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# Amending Section 2 of the Voting Rights Act of 1965

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# AMENDING SECTION 2 OF THE VOTING RIGHTS ACT OF 1965

*In 1980, in* City of Mobile v. Bolden, *the Supreme Court refused to declare a municipal electoral system unconstitutional for "minority vote dilution." The plurality opinion cited plaintiffs' failure to prove discriminatory purpose. Opposition to the judgment in* Bolden *generated a proposal to add a "results test" to section 2 of the Voting Rights Act of 1965. As part of H.R. 3112, the House version of the Voting Rights Extension Bill, a results test overwhelmingly passed the House of Representatives in October 1981. The House version of the results test was subsequently introduced in the Senate as part of S. 1992. During the course of the Senate Judiciary Committee's consideration of the bill, this Note was drafted in order to provide a clear explanation of: (1) what the then existing law was regarding vote dilution; (2) how the results test conceivably could alter that law; (3) whether the results test would be constitutional; and (4) whether enactment of the results test was advisable as a matter of public policy. On May 4, 1982 the Senate Judiciary Committee adopted new language for the amendment to section 2 and voted to report this revised version of S. 1992 to the full Senate. A new section was then added to the end of this Note, which analyzes the revised language of S. 1992. The revised version of S. 1992 subsequently was passed by the Senate and the House of Representatives and was signed into law by President Reagan on June 29, 1982.* *

*Editor's Note*: All references to "Section 2" in this Note refer to Section 2 of the Voting Rights Act of 1965 as it existed prior to June 29, 1982, when President Reagan signed into law the Voting Rights Act Amendments of 1982.

## INTRODUCTION

THE VOTING Rights Act of 1965[1] is most often employed in the federal preclearance[2] of voting law changes in jurisdictions specially designated for their history of voting discrimination.[3]

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* Pub. L. No. 97-205.

1. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified at 42 U.S.C. §§ 1971, 1973-1973bb-1 (1976)).

2. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1976). For a discussion of the operation of the § 5 preclearance provision, see *infra* text accompanying notes 73-74.

3. *Id.* § 4, 42 U.S.C. § 1973b(a)-(e) (1976). The § 4 coverage formula is designed to apply the § 5 preclearance provisions to jurisdictions which discriminated against blacks in either the 1964 or the 1968 presidential elections. The specified discrimination is defined as a utilization of "tests or devices" which conditioned voting or registration on reading and writing ability, knowledge, oral character, or voucher of one's qualifications by an already registered voter. *Id.* § 4(c), 42 U.S.C. § 1973b(c) (1976). Use of these tests or devices by a jurisdiction in either the 1965 or the 1968 election, *plus* a turnout of less than 50% of the voting age population or registration of less than 50% of that population, "triggers" the application of the special coverage provisions to a state or political subdivision. *Id.* § 4(b), 42 U.S.C. § 1973b(b) (1976). In 1975, Congress extended § 5 preclearance to jurisdictions which discriminated against *language minorities* in the 1972 presidential election. Pub. L. No. 94-73, §§ 202-204, 89 Stat. 400, 401-02 (1975) (codified at 42 U.S.C. § 1973b (1976)).

The Voting Rights Act, however, also contains a general litigation section—section 2—which outlaws voting discrimination in all states and localities:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).[4]

Thus, while the special provisions of the Voting Rights Act preclude discriminatory voting law changes in the specially covered jurisdictions, section 2 has the legal effect of first, prohibiting discriminatory voting laws in jurisdictions not covered by the preclearance provisions and second, prohibiting the perpetuation of discriminatory voting laws enacted by the specially covered jurisdictions prior to application of the preclearance provisions.[5]

House of Representatives Bill 3112,[6] passed by the House on October 5, 1981, proposes to amend section 2.[7] The House Committee on the Judiciary, in its committee report on H.R. 3112, contends that "[p]rior to [1980], a violation of Section 2 could be established by direct or indirect evidence concerning the context, nature and result of the practices at issue."[8] In 1980, however, the Supreme Court in *City of Mobile v. Bolden*[9] refused to declare a municipal electoral system unconstitutional for vote dilution—the

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This discrimination is defined by the existence of three conditions in a jurisdiction during the 1972 election: (1) members of a single language minority comprised more than 5% of the voting age population; (2) less than 50% of the voting age population turned out for or registered to vote in the election; and (3) the jurisdiction only provided registration and/or voting materials in English. *Id.* Application of preclearance to jurisdictions covered under the § 4 formula is designed to be temporary. For an explanation of how covered jurisdictions may "bail-out" of the special coverage, see *infra* note 229.

4. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1976). The "guarantees set forth in section 4(f)(2)" assure against any denial or abridgement of the right to vote because the voter is a member of a language minority. *Id.* § 4(f)(2), 42 U.S.C. § 1973b(f)(2) (1976). The italicized portion of § 2, which was added by amendment in 1975, extended that section's protections to a new group of persons, namely, members of language minorities. *See* S. REP. No. 295, 94th Cong., 1st Sess. 24 (1975). Language minorities include American Indians, Asian Americans, Alaskan Natives, or persons of Spanish heritage. Voting Rights Act of 1965, § 14(c)(3), 42 U.S.C. § 1973*l*(c)(3) (1976).

5. *See* H.R. REP. No. 227, 97th Cong., 1st Sess. 28 (1981) [hereinafter cited as HOUSE REPORT]. *See generally* Note, *The Voting Rights Act and Local At-Large Elections*, 67 VA. L. REV. 1011, 1021–26 (1981) (discussing the kinds of political units affected by § 2 of the Voting Rights Act).

6. H.R. 3112, 97th Cong., 1st Sess. (1981).

7. H.R. 3112 was passed by the House of Representatives by a vote of 389 to 24. N.Y. Times, Oct. 6, 1981, at A1, col. 6.

8. HOUSE REPORT, *supra* note 5, at 29.

9. 446 U.S. 55 (1980).

plurality basing its decision on plaintiffs' failure to prove discriminatory purpose.[10] The committee report views this holding as an abrogation of Congress' original intent that a violation of section 2 could be established by showing the discriminatory result of a challenged voting law.[11] The committee, therefore, recommended the following amendment of section 2 (words to be deleted are in brackets and new words added by amendment are in italics):

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] *in a manner which results in a denial or abridgement* of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 4(f)(2). *The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.*[12]

The amendment would "make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision."[13] Thus, a violation of section 2 would be determined according to what has frequently been called a "results test." In his dissent to the committee report, Congressman M. Caldwell Butler noted that adoption of a "results test" warranted a comprehensive examination of its ramifications instead of the "careless and hasty" consideration given to the matter by the Committee.[14]

This Note is intended to provide the type of analysis which Congressman Butler saw lacking in the committee report. The Note begins by examining past Supreme Court decisions in voting rights cases in an effort to clarify the present status of voting rights law.[15] The Note continues by analyzing the ramifications which the results test could have on state and local governments.[16] The constitutionality of the results test is then examined,[17] followed by an analysis of the political theory underlying the proposed amendment.[18] The Note concludes that the proposed addition of the H.R. 3112 results test to section 2 of the Voting Rights Act is ques-

10. HOUSE REPORT, *supra* note 5, at 29.
11. *Id.* at 29–30.
12. H.R. 3112, 97th Cong., 1st Sess. § 2 (1981) (emphasis added).
13. HOUSE REPORT, *supra* note 5, at 29.
14. *Id.* at 71.
15. *See infra* text accompanying notes 22–131.
16. *See infra* text accompanying notes 132–207.
17. *See infra* text accompanying notes 208–91.
18. *See infra* text accompanying notes 292–313.

tionable both on constitutional grounds[19] and as a matter of political philosophy.[20]

*For an analysis of the enacted version of S. 1992 see the addendum following the conclusion.*[21]

## I. BACKGROUND: EXISTING LAW

Supporters of the original section 2[22] and proponents of the results test[23] both acknowledge that section 2 merely restates the language of section 1 of the fifteenth amendment.[24] An analysis of the current legal effect of section 2, therefore, must begin with a consideration of voting rights cases under the fifteenth amendment.

### A. *Fifteenth Amendment Litigation: Prohibition of Exclusionary Voting Laws*

The Supreme Court's early decisions on the legal effect of the fifteenth amendment established that the amendment's purpose was to prevent exclusion from the elective franchise on the basis of race. In 1875, the Court stated in *United States v. Reese*[25] that before the fifteenth amendment was adopted a state could deny the vote on account of race, just as it could on account of age, property, or education. But the amendment had created a new constitutional right, which guaranteed against racial discrimination in granting the elective franchise.[26] Following *Reese*, the Court has often reiterated that the fifteenth amendment should be

19. *See infra* text accompanying note 289–91.

20. *See infra* text accompanying notes 305, 312–13.

21. *See infra* text accompanying notes 322–48.

22. *See Voting Rights: Hearing Before the Comm. on the Judiciary, United States Senate on S. 1564*, 89th Cong., 1st Sess. 208 (1965) (remarks of Sen. Dirksen) [hereinafter cited as *Hearings on S. 1564*]; *see also Bolden*, 446 U.S. at 60–61.

23. *See Bolden*, 446 U.S. at 105 n.2 (Marshall, J., dissenting). Justice Marshall's dissent in *Bolden* supports the idea of a results test. *See infra* note 125 and accompanying text.

24. "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.

25. 92 U.S. 214 (1875). *Reese* involved an indictment under §§ 3 and 4 of the Act of May 31, 1870, ch. 114, 16 Stat. 140, against two of the inspectors of a municipal election in Kentucky for refusing to receive and count the vote of William Garner, a black. 92 U.S. at 215. The Court held that because §§ 3 and 4 were not confined in their operation to unlawful discrimination on account of race, color, or previous condition of sevitude, they did not constitute "appropriate legislation" under Congress' power to enforce the 15th amendment. *Id.* at 220. *See infra* note 28. The Court, therefore, affirmed the circuit court's dismissal of the indictment. *Id.* at 221–22.

26. 92 U.S. at 217–18.

interpreted as prohibiting the outright exclusion of eligible voters on account of their race.[27]

Along with that interpretation, the Court has further established that the amendment specifically proscribes purposeful exclusion. In determining whether Congress' power[28] to prohibit the denial or abridgement of voting rights "on account of race" included the authority to legislate the Act of May 31, 1870,[29] the Court in *Reese* stated, "It is only when the wrongful refusal at such an election is *because of* race, color, or previous condition of servitude, that Congress can interfere . . . ."[30] As the italicized phrase indicates, the Court has treated the fifteenth amendment language, "on account of," as meaning "because of." Moreover, the plain meaning of the words "on account of" indicates that they are volitional in nature.[31]

Despite the fifteenth amendment's prohibition of purposefully exclusionary discrimination, the Court has often held that exclusionary results are dispositive of fifteenth amendment cases. In 1915, the Court in *Guinn v. United States*[32] held a grandfather clause[33] unconstitutional, despite the absence of an express exclu-

27. *See, e.g.*, Neal v. Delaware, 103 U.S. 370 (1880). The *Neal* Court stated: "[T]he adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution, or render inoperative, that provision which *restricts the right of suffrage to the white race." Id.* at 389 (emphasis added). The italicized language of the Court's opinion refers to the exclusion of black voters from the voting booth. For a similar statement by the Court, see Smith v. Allwright, 321 U.S. 649, 664 (1944). For an explicit reference to the fifteenth amendment in its function of proscribing exclusion, see Terry v. Adams, 345 U.S. 461 (1953). The *Terry* Court said: "It is apparent that Jaybird activities follow a plan purposefully designed to exclude Negroes from voting and at the same time to escape the Fifteenth Amendment's command that the right of citizens to vote shall neither be denied or abridged on acount of race." *Id.* at 463–64. *See infra* note 37 for a discussion of *Terry*.

28. *See* U.S. CONST. amend. XV, § 2, which provides "The Congress shall have power to enforce this article by appropriate legislation."

29. Ch. 114, 16 Stat. 140 (1870). ("An Act to enforce the Right of Citizens of the United States to vote in the several States of this Union, and for other Purposes").

30. *Reese*, 92 U.S. at 218 (emphasis added).

31. *See, e.g.*, Smith v. Allwright, 321 U.S. 649 (1944). *Smith* reasoned, "By the terms of the fifteenth amendment, [the right to vote] may not be abridged by any State *on account of* race. Under our Constitution the great privilege of the ballot may not be denied a man by the State *because of* his color." *Id.* at 662 (emphasis added). This language manifests the court's treatment of the fifteenth amendment language, "on account of," as being volitional in nature.

32. 238 U.S. 347 (1915).

33. The Oklahoma law in question, an amendment of the Oklahoma Constitution, provided:

> No person shall be registered as an elector of this state or be allowed to vote in any election herein, unless he be able to read and write any section of the Constitution of the State of Oklahoma; but no person who was, on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at

sion, because the law "itself inherently brings [an exclusionary] result into existence."[34] In 1939, in striking down a registration scheme as unconstitutional, the Court in *Lane v. Wilson*[35] noted that the practical effect of the registration scheme was to allow blacks twelve days to reassert improperly-taken constitutional rights. Thus, the scheme "operated unfairly against the very class on whose behalf the protection of the Constitution was . . . successfully invoked."[36]

Similarly, Justice Black announcing the 1953 judgment of the Court in *Terry v. Adams*,[37] looked to "[t]he effect of the whole procedure, Jaybird primary plus Democratic primary plus general election,"[38] in finding a three-step election process violative of plaintiffs' fifteenth amendment rights. Finally, in the 1960 case of *Gomillion v. Lightfoot*,[39] the Court found a valid cause of action in the redefinition of municipal boundaries because "if the allegations are established, the inescapable human effect of this essay in geometry and geography is to dispoil colored citizens, and only

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that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution. Precinct election inspectors having in charge the registration of electors shall enforce the provisions of this section at the time of registration, provided registration be required. Should registration be dispensed with, the provisions of this section shall be enforced by the precinct election officer when electors apply for ballots to vote.

*Id.* at 357. This type of provision is called a grandfather clause because it effectively excluded blacks from their right of suffrage by placing prohibitive requirements on all voters except those whose ancestors could vote prior to the enactment of the fifteenth amendment. Prior to the enactment of the fifteenth amendment, only whites could vote in Southern states.

34. *Id.* at 364–65.

35. 307 U.S. 268 (1939).

36. *Id.* at 276–77.

37. 345 U.S. 461 (1953). *Terry* involved a question of state action. The suit alleged that private political primaries held by the Jaybird Association, a white racist political organization founded in 1889, denied plaintiffs their 15th amendment rights. *Id.* at 462–63. Winnners of the Jaybird primaries nearly always ran for office as Democrats and subsequently won the Democratic primaries and the general elections without oppositon. *Id.* at 463. Because the Democratic primaries and general elections conducted by the State of Texas had become no more than perfunctory ratifiers of the Jaybird Association's nominations, the Supreme Court affirmed the district court's holding that Texas effectively had denied plaintiffs their 15th amendment rights to be free from voting discrimination on account of race. *Id.* at 469–70. Justice Black, joined by Justices Douglas and Burton, announced the *judgment* of the Court. Justice Clark, joined by Chief Justice Vinson, and Justices Reed and Jackson, wrote a concurring opinon. Justice Frankfurter wrote an opinon in which he agreed with the finding of a 15th amendment violation, but thought the Court should place greater restrictions on the district court in affording relief to the plaintiffs upon remand. Justice Minton dissented.

38. *Id.* at 469–70.

39. 364 U.S. 339 (1960).

colored citizens, of their heretofore enjoyed voting rights."[40]

*Gomillion* indicates how the Court's disposition of cases on the basis of exclusionary results can be reconciled with its interpretation of the fifteenth amendment as prohibiting purposeful exclusion of voters from the right of suffrage. The complaint in *Gomillion* alleged that a statute which redefined the city of Tuskegee's municipal boundaries deprived the plaintiffs of their constitutional rights[41] because it had the effect of removing from the city all but four or five of Tuskegee's black voters while not removing a single white voter or resident.[42] The Court held that the plaintiffs' complaint stated a claim upon which relief could be granted, reasoning that "[i]f these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible . . . that the legislation is solely concerned with segregating white and colored voters . . . ."[43] Thus, the "inescapable effect" of the redefinition of boundaries would lead to the "irresistible" conclusion that the legislature purposefully excluded black voters from Tuskegee. The Court's holding in *Gomillion*, therefore, rested on the inference that the legal result of exclusion was purposefully designed.

*Gomillion* exemplifies the principle that in cases where black voters are excluded from their right of suffrage, courts may infer discriminatory purpose and hence a fifteenth amendment violation. *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[44] though not a fifteenth amendment voting case, explicitly recognized this inferential nexus between results and purpose in cases where black voters have been excluded. The Court in *Arlington Heights*, citing *Guinn*, *Lane*, and *Gomillion*, indicated that an evidentiary finding of intent could be made relatively easily where a discriminatory pattern, "unexplainable on grounds other than race," is the result of an apparently neutral statute.[45]

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40. *Id.* at 347. The Court has held that the 15th amendment nullifies "sophisticated as well as simple-minded modes of discrimination." Lane v. Wilson, 307 U.S. 268, 275 (1939).

41. *Gomillion*, 364 U.S. at 340. The plaintiffs in *Gomillion* alleged violations of the 15th amendment right to vote and of the due process and equal protection clauses of the 14th amendment.

42. *Id.* at 341.

43. *Id.* at 341.

44. 429 U.S. 252 (1976). For a discussion of this case, see *infra* text accompanying notes 98–100.

45. 429 U.S. at 266. *Cf.* Akins v. Texas, 325 U.S. 398 (1945). Regarding jury selection, the Court in *Akins* stated: "A purpose to discriminate must be present which may be

The theoretical basis for this inferential nexus between exclusionary results and discriminatory purpose is the common law principle that a person "must be taken to contemplate the probable consequences" of his or her acts.[46] Applying this principle to voting rights cases, it is reasonable to assert that a law having the probable consequence of excluding black voters from their right of suffrage is intentionally discriminatory. Conversely, it is unreasonable to suggest that a state could specifically exclude black voters from the ballot box without intending to exclude them. Thus, because the Court seemed to have viewed exclusionary results as necessarily inferring discriminatory purpose, the issue of whether the law proscribes discriminatory results, per se, never arose in cases involving outright exclusion of voters under the fifteenth amendment.

Congress enacted section 2 of the Voting Rights Act of 1965 as a restatement of the fifteenth amendment,[47] and it must, therefore, be viewed in the context of the Supreme Court's prior fifteenth amendment decisions. Despite the absence of any purpose-results issue in those decisions, the Committee Report on H.R. 3112 asserts that Attorney General Katzenbach's testimony at the 1965 hearings[48] indicates that section 2 was meant to proscribe discriminatory results independent of discriminatory purpose. The Attorney General did indeed use the words "purpose or effect" in his testimony, but ambiguously.[49] However, more significant than the

proven by systematic exclusion of eligible jurymen of the proscribed race . . . ." *Id.* at 403–04.

46. Townsend v. Wathen, 9 East. 277, 280, 103 Eng. Rep. 579, 580–81 (K.B. 1808).

47. *See supra* text accompanying notes 22–24.

48. *Hearings on S. 1564*, *supra* note 22. The committee report cites Katzenbach's testimony at HOUSE REPORT, *supra* note 5, 29 n.99.

49. *Hearings on S. 1564*, *supra* note 22, at 191. Attorney General Katzenbach used the phrase "purpose or effect" in the following context:

> [Senator Fong:]
>
> Mr. Attorney General, turning to section 2 of the bill which reads as follows: No voting qualification or procedure shall be imposed or applied to deny or abridge the right to vote on account of race or color—
>
> there is no definition of the word "procedure" here. I am a little afraid that there may be certain practices that you may not be able to include in the word "procedure."
>
> For example, if there should be a certain statute in a State that says the registration office shall be open only 1 day in 3, or that the hours will be so restricted, I do not think you can bring such a statute under the word "procedure." Could you?
>
> Attorney General Katzenbach: I would suppose that you could if it had that purpose. I had thought of the word "procedure" as including any kind of practice of that kind if its *purpose or effect* was to deny or abridge the right to vote on account of race or color.

*Id.* (emphasis added). The committee report cites the italicized language of the exchange

ambiguity is that until this time, interpretations of the fifteenth amendment uniformly had viewed exclusionary voting laws in light of a purpose-results nexus.[50] Thus, it is unlikely that Congress intended, when originally enacting section 2, to proscribe discriminatory results as conceived by H.R. 3112, for the concept of discriminatory results as independent of discriminatory purpose, had not arisen under the fifteenth amendment, which section 2 was designed to restate.[51]

### B. *Fourteenth Amendment Litigation: Voting Strength and the Idea of Vote Diluton*

The roots of the current legislation, designed to add a results test to section 2, cannot be found in a clarification of the original intent of Congress, as the Committee Report on H.R. 3112 asserts. Rather, the H.R. 3112 results test is rooted in a relatively new application of the fourteenth amendment.

Congress passed the Voting Rights Act in response to the outright exclusion of black voters from their right of suffrage.[52] The

between Senator Fong and Attorney General Katzenbach as evidence of Congress' original intention to include a results test in the meaning of § 2. HOUSE REPORT, *supra* note 5, at 29. As the quoted section of the testimony indicates, however, Attorney General Katzenbach's reference to "purpose or effects" was extremely ambiguous. First, Katzenbach did mention an effect standard, but in the previous sentence he answered Senator Fong's inquiry by referring to a "purpose" standard. Second, in the very sentence where he discussed "effect," Katzenbach also referred to the constitutional standard of prohibiting discrimination "on account of" race; "on account of" is clearly a volitional standard. *See supra* text accompanying notes 28–31. Third, in saying "purpose or effect," Katzenbach may very well have been unintentionally referring to section 5 of the Voting Rights Act, which is the only section of the Act that contains that standard. *See infra* text accompanying notes 73–74. Finally, and perhaps most importantly, Katzenbach made his "purpose or effect" comment in the context of a discussion about what *types* of laws fall within the scope of the procedures regulated by section 2, *not* in the context of a discussion of what *legal standard* a court would apply in determining the legality of those laws.

50. *See supra* text accompanying notes 25–46.

51. In addition to the context of the purpose-results nexus in 15th amendment litigation, Justice Harlan's dissent to Allen v. State Bd. of Elections, 393 U.S. 544 (1969), supports the assertion that Congress did not intend that section 2 proscribe discriminatory results as conceived by H.R. 3112. Justice Harlan argued that Congress enacted the Voting Rights Act with electoral *procedures* in mind, not the *structure* of electoral systems which is the object of the H.R. 3112 results test. *See infra* note 75. *See also* STAFF OF SENATE SUBCOMM. ON THE CONSTITUTION, 97TH CONG., 2D SESS., REPORT ON VOTING RIGHTS ACT 22–23 (1982) [hereinafter cited as SUBCOMMITTEE REPORT] (arguing that the inclusion of an "effects test" in section 5 suggests a deliberate omission of such a test in section 2).

52. See UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 3 (1975) [hereinafter cited as UNITED STATES COMMISSION ON CIVIL RIGHTS]. That Commission stated: "It is important to recall . . . that the frustration of Federal efforts to ensure *free exercise of 15th amendment* rights led directly to the enforcement mechanisms of the Voting Rights Act." *Id.* (emphasis added). The "free exercise of

Act's special preclearance provisions were designed to preempt states with a history of discrimination from utilizing clever devices to prevent blacks from voting.[53] With the enactment of the Voting Rights Act and the consequent decrease in the incidents of outright exclusion of blacks from their elective franchise,[54] a growing number of suits have been brought focusing on the *effectiveness* of minority votes.[55] In other words, the focus of voting rights cases shifted from the right to vote, per se, to the impact of electoral systems on the strength of that vote. This new line of cases, based on the fourteenth amendment and focusing on voting strength, are referred to as "vote dilution" cases.

### 1. *The Concept of Minority Vote Dilution*

The roots of the minority vote dilution concept[56] often are contended to be in *Reynolds v. Sims*,[57] which struck down an electoral system based on "vote dilution."[58] But the "vote dilution" cited by the proponents of the results test—wherein the constitutionality of certain types of electoral structures is attacked as impairing the ability of minorities to elect members of their minority group to public office—is distinctly different from the vote dilution discussed in *Reynolds*. The Court in *Reynolds* struck down

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15th amendment rights" is simply another way of referring to the freedom from outright exclusion from the voting booth. *See supra* text accompanying notes 25–27.

53. *See supra* note 3.

54. For a review of the initial effectiveness of the outright exclusion of blacks from their franchise, see UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 52, at 39–68.

55. For a review of several recent cases focusing on the effectiveness of minority votes, see *infra* text accompanying notes 61–92. *See generally* Thernstrom, *The Odd Evolution of the Voting Rights Act*, PUB. INTEREST, Spring 1979, at 49–76 (analyzing the evolution of the Voting Rights Act from its original emphasis on voting registration to the current emphasis on voting strength).

56. This Note will distinguish "vote dilution" from "minority vote dilution." "Vote dilution" will refer to the one-person, one- vote principle set forth in Reynolds v. Sims, 377 U.S. 533 (1964), and its progeny. "Minority vote dilution," on the other hand, will refer to claims that the structure of an electoral system — designedly or otherwise — either diminishes or negates the ability of a bloc voting minority group to elect members of its own group to public office. *See infra* text accompanying notes 61–92.

57. 377 U.S. 533 (1964). For an example of a proponent of the results test who looks to *Reynolds* as the source of the minority vote dilution principle, see Justice Marshall's dissent in *Bolden*, 446 U.S. at 116–17.

58. The Court held that the equal protection clause of the 14th amendment invalidated the existing and two legislatively proposed plans for apportionment of seats in the two houses of the Alabama Legislature because the legislature apportioned neither on a population basis, nor rationally. *Reynolds*, 377 U.S. at 568. The equal protection clause of the 14th amendment states: "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

districting plans for the Alabama legislature based on a disparity in population among the districts.[59] This numerical context of the *Reynolds* vote dilution rule is expressly revealed in the Court's reasoning:

> [I]f a State should provide that the votes of citizens in one part of the State shall be given two times, or five times, or 10 times the weight of votes of citizens in another part of the State, it could hardly be contended that the right to vote of those residing in the disfavored areas had not been effectively diluted. . . . Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor.[60]

*Reynolds*, therefore, is not the true origin of the idea of minority vote dilution upon which the H.R. 3112 results test is based. Though the words may have been borrowed, the idea is distinct.

In 1965, the Court first introduced the idea of *minority* vote dilution as a violation of the fourteenth amendment in *Fortson v. Dorsey*.[61] In that case, the Court held that the creation of multi-member districts by Georgia's 1962 Senatorial Reapportionment Act did not on its face violate the one-person, one-vote principle set down the previous term in *Reynolds*.[62] Justice Brennan, however, writing for the Court, went on to make a statement that has become the oft-cited basis for minority vote dilution claims (though he acknowledged it as dictum):[63] "It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[64]

In 1966, Justice Brennan cited the *Fortson* dictum while delivering the opinion of the Court in *Burns v. Richardson*.[65] Although the Court had based its *Fortson* holding on the *Reynolds* one-person, one-vote principle, Justice Brennan conveniently used the *Fortson* dictum as an established general rule of constitutional law,[66] thus introducing a new cause of action under the fourteenth amendment.

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59. 377 U.S. at 568–69.
60. *Id.* at 562–63.
61. 379 U.S. 433 (1965).
62. *Id.* at 438.
63. *Id.* at 439.
64. *Id.*
65. 384 U.S. 73 (1966).
66. *Id.* at 89.

The Court did not base its holdings in *Fortson* and *Burns* on Justice Brennan's idea of vote dilution.[67] Minority vote dilution, therefore, had not yet been dispositive of any case. Two years after *Burns*, however, in *Allen v. State Board of Elections*,[68] the Court held that a Mississippi statute which changed a county from single-member districts to at-large voting for county supervisors was subject to the section 5 preclearance provisions of the Voting Rights Act[69] because it had the potential of nullifying the ability of black voters "to elect the candidate of their choice."[70] Chief Justice Warren, using the questionable support of *Reynolds*,[71] argued that a change to at-large voting for county supervisors could nullify the ability of voters who are members of racial minorities to elect their preferred candidates just as an absolute prohibition would.[72]

The holding in *Allen* did not actually invalidate an electoral structure, but it did subject the Mississippi at-large electoral law to the preclearance provisions of section 5 of the Voting Rights Act. Section 5 prohibits a state or political subdivision, subject to the special coverage provisions of section 4,[73] from implementing a change in its electoral laws unless it has: (1) obtained a declaratory judgment from the District Court of the District of Columbia that the change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race, color or in contravention of the guarantees set forth in Section 4(f)(2)"; or (2) submitted the proposed change to the Attorney General and the Attorney General has not objected to it.[74] As

67. The Court based its *Fortson* holding on the one-person, one-vote principle. *See supra* text accompanying note 62. Likewise, the holding in *Burns* found: (1) that the creation of multi-member senatorial districts in a Hawaii apportionment plan did not ipso facto result in invidious discrimination; and (2) that use of the number of registered voters as the apportionment base did not violate the one-person, one-vote principle because it actually produced a distribution of legislators not substantially different from that which would have resulted from the use of the state's voting age population as a guide. *Burns*, 384 U.S. at 88, 95–96.

68. 393 U.S. 544 (1969).

69. *See infra* text accompanying notes 73–74.

70. 393 U.S. at 569.

71. *Id. See supra* notes 57–60 and accompanying text.

72. 393 U.S. at 569.

73. *See supra* note 3.

74. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1976). Section 5, therefore, places on covered jurisdictions the burden of proving that a change in their voting laws is not discriminatory in either purpose or effect. South Carolina v. Katzenbach, 383 U.S. 301, 328 (1966). For a discussion of the distinction between the constitutional validity of the § 5 "effects test," and the proposed § 2 results test, see *infra* text accompanying notes 225–229.

applied to the *Allen* decision, section 5 gave Mississippi the burden of proving that the multi-member electoral scheme would not dilute minority votes in the county at issue. Thus, although *Allen* was technically a statutory interpretation of section 5, it enabled the Attorney General or District of Columbia District Court to invalidate a proposed electoral structure if it might dilute minority votes.[75]

### 2. *The Purpose Requirement*

*Fortson* and *Burns*, by setting forth the idea of minority vote dilution, and *Allen*, by enabling the prohibition of a proposed electoral structure on the basis of potential minority vote dilution, together established the precedential foundation for seeking the disestablishment of state electoral structures on the grounds of minority vote dilution. This is where the purpose-results controversy really begins. May an electoral structure be challenged success-

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75. *Allen* addressed the issue of whether the proposed change from district to at-large voting in a Mississippi county constituted a "voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" within the meaning of § 5, thus requiring preclearance before the change could be implemented. 393 U.S. at 550. The majority held that the structural change from district to at-large voting fell within the purview of § 5. Justice Harlan asserted in dissent that the language of both §§ 4 and 5 indicate that Congress intended to confine preclearance to voting *procedures* as opposed to the *structure* of electoral systems. Harlan commented on the provision in § 5 which states that "no person shall be denied the right to vote for failure to comply with [a] qualification, prerequisite, standard, practice, or procedure [which, though subject to preclearance, has not been precleared]":

> This remedy served to delimit the meaning of the [preclearance] formula in question. Congress was clearly concerned with changes in procedure with which voters could *comply*. But a law . . . which permits all members of the County Board of Supervisors to run in the entire county and not in smaller districts, does not require a voter *to comply* with anything at all, and so does not come within the scope of the language used by Congress.

*Allen*, 393 U.S. at 587 (emphasis supplied). Commenting on the language of § 4, Harlan stated:

> In moving against "tests and devices" in § 4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads § 5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by § 4, despite the fact that the two provisions were designed simply to interlock.

*Id.* at 585–86. *But see* Georgia v. United States, 411 U.S. 526, 533 (1973), where the Court stated:

> Had Congress disagreed with the interpretation of § 5 in *Allen*, it had ample opportunity to amend the statute. After extensive deliberations in 1970 on bills to extend the Voting Rights Act, during which the *Allen* case was repeatedly discussed, the Act was extended for five years, without any substantive modification of § 5 [citation omitted]. We can only conclude, then, that *Allen* correctly interpreted the congressional design when it held that "the Act gives a broad interpretation to the right to vote, recognizing that voting includes 'all action necessary to make a vote effective.'" 393 U.S., at 565–566.

fully as violating the fourteenth amendment only if it was purposefully designed to dilute minority votes, or merely where the result of minority vote dilution is present?

The Court in *Whitcomb v. Chavis*[76] addressed this purpose-results issue for the first time. In *Whitcomb*, the plaintiffs challenged that part of an Indiana statute which established Marion County as a multimember district for electing state senators and representatives.[77] The complaint alleged that the Indiana statute violated the equal protection clause by diluting the votes of blacks and poor persons living in the ghetto area of Marion County.[78] Plaintiffs argued that minority votes, under the multimember districting scheme, were in effect "cancelled out by [the votes of] other contrary interest groups."[79] They cited as evidence the fact that the ghetto residents' proportion of the legislature did not equal their proportion of the entire population. Plaintiffs requested the disestablishment of the multimember district, based on the proposition that if the county were divided into single-member districts, with the ghetto area constituting one of those districts, ghetto residents would be assured of electing three state representatives and one state senator.[80]

The Court rejected that argument stating that the plaintiffs had failed to show that the establishment of the multimember district was discriminatorily motivated.[81] The Court reasoned that the purposeful discrimination necessary to establish a constitutional violation could not be inferred merely from the absence of proportional representation of ghetto residents in the legislature.[82] Thus, *Whitcomb* recognized the concept of minority vote dilution,[83] but placed an important qualification on that concept, by requiring a showing that the legislature intended to cause such

76. 403 U.S. 124 (1971). *Whitcomb* involved both allegations of minority vote dilution and population vote dilution. See *supra* notes 56–60 and accompanying text for a discussion of population vote dilution. Justice White delivered the opinion of the Court. Justices Douglas, Brennan, and Marshall dissented from that portion of the opinion which dealt with minority vote dilution.

77. 403 U.S. at 127.

78. *Id.* at 128–29. The equal protection clause is set forth at *supra* note 58.

79. 403 U.S. at 129.

80. *Id.*

81. *Id.* at 149. *But cf. id.* at 177 (Douglas, J., dissenting). Justice Douglas remarked, "A showing of racial motivation is not necessary when dealing with multi-member districts. . . . [T]he test for multi-member districts is whether there are invidious effects." *Id.* (citations omitted).

82. *Id.* at 149–53.

83. The Court cited to *Fortson* and *Burns*. *Id.* at 142.

dilution. A mere showing of the absence of proportional representation of minorities does not, under *Whitcomb*, establish a constitutional violation.

Two years after *Whitcomb*, in *White v. Regester*,[84] the Supreme Court upheld a district court order requiring that two multimember state legislative districts—Dallas County and Bexar County—be reconstituted into single-member districts.[85] Although the decision cited *Whitcomb* with approval,[86] *White* gave conflicting signals as to whether the Court intended to follow the *Whitcomb* purpose requirement.

The Court's reasoning in upholding the disestablishment of Dallas County's multimember electoral scheme clearly follows a purpose standard. The Court noted the history of official discrimination in Texas and in some of its electoral law requirements. The dispositive factor for the Court, however, seems to have been the district court's finding that a white-dominated organization in effective control of the Democratic Party's slating virtually excluded blacks from the primary selection process.[87] The Court's decision regarding Dallas County, therefore, implicitly rests on the conclusion that the multimember electoral structure purposefully was used to exclude blacks from public office. Furthermore, Justice White, who wrote the majority opinion in *White*, explicitly referred to the case as an example of the purpose standard, in a later opinion.[88]

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84. 412 U.S. 755 (1973). *White* involved both allegations of minority vote dilution and population vote dilution. See *supra* notes 56–60 and accompanying text for a discussion of population vote dilution. Justice White delivered the opinon of the Court. No Justice dissented from that portion of the opinion which dealt with minority vote dilution.

85. *Id.* at 765. The Dallas County and Bexar County multimember districts were created as part of a Texas Legislative Redistricting Board plan for the state representatives to be elected to the 150-member House from 79 single-member and 22 multimember districts. *Id.* at 758.

86. *Id.* at 765–66.

87. The district court had found that since Reconstruction days there had been only two blacks in the Dallas County delegation to the Texas House of Representatives — the only black delegates ever slated by the Dallas Committee for Responsible Government. 412 U.S. at 766–67. The Court noted the district court's finding that "it is extremely difficult to secure either a representative seat in the Dallas County delegation or the Democratic primary nomination without the endorsement of the Dallas Committee for Responsible Government." *Id.* at 767 n.11, citing 343 F. Supp. 704, 726.

88. In City of Mobile v. Bolden, 446 U.S. 55, Justice White stated in dissent:

> In [*White*], there was no evidence that Negroes faced official obstacles to registration, voting, and running for office, yet we upheld a finding that they had been excluded from effective participation in the political process in violation of the Equal Protection Clause because a multimember districting scheme, in the context of racial voting at the polls, was being used invidiously to prevent Negroes from being elected to public office. In *Gomillion v. Lightfoot*, 364 U.S. 339 (1960),

It is difficult, however, to construe the Court's opinion upholding the disestablishment of Bexar County's electoral system as adhering to a purpose standard. The Court's decision rested on the district court's findings with regard to: the history of discrimination against Mexican-Americans in Bexar County; cultural and language barriers; the absence of proportional representation; and legislative unresponsiveness to voter needs.[89] Looking at this "totality of circumstances," the Court upheld the district court's assessment that the Bexar County multimember district "excluded Mexican-Americans from effective participation in political life."[90] The Court therefore upheld the lower court's ruling that single-member districts were required to remedy "the *effects* of past and present discrimination against Mexican-Americans."[91] Whereas the dispositive factor as to Dallas County was the purposeful use of the multimember electoral structure to exclude blacks from the primary selection process, the disestablishment of the Bexar County multimember district seems to have been based on the idea that proportional representation is a good remedy for general discrimination.[92]

Despite the ambiguities in *White*, three cases decided in the late 1970's affirmed the general principle that a plaintiff must show purposeful discrimination in order to prove that a racially neutral statute[93] violates the equal protection clause. Although these cases were not minority vote dilution cases, the Court implied that the holdings should apply to voting cases by approvingly referring to *Wright v. Rockefeller*[94]—a congressional apportionment case

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and *Terry v. Adams*, 345 U.S. 461 (1953), we invalidated electoral systems under the Fifteenth Amendment not because they erected official obstacles in the path of Negroes registering, voting, or running for office, but because they were used effectively to deprive the Negro vote of any value. Thus, even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of City Commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process.

*Id.* at 102.

89. *Id.* at 767–69.

90. *Id.* at 769.

91. *Id.* at 769 (emphasis added). For a discussion of the "totality of circumstances" doctrine, see Note, *Discriminatory Effects of Elections At-Large: The "Totality of Circumstances" Doctrine*, 41 ALB. L. REV. 363 (1977).

92. The disestablishment of Bexar County's multimember district in order to produce proportional representation of its Mexican-American citizens may thus be viewed as a type of "affirmative action" for past discrimination.

93. A racially neutral statute does not in any way base its classifications on race. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976).

94. 376 U.S. 52 (1964). *Wright* involved an action challenging the constitutionality of

which required proof of discriminatory purpose.

A 1976 decision, *Washington v. Davis*,[95] involved a challenge to the constitutional validity of a District of Columbia police examination which produced a disproportionately low representation of blacks on the police force. The Court held that disproportionate impact, absent a showing of discriminatory purpose, is insufficient to establish a violation of the equal protection clause.[96] Though relevant, disproportionate impact is not dispositive of fourteenth amendment claims of racial discrimination.[97]

One year after *Davis*, in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[98] the Court concisely reiterated the purpose requirement: "[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. . . . Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."[99] The Court then clarified the *Davis* purpose requirement by stating that "racial discrimination is not just another competing consideration. When there is proof that a discriminatory purpose has been a motivating factor in the decision, . . . judicial deference is no longer justified."[100]

In 1979, in *Personnel Administrator of Massachusetts v. Feeney*,[101] the Court stated that "discriminatory purpose" implies

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that part of a New York statute apportioning congressional districts lying in New York County. The suit alleged that the apportionment had been made with racial considerations in mind and that it therefore violated the fourteenth and fifteenth amendments. *Id.* at 53–54. The plaintiff, however, failed to prove that "the New York Legislature was either motivated by racial considerations or in fact drew the districts on racial lines." *Id.* at 56. Thus, the Court affirmed the district court's dismissal of the complaint. *Id.* at 58. Justices Douglas and Goldberg each wrote dissenting opinions. Both Washington v. Davis, 426 U.S. 229, 240 (1976), and Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977), cited *Wright* with approval.

95. 426 U.S. 229 (1976). Justice White delivered the opinion of the Court. Justice Stewart joined in the parts of the Court opinions which discussed the purpose requirement. Justice Stevens filed a concurring opinion. Justice Brennan, joined by Justice Marshall, filed a dissenting opinion.

96. *Id.* at 239.

97. *Id.* at 242.

98. 429 U.S. 252 (1977). Justice Powell delivered the opinion of the Court. Justice Marshall, joined by Justice Brennan, concurred in the parts of the opinion discussing the purpose requirement, but dissented in the result. Justice White dissented. Justice Stevens took no part in the consideration or decision of the case.

99. *Id.* at 264–65 (citations omitted).

100. *Id.* at 265 (citations omitted).

101. 442 U.S. 256 (1979). Justice Stewart delivered the opinion of the Court. Justice Stevens, joined by Justice White, filed a concurring opinion. Justice Marshall, joined by Justice Brennan, filed a dissenting opinion.

that action had been taken "because of" and not merely "in spite of" discriminatory effects.[102] The Court then ackowledged that "when the adverse consequences of a law upon an identifiable group are . . . inevitable . . . a strong inference that the adverse effects were desired can reasonably be drawn."[103] The Court, however, pointed out that inference is not equivalent to proof.[104]

3. City of Mobile v. Bolden

One year after *Feeney*, in *City of Mobile v. Bolden*,[105] the Court affirmed the purpose requirement for minority vote dilution cases. Although there was no majority opinion in *Bolden*, a majority of the justices seemed to agree that some showing of purpose is required in vote dilution cases.[106]

*Bolden* reversed a court of appeals affirmance of a district court opinion ordering the disestablishment of a multimember voting scheme in Mobile, Alabama. At the time of the initial action, the City of Mobile had a commission form of government, composed of three commmissioners elected at-large.[107] Although one-third of the residents in Mobile were black, no black ever had been elected to the city commission.[108] Thus, the plaintiffs alleged that the practice of electing city commissioners at-large unfairly diluted the voting strength of Mobile's black voters in contravention of section 2 of the Voting Rights Act, the equal protection clause of the fourteenth amendment, and the fifteenth amendment.[109]

Justice Stewart, writing for a plurality, found that because section 2's legislative history indicates that it is essentially a restatement of the fifteenth amendment, section 2 has no independent

102. *Id.* at 279.

103. *Id.* at 279 n.25.

104. *Id.*

105. 446 U.S. 55 (1980).

106. Justice Stewart announced the judgment of the Court and delivered an opinion in which Chief Justice Burger and Justices Powell and Rehnquist joined. Justice White, in his dissent, *id.* at 94–103, ackowledged the validity of the purpose requirement. *See* Rogers v. Lodge, 50 U.S.L.W. 5041, 5043 (U.S. July 1, 1982) (No. 80–2100), where Justice White confirms this interpretation of his *Bolden* dissent. For an outline of all the concurring and dissenting opinions, see *infra* text accompanying notes 122–26.

107. 446 U.S. at 59.

108. *Id.* at 71. The plurality opinion related: "There have been only three Negro candidates for the City Commission, all in 1973. According to the District Court, the Negro candidates 'were young, inexperienced, and mounted extremely limited campaigns' and received only 'modest support from the black community . . . .'" *Id.* at 73 n.19 (quoting Bolden v. Mobile, 423 F. Supp. 384, 388 (S.D. Ala. 1976)).

109. *Id.* at 58.

legal effect of its own.[110] Because there had been no purposeful exclusion of black voters from the voting booth and no hinderance to black registration, the plurality found that the fifteenth amendment had not been violated.[111]

In regard to the fourteenth amendment claim, Justice Stewart, citing *Whitcomb*, *White*, *Davis*, *Arlington Heights*, and *Feeney*, stated that the plaintiffs must show purposeful vote dilution in order to prevail.[112] Initially, Justice Stewart applied the *Feeney* standard: mere foreseeability of disproportionate representation due to bloc voting in the at-large district is insufficient to establish discriminatory purpose.[113] The legislature must set up or retain[114] the at-large district because of its vote diluting effects, not merely in spite of them. Justice Stewart concluded that the plaintiffs had failed to establish that the legislature acted with the requisite discriminatory purpose.[115]

In reaching his conclusion, Justice Stewart addressed four objective factors relied on by the district court to infer the requisite discriminatory purpose: (1) the substantial history of racial discrimination in Alabama;[116] (2) discrimination in municipal employment and in dispensing public services;[117] (3) the fact that no

110. *Id.* at 60–61.

111. 446 U.S. at 65. In Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982). Circuit Judge Fay, commenting on *Bolden* observed:

> Though the plurality would limit the scope of the Fifteenth Amendment to those situations in which there was official action directly impinging the rights of Blacks to register or vote, that position did not command a majority. Three dissenting Justices specifically said the parameters of the Fifteenth Amendment encompasses voting dilution cases in which it is asserted that the system purposefully limits the access of Blacks to the political process. In his concurrence, Justice Blackmun agrees with the position taken by Justice White in his dissent, as to the substantive questions presented, and thereby becomes the fourth member of the Court to approve of an expansive reading of the Fifteenth Amendment. In his concurrence, Justice Stevens explicitly states, "I disagree with Mr. Justice Stewart's conclusion for the plurality that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar."

*Id.* at 1372–73 (quoting *Bolden*, 446 U.S. at 84 n.3 (Stevens, J., concurring)).

112. *Id.* at 65–70. The plurality opinion asserted that *White* did not conflict with the purpose requirement set forth in *Whitcomb*, *Davis*, *Arlington Heights*, and *Feeney*. *Id.* at 69. However, as discussed above, *supra* text accompanying notes 84–92, *White* is ambiguous in its concurrence with the purpose requirements.

113. 446 U.S. at 72 n.17.

114. For an example of where the Court has found purposeful retention or maintenance of an electoral structure, see Rogers v. Lodge, 102 S. Ct. 3272 (1982).

115. 446 U.S. at 73.

116. *Id.* at 74.

117. *Id.* at 73–74.

black ever had been elected commissioner;[118] and (4) the mechanics of the at-large system itself.[119] After examining each of these objective factors, he concluded that none of them provided a sufficient inference of discriminatory purpose.[120] Despite Justice Stewart's clarity insofar as he requires proof of discriminatory purpose, his plurality opinion gives little guidance as to what objective evidence will prove discriminatory purpose.[121]

Justices Blackmun and Stevens wrote concurring opinions while Justices White, Brennan, and Marshall dissented. Justice Blackmun argued that even though purposeful discrimination had been proven, the district court's remedy was inappropriate.[122] Justice Stevens argued that purposeful discrimination is amenable to objective proof, but he concluded that the plaintiffs did not prove it in this instance.[123] Justice White reasoned that purposeful discrimination had been sufficiently proven in the lower court through the objective factors which the plurality had found unconvincing.[124] Justice Marshall, agreeing with Justice White that discriminatory purpose had been established inferentially, further argued that proof of discriminatory results alone sufficiently establishes an equal protection violation.[125] Justice Brennan agreed with both Justices White and Marshall.[126]

In sum, the *Bolden* plurality opinion, taken together with ear-

118. *Id.* at 73.

119. *Id.* at 74.

120. The Court found the history of discrimination in Alabama to be "of limited help in resolving" the question of purposeful dilution. *Id.* at 74. Moreover, the Court noted that discrimination in municipal employment and in the dispensing of public services does not necessarily prove purposeful discrimination in the establishment of Mobile's electoral structure. *Id.* at 74. Further, the Court noted that the absence of any black commissioners "alone does not work a constitutional deprivation." *Id.* at 73.

Finally, the Court commented on the mechanics of the at-large system by stating: "[T]hose features of that electoral system, such as the majority vote requirement, tend naturally to disadvantage any voting minority . . . . They are far from proof that the at- large electoral scheme represents purposeful discrimination against Negro voters." *Id.* at 74.

121. *See* Comment, City of Mobile v. Bolden: *A Setback in the Fight Against Discrimination*, 47 BROOKLYN L. REV. 169 (1980) (confusion that *Mobile* has created in ascertaining what factual circumstances are sufficient to infer discriminatory purpose discussed). *See generally* SUBCOMM. REPORT, *supra* note 51, at 25–29 (use of inferential evidence to prove discriminatory intent discussed). The recent case of Rogers v. Lodge, 102 S. Ct. 3272 (1982), addresses the issue of evidentiary requirements in minority vote dilution cases.

122. 446 U.S. at 80–83.

123. *Id.* at 83–94.

124. *Id.* at 94–103.

125. *Id.* at 103–41.

126. *Id.* at 94.

lier precedent,[127] presents the following picture of the status quo in voting rights law: 1) Section 2 of the Voting Rights Act, as it now stands, is simply a restatement of section 1 of the fifteenth amendment.[128] 2) Section 1 of the fifteenth amendment prohibits the outright exclusion of voters from their elective franchise on account of race. Because it is unreasonable to suggest that a state could specifically exclude blacks from the right of suffrage without so intending, there will always exist an inferential nexus between exclusionary results and discriminatory purposes.[129] 3) The equal protection clause of the fourteenth amendment provides the basis for minority vote dilution cases. Unlike cases involving the fifteenth amendment, which protects the rights of minorities to cast ballots, minority vote dilution cases address the impact of electoral structures on the ability of minorities to elect members of their own group. The absence of proportional representation of minorities, however, is insufficient to invalidate an electoral structure. A minority vote dilution case may succeed only if the electoral structure at issue was purposefully designed or retained[130] to dilute the votes of minorities. It is unclear, however, what factors are dispositive in proving such a discriminatory purpose.[131]

## II. H.R. 3112: RAMIFICATIONS OF THE RESULTS TEST

In the Judiciary Committee Report on H.R. 3112, the committee states that "[b]y amending Section 2 of the Act, Congress intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the content or motivation behind it."[132] This is inaccurate. *Bolden*—insofar as it required a showing of discriminatory purpose in minority vote dilution cases—was consistent with prior decisions which had established the purpose requirement.[133] The

127. *See supra* notes 25–104 and accompanying text.

128. *See supra* notes 22–24 and accompanying text.

129. *See supra* notes 25–51 and accompanying text.

130. *See supra* note 114 for a case reference involving purposeful retention.

131. *See supra* notes 52–126 and accompanying text. The issue of what factors are dispositive in proving discriminatory purpose was recently addressed in Rogers v. Lodge, 102 S. Ct. 3272 (1982).

132. HOUSE REPORT, *supra* note 5, at 29–30.

133. *See supra* notes 105–15 and accompanying text. *But see* Note, City of Mobile v. Bolden: *Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments*, 18 HOUS. L. REV. 611 (1981) (argues that a close analysis of the cases relied on by the plurality in *Bolden* does *not* show a clearly articulated requirement of purposeful discrimination). *Cf.* Comment, *The Standard of Proof in At-Large Vote Dilution Discrimi-*

results test, therefore, presents a change in a fairly established rule of law, not the simple overturning of an anomalous decision as portrayed by the committee report.

Examining the language of section 2 in its proposed amended form[134] gives little help in discerning the possible ramifications of the change the results test would work on existing law. The first clause of section 2—"[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any state or political subdivision . . ."[135]—remains unchanged by the amendment. That clause has already been interpreted in *Allen* to encompass electoral structures as well as electoral procedures.[136] Following this unchanged clause, the amendment adds the so-called results test: "in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in Section 4(f)(2)."[137] Words prohibiting an electoral law or a practice which "results in a denial or abridgement of" the right to vote are much too vague to guide courts in ruling on what exactly is prohibited. Admittedly, the amendment does add a qualifying sentence to section 2: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this Section."[138] This sentence, however, does not alleviate the vagueness as to what is prohibited and, in fact, contributes to it.[139] Thus, because the language of the amendment does not explicitly set forth the objects of its prohibition, it is necessary to consult other sources to ascertain the amendment's ramifications.

The House Judiciary Committee's Report on H.R. 3112[140] and court cases which have been decided under section 5 of the Voting Rights Act[141] may be inspected for guidance in predicting the prohibitive scope of the results test. Section 5 litigation is relevant

*nation Cases After* City of Mobile v. Bolden, 10 FORDHAM URB. L.J. 103, 105 (1981) (arguing that the effect of *Bolden* "has been to increase the stringency of the burden of proof while reducing the necessary quantum of evidence").

134. *See supra* text accompanying note 12.

135. Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973 (1976).

136. *See supra* note 75.

137. *See supra* text accompanying note 12.

138. *Id.*

139. *See infra* text accompanying notes 149–52.

140. HOUSE REPORT, *supra* note 5.

141. *See supra* text accompanying notes 73–74.

because section 5 presently contains a provision analogous to the results test.[142] Moreover, the committee report states that one purpose of the amendment to section 2 is to make that section consistent with section 5 by adding a results test.[143]

### A. *Multimember Electoral Districts*

The disestablishment of multimember electoral districts[144] might be one ramification of the proposed results test. The committee report states that "[n]umerous empirical studies . . . have found a strong link between at-large elections and lack of minority representation."[145] The report continues: "Not all at-large election systems would be prohibited under this amendment, however, but only those which are imposed or applied in a manner which accomplished a discriminatory result."[146] Thus, the committee report views "lack of minority representation" as a probable discriminatory result of multimember electoral districts, the occurrence of which warrants the disestablishment of those electoral districts.

"Lack of minority representation" does not refer to the disenfranchisement of minorities, but to the situation where minorities are not represented by members of their own minority group.[147] Thus, the assumption underlying the results test is that "proportional representation"[148] of racial and language minorities by

142. *See supra* text accompanying note 74. Section 5's analogous provision will be referred to as the "effects test."

143. *See* HOUSE REPORT, *supra* note 5, at 28. The committee states:

> 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 [section 2] or preclearance [section 5]. The lawfulness of such a practice should not vary depending upon when it was adopted, i.e., whether it is a change.

*Id.*

144. The terms "multimember electoral districts" and "at-large elections" will be used interchangeably. Both refer to electoral structures in which more than one representative is elected by the same constituency.

145. HOUSE REPORT, *supra* note 5, at 30. *See, e.g.,* Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85 (1979).

146. HOUSE REPORT, *supra* note 5, at 30.

147. This is supported by the context in which that phrase is used. The prior sentence in the committee report discusses vote dilution, not voter exclusion: "Discriminatory election structures can minimize and cancel out minority voting strength as much as prohibiting minorities from registering and voting." *Id. See also* SUBCOMM. REPORT, *supra* note 51, at 29–32 (results test as a legal standard discussed).

148. "Proportional representation refers to a plan of government which adopts the racial or ethnic group as the primary unit of political representation and apportions seats in electoral bodies according to the comparative numerical strength of these groups." SUBCOMM. REPORT, *supra* note 51, at 32–33.

members of their own minority group is a desirable goal. This assumption is supported, ironically, by the inclusion of a disclaimer in the proposed amendment: "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."[149] Though the disclaimer does indeed deny the creation of an absolute right to proportional representation, the committee report's explanation of the disclaiming language states that a lack of proportional representation "would be highly relevant" in determining whether the results test had been violated.[150] This qualification, together with the "in and of itself" language of the disclaimer,[151] indicates that the absence of proportional representation plus some extra factor would lead to a violation.[152] The amendment's disclaimer of proportional representation, therefore, is a smoke screen designed to obscure the desired effect of the results test—that electoral schemes be judicially disestablished if they fail to adhere to some judicially-established degree of proportional representation.

The degree of departure from proportional representation which would constitute a violation of the amendment is clarified, to some extent, in a test which the committee report sets forth regarding multimember electoral schemes:

> It would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language minority.[153]

Thus, the committee report sets up a three-part test for determining whether a multimember electoral district violates the results test. The electoral scheme would be in violation of the amendment if minority candidates or candidates identified with the interests of minorities are defeated by a bloc voting majority, consistently, and over a substantial period of time.

The three-part test initially makes another attempt at disclaiming the amendment's creation of a right to proportional represen-

149. H.R. 3112, 97th Cong., 1st Sess. § 2 (1981).

150. HOUSE REPORT, *supra* note 5, at 30.

151. *See* SUBCOMM. REPORT, *supra* note 51, at 35–40.

152. An example of an extra factor would probably be racial bloc voting. *See infra* text accompanying note 153. The committee report also lists other objective factors which, presumably, would fulfill the requirement for something extra in addition to a statistical absence of proportional representation. *See infra* text accompanying notes 161–64.

153. *Id.*

tation. By referring to the defeat of "minority candidates or candidates identified with the interests of a racial or language minority,"[154] the committee report implies that the amendment does not necessarily create a right of proportional representation, because the results test covers the defeat of sympathetic nonminority candidates as well as the defeat of minority candidates. This disclaimer of proportional representation, however, fails for three reasons. First, the committee report explicitly states that a lack of proportional representation would be "highly relevant" in determining whether the results test had been violated.[155] Second, if the results test becomes law, the committee report's reference to "candidates identified with the interests of [minorities]" would be susceptible to constitutional attack.[156] Finally, the committee report states that the amendment will not require the courts to resolve issues of political identification: "The proposed amendment avoids highly subjective factors such [as] responsiveness of elected officials to the minority community."[157] Thus, the disclaimer clause in the committee report appears to be another smoke screen designed to obscure the goal of proportional representation underlying the results test. The three-part test, therefore, will be analyzed only in the context of its impact on *minority* candidates.

The first element—that minority candidates be defeated by a bloc voting majority—may be viewed as a constant in the formula, because the existence of racially or ethnically polarized voting is largely a statistical matter. The second element—that minority candidates be defeated consistently—may also be viewed as a constant, because consistency is a uniform standard. The third part of the test, however—that minority candidates be defeated over a substantial period of time—is a variable standard. The number of years of consistent defeat of minority candidates by bloc voting majorities which would trigger the invalidation of a multimember electoral structure would depend upon judicial construction of the results test. It is this third element of the three-part test which would seem to determine how far a multimember electoral structure could stray from the goal of producing proportional represen-

154. *Id.*

155. *See supra* text accompanying note 150.

156. *See infra* text accompanying notes 306–09.

157. *See* HOUSE REPORT, *supra* note 5, at 30. *But cf.* Note, *Multimember Electoral Systems and the Discriminatory-Purpose Standard:* City of Mobile v. Bolden, 12 TEX. TECH. L. REV. 743, 760–62 (1981) (suggesting that the test for illegality in vote dilution cases should be lack of responsiveness, rather than discriminatory purpose or discriminatory effect).

tation before it would become susceptible to judicial disestablishment.

Because the results test has been proposed as an amendment to section 2 in response to the *Bolden* decision,[158] an application of the three-part test to the factual situation from which *Bolden* arose should provide an appropriate example of how the results test would invalidate a multimember electoral district. Before the plaintiffs filed their complaint in *Bolden*, however, only three black candidates had run for the city commission, all in 1973.[159] Under any construction of substantiality, one election cannot be construed as a "substantial period of time." Thus, Mobile's multimember electoral structure could not be invalidated under the committee report's three-part test. Yet the House Judiciary Committee may be presumed to have intended that Mobile's multimember electoral structure would be invalidated under the amendment; indeed, opposition to the Court's overruling of that electoral structure's disestablishment is what provided the impetus for the proposed amendment to section 2.[160]

The solution to the *Bolden* paradox is that, in addition to the three-part test for determining when multimember electoral structures would violate the proposed amendment, the committee report sets forth a second test—the objective-factor test. In contrast to the three-part test which focuses on the defeat of minority candidates, the objective-factor test focuses on the factors which make up an electoral system:

> [In determining] a violation of the section . . . other objective factors . . . would be highly relevant . . . such as a history of discrimination affecting the right to vote, racially polarity [sic] voting which impedes the election opportunities of minority group members, discriminatory elements of the electoral system such as at-large elections, a majority vote requirement,[161] a prohibition on single-shot voting,[162] and numbered posts which enhance the opportunity for discrimination,[163] and discriminatory slating or the failure of minorities to win party nomination.[164]

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158. *See supra* text accompanying notes 7–12.

159. *See supra* note 108.

160. *See supra* text accompanying notes 7–12.

161. For a discussion of the majority vote requirement, see *infra* text accompanying notes 199–202.

162. For an explanation of single-shot voting, see UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 52, at 206–07.

163. For an explanation of numbered posts, see *id.* at 207.

164. HOUSE REPORT, *supra* note 5, at 30. Another factor, indirectly referred to by the

The committee report cites *White v. Regester*[165] for the objective-factor test.[166] In *White*, the disestablishment of Bexar County's multimember district was based on the district court's inquiry into the "totality of circumstances,"[167] and its conclusion that single-member districts were required to remedy the effects of past and present discrimination.[168] But the committee report, while approving a totality of circumstances inquiry implicitly disclaims any intention to use disestablishment of electoral structures as a remedy for general discrimination.[169]

The objective-factor test appears to manifest the committee's intention that multimember electoral systems should be struck down if the totality of circumstances surrounding a particular electoral process lessens the likelihood of proportional representation. That intention is evidenced in the committee's stated desire to proscribe processes which "impeded the election opportunities of minority group members . . . ."[170] Thus, if the electoral process of Mobile is found to lessen the likelihood of proportional representation, the examining court could disestablish the multi-

committee report in another context, is the annexation of land. *Id.* at 45. In setting forth the purpose of the amendment to § 2, the committee report states: "For purposes of this Section, conduct which has the effect, impact or consequence of discrimination on the basis of race, color, or member [*sic*] in a language minority group would be in violation of Section 2 of the Act." *Id.* (citing Richmond v. United States, 422 U.S. 358 (1975)). *Richmond* involved an action under § 5 of the Voting Rights Act for a declaratory judgment that Richmond, Virginia's annexation of some adjacent county land did not have the purpose and would not have the effect of denying or abridging the right to vote on account of color. The Court in *Richmond* held, in part, that the annexation did not constitute a discriminatory effect under § 5, *but only because* Richmond accompanied the annexation with the replacement of Richmond's at-large election of councilmen with a ward system. 422 U.S. at 370. Thus, *Richmond* indicates that land annexations will be viewed under the Voting Rights Act as a factor constituting a discriminatory effect because of their ability to reduce the proportion which minorities constitute in a city's population. *See, e.g., id.* at 372. *See generally* Weiner, *Boundary Changes and the Power of the Vote*, 54 U. DET. J. URB. L. 959 (1977) (part of a symposium on local government boundary practices which disadvantage minorities).

165. 412 U.S. 755 (1973).

166. HOUSE REPORT, *supra* note 5, at 30 n.104 (1981).

167. *See supra* text accompanying notes 84–92.

168. 412 U.S. at 769 (citation omitted).

169. To remedy general discrimination, a court would have to determine whether elected officials had been responsive to the needs and interests of minorities. The committee report, however, is unwilling to have courts make such judgments. The committee, therefore, must not intend the results test to remedy general discrimination.
HOUSE REPORT, *supra* note 5, at 30.

170. *Id.* The results test section of the committee report focuses on the tendency of various electoral structures to promote or impede proportional representation. *See supra* text accompanying notes 145–52.

member electoral structure on the grounds that it violates the results test.

Multimember election districts, therefore, could be attacked as violative of the results test under either of two theories: (1) that minority candidates have been defeated by bloc voting majorities, consistently, and over a substantial period of time;[171] or (2) that certain objective factors have effectively lessened the likelihood of proportional representation in the multimember district.[172] Since a majority of the municipalities in the country conduct at-large elections of their city commissions or council members,[173] the ramifications of a results test could be significant.

### B. *Establishment of Electoral Districts*

The committee report also states that the results test would have an impact on the states' establishment of legislative and congressional electoral districts. The amendment to section 2 uses the same three-part test for determining whether a districting plan or a multimember district violates the results test.[174] The test for districting, however, adds the phrase: "or in other ways denies equal access to the political process . . . ."[175] Since the denial of equal access refers to the objective-factor test,[176] the courts could scrutinize districting plans with the same latitude that the objective-factor test allows them in scrutinizing multimember electoral systems.[177]

Cases decided under section 5 of the Voting Rights Act[178] provide concrete examples of how the section 2 proportionality requirement might operate in the establishment of electoral districts.

171. *See supra* text accompanying notes 153–57.

172. *See supra* text accompanying notes 158–70.

173. 1979 MUNICIPAL YEAR BOOK 98–99 (Table 4/2) (figures accurate as of 1977).

174. "A districting plan which [permits a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language majority] . . . or in other ways denies equal access to the political process would . . . be illegal." HOUSE REPORT, *supra* note 5, at 30–31. The portion of the quote set in brackets has been placed there because the original sentence in the committee report begins with the phrase: "A districting plan which suffers from these defects . . . ." These defects refers to the three-part test elucidated in the immediately preceding sentence. *See generally* Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 HARV. L. REV. 1847 (1978) (issues that arise when racial considerations become intertwined with apportionment decisions of legislators and courts discussed).

175. HOUSE REPORT, *supra* note 5, at 30–31.

176. *See infra* text accompanying notes 244–58.

177. *See supra* text accompanying notes 161–70.

178. Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c (1976).

Section 5 cases are helpful because the section 2 results test is analogous to the section 5 "effects" test.[179] *United Jewish Organizations of Williamsburg, Inc. v. Carey*,[180] a section 5 case decided in 1977, suggests that race-conscious districting might be mandated by the section 2 amendment.[181]

*United Jewish Organizations* arose from New York's efforts to have the Attorney General preclear its redistricting plans for Kings County under section 5.[182] After the Attorney General rejected a New York redistricting plan in 1972, New York officials met with Justice Department officials to determine what type of plan would be acceptable. The Justice Department officials suggested that sixty-five percent non-white majorities in two assembly districts and two state senate districts would be acceptable.[183] As a consequence, the Hasidic Jewish Community in Kings County was split between two districts.[184] One representative of the Hasidic community brought suit challenging the use of racial considerations in the establishment of the state electoral districts in Kings County. Although the holding failed to command a majority opinion, a majority of the Justices found New York's use of racial considerations in its redistricting to be constitutional.[185] A plurality of four Justices held the racial gerrymandering to be constitutional because New York was attempting to comply with section 5 of the Voting Rights Act.[186] A combination of five Justices found that New York acted constitutionally on the broader

179. *See supra* text accompanying notes 73–74. *See also supra* note 143 and accompanying text.

180. 430 U.S. 144 (1977).

181. *See id.* at 160–62.

182. *Id.* at 148–49.

183. *Id.* at 181–82 (Burger, C.J., dissenting).

184. *Id.* at 152.

185. By a 7–1 margin the Supreme Court decided that New York had acted constitutionally. Justice White announced the judgment of the Court and filed an opinion in which Justice Stevens joined. Justices Brennan, Blackmun and Rehnquist joined in parts of Justice White's opinion. Justice Stewart concurred in the judgment and filed an opinion in which Justice Powell joined. Chief Justice Burger dissented. Justice Marshall took no part in the case.

186. Justice White, joined by Justices Stevens, Brennan, and Blackmun, stated:

> Petitioners have not shown that New York did more than accede to a position taken by the Attorney General that was authorized by our constitutionally permissible construction of § 5. New York adopted the 1974 plan because it sought to comply with the Voting Rights Act. This has been its primary defense of the plan, which was sustained on that basis by the Court of Appeals. . . . [T]he Court of Appeals was essentially correct . . . .

*Id.* at 164–65. *See generally* Note, United Jewish Organizations v. Carey *and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571 (1978) (analyzes the *United Jewish Organizations* plurality opinion and argues that the statutory and constitutional issues

grounds that its racial gerrymandering did not amount to unconstitutional discrimination against the plaintiffs.[187]

*United Jewish Organizations* demonstrates that the use of strict racial gerrymandering by jurisdictions attempting to comply with the effects test of section 5 is permissible. By analogy, it can be presumed that the Court would permit states to draw their legislative and congressional districts on racial lines in order to avoid a violation of the proposed section 2 results test.[188] Congressman Butler, in his dissent to the committee report, pointed out that many states—as a practical matter—would feel pressured to gerrymander their districts racially and ethnically in order to avoid a violation of the results test.[189]

The conclusion that section 2 could require racial or ethnic districting points to an absurdity inherent in the results test. Suppose, for example, that State X is in the process of redistricting its state senate districts following the 1990 census. Assume that the census indicates that black voters could have an impact on four senate races because four districts have substantial black minorities. Assume further that State X's legislature is populated by a large number of racists. The legislature, therefore, racially gerrymanders the districts to create two state senate districts with black majorities, thereby minimizing the number of districts influenced by black voters. Under the equal protection clause of the fourteenth amendment, State X's discriminatory purpose in establishing the state senate districts would invalidate the newly created districts.[190]

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might have been resolved more adequately by recognizing an aggregate voting right for *racial* groups under the 15th amendment).

187. Justice White, joined by Justices Stevens and Rehnquist, stated: "Whether or not the plan was authorized by or was in compliance with § 5 of the Voting Rights Act, New York was free to do what it did as long as it did not violate the Constitution, particularly the Fourteenth and Fifteenth Amendments; and we are convinced that neither Amendment was infringed." *Id.* at 165. Justice Stewart, joined by Justice Powell, stated in his concurrence in the judgment: "Having failed to show that the legislative reapportionment plan had either the purpose or the effect of discriminating against them on the basis of their race, the petitioners have offered no basis for affording them the constitutional relief they seek." 430 U.S. at 180.

188. *See supra* text accompanying notes 145–52.

189. Butler stated:

> One practical effect of the amended language proposed in H.R. 3112 would . . . be to require State and local governments to study the effects of all proposed voting procedures and adopt only those which maximize statistically the voting impact of minority citizens. Ultimately, this logic could lead to noncontinuous voting district boundaries, crazy quilt annexation patterns and the like.

HOUSE REPORT, *supra* note 5, at 72.

190. *See supra* text accompanying notes 76–115.

Suppose, however, that State X conducted its redistricting in a nondiscriminatory atmosphere and that State X maintains the four districts with substantial black minorities for a variety of nondiscriminatory reasons. Nevertheless, a private citizen brings a minority vote dilution suit under the amended section 2 based upon two theories: first, that black candidates for the state senate in these four districts have been consistently defeated by a bloc voting majority over a substantial period of time; and second, that blacks do not have equal access to the political process under the objective-factor test.[191] After a proper showing of proof, a court finds that State X's establishment of state senate districts is illegal and orders the establishment of a districting scheme which will promote proportional representation of blacks in the state senate. The scheme which a court orders merges the substantial black minorities in four districts in order to create two state senate districts with black majorities—the same system which would be declared unconstitutional in the first hypothetical.

Thus, an amended section 2 would empower a court to order precisely the same type of racially conscious districting scheme which it would also be obligated to strike down if set up by a racist state legislature. This absurdity results from the paradoxical nature of an amended section 2: on the one hand it would still prohibit purposeful discrimination in electoral districting,[192] but on the other hand, it would force states—and if states failed, courts—to maintain a certain degree of proportional representation through the vehicle of districting. The underlying reason for this paradox is the simple principle of logic that the law cannot simultaneously say to the states "thou shalt not racially gerrymander" *and* "thou shalt racially gerrymander."

### C. *Other Prohibited Electoral Practices*

#### 1. *Unequal Availability of Absentee Ballots*

The committee report states that "a violation would be proved by showing that election officials made absentee ballots available to white citizens without a corresponding opportunity being given to minority citizens similarly situated."[193] This suggests that sec-

191. *See supra* text accompanying notes 153–57 and 175–77.

192. Regarding purposeful discrimination, the committee report states, "The alternative standard of proving that a voting practice or procedure is unlawful if a discriminatory purpose was a motivating factor would still be available to plaintiffs . . . ." HOUSE REPORT, *supra* note 5, at 30 n.101.

193. *Id.* at 31 n.105.

tion 2 must be amended in order to prohibit the unequal availability of absentee ballots. The results test, however, has been conceived in order to deal with minority vote dilution—the relative strength of minority votes. The opportunity to receive absentee ballots, on the other hand, pertains to the right to vote in the first place. Since the exclusion of voters from their right of suffrage always infers discriminatory purpose,[194] the unequal distribution of absentee ballots is already illegal under the current wording of section 2.[195]

### 2. *Purging of Voter Registration Rolls*

The committee report further states that "purging of voter registration rolls would violate section 2 if plaintiffs show a result which demonstrably disadvantages minority voters. Only purges having a discriminatory result are prohibited."[196] The purging of voter registration rolls involves the exclusion of voters from their right of suffrage, rather than vote dilution; the inability to register, results in the inability to vote. Since an exclusionary result necessarily infers discriminatory purpose,[197] the purging of voter registration rolls is already illegal under the current wording of section 2.[198]

### 3. *The Majority Vote Requirement*

Finally, the committee report states, "The majority vote requirement would . . . be prohibited"[199] where "a bloc voting majority over a substantial period of time consistently [defeats] minority candidates or candidates identified with the interests of a racial or language minority."[200] The majority vote requirement is illustrated by the following hypothetical. Assume that in a general election there are two white candidates and a black candidate. Making the additional assumption that the jurisdiction is 60%

194. *See supra* text accompanying notes 41–46.

195. *See supra* text accompanying note 4.

196. HOUSE REPORT, *supra* note 5, at 31 n.105.

197. *See supra* text accompanying notes 41–46.

198. *See supra* text accompanying note 4.

199. HOUSE REPORT, *supra* note 5, at 31 n.105.

200. *Id.* at 30. This qualification of the majority vote requirement prohibition is based on the following language of the committee report: "The majority vote requirement would also be prohibited under the standards applicable to other discriminatory vote dilutions." *Id.* at 31 n.105. The standard referred to is the three-part test applied to multimember districts and establishment of state electoral districts. *See supra* text accompanying notes 153–57.

white and 40% black, it is possible with racial bloc voting that in the general election one white candidate would get 25% of the vote, the other white candidate would get 35%, and the black candidate would get 40%. A majority vote requirement would force a runoff between the white candidate who received 35% of the vote and the black candidate who received 40%. With racial bloc voting the black candidate would lose the runoff election—60% to 40%.[201]

The prohibition of a majority vote requirement when it results in vote dilution seems to provide an alternative to the prohibition of multimember districts and establishment of electoral districts along minority lines. Whereas the prohibition of a majority vote requirement attempts to achieve proportional representation by enabling a bloc voting minority to win an election by a plurality, the disestablishment of multimember districts and racial or ethnic gerrymandering attempt to achieve proportional representation by the judicial creation of districts in which minorities constitute a majority.[202] The number of actions brought for the disestablishment of multimember districts and racial/ethnic gerrymandering, because of their greater certainty of achieving proportional representation, would likely overshadow the number of actions brought to strike down majority vote requirements.

In sum, the addition of the results test to section 2 could lead to three significant ramifications.[203] First, the dominant form of electing municipal officials, the multimember electoral scheme, could become the subject of judicial scrutiny in a multiplicity of suits, based on a vague proportional representation standard.[204] Second, the states could be required, in their establishment of legislative and congressional districts, to racially and ethnically[205] gerrymander districts to satisfy a judicially established standard of proportionality.[206] Finally, as an alternative to the above two legal actions against state and local governments, actions could be brought to invalidate majority vote requirements where election results violate a judicially established standard of

201. *See* UNITED STATES COMMISSION ON CIVIL RIGHTS, *supra* note 52, at 206.

202. *See supra* text accompanying notes 144–92.

203. For a study which predicts some of the possible ramifications of the results test on states and municipalities, see SUBCOMM. REPORT, *supra* note 51, at 46–52.

204. *See supra* text accompanying notes 144–73.

205. The gerrymandering would be based on the demographics of language minorities as well as of racial minorities. *See supra* note 4.

206. *See supra* text accompanying notes 174–92.

proportionality.[207]

## III. CONSTITUTIONAL ANALYSIS

In its report on the amendment to section 2, the House Judiciary Committee set forth the two objectives of the results test: the prevention of fourteenth and fifteenth amendment violations,[208] and the remedying of the present effects of past violations.[209] The first objective is certainly a legitimate end. The results test, however, is not an appropriately adapted means to that end because potentially it could strike down many constitutionally legitimate state statutes.[210] The second objective—remedying the present effects of past violations—appears, on its face, to be a legitimate end, but when examined in the context of the committee report, the second objective is revealed to be one beyond the scope of the Constitution.[211] Because the means used to achieve the first objective are constitutionally inappropriate and the second objective seeks a constitutionally inappropriate end, the constitutionality of the results test is questionable.[212]

### A. *The Results Test as a Means*

In justifying the results test as an appropriate means of enforcing the fourteenth and fifteenth amendments, the committee report indicated that since discriminatory purpose is often concealed, prohibition of voting practices which have a discriminatory result is appropriate.[213]

Fifteenth amendment voting rights cases involve the outright exclusion of voters from their right of suffrage.[214] In such cases of exclusion, an inferential nexus exists between the result of exclusion and the prohibited discriminatory purpose.[215] Because of this inferential nexus, fifteenth amendment violations can be identified

207. *See supra* text accompanying notes 199–202.

208. *See infra* note 213 and accompanying text.

209. *See infra* text accompanying note 243.

210. *See infra* text accompanying notes 213–42.

211. *See infra* text accompanying notes 243–91.

212. *See* McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 421 (1819), where Chief Justice Marshall stated: "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 consist with the letter and spirit of the constitution, are constitutional." The Court explicitly has applied the *McCulloch* test to § 5 of the 14th amendment. *See* Katzenbach v. Morgan, 384 U.S. 641, 650 (1966).

213. HOUSE REPORT, *supra* note 5, at 31.

214. *See supra* text accompanying notes 25–27.

215. *See supra* text accompanying notes 32–46.

easily. Hence, the justification of the results test as a means of attacking covert purposeful discrimination must rely on Congress' fourteenth amendment enforcement powers.[216]

In finding authority to enact the results test under section 5 of the fourteenth amendment, the committee's argument manifests the following reasoning. The equal protection clause of the fourteenth amendment prohibits the purposeful dilution of minority voting strength by the states. Because this purposeful discrimination is often concealed, the fourteenth amendment prohibition is difficult to enforce. The results test, therefore, by prohibiting all electoral laws which *result* in vote dilution, will ipso facto prohibit those laws which were motivated by an unconstitutional *purpose* to dilute.

This particular assertion of congressional power is potentially grossly overinclusive.[217] Many constitutionally legitimate electoral laws could be struck down, because the absence of proportional representation—the results test's basis for section 2 violations—does not necessarily infer discriminatory purpose.

The Supreme Court previously has upheld potentially overinclusive congressional legislation. In *Oregon v. Mitchell*,[218] the Court upheld Congress' nationwide ban on literacy tests enacted as part of the 1970 amendments to the Voting Rights Act.[219] The legislation's potential overinclusiveness arose from the uncertainty over how many of the existing literacy tests had been discriminatorily motivated and from the tenuous assumption that every future literacy test would be discriminatorily motivated.

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216. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5.

217. The statutory quality of overinclusiveness, as discussed in this Note, refers to a situation where a congressional statute, in the process of prohibiting specified state statutes, has the legal effect of prohibiting other state statutes which Congress is *not* constitutionally empowered to prohibit. For an example of where the word "overinclusiveness" has been used in this way, see Rome v. United States, 446 U.S. 156, 215 (Rehnquist, J., dissenting).

218. 400 U.S. 112 (1970). *Oregon* involved constitutional challenges to certain sections of the Voting Rights Act Amendments of 1970. Although the Court divided on all other provisions of the 1970 Act, it united in one respect: every Justice found the nationwide literacy test suspension constitutional. Justice Black, announcing the judgment of the Court, stated,

> I believe that Congress, in the exercise of its power to enforce the Fourteenth and Fifteenth Amendments, can prohibit the use of literacy tests or other devices used to discriminate against voters on account of their race in both state and federal elections. For reasons expressed in separate opinions, all of my Brethren join me in this judgment."

*Id.* at 118.

219. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. § 1973b(f) (1976)).

Justice Douglas, in his own opinion in *Mitchell*, suggested two justifications for upholding the nationwide ban. First, in enacting the literacy test ban, Congress could legitimately "rely on the fact that most States do not have literacy tests [and] that the tests have been used at times as a discriminatory weapon against some minorities . . . ."[220] Second, Justice Douglas reasoned that the legislation's remedial objective mitigated its overinclusiveness. The remedial objective of the legislation recognized the past violations of many states in providing minorities with equal education.[221] Because of these violations, it is reasonable to infer that fewer minorities have obtained a given degree of literacy than their white counterparts.[222] Past equal protection violations, therefore, indirectly caused the inability of minorities to pass the literacy prerequisites to voting. Thus, the literacy test ban stood as a congressional remedy for the present effects of past state violations of the equal protection clause.[223]

The results test may be distinguished from both of Justice Douglas' lines of reasoning. First, unlike the literacy tests, every state has electoral laws and the number of those electoral laws which are utilized to exclude minorities from the political process is unknown. Second, the results test may not be justified as a remedy for the present effects of past discrimination.[224] Thus, *Mitchell* cannot serve as a precedent for justifying the potentially gross overinclusiveness of the results test.

The Court's 1980 decision in *City of Rome v. United States*[225] ruled, in part, on the potential overinclusiveness of the effects test contained in section 5 of the Voting Rights Act.[226] The section 5 effects test, like the proposed results test, is potentially overinclusive because in pursuing its objective of preventing purposeful discrimination, the effects test could invalidate nondiscriminatorily motivated electoral laws.[227] The Court in *Rome* reasoned, however, that the scope of section 5 mitigated the risk of its being overinclusive because the Act applied only to jurisdictions which

220. *Id.* at 147 (dissenting in part and concurring in part).

221. *Id.* at 146.

222. *Id.*

223. *See id.*

224. *See infra* text accompanying notes 243–91.

225. 446 U.S. 156 (1980).

226. *Id.* at 160–61. *See supra* text accompanying notes 73–74.

227. Although § 5 does not invalidate electoral laws, it enables the Attorney General and the District of Columbia District Court to prevent the enactment of certain electoral laws. *See, e.g., supra* note 75 and accompanying text.

have a demonstrable history of voting discrimination.[228] Further, these jurisdictions can eventually be released from section 5 coverage upon demonstrating that they have not enacted discriminatory voting laws for a specified number of years.[229] The effects test of section 5, therefore, unlike the proposed section 2 results test, is

228. 446 U.S. at 177. The Court in *Rome* cited South Carolina v. Katzenbach, 383 U.S. 301 (1966), as an example of how Congress' factual findings of a demonstrable history of intentional racial discrimination justified its exercise of remedial powers. The cited passage in *South Carolina* stated:

> The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate. . . . Congress knew that some of the States covered by § 4(b) of the Act had resorted to the extraordinary stratagem of contriving new rules of various kinds for the sole purpose of perpetuating voting discrimination in the face of adverse federal court decrees. Congress had reason to suppose that these States might try similar maneuvers in the future in order to evade the remedies for voting discrimination contained in the Act itself. Under the compulsion of these unique circumstances, Congress responded in a permissibly decisive manner.

*Id.* at 334–35. Thus, like the Court in *Rome*, the Court in *South Carolina* stressed that since Congress' remedial measures had been tailored to remedy instances of *purposeful* discrimination, Congress avoided the problem of overinclusiveness. *But see* McClellan, *Fiddling With the Constitution While* Rome *Burns: The Case Against the Voting Rights Act of 1965*, 42 LA. L. REV. 5, 5–6, 29–43 (1981) (relates that although the City of Rome is part of a covered state—Georgia—the city, itself, does *not* have a demonstrable history of discrimination). For an explanation of which jurisdictions are covered by § 5, *see supra* note 3 and accompanying text.

229. *See* Voting Rights Act of 1965 § 4, 42 U.S.C. § 1973b(a) (1976). Section 4 of the Voting Rights Act currently specifies a period of time after which covered jurisdictions may be released from the § 5 preclearance provisions and, therefore, the § 5 effects test. The release, or "bail-out," provision of § 4, as originally enacted, provided that if a covered jurisdiction could demonstrate to the District of Columbia District Court that it had not used a "test or device" during the previous five years, it would be released from § 5 coverage. Voting Rights Act of 1965, Pub. L. No. 89–110, § 4, 79 Stat. 437, 438. Since § 4 mandates the suspension of such tests and devices, release from the preclearance provisions would have been virtually automatic for the covered jurisdictions five years following the date of the passage of the Act. In 1970, however, Congress lengthened the bail-out period to 10 years. Voting Rights Act Amendments of 1970, Pub. L. No. 91–285, § 3, 84 Stat. 314, 315. In 1975, Congress lengthened the bail-out period to 17 years. Voting Rights Act Amendments of 1975, Pub. L. No. 94–73, § 101, 89 Stat. 400, 401. Thus, jurisdictions covered under the original Voting Rights Act of 1965 are eligible for bail-out beginning on August 6, 1982, and jurisdictions covered under the Voting Rights Act Amendments of 1970 are eligible beginning August 6, 1987. Jurisdictions subject to preclearance due to the language minority provisions enacted in 1975 are eligible for bail-out upon a declaratory judgment that they have not used specified tests or devices for 10 years. Thus, those jurisdictions are eligible for bail-out beginning on August 6, 1985. *Id.* Due to the imminence of the first bail-out date, August 6, 1982, Congress is currently considering amending the bail-out provisions of § 4 of the Voting Rights Act. *See* H.R. 3112, 97th Cong., 1st Sess. § 1 (1981); S. 1992, 97th Cong., lst Sess. § 2 (1981).

*Editor's Note*: The Voting Rights Act Amendments of 1982 signed into law by President Reagan on June 29, 1982 has postponed the bail-out dates for covered jurisdictions.

tailored—both in scope and duration—to mitigate potential overinclusiveness.

Shortly after *Rome*, the Court faced another potentially overinclusive statute in *Fullilove v. Klutznick*.[230] The plaintiffs in *Fullilove* challenged the Public Works Employment Act of 1977 (1977 Act).[231] The 1977 Act required that, absent an administrative waiver, at least ten percent of federal funds granted for local public works projects must be used by the state or local grantee to procure services or supplies from businesses owned by minority group members.[232] Chief Justice Burger, in his plurality opinion, explained that the 1977 Act purported to remedy the present effects of past discrimination against minority businesses.[233] Accordingly, Congress enacted the 1977 Act to ensure that those traditional procurement practices would not perpetuate past discrimination.

Nonminority contractors, however, claimed that the 1977 Act should fail for overinclusiveness because it "bestows a benefit on businesses identified by racial or ethnic criteria which cannot be justified on the basis of competitive criteria or as a remedy for the present effects of identified prior discrimination."[234] The Court,[235] nevertheless, upheld the 1977 Act. Chief Justice Burger suggested two factors which mitigated the Act's potential overinclusiveness. First, Congress carefully tailored the administrative procedures under the 1977 Act to accomplish the Act's remedial objectives.[236] Second, the limited duration of the program miti-

230. 448 U.S. 448 (1980).

231. Public Works Employment Act of 1977, Pub. L. 95-28, 91 Stat. 116.

232. *Id.*

233. 448 U.S. at 478.

234. *Id.* at 486.

235. Chief Justice Burger announced the judgment of the Court and delivered an opinion in which Justices White and Powell joined. Justice Powell filed a concurring opinion. Justice Marshall concurred in the judgment and filed an opinion in which Justices Brennan and Blackmun joined. Justice Stewart dissented and filed an opinion in which Justice Rehnquist joined. Justice Stevens filed a dissenting opinion.

236. The Court stated:

> There is administrative scrutiny to identify and eliminate from participation in the program MBE's [minority business enterprises] who are not "bona-fide" within the regulations and guidelines . . . . And even as to the specific contract awards, waiver is available to avoid dealing with an MBE who is attempting to exploit the remedial aspects of the program by charging an unreasonable price, i.e., a price not attributable to the present effects of past discrimination. . . .
>
> Grantees are given the opportunity to demonstrate that their best efforts will not succeed or have not succeeded in achieving the statutory 10% target for minority firm participants within the limitation of the program's remedial objectives. In these circumstances a waiver is available once compliance has been demon-

gated the potential overinclusiveness of the 1977 Act. Chief Justice Burger pointed out that the 10% requirement "may be viewed as a pilot project, appropriately limited in extent and duration, and subject to reassessment and reevaluation by the Congress prior to any extension or re-enactment."[237]

Neither of these two mitigating factors apply to the potentially severe overinclusiveness of a section 2 results test. The proposed amendment to section 2 does not provide any administrative procedures which could tailor the results test's prohibition to electoral structures involving a risk of purposeful discrimination.[238] Thus, the results test would apply to every state's electoral structure. Moreover, unlike the duration of the 1977 Act in *Fullilove*,[239] the duration of the results test is unlimited.[240]

In sum, Congress' objective of preventing purposeful minority vote dilution under the fourteenth amendment is a legitimate end. This legitimate end, however, does not justify the enactment of an inappropriate means—the potentially overinclusive results test. The results test is overinclusive because unlike existing law,[241] which requires that all evidence in voting rights cases be designed to prove purposeful discrimination, the primary legal objectives of the results test are unrelated to proving discriminatory purpose.[242] The results test, therefore, could strike down a great many constitutionally legitimate electoral laws—laws which are not purposefully discriminatory. Since none of the mitigating factors which helped to overcome objections to overinclusiveness in *Oregon*, *Rome*, and *Fullilove* apply to the results test's overinclusiveness, the constitutionality of the results test as a means is questionable.

### B. *The Results Test as an End*

The other constitutional basis which the committee report cites for a results test is the objective of remedying the present effects of past purposeful discrimination:

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strated. A waiver may be granted at any time during the contracting process, or even prior to letting contracts if the facts warrant.

448 U.S. at 487–88.

237. *Id.* at 489 (footnote omitted).

238. *See supra* text accompanying notes 132–207. Section 5 may be distinguished from § 2 precisely because it is tailored to the prohibition of electoral laws involving a risk of purposeful discrimination. *See supra* text accompanying notes 228–29.

239. *See supra* text accompanying note 237.

240. SUBCOMM. REPORT, *supra* note 5, at 44–45.

241. *See supra* text accompanying notes 22–131.

242. *See supra* text accompanying notes 145–46.

> Voting practices which have a discriminatory result also frequently perpetuate the effects of past purposeful discrimination, and continue the denial to minorities of equal access to the political processes which was commenced in an era in which minorities were purposefully excluded from opportunities to register and vote. These Section 2 Amendments also provide an appropriate and reasonable remedy for overcoming the effects of this past purposeful discrimination against minorities.[243]

As an abstract matter, the objective of "overcoming the effects of . . . past purposeful discrimination against minorities"[244] is a legitimate end "within the scope of the constitution."[245] Upon closer examination, however, its legitimacy becomes dubious. Initially, the meaning of the phrase "the [present] effects of this past purposeful"[246] exclusion of minorities from opportunities to register and vote must be identified. The committee report states that the effects of past purposeful discrimination are "the [continuing] denial to minorities of equal access to the political processes."[247] To better understand this suggested continuing constitutional violation, the concept of denial of "equal access to the political processes" must be examined.

The committee report cites *Kirksey v. Board of Supervisors*,[248] as an example of past purposeful exclusion of minorities from opportunities to register and vote, which exclusion has been perpetuated in the form of unequal access for minorities to the political processes. *Kirksey* involved an action brought by black residents of Hinds County, Mississippi, challenging the implementation of a redistricting plan for the county board of supervisors and other county officers.[249] The Fifth Circuit, on rehearing en banc, struck down the plan as an unconstitutional continuation of a purposeful denial of access to the political process.[250] In striking down the redistricting plan, the Fifth Circuit looked to the factors delineated in *White v. Regester*[251] as indicative of a denial of access to the political process:

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243. HOUSE REPORT, *supra* note 5, at 31.

244. *Id.*

245. McCulloch v. Maryland, 17 U.S. (Wheat.) 316, 421 (1819). *See supra* note 212 and accompanying text.

246. HOUSE REPORT, *supra* note 5, at 31.

247. *Id.*

248. 554 F.2d 139 (5th Cir.) (rehearing en banc), *cert. denied*, 434 U.S. 968 (1977).

249. *Id.* at 140–42.

250. *Id.* at 151.

251. 412 U.S. 755 (1973). For a discussion of *White*, see *supra* text accompanying notes 84–92.

> a history of official racial discrimination which touched the right of the minority to register and vote and to participate in the democratic process . . .; a historical pattern of a disproportionately low number of minority group members being elected to the legislative body . . .; a lack of responsiveness on the part of elected officials to the needs of the minority community . . .; a depressed socioeconomic status which makes participation in community processes difficult . . .; and rules requiring a majority vote as a prerequisite to nomination . . . .[252]

The committee report also delineates factors relevant to a violation of the results test and, like the court in *Kirksey*, bases these factors on *White v. Regester*.[253] The objective factors delineated in the committee report, however, differ from those set forth in *Kirksey* in two respects: First, the committee report explicitly removes "responsiveness of elected officials to the minority community" from its list of factors relevant to a violation of the results test;[254] and second, the committee report makes no mention of the depressed socioeconomic status of minorities.[255]

The effect of these differences is significant. By excluding "responsiveness of elected officials" and omitting mention of minorities' socioeconomic conditions, the committee report's definition of unequal access is confined to factors relating solely to whether minorities are proportionally represented. Of the remaining three factors listed in *Kirksey*[256], the only one which lends a definitive meaning to unequal access is "a historical pattern of a disproportionately low number of minority group members being elected to the legislative body."[257] In sum, given the committee report's citation of *Kirksey* as an example of unequal access to the political

252. *Kirksey*, 554 F.2d at 143. The court in *Kirksey* stated further: "By proof of an aggregation of at least some of these factors, or similar ones, a plaintiff can demonstrate that the members of a particular group in question are being denied access." *Id.*

253. *See supra* text accompanying notes 161–69.

254. HOUSE REPORT, *supra* note 5, at 30.

255. *See id.*

256. The remaining factors are: (1) "a history of official racial discrimination which touched the right of the minority to register and vote and to participate in the democratic process"; (2) "a historical pattern of a disproportionately low number of minority group members being elected to the legislative body"; and (3) "rules requiring a majority vote as a prerequisite to nomination. *Kirksey*, 554 F.2d at 143.

257. *Id.* It is difficult to envision how "a history of official racial discrimination which touched the right of the minority to register and vote and to participate in the democratic process" would help to define the present constitutional wrong of unequal access. As Justice Stewart, writing for the plurality in *Bolden*, stated, "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." 446 U.S. at 74. It is also difficult to understand how "rules requiring a majority vote as a prerequisite to nomination" can constitute a constitutional violation.

process, the report's removal of official responsiveness from consideration, and its omission of socioeconomic conditions from its list of factors relevant to a violation, the committee report defines unequal access to the political process as a lack of proportional representation of minorities.[258]

Thus, the constitutionality of the results test as an end depends upon whether the remedying of this unequal access—the lack of proportional representation—is a constitutionally legitimate end. The Court, however, has never recognized lack of proportional representation as a per se constitutional violation.[259] The Court has recognized only that a consideration of race or ethnicity may be employed in setting up electoral districts which remedy situations where purposeful minority vote dilution has occurred or where Congress has determined that a risk of such purposeful dilution exists.[260] Before it may be concluded, however, that the results test's objective of remedying disproportionate representation is unconstitutional, it must be determined whether Congress, on its own, may determine what constitutes a fourteenth amendment violation.

The issue of congressional power under section 5 of the fourteenth amendment is a controversial one and is far from settled.[261] *Katzenbach v. Morgan*[262] is often cited as the source of this controversy. The plaintiffs in *Morgan* brought suit challenging section 4(e) of the Voting Rights Act[263] insofar as it pro tanto

258. *See supra* text accompanying notes 145–51.

259. *See supra* text accompanying note 82. The disclaimer in the results test language requires something extra besides a statistical absence of proportional representation, but the lack of proportional representation would be the primary factor. *See supra* note 152 and accompanying text.

260. *See, e.g.*, United Jewish Organizations of Williamsburgh, Inc. v. Carey, 430 U.S. 144 (1977), discussed *supra* in text accompanying notes 180–87. Congress has determined that a risk of purposeful voting discrimination exists in jurisdictions covered by § 5 of the Voting Rights Act. *See supra* text accompanying note 228.

261. *See generally*, L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 5–14 (1978).

262. 384 U.S. 641 (1966). *See generally* Buchanan, Katzenbach v. Morgan *and Congressional Enforcement Power Under the Fourteenth Amendment: A Study in Conceptual Confusion*, 17 HOUS. L. REV. 69 (1979) (argues that Congress, under the rubric of "promoting 14th amendment values," may prohibit state action which is not prohibited by the 14th amendment's self-executing force).

263. Voting Rights Act of 1965 § 4(e), 42 U.S.C. § 1973b(e) (1976). The full text of section 4(e) is as follows:

> (1) Congress hereby declares that to secure the rights under the fourteenth amendment of persons educated in American-flag schools in which the predominant classroom language was other than English, it is necessary to prohibit the States from conditioning the right to vote of such persons on ability to read, write, understand, or interpret any matter in the English language.
>
> (2) No person who demonstrates that he has successfully completed the sixth pri-

prohibited the enforcement of the election laws of New York requiring an ability to read and write English as a condition of voting.[264] The Court, however, upheld section 4(e) as "a proper exercise of the power granted to Congress by § 5 of the Fourteenth Amendment."[265]

The Court upheld section 4(e) on two alternative theories, the second of which is relevant to Congress' power to define constitutional violations.[266] Justice Brennan, delivering the opinion of the Court, argued that Congress could have independently concluded that New York's English language literacy test violated the equal protection clause of the fourteenth amendment,[267] notwithstanding a judgment by the Court seven years earlier that literacy tests do not per se violate the fourteenth and fifteenth amendments.[268] In the words of one commentator, the "novelty [of this theory] lay in the assumed claim of Congress to the post of constitutional interpreter."[269]

The *Morgan* Court affirmed Congress' power to invalidate a state electoral law even though the Court had previously held that

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> mary grade in a public school in, or a private school accredited by, any state or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English, shall be denied the right to vote in any Federal, State, or local election because of his inability to read, write, understand, or interpret any matter in the English language, except that in States in which State law provides that a different level of education is presumptive of literacy, he shall demonstrate that he has successfully completed an equivalent level of education in a public school in, or a private school accredited by, any State or territory, the District of Columbia, or the Commonwealth of Puerto Rico in which the predominant classroom language was other than English.

*Id.*

264. *Id.* at 643–44.

265. *Id.* at 646.

266. The first theory viewed § 4(e) as a constitutional *means* rather than as a legitimate *end*. *Id.* at 652–53.

267. *Id.* at 653–56.

268. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959). Regarding *Lassiter*, the Court in *Morgan* stated:

> [O]ur task in this case is not to determine whether the New York English literacy requirement as applied to deny the right to vote to a person who successfully completed the sixth grade in a Puerto Rican school violates the Equal Protection Clause. Accordingly, our decision in *Lassiter v. Northampton Election Bd.* . . . sustaining the North Carolina English literacy requirement as not in all circumstances prohibited by the first sections of the Fourteenth and Fifteenth Amendments, is inapposite. . . . *Lassiter* did not present the question before us here: Without regard to whether the judiciary would find that the Equal Protection Clause itself nullifies New York's English literacy requirement as so applied, could Congress prohibit the enforcement of the state law by legislating under § 5 of the Fourteenth Amendment?

384 U.S. at 649.

269. L. TRIBE, *supra* note 261, at 266.

literacy tests are not per se invalid. Thus, it may be argued that Congress can legitimately declare state electoral laws to be invalid under the results test even though in *Whitcomb v. Chavis* the Court declared that electoral laws which fail to produce proportional representation are not per se invalid.[270] *Morgan*, therefore, appears to support the constitutionality of the results test. The precedential impact of *Morgan*, however, is questionable for two reasons.

First, it is reasonable to distinguish the election law construed in *Morgan* from the results test, notwithstanding the broad language of Justice Brennan's opinion in *Morgan*. The test, as set forth by Justice Brennan, is that a congressional enactment extending the reach of the fourteenth amendment is constitutional if the Court can "perceive a basis upon which Congress might predicate a judgment that [a particular state law] . . . was an invidious discrimination in violation of the Equal Protection Clause."[271] In *Morgan* the Court may have deferred to Congress' expansion of the reach of the fourteenth amendment because Congress was extending an existing basic right—the right to vote—to a class of citizens previously excluded from that right.[272] The results test, on the other hand, would create in effect a new right, the right to a degree of proportional representation.[273] Thus, it might be argued that though *Morgan*, on its face, supports the constitutionality of the results test, the substantive differences between *Morgan* and the proposed results test render *Morgan* inapposite to the issue of whether the proposed results test is a constitutionally legitimate end.

The second basis upon which the relevance of *Morgan* to the results test may be questioned is the *Morgan* decision's lack of precedential impact. Congressional power to expand the reach of the fourteenth amendment was only one of the theories by which the Court upheld section 4(e) of the Voting Rights Act.[274] The Court's other theory viewed section 4(e) of the Voting Rights Act as a constitutional means rather than as a legitimate end.[275] As

270. *See* 403 U.S. 124 (1971); *supra* note 82 and accompanying text.

271. *Morgan*, 384 U.S. at 656.

272. *See supra* text accompanying note 263.

273. *See supra* text accompanying notes 132–207. The right would not be absolute because of the disclaimer, but the absence of the proportional representation plus "something extra" would establish a violation. *See supra* note 152 and accompanying text.

274. *See supra* text accompanying notes 267–69.

275. *Morgan*, 384 U.S. at 652–53.

Justice Rehnquist has suggested,[276] *Morgan*'s precedential value is therefore lessened because the Court did not solely rely upon the theory of Congress-as-constitutional-interpreter.

*Morgan*'s precedential value is further lessened by the subsequent case of *Oregon v. Mitchell*.[277] *Mitchell* addressed, but failed to answer conclusively, the *Morgan* issue of whether Congress has the power to define constitutional violations. The issue arose in the Court's determination of the constitutionality of one of the Voting Rights Act Amendments of 1970[278] which granted 18-year-olds the right to vote in both federal and state elections.

Congress justified the legislation on the theory that the equal protection clause prohibits discrimination in suffrage between individuals aged 18 to 21 and individuals over 21.[279] Thus, Congress assumed the power to expand the coverage of the fourteenth amendment beyond the scope of prior judicial rulings as *Morgan* had suggested it might do. The Court, however, ruled that although Congress could lower the voting age to 18 in federal elections, it could not do so in state elections.[280] The Court arrived at this result in the following manner: four Justices concluded that Congress *could* lower the voting age in *both* federal *and* state elections;[281] four Justices concluded that Congress could *not* lower the

276. City of Rome v. United States, 446 U.S. 156, 220 n.8 (1980) (Rehnquist, J., dissenting).

277. 400 U.S. 112 (1970).

278. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 302, 84 Stat. 314, 318. Section 302 provides:

> Except as required by the Constitution, no citizen of the United States who is otherwise qualified to vote in any State or political subdivision in any primary or in any election shall be denied the right to vote in any such primary or election on account of age if such citizen is eighteen years of age or older.

279. The congressional findings accompanying § 302 stated that a requirement that a voter be 21 years old:

> (1) denies and abridges the inherent constitutional rights of citizens eighteen years of age but not yet twenty-one years of age to vote—a particularly unfair treatment of such citizens in view of the national defense responsibilities imposed upon such citizens;
>
> (2) has the effect of denying to citizens eighteen years of age but not yet twenty-one years of age the due process and equal protection of the laws that are guaranteed to them under the fourteenth amendment of the Constitution; and
>
> (3) does not bear a reasonable relationship to any compelling State interest.

*Id.* § 301, 84 Stat. at 318.

280. Justice Black announced the judgment of the Court. *Oregon*, 400 U.S. at 118.

281. Justice Douglas, in his opinion, stated: "The grant of the franchise to 18-year-olds by Congress is in my view valid across the board." *Id.* at 135. Justice Douglas went on to say, "Congress might well conclude that a reduction in the voting age from 21 to 18 was needed in the interest of equal protection." *Id.* at 141. Justices Brennan, White, and Marshall, joining together in an opinion, stated:

> We believe there is serious question whether a statute granting the franchise to

voting age in *any* election, federal or state;[282] and Justice Black concluded that Congress had the power to lower the voting age in federal *but not* in state elections[283]—a proposition which all eight of the other Justices rejected. In the words of one commentator, "The Court's 'last word' (so far) on this issue is thus quite literally incomprehensible."[284]

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citizens 21 and over while denying it to those between the ages of 18 and 21 could, in any event, withstand present scrutiny under the Equal Protection Clause. Regardless of the answer to this question, however, it is clear to us that proper regard for the special function of Congress in making determinations of legislative fact compels this Court to respect those determinations unless they are contradicted by evidence far stronger than anything that has been adduced in these cases. We would uphold § 302 as a valid exercise of congressional power under § 5 of the Fourteenth Amendment.

*Id.* at 240.

282. Justice Stewart, in an opinion in which Chief Justice Burger and Justice Blackmun joined, stated: "Congress was wholly without constitutional power to alter—for the purpose of *any* elections—the voting age qualifications now determined by the several States." *Id.* at 282 (emphasis supplied). Furthermore, Stewart opined:

> In my view, neither the *Morgan* case, nor any other case upon which the Government relies, establishes such congressional power, even assuming that all those cases were rightly decided. Mr. Justice Black is surely correct when he writes, ". . . It is obvious that the whole Constitution reserves to the States the power to set voter qualifications in state and local elections, except to the limited extent that the people through constitutional amendments have specifically narrowed the powers of the States." . . . [I]t is equally plain to me that the Constitution just as completely withholds from Congress the power to alter by legislation qualifications for voters in federal elections, in view of the explicit provisions of Article I, Article II, and the Seventeenth Amendment.

*Id.* at 293–94. Justice Harlan, in his opinion, stated: "I think that the history of the Fourteenth Amendment makes it clear beyond any reasonable doubt that no part of the legislation now under review can be upheld as a legitimate exercise of congressional power under that Amendment." *Id.* at 155.

283. Justice Black stated:

> [T]he responsibility of the States for setting the qualifications of voters in congressional elections was made subject to the power of Congress to make or alter such regulations if it deemed it advisable to do so. . . . Moreover, the power of Congress to make election regulations in national elections is augmented by the Necessary and Proper Clause.

*Id.* at 119–20. Justice Black further commented:

> In short, the Constitution allotted to the States the power to make laws regarding national elections, but provided that if Congress became dissatisfied with the state laws, Congress could alter them. . . . I would hold, as have a long line of decisions in this Court, that Congress has ultimate supervisory power over congressional elections. Similarly, it is the prerogative of Congress to oversee the conduct of presidential and vice-presidential elections and to set the qualifications for voters for electors for those offices. It cannot be seriously contended that Congress has less power over the conduct of presidential elections than it has over congressional elections.
>
> On the other hand, the Constitution was also intended to preserve to the States the power that even the Colonies had to establish and maintain their own separate and independent governments, except insofar as the Constitution itself commands otherwise.

*Id.* at 123–24 (footnotes omitted).

284. L. TRIBE, *supra* note 248L, at 267.

*Morgan*, therefore, is not a solid precedent on which to base Congress' power to enact the results test for three reasons: (1) the reach of *Morgan* beyond its own factual situation is unclear;[285] (2) it did not solely rely on the theory of Congress-as-constitutional-interpreter;[286] and (3) subsequent cases have failed to clarify its precedential impact.[287] The issue of when Congress may expand the reach of the fourteenth amendment is still an open question. Because the results test creates a significant new fourteenth amendment right to a degree of proportional representation, it would seem wise to heed Justice Harlan's compelling argument:

> In Article V, the Framers expressed the view that the political restraints on Congress alone were an insufficient control over the process of constitution making. The concurrence of two-thirds of each House and of three-fourths of the States was needed for the political check to be adequate. To allow a simple majority of Congress to have final say on matters of constitutional interpretation is therefore fundamentally out of keeping with the constitutional structure.[288]

In sum, the constitutionality of the results test is questionable in light of both its stated objectives. Its constitutionality may be attacked as a means of preventing purposeful voting discrimination because it may potentially strike down a great many constitutionally legitimate state statutes.[289] It may also be attacked in its capacity as an end because it expands the reach of the fourteenth amendment into an area already explicitly avoided by the Supreme Court.[290] Moreover, the theory that Congress may expand the substantive reach of the fourteenth amendment lacks solid precedential authority[291] and as a matter of constitutional policy is unwise.

## IV. POLITICAL ANALYSIS

### A. *The Political Philosophy Behind the Results Test*

The proponents of the results test believe that the "denial to

285. *See supra* text accompanying notes 271–73.

286. *See supra* text accompanying notes 274–76.

287. *See supra* text accompanying notes 277–84.

288. *Oregon*, 400 U.S. at 205 (Harlan, J., concurring in part and dissenting in part). *See also* SUBCOMM. REPORT, *supra* note 51, at 63–65 (arguing that Congress lacks authority to enact the results test).

289. *See supra* text accompanying notes 213–42.

290. *See supra* text accompanying notes 259–60.

291. *See supra* text accompanying notes 271–84.

minorities of equal access to the political process"[292] will be remedied by fostering the proportional representation of minorities.[293] This view of the problem and its solution are based on the assumption that minorities do not have access to the political process if they are not represented by members of their own minority group.[294] The results test proponents, therefore, argue that electoral schemes which result in the consistent defeat of minority candidates by bloc voting majorities over a substantial period of time should be replaced with electoral schemes which have a better chance of producing proportional representation. Thus, the fundamental premise of their argument is that *a person who is not a member of a racial or language minority group will not represent the interests of that minority group*. This premise is composed of two elements: (1) that racial and language minority groups have interests unique to themselves; and (2) that people who are not members of a particular minority group will not represent those interests.[295]

### 1. *Group Representation*

The committee report impliedly supports the idea that minorities have unique group interests, by explicitly referring to "the interests of a racial or language minority."[296] The idea of group representation in the state legislatures, however, runs counter to existing constitutional principles. Indeed, *Reynolds v. Sims*—which the proponents of the results test erroneously cite as the fountainhead of the minority vote dilution principle[297]—supports the idea that it is individuals who are represented in our state legislatures: "Legislators are people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests."[298]

Several Supreme Court opinions discuss the problems which might arise from the adoption of the concept of minority group

292. *See supra* text accompanying notes 244–58.

293. *See supra* text accompanying notes 145–92.

294. The reference in the committee report to "[nonminority] candidate identified with the interests of a racial or language minority" is merely a smoke screen. *See supra* text accompanying notes 154–57.

295. *Id.*

296. HOUSE REPORT, *supra* note 5, at 30 (1981) (emphasis added).

297. *See supra* text accompanying notes 57–60. *Contra* Comment, *Constitutional Challenges to Gerrymanders*, 45 U. CHI. L. REV. 845 (1978) (arguing that *Reynolds* actually spawned the legal principle of group voting rights).

298. *Reynolds*, 377 U.S. at 562.

representation. In *Whitcomb*, the Court discussed the difficulty of containing a principle of group representation:

> [A standard] guaranteeing one racial group representation . . . is expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district. This approach would make it difficult to reject claims of Democrats, Republicans, or members of any political organization. . . . There are also union oriented workers, the university community, religious or ethnic groups occupying indentifiable areas of our heterogeneous cities and urban areas.[299]

Members of the Court have also questioned the wisdom of molding our electoral laws around racial and language minority interests. Justice Douglas, in his dissenting opinion in *Wright v. Rockefeller*, pointed out that racial divisiveness can be generated by drawing legislative district lines on the basis of racial interests:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.[300]

Chief Justice Burger's dissent in *United Jewish Organizations* documented the potential for racial and ethnic animosity generated by racial gerrymandering:

> [T]hose described as "nonwhites" include, in addition to Negroes, a substantial portion of Puerto Ricans. The Puerto Rican population . . . has expressly disavowed any identity of interest with the Negroes, and, in fact, objected to the 1974 redistricting scheme because it did not establish a Puerto Rican controlled district within the county.[301]

In addition to the problems of containing the group representation idea and the potential divisiveness of drawing district lines on the basis of minority demography, there is no clear ambit of "minority group interests." Past and present discrimination cer-

299. *Whitcomb*, 403 U.S. at 156–57. *But cf.* Note, *supra* note 180, at 57 (arguing for the recognition of group voting rights which would be limited to *racial* groups by the parameters of the 15th amendment). For a discussion of *Whitcomb*, see *supra* text accompanying notes 76–83.

300. *Wright*, 376 U.S. at 67. For a discussion of *Wright*, see *supra* note 94.

301. United Jewish Organizations, 430 U.S. at 185. For a discussion of *United Jewish Organizations*, see *supra* text accompanying notes 180–87.

tainly provides members of a minority group with a common interest in lobbying for governmental efforts to eliminate such discrimination. There is, however, little reason to assume that beyond the common interest of combatting discrimination, members of minority groups will vote in a bloc. Indeed, Justice Stevens asserted that such an assumption is an affront to members of minority groups:

> Respect for the citizenry in the black community compels acceptance of the fact that in the long run there is no more certainty that these individuals will vote alike than will individual members of any other ethnic, economic, or social group. The probability of parallel voting fluctuates as the blend of political issues affecting the outcome of an election changes from time to time to emphasize one issue, or a few, rather than others, as dominant. The facts that a political group has its own history, has suffered its own special injustices, and has its own congeries of special political interests, do not make one such group diffrent from any other in the eyes of the law.[302]

### 2. *"Representation" of Minorities*

Justice Stevens' observation calls into question the assumption that people who are not members of a particular minority group generally will not represent minority group interests—the second element of the premise behind proportional representation.[303] If, as Justice Stevens suggests, minority group interests are only a small portion of the interests which form the political complexion of the country, there is no reason why that assumption should hold. It is groundless to argue that a white representative could not represent the economic, environmental, health, and security interests of black constituents, because those interests pertain to people as people, not as members of a minority group. Moreover, there is no basis for asserting that a nonminority representative cannot be sensitive to the interests of minorities in combating discrimination.[304]

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302. *Bolden*, 446 U.S. at 89 n.10.

303. *See supra* text accompanying note 295.

304. Indeed, the civil rights movement and the legislation which it has produced is testimony to the sensitivity of many nonminority Americans to the plight of minorities. If insensitivity was the norm, there would be no such legislation. This is certainly not to deny the discrimination which exists today in our country. It is simply to attack as erroneous the presumption that an individual is best represented by a member of his or her racial or ethnic group. *See also* SUBCOMM. REPORT, *supra* note 51, at 42. *Cf.* THE FEDERALIST No. 35 (A. Hamilton) (arguing that in a free society there can never be—nor would it be desirable that there be—a situation where each class of society is represented by one of its own).

Justice Rehnquist, dissenting in *Rome v. United States*, attacked the idea that good representation requires proportional representation. He noted that blacks who had testified in Rome had expressed no dissatisfaction with white representation, but merely a preference to be represented by blacks.[305]

Thus, the results test, as a matter of public policy, could have adverse ramifications. The results test is based on the goal of *group* representation which is antithetical to the prevailing standard of *individual* voting rights, could be difficult to contain to particular groups, is potentially divisive, and erroneously assumes that racial and ethnic minorities stand together as interest groups across the complex of issues dividing our society. Moreover, the results test is based on the invalid assumption that racial and ethnic minorities are best represented by members of their own minority group.

### B. *Ramifications of the Results Test On Constitutional Structure*

While the results test would promote proportional representation of minorities,[306] representation by nonminority candidates "identified with the interests of a racial or language minority" would purportedly satisfy the results test as well.[307] In litigating section 2 cases, courts accordingly would have to determine which nonminority candidates in a challenged jurisdiction have been "identified with the interests of [minorities]." Such determinations might breach the Constitution's separation of powers.

There are two possible approaches the courts could use in ruling on which candidates identify with the interests of minorities. First, they could use a statistical approach—a factual determination of which candidates a bloc voting minority group has voted for. It is something of a political leap of faith, however, to assume that because a candidate has been endorsed by a political group that he or she is necessarily identified with the interests of that minority group. In order to ascertain a more substantive identification, a court might engage in a second approach, which would seek to determine what minority interests are and how a particular

305. *Rome*, 446 U.S. at 218 (Rehnquist, J., dissenting).

306. *See supra* text accompanying notes 145–51.

307. The House Judiciary Committee Report defines minority vote dilution as the situation where "a bloc voting majority over a substantial period of time consistently . . . defeat[s] minority candidates or *candidates identified with the interests of a racial or language minority*." HOUSE REPORT, *supra* note 5, at 30 (1981) (emphasis added). *But see supra* text accompanying notes 154–57.

candidate's platform and past record in office stood in relation to those interests. This would breach the separation of powers by requiring judicial determinations on strictly political issues.[308] Apparently recognizing this problem, the committee report, states that the results test will not impose on the courts the task of ruling on subjective political issues, such as responsiveness to minority interests.[309]

To enforce the results test, courts will be involved in striking down states' multimember electoral schemes pursuant to federal law, and in setting up alternative electoral systems. This could have deleterious effects on the nation's federal structure. Indeed, it can be argued that a state's power to determine its own form of electoral structure is the most important element of the state's independent sovereignty.[310] Thus, the doctrine of federalism suggests that the question of whether to adopt single-member as opposed to multimember electoral schemes is a choice to be made by the citizens and legislatures of each state.[311]

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308. For a general discussion of the importance of the Constitution's separation of powers, see THE FEDERALIST Nos. 47, 48, 51 (J. Madison).

309. *See supra* text accompanying note 157.

310. *See* Oregon v. Mitchell, 400 U.S. 112 (1970). Justice Black stated in *Mitchell*:

> No function is more essential to the separate and independent existence of the States and their governments than the power to determine within the limits of the Constitution the qualifications of their own voters for state, county, and municipal offices and the nature of their own machinery for filling local public offices.

*Id.* at 125.

311. The committee report views multimember districts as undesirable due to their tendency to "dilute" the votes of minorities: "Numerous empirical studies based on data collected from many communities have found a strong link between at-large elections and lack of minority representation." HOUSE REPORT, *supra* note 5, at 30 (1981). Many reasons, however, have been set forth in support of multimember districts including: (1) their tendency to focus represtantives' attention toward more broad-based concerns; (2) a similar tendency to focus voters' attention toward general community issues; (3) avoidance of gerrymandering; and (4) less difficulty in complying with the one-person, one-vote requirement. *See* Holt v. Richardson, 240 F. Supp. 724, 727 (D. Hawaii 1965). Even in terms of representing minority interests per se, the proposition that single-member districts are inherently preferable to multimember districts is questionable. Under a single-member scheme, a member of a minority group likely will be elected to a governing body, but will then be a minority in that governing body. Under a multimember scheme, however, a bloc voting minority group could constitute swing votes in the election of all the representatives. Which electoral scheme benefits minority groups more is less than obvious and, as such, is a political issue which should be left to the voters of each state—not to the judiciary. For a stark example of the disagreement over whether controlling power in one district or swing power in several districts is desirable, see Wright v. Rockefeller, 376 U.S. 52 (1964), where plaintiffs "prefer[red] a more even distribution of minority groups among the four congressional districts," but incumbent minority politicians, as intervenors in the case, "argue[d] strenuously that the kind of districts for which [plaintiffs] contended would be undesirable . . . . " *Id.* at 58. *See also* Dantzler, *Electoral Law: Multimember Districts*, 1978 ANN.

In sum, the results test poses two potentially profound ramifications for the nature of the nation's constitutional structure. First, the results test may cause the constitutional separation of powers to be breached by asking the courts to rule on what legislation is desirable for minority groups and which candidates have adequately supported that legislation.[312] Second, the results test may impair the nation's federal structure by giving the judiciary the ability to disestablish state electoral schemes pursuant to federal law.[313]

## CONCLUSION

The concern which gives rise to the proposal to add a results test to section 2 of the Voting Rights Act is the continuing unequal application of our nation's laws to racial and language minorities. The motivation behind the results test is the belief that by ensuring a degree of proportional representation, minorities will be well-represented and will finally be guaranteed equal protection of the laws.[314] But rather than ameliorating discrimination, the results test threatens to encourage it.

The results test would be unable to fulfill its objective of ensuring equal application of the laws to minorities because the test is based on the fallacy that a black representative would necessarily be an effective representative for black constituents and conversely, that a white representative probably would not be an effective representative for black constituents.[315] A representative's effectiveness, however, depends on his or her individual sincerity and competence. A belief that a representative's race or ethnicity is a measure of his or her effectiveness has no place in a society struggling to rid itself of prejudice.

In addition to the results test's inherent ineffectiveness in achieving its goals, the test might actually cause a worsening of discrimination in our nation because it would institutionalize race and language minority status in the national voting laws.[316] The underlying standard of proportional representation could, in effect, force state legislatures to draw their electoral district lines on

SURV. AM. L. 91 (discussing the judiciary's inconclusiveness about the relative desirability of multimember districts).

312. *See supra* text accompanying notes 306–09.

313. *See supra* text accompanying note 310.

314. *See supra* text accompanying notes 244–58.

315. *See supra* text accompanying notes 303–05.

316. *See supra* text accompanying notes 300–01.

the basis of race and language minority status.[317] But as Chief Justice Burger observed in *United Jewish Organizations*, the proper remedy for racial and ethnic bias in districting is to reapportion districts along neutral lines.[318]

The source of the problem of unequal application of the laws is not the lack of proportional representation. While the problem prior to enactment of the Voting Rights Act was the absence of representation, the problem today is not the lack of proportional representation, but rather, the problem of insensitive or unresponsive representation. The remedies are, therefore, concerted political action to achieve responsiveness and targeted legal action[319] aimed at individual instances of insensitivity and outright bigotry. Granted, these remedies are slow and piecemeal compared to the results test's alluring aim of achieving "better" representation in one single stroke. The results test, however, would not guarantee better representation[320] and could result in reinforcing the racial and ethnic antagonisms which the civil rights movement of the last generation has fought so hard to eliminate.[321]

## ADDENDUM: THE REVISED VERSION OF SENATE BILL 1992

The Senate Judiciary Committee, on May 4, 1982, adopted new language for the amendment to section 2 of the Voting Rights Act.[322] The following analysis of the new S. 1992 language[323] concludes that it may be viewed as either similar to the H.R. 3112 results test passed by the House of Representatives[324], or it may be

317. *See supra* text accompanying notes 175–92.

318. 430 U.S. at 186 (Burger, C.J., dissenting). *But see* Martin, *The Quest for Racial Representation in Legislative Apportionment*, 21 How. L.J. 455, 478–79 (1978) (criticizing Burger's statement and arguing for proportional representation of racial minorities).

319. *See, e.g.*, 42 U.S.C. § 1983 (1976):

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

320. *See supra* text accompanying notes 303–05.

321. *See supra* text accompanying notes 300–01.

322. The new language was adopted by a vote of fourteen to four. *Dole Paves Way for Voting Rights Collapse*, HUMAN EVENTS 3 (May 15, 1982).

323. "New S. 1992 language" refers to the language adopted by the Senate Judiciary Committee on May 4, 1982 to amend section 2 of the Voting Rights Act. Prior to the Judiciary Committee's action, the "old S. 1992" proposal to amend section 2 of the Voting Rights Act had been identical to the H.R. 3112 language. *See supra* text accompanying note 12.

324. *See supra* text accompanying note 12.

viewed as an evidentiary rule consistent with, though not identical to, the existing intent standard followed by the courts.[325] The former interpretation raises the same policy and constitutional problems inherent in the H.R. 3112 legislation,[326] while the latter interpretation avoids those problems and is therefore more compelling.

The new language of S. 1992 changes section 2 of the Voting Rights Act of 1965[327] by substituting the following language:

> Sec. 2(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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 or political subdivision 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.[328]

The first sentence of the new Senate language is identical to the H.R. 3112 language[329] except for the addition of the qualifier, "as provided in subsection b." Subsection (b) is substituted for the disclaimer language of H.R. 3112.[330] The final clause of the new Senate language—"nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population"—is substantively the same, since both disclaimers essentially provide that the amendment is not meant to establish an *absolute* right to proportional represen-

325. *See supra* text accompanying notes 76–131.

326. For an analysis of the policy problems inherent in the H.R. 3112 legislation see *supra* text accompanying notes 292–313. For an analysis of the constitutional problems see *supra* text accompanying notes 208–91.

327. Pub. L. No. 89–110, 79 Stat. 437 (1905) (codified at 42 U.S.C. §§ 1971, 1973–1973bb-1 (1976)).

328. S. 1992, as amended, 97th Cong., 2d Sess. § 3 (1982).

329. *See supra* text accompanying note 12.

330. *See supra* text accompanying notes 149–52.

tation.[331] When examining the remaining language of subsection (b) it is readily apparent that it is taken, almost verbatim, from *White v. Regester*.[332]

As shown above,[333] *White* was an ambiguous decision. While the judicial standard applied in the decision regarding Dallas County appears to have been an intent test, the decision regarding Bexar County was based on judicial findings concerning a variety of factors not employed to prove intentional discriminatory use of the electoral process.

The differing standards employed in *White* manifest different approaches to the role of proportional representation in discrimination cases. The disestablishment of the Dallas County multimember district and its replacement with single-member districts exemplifies a view of proportional representation as a remedy for the purposeful exclusion of minorities from the electoral process. The decision was based on the implicit recognition that where an electoral structure is being purposefully used to exclude a minority group from the political process, the only remedy is to disestablish that electoral structure and replace it with one which ensures that some members of the minority group can be elected to office, despite the ill intentions of the majority.[334] The disestab-

331. The fact that neither H.R. 3112 nor the new version of S. 1992 establishes an *absolute* right to proportional representation does little to diffuse the opposition to amending section 2 of the Voting Rights Act, since the issue remains as to what must be shown in addition to a lack of proportional representation in order to establish a violation of section 2.

332. 412 U.S. 755 (1973). The new S. 1992 language was drawn from the following language in *White*:

> The plaintiff's burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents of the district to participate in the political processes and to elect legislators of their choice.

*Id.* at 766.

333. *See supra* text accompanying notes 84–92.

334. This implicit recognition by the Court may be drawn from the following language:

> [The Dallas Committee for Responsible Government (DCRG)] did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." [343 F. Supp.], at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," [343 F. Supp.], at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District

lishment of the multimember district in Bexar County, however, exemplifies the different view of proportional representaton as a remedy for general discrimination.[335]

Since the S. 1992 language was drawn from *White*,[336] its operative impact will depend on whether it is interpreted in light of the Dallas County decision or the Bexar County decision. If S. 1992 is interpreted in light of the Dallas County analysis, it will stand as an *evidentiary rule* manifesting congressional intent with regard to proof of discriminatory purpose. It would, in effect, serve as a congressional adoption of Justice White's dissent to *Bolden*, which recognized an intent standard but objected to the plurality's point-by-point invalidation of the evidence introduced by plaintiffs to prove discriminatory intent.[337] The "totality of circumstances" test would stand as a congressional direction to courts to look at evidence as a totality, rather than piece-by-piece, when determining whether discriminatory intent has been proven. Under such an analysis, the absence of proportional representation would simply constitute one type of evidence, amid the totality, which could be used to prove intentional discrimination.[338]

Interpreting the S.1992 language in light of the Bexar County analysis would produce a very different operative impact for the legislation. Under a Bexar County analysis, plaintiffs would be able to prove an "exclusion" from the political process without proving intent.[339] Therefore, evidence of a lack of proportional

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Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

412 U.S. at 767. Single-member districts were therefore sustained by the Court as an appropriate remedy for the condition of "not [being] permitted to enter into the political process in a reliable and meaningful manner."

335. *See supra* text accompanying notes 89–92.

336. *See supra* note 332.

337. Mobile v. Bolden, 446 U.S. 55, 94–103 (1980). Justice White stated, in part:

> Although the totality of the facts relied upon by the District Court to support its inference of purposeful discrimination is even more compelling than that present in *White v. Regester*, the plurality today rejects the inference of purposeful discrimination apparently because each of the factors relied upon by the courts below is alone insufficient to support the inference. . . . By viewing each of the factors relied upon below in isolation, and ignoring the fact that racial bloc voting at the polls makes it impossible to elect a black commissioner under the at-large system, the plurality rejects the "totality of the circumstances" approach we endorsed in *White v. Regester*. . . .

*Id.* at 103.

338. The issue of what additional evidence would be required to prove purposeful use of an electoral structure to exclude minorities from the political process would have to be settled on a case-by-case basis.

339. The Court in *White* pointed to the district court's judgment that plaintiffs "are effectively removed from the political processes of Bexar [County]. . . ." 412 U.S. at 769.

representation, together with some general evidence of discrimination, would be sufficient to establish a violation, thereby allowing judicial restructuring of the electoral system in order to produce proportional representation.[340] Put another way, while under a Dallas County analysis, a totality of evidence would have to reach the threshold of proving intent in order to establish a violation, there is no objective evidentiary threshold under a Bexar County analysis.[341] The judge could make a subjective determination of whether proportional representation is needed in a given situation to remedy a group's alienation from the political process. Interpreting the S.1992 language under a Bexar County analysis therefore produces the same substantive amendment as the H.R. 3112 version passed by the House of Representatives. For example, under either an H.R. 3112 analysis or a Bexar County analysis, lack of proportional representation, plus racial or ethnic bloc voting, could be viewed by a judge as an "exclusion" of a minority from the political process, thus warranting creation of single-member districts or redrawing of existing district lines.[342]

It may be argued that the suggested Dallas County analysis is unreasonable in that proponents of a "results test" cannot be interpreted to have proposed legislation consistent with an "intent" standard. It should be recalled that the legislative initiative to amend section 2 of the Voting Rights Act arose out of opposition to the plurality opinion in *Mobile v. Bolden*.[343] There were two strong dissents to *Bolden*. Justice White's dissent *acknowledged an intent standard* but objected to the plurality's failure to look at the evidence as a totality.[344] This is a Dallas County analysis. Justice Marshall's dissent to *Bolden* went further and argued that intent is not a requirement for proving a constitutional violation, thus giving judges wide discretion in determining when an electoral struc-

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The danger of finding violations on the basis of effective exclusion as opposed to purposeful exclusion is that the former standard is more subjective than the latter.

340. The new language of S. 1992 provides only that lack of proportional representation is "one 'circumstance' which may be considered." *See supra* text accompanying note 328. Beyond this, there is no guidance as to what type or degree of additional evidence is required to constitute a violation.

341. In other words, proof of intent is a more objective standard for establishing a violation than is "effective exclusion." Without this burden of having to prove intent in minority vote dilution cases, there would be virtually no parameters on a judge's discretion to find violations.

342. *See supra* text accompanying notes 132–207.

343. *See supra* text accompanying notes 8–13.

344. *See supra* note 106 and accompanying text.

ture is unconstitutional.[345] This is a Bexar County analysis. Both approaches dissent to the plurality opinion in *Bolden*[346] and are therefore equally viable interpretations of legislation designed to alter the plurality's ruling in *Bolden*.[347]

Though both interpretations of the S. 1992 language are viable, there are crucial distinctions between them. The Bexar County approach presents the same profound policy and constitutional problems as the H.R. 3112 legislation.[348] The Dallas County approach avoids these policy and constitutional problems. Thus, when the S.1992 language reaches the courts, a responsible judicial application of S.1992 would be to adopt the Dallas County approach. Moreover, because the legislation passed the Senate Judiciary Committee as a "compromise bill," the legislation may be presumed to avoid some of the highly-debated policy problems posed by the H.R. 3112 test.

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345. 446 U.S. at 103–41. Justice Marshall stated, in part: "In my view, our vote-dilution decisions require only a showing of discriminatory impact to justify the invalidation of a multimember districting scheme, and, because they are premised on the fundamental interest in voting protected by the Fourteenth Amendment, the discriminatory-impact standard adopted by them is unaffected by *Washington v. Davis* . . . ." *Id.* at 104.

346. 446 U.S. at 58–83.

347. For an expression of support of the *White* standard by a proponent of the amendment to § 2, see *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary*, 97th Cong., 1st Sess. 2053 (1981).

348. *See supra* text accompanying notes 208–313. Lest the unconstitutionality of the approach based on a Supreme Court holding be challenged as illogical, it should be noted that the Bexar County portion of the decision in *White* is inconsistent with the predominant body of law in minority vote dilution cases. *See supra* text accompanying notes 130–31. The necessity of proving intent in minority vote dilution cases was indeed affirmed as a principle of constitutional law in Rogers v. Lodge, 102 S. Ct. 3272 (1982).