden of proof from the jurisdiction to minority voters.

For the Act to operate with full effectiveness, however, section 5 review must include the results test. By failing to adopt a results test for section 5, courts would condemn voting rights litigants to needlessly duplicative judicial review, and would slow the progress that covered jurisdictions

5 coverage, on the other. They offer a firm but fair and achievable set of standards for determining when a jurisdiction’s preclearance obligations should end.

Id.

105. Senator Stevens argued that since the Senate Report made clear that the standard under § 4 was to be the results test, there was no need to introduce the new phrase “inhibit or dilute equal access”:

Now the standard for the bailout under this bill, according to the committee report, is in fact to be the standard of section 2. . . . The court is going to look at subsection 4(a)(1)(F)(i) however, and say there is the language and it says “inhibit or dilute equal access.” It is not going to pay any attention to this report. . . . They [sic] are going to read the bill in plain English language and find two standards; not one, two.

128 CONG. REC. S6990 (daily ed. June 6, 1982) (statement of Sen. Stevens).

106. SENATE REPORT, *supra* note 42, at 54.

107. In Senator Dole’s words, the amendment would “erroneously require a voter challenging bailout to prove a White against Register case in the middle of a covered jurisdiction’s bailout suit. . . . The proper burden of proving bailout is with the jurisdiction.” 128 CONG. REC. S6993 (daily ed. June 17, 1983) (statement of Sen. Dole). Similarly, Senator Kennedy stated:

Once a test is inscribed in terms of section 2, where the plaintiffs have the burden of proof, and you place the identical language in section 5 [sic], where the jurisdiction has the burden of proof, it is likely to be interpreted as shifting the burden of proof from the jurisdiction to the individual on bailout. That is of considerable concern and we do not take it lightly.

Id. at S6995.

Senator Stevens’ proposed amendment also provoked concern in the civil rights lobby that, because the amendment removed the language “inhibit or dilute” from the bill, courts might conclude that Congress intended the Voting Rights Act to cover only problems of denial of access to the polls and not vote dilution. *See* Leadership Conference on Civil Rights, Factsheet on Stevens’ Amendments (Modifying Bailout Provision) (June 16, 1982), reprinted in 128 CONG. REC. S6997 (daily ed. June 17, 1982).

would otherwise make toward eliminating racial vote dilution. The legislative history does not support the view, however, that Congress intended the courts and the Department of Justice entirely to abandon the retrogression test. The retrogression test will still be useful in certain cases. Because it does not require the same fact gathering as does the results test, the retrogression test is a convenient basis for denying preclearance to obviously retrogressive changes. Yet the practical and substantive limits of the retrogression test reveal the need for an alternative test in section 5.

C. *The Results Test: Who Bears the Burden of Proof?*

If the section 2 results test is applied to section 5, then courts will need to decide which party should bear the burden of showing a results violation in a section 5 suit. The Department of Justice has argued that the jurisdiction seeking preclearance should not have the burden of proving, as it ordinarily would under section 5, that the proposed changes do not violate the results standard.¹⁰⁸ Instead, according to the Department of Justice, the burden initially should be on the United States to show a results violation, and should "shift[] to the plaintiffs . . . only after a *prima facie* case has been made."¹⁰⁹

The justification for this interpretation lies both in the absence of an explicit statement by Congress that the burden of proof should be on the jurisdiction¹¹⁰ and in the Senate Report's reference to a violation of "section 2" rather than "the results test."¹¹¹ The Department of Justice interprets the Senate Report to mean that within the ongoing process of section 5 review there should be embedded a mini-section 2 suit: If the Senate had meant otherwise, it would have said "results test" and not "section 2."

Courts should not adopt this interpretation. Removing the burden of proof from the jurisdiction is not mandated by the legislative history of the 1982 amendments, and would run counter to the need for¹¹² and structure

108. Pretrial Brief, *supra* note 90, at 74; see Blumstein, *supra* note 42, at 684 n. 254 (minority voters should have burden of proof if results test is applied to § 5).

109. Pretrial Brief, *supra* note 90, at 74.

110. *Id.* (1982 amendments "did not assign to covered jurisdictions an additional burden of proof to be met in order to obtain preclearance").

111. SENATE REPORT, *supra* note 42, at 12 n.31 ("In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.").

112. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 556 n.21 (1969) ("Of course the private litigant could always bring suit under the Fifteenth Amendment [when a jurisdiction has failed to submit a change for preclearance]. But it was the inadequacy of just these suits for securing the right to vote that prompted Congress to pass the Voting Rights Act."); Keady & Cochran, *Section 5 of the Voting Rights Act: A Time for Revision*, 69 Ky. L.J. 741, 774-76 (1980-81) (immense number of § 5 submissions precludes Attorney General from providing adequate review).

If one placed the burden of proof in § 5 on the Department of Justice and minority voters, then the

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of preclearance.¹¹³ Neither the private litigants nor the Attorney General has the resources to shoulder this burden, and the preclearance mechanism reflects Congress' considered decision "to shift the advantage of time and inertia from the perpetrators of the evil to its victims."¹¹⁴ Moreover, the precedential value of section 5 preclearance in a subsequent bailout suit under section 4 would be lost if the burden of proof in preclearance review were placed on the United States, since in section 4 bailout suits the burden would be on the jurisdiction. That a jurisdiction's voting changes had been precleared would not carry any weight in the bailout proceeding. In contrast, if the burden were on the jurisdiction in the preclearance phase, and if the jurisdiction carried this burden, it would establish the legitimacy of the cleared change in a bailout suit under section 4 as well. Given the basic purposes both of the Act as a whole and of section 5 in particular, the burden of proof in section 5 suits should lie on the jurisdiction to show no discriminatory results.

III. THE STATUTORY AND CONSTITUTIONAL CONTEXT

Although an examination of the legislative history and the statutory scheme alone strongly suggests that the standard for section 5 review has changed, it is also worth looking at the significance of this change in a broader context. The new standard appears to be a positive step toward

incorporation of a results test into § 5 would add very little to the protection of minority voters; these voters could always bring a § 2 suit against a covered jurisdiction once the precleared change had been implemented. This was Senator Dole's point in arguing against a proposal to remove the burden of proof from jurisdictions under § 4. ("It is not the voter's burden to prove a section 2 case under the bailout. if [sic] that were so, then the entire provision is unnecessary because a voter can always bring a section 2 case if that voter can hire a lawyer to prove the complex and difficult issues involved in section 2.") 128 CONG. REC. S6993 (daily ed. June 17, 1983) (statement of Sen. Dole).

113. The structure of preclearance review counsels against placing the burden of proof on the Department of Justice, because the Department acts primarily as a judge and not as a litigant. It has independent authority to preclear proposed voting changes, receives numerous submissions each year, and is dependent on the information provided by the submitting jurisdiction to make its judgment. Minority voters are a part of this process in a formal sense, in that the Department of Justice represents them, and they cannot appeal a decision to preclear a change. In practice, however, they are denied the opportunity to shoulder the burden of proof; the Department of Justice typically relies on information submitted by the jurisdiction to determine whether the jurisdiction has met the burden of proof. If the burden of proof were placed on the Department of Justice, the Department would be in the awkward position of relying on the jurisdiction to proffer the information necessary for the Department to carry its burden. The long-run impact of such a burden shift thus ultimately could be deleterious to the very interests that Congress intended § 2 and § 5 to protect—those of minority voters. Currently, a change precleared by the Attorney General can still be challenged by minority voters under § 2. *See Major v. Treen*, 574 F. Supp. 325, 328 (E.D. La. 1983). If § 5 preclearance included a results review, then this recourse might no longer be available. And if that review took place in an office in the Department of Justice and not in the courtroom, with no direct participation by minority voters, then it is not clear whether the new standard would afford minority voters much additional protection. By keeping the burden of proof on the jurisdiction, courts would maintain the existing distinction between § 2 and § 5 actions, and ensure that racial minority voters continued to have two stages of protection against vote dilution.

114. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

fulfilling the Act's original goals and the promise of the Fourteenth and Fifteenth Amendments.

A. *Original Purpose*

In upholding the constitutionality of section 5 in *South Carolina v. Katzenbach*,¹¹⁵ the Supreme Court stated that "[t]he Voting Rights Act was designed by Congress to banish the blight of racial discrimination in voting, which has infected the electoral process in parts of our country for nearly a century."¹¹⁶ The retrogression test, however, would indicate that the purpose of section 5 is simply to preserve existing levels of minority voting strength.¹¹⁷ This view is fundamentally mistaken. In *Katzenbach*, the Court made clear its understanding that the Voting Rights Act was designed not merely to freeze voting discrimination at existing levels, but to "rid the country of racial discrimination in voting."¹¹⁸ Congress has reaffirmed this interpretation.¹¹⁹

The retrogression test is inconsistent with the fundamental purpose of the Voting Rights Act and of section 5; it does not demand progress from the covered jurisdictions, but asks only that jurisdictions not make conditions worse. One can argue that "not making things worse" is progress,¹²⁰ but that does not appear to be the kind of progress Congress had in mind. Congress knew that states "had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination;"¹²¹ preclearance was needed to ensure that such a stratagem would not succeed. Although plans that perpetuate or do not fully remedy vote dilution will generally fail the results test,¹²² they will

115. *Id.*

116. *Id.* at 308, cited with approval in *McCain v. Lybrand*, 104 S. Ct. 1037, 1043 (1984).

117. See, e.g., *McMillan v. Escambia County*, 559 F. Supp. 720, 729 (N.D. Fla. 1983) (section 5 designed to "preserve the status quo"), vacated and remanded on other grounds, 104 S. Ct. 1577 (1984).

118. *South Carolina v. Katzenbach*, 383 U.S. at 315.

119. In 1970, 1975, and 1982 Congress extended the Voting Rights Act for limited time periods in order to complete the job of eliminating vote dilution. See, e.g., S. REP. NO. 295, 94th Cong., 1st Sess. 19, reprinted in 1975 U.S. CODE CONG. & AD. NEWS 774, 785; SENATE REPORT, *supra* note 42, at 9-15; H.R. REP. NO. 227, 97th Cong. 1st Sess. 43 (1981); cf. *United States v. Board of Comm'rs*, 435 U.S. 110, 134 (1978) ("When a Congress that re-enacts a statute voices its approval of an administrative or other interpretation thereof, Congress is treated as having adopted that interpretation, and this Court is bound thereby.") (citations omitted).

120. See *supra* note 26.

121. *South Carolina v. Katzenbach*, 383 U.S. at 335; see also *id.* at 316 ("Section 5 prescribes a second remedy, the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination."); *City of Lockhart v. United States*, 460 U.S. 125, 138-42 (1983) (Marshall, J., dissenting) (legislative history shows purpose of § 5 to prevent perpetuation of vote dilution); 128 CONG. REC. S6942 (daily ed. June 17, 1982) (statement of Sen. Mathias) (purpose as recognized in *South Carolina v. Katzenbach* still accurate interpretation of congressional intent).

122. See discussion of *Lockhart*, *supra* notes 29-33, 58-65 and accompanying text; see also Beer

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often pass the retrogression test. The Court's retrogression test is thus equivalent to those "extraordinary stratagems" that Congress feared states would employ to perpetuate vote dilution.

B. *Equal Protection*

If we view the right to an undiluted vote not simply as a statutory right, but as a fundamental right of constitutional stature,¹²³ then the retrogression test is inadequate—it does not provide to minority voters in different jurisdictions the equal protection of their voting rights. The right to vote, understood as the right to cast a ballot, is in constitutional terms a fundamental right.¹²⁴ But the case law is ambiguous about the degree of protection the Constitution affords against racial vote dilution.¹²⁵ In *City of Mobile v. Bolden*, Justice Stewart rejected the claim that the right to vote protected by the Fifteenth Amendment included a right of minorities to be free from unintentional racial vote dilution.¹²⁶ His argument persuaded only a plurality of the Court, however,¹²⁷ and is inconsistent both with a straightforward reading of the text of the Fifteenth Amendment¹²⁸ and

v. United States, 425 U.S. 130, 143–44 (1976) (White, J., dissenting) (facts found by district court, including racial bloc voting, segregated residential patterns, and majority and anti-single-shot voting requirements, suggest that proposed changes would not "afford the Negro minority the opportunity to achieve legislative representation roughly proportional to the Negro population in the community").

123. The Voting Rights Act "is designed primarily to enforce the 15th amendment . . ." H.R. REP. NO. 439, 89th Cong., 1st Sess. 1, reprinted in 1965 U.S. CODE CONG. & AD. NEWS 2437, 2437.

124. Although the Constitution does not specifically confer a right to vote, it certainly presupposes such a right. The right to vote is protected by the Fifteenth Amendment, and is essential to the meaning and functioning of representative government: The right to vote is fundamental because it is "preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *accord Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (right to vote "preservative of . . . basic civil and political rights"). One might also argue that the right to vote is inherent in the First Amendment guarantee of freedom of political speech, for the ballot is the ultimate tangible manifestation of political expression. It is not surprising that state legislation which infringed upon the right to vote was among the first to receive strict scrutiny under the equal protection clause in the Supreme Court. *See, e.g., Baker v. Carr*, 369 U.S. 186, 237 (1962) (claim of vote dilution presents "a justiciable constitutional cause of action," and "right asserted is within the reach of judicial protection under the Fourteenth Amendment"); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) ("[T]he right to vote is too precious, too fundamental to be so burdened or conditioned.").

125. *See Note, The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 143 n.42 (1980) (constitutional theory in vote dilution decisions ambiguous; can be read as involving fundamental rights or suspect classification analysis). *But see City of Mobile v. Bolden*, 446 U.S. 55, 120 (1980) (Marshall, J., dissenting) ("Our vote-dilution decisions, then, involve the fundamental-interest branch, rather than the antidiscrimination branch, of our jurisprudence under the Equal Protection Clause.").

126. 446 U.S. 55, 65 (1980) (plurality opinion) (Fifteenth Amendment bars only purposeful abridgement of right to vote). Justice Stewart's rejection seems to have been based more on skepticism about the judicial manageability of identifying voting rights violations than on a reading of the Constitution or case law. *See id.* at 78–79 n.26.

127. Only Chief Justice Burger and Justices Powell and Rehnquist joined the opinion. *Id.* at 55.

128. "The right of citizens of the United States 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 servitude." U.S. CONST. amend. XV, § 1. The Fifteenth Amendment phrase "denied or abridged" is most naturally read to encompass problems of access and dilution. *See Hartman, supra* note 22, at 706; *cf. Beer v.*

with the reasoning of other opinions of the Court explaining why voting is a fundamental right under the Fourteenth Amendment. In *Reynolds v. Sims*,¹²⁹ for example, the Court stated that "the right of suffrage is a fundamental matter in a free and democratic society,"¹³⁰ and that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise."¹³¹ The core principle of *Reynolds* that all votes must carry an equal weight is as applicable to minority voters today as to the urban plaintiffs who originally brought that suit.¹³²

The retrogression test is inappropriate as the sole test for a fundamental right since the structure of the test inevitably denies minority voters in some districts the equal protection of the laws. Because the test employs a relative standard, a district in which black voting strength is represented more fairly to begin with will receive greater protection than one in which black voting strength is less fairly represented.¹³³ The test thus leaves

United States, 425 U.S. 130, 153 n.11 (1976) (Marshall, J., dissenting) ("I read 'abridge' in both § 5 and the Fifteenth Amendment as primarily involving an absolute assessment of dilution of Negro voting power from its potential. . . ."); *Wilkes County v. United States*, 450 F. Supp. 1171, 1178 (D.D.C.) ("The use of at-large elections in Wilkes County has the effect of *abridging* the right to vote of blacks on account of race or color by *diluting* and reducing the influence of blacks in elections. . . .") (emphasis added), *aff'd mem.*, 439 U.S. 999 (1978).

129. 377 U.S. 533 (1964) (constitutional principle of one person, one vote protects urban voters from districting schemes (malapportionment) that render votes of sparsely-populated rural areas more influential than their own).

130. *Id.* at 561-62.

131. *Id.* at 555; cf. J.S. MILL, *supra* note 22, at 142 ("[T]here is not equal suffrage where every single individual does not count for as much as any other single individual in the community.").

132. While the bold rhetoric in *Reynolds* can be read to encompass all aspects of vote dilution, the remedy flowing from *Reynolds* dealt simply with malapportionment, and not specifically with racial vote dilution. See Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984) (distinguishing malapportionment and equally weighted vote from racial vote dilution and equally meaningful vote). But mathematically equal apportionment may still under- or over-represent voters. R. DIXON, *DEMOCRATIC REPRESENTATION* 18 (1968). Thus the *Reynolds* formula for mathematically equal votes addresses only part of the problem of vote dilution. Yet the logic of *Reynolds* offers no reason for limiting the remedy only to malapportionment. Indeed, the Court in *Reynolds* drew support for its holding from cases involving racial vote denial and dilution. 377 U.S. at 563 (citing *Gomillion v. Lightfoot*, 364 U.S. 339, 342 (1960) and *Lane v. Wilson*, 307 U.S. 268, 275 (1939)). When the under-represented voters are racial minorities, the problem of diluted votes takes on added constitutional significance. See SENATE REPORT, *supra* note 42, at 19-27 ("basic vote dilution principle" of *Reynolds* applies to racial vote dilution; *City of Mobile* departed from this principle); Blacksher & Menefee, *supra* note 42; cf. Hartman, *supra* note 22, at 708-10 (criticizing Justice Stewart's opinion in *City of Mobile* for failing to advance principled distinction between numerical malapportionment and racial vote dilution while making discriminatory motivation touchstone only of latter).

133. For example, assume that cities *A* and *B* both have council governments composed of representatives from five single-member districts, that both have 60% white and 40% black voting-age populations, and that both have a history of racial discrimination and persistent racial bloc voting. Minority voters in *A* and *B* are similarly situated in all respects except in their ability to elect representatives of their choice. In *A*, district lines are drawn to fairly reflect minority voting strength—two out of five districts are black majority districts; in *B*, the lines are drawn so there are no black majority districts. If *A* submits a redistricting plan that reduces the number of its black majority districts from two to one, this plan will not pass the retrogression test; it will have a clearly retrogressive effect

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worst off those voters who were in the worst position to start with.¹³⁴ This variation in the protection of voting rights across jurisdictions cannot withstand the strict scrutiny that courts should apply in cases involving an infringement of a fundamental right.¹³⁵

The retrogression test smacks of the logic that two wrongs make a right: It allows abridgement of a fundamental right simply because the abridgement created by the new law is no worse than the abridgement which previously existed.¹³⁶ Such variations in protection would be less likely to occur if the results test were used. As both an absolute test and one that is tailored to fit local circumstances, the results test eliminates the built-in bias of the retrogression test in favor of jurisdictions with the most severe racial vote dilution.

CONCLUSION

Courts should respond to the legislative history of the 1982 Voting Rights Act Amendments by adopting the results test for section 5, and by keeping the burden on jurisdictions to prove that proposed changes do not result in vote dilution. While courts need not abandon the retrogression test entirely, they should no longer use it to preclear changes that would violate the results test of sections 2 and 4. Instead, they should use the retrogression test as a threshold test, denying preclearance to those changes with an obviously retrogressive impact and approving only those changes that pass both the retrogression and results tests. This approach to section 5 will ensure that the various sections of the Act operate to-

on the ability of blacks in *A* to elect representatives of their choices. But if *B* submits a proposal that increases the number of black majority districts from zero to one, this plan will pass the test and be precleared. While such a plan improves representation for minority voters in *B*, it plainly fails to eliminate minority vote dilution. *B*'s minority voters must put up with vote dilution not tolerated in *A*, simply because the new degree of dilution in *B* is no worse than what had previously existed. The retrogression test does not impose an affirmative duty to eliminate all vote dilution, and does not provide the protection properly accorded a fundamental right.

134. Binion, *The Implementation of Section 5 of the 1965 Voting Rights Act: A Retrospective on the Role of Courts*, 32 W. POL. Q. 154, 171 (1979) (Supreme Court's interpretation of § 5 in *Beer* "reward[s] those jurisdictions with a history of the worst dilution of black electoral strength"); Engstrom, *Racial Vote Dilution: Supreme Court Interpretations of Section 5 of the Voting Rights Act*, 4 S.U.L. REV. 139, 162 (1978).

135. *Reynolds v. Sims*, 377 U.S. 533, 562 (1964) ("[A]ny alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.").

136. The Court rejected this "two wrongs make a right" logic in an analogous situation involving school desegregation. See *Green v. County School Bd.*, 391 U.S. 430, 437-38, 441 (1968) (county that replaced de jure school segregation with "free choice" plan that perpetuated segregation did not meet its obligation to eliminate discrimination "root and branch").

gether efficiently and coherently, and will return section 5 to its proper role as an agent for the elimination rather than the perpetuation of racial vote dilution.

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