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The Bench and the Ballot: Applying the Protections of the Voting Rights Act to Judicial Elections

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THE BENCH AND THE BALLOT: APPLYING THE PROTECTIONS OF THE VOTING RIGHTS ACT TO JUDICIAL ELECTIONS

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I. INTRODUCTION

The report of the Florida Supreme Court Racial and Ethnic Bias Study Commission documents an exhaustive examination of the effects of racial and ethnic bias on the administration of justice in Florida.[1] One dominant theme of the study is the importance of diversity on the bench and at all levels of the judicial system. As the Study Commission concluded, "[t]he State simply cannot expect continued acceptance of a judicial system in which minorities are virtually invisible in positions of decision-making and responsibility."[2]

The Study Commission's findings coincide with major developments in litigation challenging at-large judicial election systems under Section 2 of the Voting Rights Act of 1965.[3] Reversing a 12-1 en banc decision of the Fifth Circuit,[4] the United States Supreme Court ruled last term in two companion cases that state election schemes for judges are covered by the requirements of Section 2 of the Voting Rights Act.[5] Black voters may therefore seek relief under Section 2

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1. REPORT AND RECOMMENDATIONS OF THE FLORIDA SUPREME COURT RACIAL AND ETHNIC BIAS STUDY COMMISSION (1991), *reprinted in* 19 FLA. ST. U. L. REV. 591 (1992) (reprinted with permission) [hereinafter STUDY COMMISSION].

2. *Id.* at 611-12.

3. 42 U.S.C. § 1973 (1988).

4. League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991).

5. Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991); Chisom v. Roemer, 111 S. Ct. 2354 (1991). Additionally, the Supreme Court confirmed that Section 5 of the Voting Rights Act, which contains similar language, also applies to the election of judges. Clark v. Roemer, 111 S. Ct. 2096 (1991). *See also* Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986) (mem.).

against at-large judicial election systems that deny them an equal opportunity to elect candidates of their choice to office.

Lawsuits targeting judicial elections are an outgrowth of more than two decades of litigation challenging racially discriminatory election schemes and practices under the Voting Rights Act and the Constitution. The Supreme Court held as early as 1969 that at-large election schemes, like literacy tests and other direct barriers to voter registration, were subject to challenge under the Voting Rights Act because of their potential to dilute minority voting strength.[6] In so ruling, the Supreme Court recognized that "the right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."[7]

The potentially discriminatory features of at-large election systems are readily understood. When multiple officeholders are elected at large from a predominantly white election district, a minority group within the district may be unable to elect its preferred candidates to any positions. This occurs when voting is polarized along racial lines.[8] The white electorate's ability to control the outcome of all of the elections under an at-large system creates a winner-take-all advantage for the majority group; even a substantial minority population may be effectively disfranchised.

The virtually all-white racial composition of many elected state judiciaries reflects the exclusionary features of at-large voting. Since 1984, the use of at-large elections for state judges has prompted the filing of voting rights lawsuits in twelve states, including Florida.[9]

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6. *See* Fairley v. Patterson, 393 U.S. 544 (1969) (companion case to Allen v. State Bd. of Elections, 393 U.S. 544 (1969)). In *Fairley*, the Court ruled that under Section 5 of the Voting Rights Act a legislative change from single-member districts to at-large elections required preclearance by the Department of Justice, because such a change may discriminate against minority voters. *See generally* FRANK R. PARKER, BLACK VOTES COUNT: POLITICAL EMPOWERMENT IN MISSISSIPPI AFTER 1965, at 97-99, 170-72 (1990).

7. 393 U.S. at 569.

8. *See* Thornburg v. Gingles, 478 U.S. 30, 47-48 (1986). Run-off or majority-vote requirements may reinforce this effect, as may the use of staggered terms, designated seats, and large election districts. *Id.* at 56. *See also* Rogers v. Lodge, 458 U.S. 613, 617, 627 (1982).

9. Davis v. Chiles, No. 90-40098 (N.D. Fla. filed June 5, 1990); Nipper v. Chiles, No. 90-447-CIV-J-16 (M.D. Fla. Nov. 23, 1990) (mem.). These lawsuits went to trial in October and were awaiting decision. In addition to these suits, in 1988 a plaintiff acting pro se filed a voting rights suit challenging circuit and county court elections in Hillsborough County. Al-Hakim v. Florida, No. 88-01416-CIV-T-10 (M.D. Fla. filed Sept. 21, 1988), *judgment for defs. vacated*, 948 F.2d 1296 (11th Cir. 1991). The case was tried on stipulated facts and the district court entered summary judgment in favor of defendants. The court of appeals vacated and remanded because the district court had not given the parties proper notice that the court was considering entry of summary judgment. *See* Al-Hakim v. Florida, No. 90-4148 (11th Cir. Nov. 12, 1991).

See also League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc) (challenging at-large elections for district judges in nine counties in

The Study Commission's report and the United States Supreme Court's recent decisions combine to make this an opportune time to examine the impact of the Voting Rights Act on judicial elections. To place these developments in the context of Florida's judicial election system, part I of this Article describes Florida's election scheme and those aspects that have been challenged in pending voting rights lawsuits. Part II of the Article describes the background of efforts to apply the protections of the Voting Rights Act to judicial elections, including the United States Supreme Court's decisions in *Chisom v. Roemer* and *Houston Lawyers' Ass'n v. Attorney General.* Part III then discusses the issues on which judicial election lawsuits are likely to focus in the wake of the Supreme Court's decisions, including issues surrounding the remedies that are available when an at-large judicial election system is found to be discriminatory.

II. FLORIDA'S AT-LARGE ELECTIONS FOR CIRCUIT AND COUNTY JUDGES

Florida has a two-level trial court system: the circuit courts, which are trial courts of general jurisdiction, and the county courts, whose

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Texas), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991); Chisom v. Edwards, 839 F.2d 1056 (5th Cir.) (challenging election of two Louisiana Supreme Court Justices from one supreme court district), *cert. denied sub nom.* Roemer v. Chisom, 488 U.S. 955 (1988), *after remand*, 917 F.2d 187 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2354 (1991); Tsosie v. King, No. CIV91-0905M (D.N.M. filed Sept. 9, 1991) (challenging system for electing New Mexico district court judges in one judicial district, and challenging method for electing magistrates in one New Mexico county); Lopez v. Monterey County, Cal., No. C-91-20559 (N.D. Cal. filed Sept. 6, 1991) (challenging changes to election system for municipal court judges in Monterey County, California); Bradley v. Indiana State Election Bd., No. IP91-898C (S.D. Ind. filed Aug. 9, 1991) (challenging retention elections for local Indiana judges); Cousin v. McWherter, CIV-1-90-0339 (E.D. Tenn. filed Aug. 31, 1990) (challenging election system for judges of the Eleventh Judicial Circuit and the Court of General Sessions of Hamilton County, Tennessee); Magnolia Bar Ass'n v. Lee, No. J90-0413(B) (S.D. Miss. filed Aug. 17, 1990) (challenging system for selecting Mississippi Supreme Court); Brooks v. State Bd. of Elections, 775 F. Supp. 1470 (S.D. Ga. 1989) (three-judge court) (challenging changes to Georgia superior court system), *aff'd*, 111 S. Ct. 288 (1990) (mem.); Southern Christian Leadership Conf. v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989) (challenging at-large elections for judges in Alabama judicial circuits and districts); Hunt v. Arkansas, No. PB-C-89-406 (E.D. Ark. filed July 27, 1989) (challenge to method of electing supreme court, court of appeals, circuit, chancery, and juvenile court judges in Arkansas); Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988) (challenging use of multi-member districts to elect district court, family court, and court of appeal judges in Louisiana), *appeal argued*, No. 91-3737 (5th Cir. Nov. 4, 1991); Mallory v. Eyrich, 666 F. Supp. 1060 (S.D. Ohio) (challenging method of electing municipal judges in an Ohio county), *rev'd*, 839 F.2d 275 (6th Cir. 1988); Williams v. State Bd. of Elections, 696 F. Supp. 1563 (N.D. Ill. 1988) (challenging at-large system for electing supreme court, appellate court, and circuit court judges in Cook County, Illinois; and appointment system for selecting associate circuit court judges in Cook County); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987) (challenging use of multi-member districts to elect chancery court chancellors, and district and circuit court judges throughout Mississippi; and of at-large, numbered post election method to elect county judges in three Mississippi counties); Alexander v. Martin, No. 86-1048-CIV-5 (E.D.N.C. filed Oct. 2, 1986) (challenging at-large elections for superior court judges in North Carolina).

jurisdiction is limited by subject matter and by the amount in controversy.[10] The judges on these courts are elected in circuitwide or countywide at-large voting.[11] Although mid-term vacancies on the circuit and county courts may be filled by appointment, a judge appointed to such a vacancy must stand for election at the expiration of the term for which the appointment was made.[12]

The number of judges in a circuit or county varies widely across the state, with the number of circuit judges per circuit ranging from four to sixty-five and the number of county judges per county ranging from one to thirty-six.[13] Regardless of the number of judges on the court, under the at-large election system all of the voters in the circuit or county vote on each individual seat on the court. All of the judicial circuits in Florida have electorates that are predominantly white, as do all but one of the counties in Florida.[14]

The at-large system of electing circuit and county judges in Florida has produced a trial court judiciary that has very few minority members. Figures compiled by the Honorable Robert A. Young in 1990 show that the majority of Florida's twenty judicial circuits had neither black nor Hispanic judges on the circuit bench.[15] The findings of the Study Commission confirm the low numbers of minority judges among the elected judiciary, noting that only five minority judges—of 630 elected judges—in the state attained their posts on the circuit or county courts in at-large elections.[16]

The exclusionary effects of at-large judicial elections have been particularly severe in the northern part of the state, as the findings of the

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10. FLA. STAT. §§ 26.012, 34.01 (1989).

11. FLA. CONST. art. V, § 10(b). Appellate judges and justices of the Supreme Court do not run in traditional contested elections. Instead, they are initially appointed to office and every six years are subject to retention elections in which the electorate may vote for or against retention of the judge. *Id.* §§ 10, 11(a).

12. FLA. CONST. art. V, § 11(b).

13. FLA. STAT. ANN. §§ 26.031, 34.022 (West 1988 & Supp. 1991).

14. *See* BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, 1990 CPH-1-11, 1990 CENSUS OF POPULATION AND HOUSING, FLORIDA 52 (1990) [hereinafter 1990 CENSUS]. Gadsden County, Florida, has a black population majority of 57.7%. *Id.* Dade County, which comprises the 11th Judicial Circuit, has a predominantly white population under the Census classification, which classifies Hispanics as either white or black. When Hispanics are treated as a separate classification, neither blacks, Hispanics, nor non-Hispanic whites form an outright majority in Dade County. *Id.*

15. Robert A. Young, *Single Member Judicial Districts, Fair or Foul?*, FLA. B. NEWS, May 1, 1990, at 4, 5 (tbl.).

16. CENTER FOR GOVERNMENTAL RESPONSIBILITY, UNIVERSITY OF FLORIDA, RACIAL AND ETHNIC DIVERSITY OF THE FLORIDA JUSTICE SYSTEM pt. 2, at 21-22 (1990) (study commissioned by the Fla. Sup. Ct. Racial and Ethnic Bias Study Comm'n) (available at the Supreme Court Archives, Tallahassee, Fla.).

The remaining minority judges initially attained their seats through appointment to mid-term vacancies. *Id.* pt. 2, at 21.

Study Commission confirm.[17] In the northern region of the state, fifty percent of sitting judges surveyed agreed that at-large elections favor nonminority candidates; only forty percent disagreed.[18] These results are especially noteworthy because many of the judges surveyed were elected under the current at-large system and would not be expected to call it discriminatory.

The discriminatory impact of at-large elections for local governmental bodies has been the subject of voting rights litigation for many years, again particularly in the northern part of the state. The counties of Bradford, Escambia, Gadsden, and Leon are among those where at-large election schemes for school board members, county commissioners, or other local elected offices have either been struck down by the courts or changed through consent decrees.[19] Judicial election lawsuits are also pending in this region of the state, filed by black voters in Tallahassee and Jacksonville to challenge at-large elections as they operate in the Second[20] and Fourth[21] Judicial Circuits and the Leon and Duval County Courts. The Second Judicial Circuit, with a black population of nearly thirty percent, has never had a black judge. In the Fourth Judicial Circuit, where there are twenty-eight circuit judges and a black population of twenty-one percent, only one black judge sits on the bench.[22]

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17. *See id.* pt. 2, at 10.

18. The remainder had no opinion. *See id.* pt. 2, at 25 (tbl. 1). For purposes of the study, the northern region included the counties of Alachua, Baker, Bay, Bradford, Calhoun, Clay, Columbia, Dixie, Duval, Escambia, Franklin, Gadsden, Gilchrist, Gulf, Hamilton, Homes, Jackson, Jefferson, Lafayette, Leon, Levy, Liberty, Madison, Nassau, Okaloosa, Santa Rosa, Suwannee, Taylor, Union, Wakulla, Walton, and Washington. *Id.* pt. 2, at 10 n.26.

19. *See* Tallahassee Branch of NAACP v. Leon County, 827 F.2d 1436, 1437 (11th Cir. 1987), *cert. denied*, 488 U.S. 960 (1988); McMillan v. Escambia County, 748 F.2d 1037 (5th Cir. 1984); NAACP v. Gadsden County Sch. Bd., 691 F.2d 978 (11th Cir. 1982); Bradford County NAACP v. City of Starke, 712 F. Supp. 1523 (M.D. Fla. 1989). *See also* Solomon v. Liberty County, 899 F.2d 1012 (11th Cir. 1990) (per curiam, en banc) (holding that plaintiffs had demonstrated, as a matter of law, a number of relevant factors, including the existence of legally significant racially polarized voting, and remanding to the district court), *cert. denied*, 111 S. Ct. 670 (1991).

20. *See supra* note 9. The Second Judicial Circuit includes the counties of Gadsden, Franklin, Jefferson, Leon, Liberty, and Wakulla. FLA. STAT. § 26.021(2) (1989).

21. *See supra* note 9. The Fourth Judicial Circuit includes the counties of Clay, Duval, and Nassau. FLA. STAT. § 26.021(4) (1989).

22. The Second Judicial Circuit, which includes Tallahassee, is 28.9 percent black in total population, while Leon County is 24.2 percent black. 1990 CENSUS, *supra* note 14, at 52. The Second Judicial Circuit and the Leon County Court together have 14 judges. Like the Second Judicial Circuit, the Leon County Court has never had a black judge. The Fourth Judicial Circuit, which includes Jacksonville, is 21.1% black, and Duval County is 24.4% black. *Id.* The Duval County Court, with 12 judges, had its second black judge appointed only a few months ago. No black candidate has ever prevailed in a contested election for a seat on that court or on the Fourth Judicial Circuit. The black judges all obtained their positions through appointments to mid-term vacancies.

The Supreme Court's recent decisions concerning judicial elections[23] have given new impetus to judicial election challenges such as the pending Florida lawsuits. As those decisions indicate, the effort to find an exemption for judicial elections in Section 2 of the Voting Rights Act faced formidable obstacles in the plain language of the statute, the legislative history, and prior Supreme Court decisions construing parallel provisions of the Voting Rights Act. The next section describes this background and the Supreme Court's rulings.

III. SECTION 2 OF THE VOTING RIGHTS ACT AND JUDICIAL ELECTIONS

Two cases before the United States Supreme Court last term presented the question of whether Section 2's protections against racially discriminatory election practices apply to elections for judges. *League of United Latin American Citizens Council No. 4434 v. Clements*[24] was a challenge to at-large elections for trial judges in several Texas counties. The Fifth Circuit, sitting en banc and overruling a Fifth Circuit panel decision handed down just two years earlier,[25] held that Section 2 was inapplicable to the challenged elections. Seven members of the Fifth Circuit held that Congress, in amending Section 2 in 1982, had employed the term "representatives" to exclude judicial elections from coverage.[26] Another four members, while strongly disagreeing with this interpretation of the word "representatives," concluded that single-member offices are excluded from the section's coverage and that trial judges (but not appellate judges) hold single-member offices and are therefore excluded from coverage.[27] One member of the court, while leaving open the possibility that Section 2 might apply to certain types of judicial elections, would have held that Section 2 excludes elections for judgeships where the judges' jurisdiction is geographically coextensive with the district from which they are elected.[28] Only one judge dissented, concluding that Section 2 contains no exemption for any elected office.[29]

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23. Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991); Chisom v. Roemer, 111 S. Ct. 2354 (1991).

24. 914 F.2d 620 (5th Cir. 1990) (en banc).

25. Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom.* Roemer v. Chisom, 488 U.S. 955 (1988), *after remand*, 917 F.2d 1056 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2354 (1991).

26. 914 F.2d at 620-34.

27. *Id.* at 634-51 (Higginbotham, J., concurring, joined by Politz, King, and Davis, JJ.).

28. *Id.* at 631-34 (Clark, C.J., concurring).

29. *Id.* at 651-71 (Johnson, J., dissenting).

The other Section 2 case that went to the Supreme Court with *Clements* was *Chisom v. Roemer*.[30] In *Chisom*, black Louisiana voters, joined by the United States as plaintiff-intervenor, challenged a multimember district used to elect two Louisiana Supreme Court justices from the geographical area including New Orleans. Based on its ruling in *Clements*, the Fifth Circuit remanded *Chisom* to the district court with instructions to dismiss the complaint.[31] The United States Supreme Court granted certiorari in both cases and consolidated them for argument.

Despite the doctrinal complexities suggested by the Fifth Circuit's fractured decision in *Clements*, until 1990 the question of Section 2's coverage of judicial elections did not appear destined to reach the Supreme Court. Up to that point, the lower courts were virtually unanimous in concluding that Congress did not exclude judicial elections from the coverage of amended Section 2.[32] The first lawsuit challenging at-large judicial elections under amended Section 2 was filed in 1984,[33] only two years after the amendment. By 1988, the two courts of appeals to hear argument on the issue had concluded, without elaborate discussion, that no special exemption for judicial elections could be found in Section 2.[34] After those decisions, not a single lower court held otherwise until the Fifth Circuit revisited the issue in *Clements*.[35]

There were several reasons for this consensus among the lower courts. First, it was well understood that Congress amended Section 2

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30. 111 S. Ct. 2354 (1991). Chisom v. Roemer was the same case in which the Fifth Circuit had initially ruled that Section 2 of the Voting Rights Act covers judicial elections. *See* Chisom v. Edwards, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom.* Roemer v. Chisom, 488 U.S. 955 (1988). After trial on the merits, however, the district court ruled against the plaintiffs. The plaintiffs then appealed to the Fifth Circuit, but before the appeal was heard the Fifth Circuit issued its decision in League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991), overruling the earlier *Chisom* decision.

31. 917 F.2d 187 (1990).

32. *See* Mallory v. Eyrich, 839 F.2d 279 (6th Cir. 1988), *rev'g* 666 F. Supp. 1060 (S.D. Ohio 1987); Chisom v. Edwards, 839 F.2d at 1056; Southern Christian Leadership Conf. v. Siegelman, 714 F. Supp. 511 (M.D. Ala. 1989); Williams v. State Bd. of Elections, 696 F. Supp. 1563 (N.D. Ill. 1988); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987).

33. Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987).

34. *Mallory*, 839 F.2d at 279; Chisom v. Edwards, 839 F.2d at 1056. As Judge Higginbotham noted in his concurrence in *Clements*, then-Solicitor General Charles Fried and then-head of the Justice Department's Civil Rights Division William Bradford Reynolds supported the plaintiffs' position that Section 2 applies to judicial elections when the issue was first before the Fifth Circuit in 1988 in Chisom v. Edwards. *See Clements*, 914 F.2d at 642. The Solicitor General and the Justice Department maintained that position throughout the subsequent litigation. *See* Chisom v. Roemer, 111 S. Ct. at 2358.

35. Lower courts in other circuits continued to refuse to dismiss voting rights challenges to at-large judicial elections even after the Fifth Circuit's *Clements* decision. *See* Nipper v. Chiles, No. 90-447-CIV-J-16 (M.D. Fla. Nov. 23, 1990) (mem.).

of the Voting Rights Act in 1982 to *broaden* the Act's coverage by eliminating any requirement of proving a discriminatory intent behind the use of a challenged election scheme or practice.[36] The amendment was a response to the Supreme Court's decision in *City of Mobile v. Bolden*,[37] which had read Section 2 to incorporate an intent test.[38] It was also generally conceded, even by the *Clements* court, that Section 2 had applied to judicial elections before its amendment in 1982.[39] The amendment process in 1982, while marked by prolonged wrangling over whether the intent requirement should be eliminated,[40] included no evidence of a debate about whether the categories of elections and elected officials subject to the Act should be narrowed.[41]

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36. *See* Thornburg v. Gingles, 478 U.S. 30, 35 (1986). To accomplish this change, Congress altered Section 2's original language, which had prohibited practices "imposed or applied . . . *to deny or abridge* the right . . . to vote on account of race or color." 42 U.S.C. § 1973 (1976) (emphasis added). The new language banned practices "imposed or applied . . . *in a manner which results in a denial or abridgement of* the right . . . to vote on account of race or color" (emphasis added). This section of the Act was designated as 2(a), and a new section 2(b) was added, which states:

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

42 U.S.C. § 1973 (1982).

37. 446 U.S. 55 (1980).

38. *See Gingles*, 478 U.S. at 35.

39. *See* League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 631 (5th Cir. 1990) (en banc) (Clark, C.J., concurring), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991); *id.* at 637 (Higginbotham, J., concurring). The parties before the Supreme Court in Chisom v. Roemer also conceded that Section 2 of the Voting Rights Act applied to judicial elections before 1982. 111 S. Ct. at 2360.

40. *See Clements*, 914 F.2d at 640-41 (Higginbotham, J., concurring) (citing legislative debate over replacement of an "intent" standard with a "results" test).

41. In fact, there was extensive evidence in the legislative history supporting the conclusion that all elections, including judicial elections, remained within the coverage of amended Section 2. At the 1981 and 1982 congressional hearings in both the House and the Senate, minority witnesses and representatives of civil rights organizations testified about discrimination in judicial elections, presented examples of how vote dilution hampered the election of minority judges, and articulated the need for better minority representation on the bench. *See Voting Rights Act, 1982: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 669, 748 (1983); *Extension of the Voting Rights Act, 1981: Hearings on H.R. 1407, H.R. 1731, H.R. 2942, H.R. 3112, H.R. 3198, H.R. 3473, and H.R. 3498 Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 97th Cong., 1st Sess. 234, 516-28, 550, 571, 574, 825, 930, 940-42, 949, 1253, 1745, 2647-48 (1982).

Second, in 1986 the Supreme Court summarily affirmed a lower court decision holding that the preclearance provisions of Section 5 of the Voting Rights Act apply to judicial election laws and practices.[42] The same definition of "vote" and "voting" applies to Sections 2 and 5 of the Voting Rights Act. "Vote" and "voting" are defined to include "all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to . . . casting a ballot and having such ballot counted properly . . . with respect to candidates for public or party office."[43] Judges who must stand for election are clearly "candidates for public . . . office,"[44] and are therefore included in the definition. No cogent reason exists for reading the coverage of Section 2 and Section 5 differently, given their shared definition of key terms.

Third, there is a very simple explanation for Congress' use of the word "representatives" in amended Section 2—an explanation that does not imply any intent to exclude judges. The portion of amended Section 2 containing the word "representatives" was taken directly from language in *White v. Regester*,[45] a vote dilution case that refers to minority groups whose members have less opportunity than others "to participate in the political process and to elect legislators of their choice."[46] In amending Section 2, Congress adopted this language but substituted the word "representatives" for the word "legislators."[47] As the Sixth Circuit stated in *Mallory v. Eyrich*,[48] "[i]t seems evident that Congress was seeking a broader word to make it clear that subsection (b) is not limited to legislative races."[49] Because the elections and offices covered are defined in Section 14(c)(1) of the Act,[50] the drafters of amended Section 2 did not list all covered offices by title, but simply substituted a generic term for elected officers in place of the word "legislators."

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42. Haith v. Martin, 618 F. Supp. 410 (E.D.N.C. 1985) (three judge court), *aff'd*, 477 U.S. 901 (1986) (mem.). In 1990, just after the en banc *Clements* decision, the Supreme Court again summarily affirmed an appeal from a three-judge court decision holding Section 5 applicable to judicial elections. *See* Brooks v. State Bd. of Elections, 775 F. Supp. 1470 (S.D. Ga. 1989), *aff'd*, 111 S. Ct. 288 (1990) (mem.). *See also* Clark v. Roemer, 111 S. Ct. 2096 (1991) (holding, in full opinion, that Section 5 applies to changes in judicial election laws).

43. 42 U.S.C. § 1973l(c)(1) (1988).

44. *Id.*

45. 412 U.S. 755 (1973).

46. *Id.* at 766.

47. *See supra* note 36 (text of Section 2(b)).

48. 839 F.2d 275 (6th Cir. 1988).

49. *Id.* at 279.

50. *See supra* text accompanying note 43.

Given this background, the panel decision in *Clements* holding trial judge elections exempt from Section 2, and the subsequent en banc decision holding all judicial elections exempt from coverage, marked a surprising rejection of the previous consensus among lower courts. The decisions are probably best explained by the en banc majority's clear discomfort with the very notion of an elected judiciary[51] and, for those judges joining Judge Higginbotham's concurrence, their deep philosophical aversion to the use of standard remedial schemes to replace at-large judicial elections.[52]

The Supreme Court, in reversing, found these policy-oriented considerations unpersuasive. In *Chisom v. Roemer*, Justice Stevens, writing for six members of the Court, held that no exemption for judicial elections could be found in the language or legislative history of amended Section 2.[53] The word "representatives" could not be read to exclude judges without calling into question the coverage of a whole variety of nonlegislative offices that were concededly encompassed by the Act. The Court held that "[i]f executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered 'representatives' simply because they are chosen by popular election, then the same reasoning should apply to elected judges."[54]

The Supreme Court noted the Fifth Circuit's concern that judges not be controlled by popular will in their decisionmaking. This policy preference had not, however, prevented Louisiana from deciding to elect its judges and, in the Court's view, could not control the question of Section 2's coverage. "The fundamental tension between the ideal character of the judicial office and the real world of electoral politics," Justice Stevens wrote in *Chisom*, "cannot be resolved by crediting judges with total indifference to the popular will while simultaneously requiring them to run for elected office."[55] The Court held that, having made judges accountable to the public by selecting them through popular elections, Louisiana could not claim an exemption from Section 2's requirements of racial fairness in the electoral process.

In *Houston Lawyers' Ass'n v. Attorney General*, the same six-Justice majority rejected Judge Higginbotham's "single-member of-

51. *See* League of Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 625-26 (5th Cir. 1990) (en banc) (citing descriptions of the appointed federal judiciary as evidence of the nature of judicial office), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991).

52. *Id.* at 649-51 (Higginbotham, J., concurring).

53. 111 S. Ct. 2354, 2368 (1991).

54. *Id.* at 2366.

55. *Id.* at 2367.

fice" theory, under which elections for appellate judges but not trial judges would be covered by Section 2 of the Voting Rights Act.[56] Judge Higginbotham's opinion in *Clements* had focused on what he considered the undesirability of electing trial judges from subdistricts,[57] the remedy often sought when at-large elections are found to dilute minority voting strength.[58] According to Judge Higginbotham, the state's interest in maintaining an election district coextensive with the trial judge's jurisdiction is of such importance that at-large elections for trial judges are beyond the reach of Section 2.[59] In a related argument, Judge Higginbotham also urged that, because trial judges exercise authority independently of each other, they should be deemed to hold "single-member" offices, which by definition cannot be subdivided to remedy any dilution of minority voting strength.[60]

In reversing, the Supreme Court again held that such policy concerns did not control the issue of statutory coverage. Justice Stevens wrote:

> Even if we assume, *arguendo*, that the State's interest in electing judges on a district-wide basis may preclude a remedy that involves redrawing boundaries or subdividing districts, or may even preclude a finding that vote dilution has occurred under the "totality of the circumstances" in a particular case, that interest does not justify excluding elections for single-member offices from the *coverage* of the § 2 results test.[61]

Houston Lawyers' Ass'n, like *Chisom*, thus embraced a broad interpretation of the coverage of Section 2. If a state holds elections for

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56. 111 S. Ct. 2376 (1991).

57. League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 645-51 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991).

58. Drawing subdistricts for election purposes is one method of remedying the dilution of minority voting strength caused by at-large election systems. One or more subdistricts can generally be drawn in which minorities will constitute the majority of the voting age population, permitting minorities to elect candidates of their choice to some of the seats. *See generally* Clark v. Roemer, 777 F. Supp. 471, 479-83 (M.D. La. 1991), *appeal argued*, No. 91-3737 (5th Cir. Nov. 4, 1991); Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988). The term "subdistricts" rather than "single-member districts" is used in this Article because the latter term is often a misnomer; as illustrated in the *Clark* litigation, subdistricts electing more than one judge each can often be used in a remedial plan under Section 2. Clark v. Roemer, Judgment (M.D. La. Aug. 30, 1991). In addition, the term "subdistricts" accurately reflects that the larger original district is often retained for purposes of jurisdiction and judicial administration. *See Martin*, 700 F. Supp. at 332-33.

59. *Clements*, 914 F.2d at 645-47.

60. *Id.* at 646-51.

61. Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376, 2380-81 (1991).

trial judges, "those elections must be conducted in compliance with the Voting Rights Act."[62]

The six-three Supreme Court majority that handed a major victory to minority voters in these two cases probably does not, for better or for worse, represent a sudden surge of liberal activism on the increasingly conservative Court. It indicates instead that there was remarkably little support for the positions taken by the Fifth Circuit majority and the Higginbotham concurrence. Furthermore, the Fifth Circuit's unsound statutory construction was bad policy. Lost in the Fifth Circuit's alarum about possible harm to state interests was the fact that its interpretation would create a safe harbor for racially discriminatory practices in judicial elections. As the report of the Florida Supreme Court Racial and Ethnic Bias Study Commission recognizes, the justice system is the last place where exemptions from civil rights protections should be sought.[63]

IV. Issues in Future Litigation Concerning Judicial Elections

Future litigation concerning judicial elections is likely to focus on several issues that will arise in the wake of the Supreme Court's decisions in *Chisom* and *Houston Lawyers' Ass'n*. In *Houston Lawyers' Ass'n*, the Court suggested that a state's interest in a particular electoral system may be evaluated at some stage of the litigation, but it did not define the role that such an evaluation should play. The Court also took no position on the merits of Judge Higginbotham's criticisms of the use of subdistricts for judicial elections, nor on the evidence a state would have to muster to prove that its interests preclude the use of a particular remedy. In addition, dictum in *Chisom* concerning appointive systems has led to some speculation that a switch to so-called "merit retention" systems for judicial selection may provide an escape route for states where litigation is pending. These issues are addressed below.

A. The Role of State Interest Analysis in Section 2 Challenges After Chisom v. Roemer *and* Houston Lawyers' Ass'n v. Attorney General

As noted earlier,[64] Judge Higginbotham's concurring opinion in *Clements* gave overriding weight to asserted state interests in "linking" a court's electoral base and jurisdiction. While holding that such interests do not control Section 2's coverage, the *Houston Lawyers'*

62. *Id.* at 2380.
63. Study Commission, *supra* note 1, at 608, 610-12.
64. *See supra* text accompanying notes 56-60.

Ass'n opinion creates some ambiguity as to the role such interests may play in Section 2 litigation. The opinion suggests that the interests identified by Judge Higginbotham, while irrelevant to the question of Section 2's coverage, may be relevant "*either to* an analysis of the totality of the circumstances"—i.e., at the liability stage of a Section 2 case—"*or to* a consideration of possible *remedies* in the event a violation is proved."[65] The Court thus appeared to reserve decision as to the stage of the litigation when such interests would come into play. Later in the opinion, however, Justice Stevens asserts that "the State's interest in maintaining an electoral system . . . is a legitimate factor to be considered"[66] in determining whether Section 2 has been violated—albeit "merely one factor."[67] The opinion does not resolve the apparent inconsistency between these two different statements.

The legislative history of Section 2, however, provides direct guidance on this issue by expressly addressing the role of "state interest" analysis in determining liability under Section 2. The Senate Report accompanying amended Section 2 lists seven "typical factors" probative in determining whether, under the totality of the circumstances, an electoral scheme denies minority voters an equal opportunity to participate in the electoral process and elect candidates of their choice.[68] Two additional factors are also listed that "in some cases have had probative value as part of plaintiffs' evidence,"[69] including

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65. 111 S. Ct. at 2380 (emphasis added).

66. *Id.* at 2381.

67. *Id.*

68. *See* S. REP. No. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07. The "typical factors" to be considered by a court include:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. (footnotes omitted).

69. *Id.* at 29, 1982 U.S.C.C.A.N. 177, 207.

whether the policies underlying the use of a challenged practice are tenuous.[70]

A consideration of state interests in an electoral scheme thus plays a limited role under Section 2. The factor is expressly restricted to a lesser role than the first seven factors listed in the Senate Report. The Senate Report, moreover, makes the state interests factor merely an optional part of the plaintiffs' case, and it expressly states that the "failure of plaintiff to establish any particular factor . . . is not rebuttal evidence of non-dilution."[71]

Thus, under the evidentiary framework set forth in the Senate Report, state interests come into play at the liability stage only if plaintiffs undertake to bolster their case by proving that state interests in a particular election system are tenuous. Even if the court is not persuaded that this factor weighs in plaintiffs' favor, that conclusion cannot require a finding for defendants.[72] Instead, the ultimate inquiry remains whether, under the totality of the circumstances, the electoral system results in discrimination against minority voters.[73] As the Senate Report cautions, "even a consistently applied practice premised on a racially neutral policy would not negate a plaintiff's showing through other factors that the challenged practice denies minorities fair access to the process."[74]

Permitting state interests to trump a showing of vote dilution not only is inconsistent with specific provisions of the Senate Report but also would directly undermine the primary purpose behind the 1982 amendment of Section 2. The purpose of the amendment was to make clear that plaintiffs could prevail without showing that a particular electoral scheme had been employed for an invidious purpose.[75] If a state were allowed to rebut a showing of vote dilution by demonstrating a legitimate interest in using the challenged at-large system, the existence of a Section 2 violation would depend, as it did before 1982, upon the state's intent in using the practice. Thus, any analysis of state interests must be carefully circumscribed to avoid a direct con-

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70. *Id.* The remaining factor is whether elected officials have been unresponsive to the particularized needs of the minority group. *Id.* The Senate Report cautions that "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *Id.* The Supreme Court in *Gingles* held that the Senate Report is an authoritative statement of Congressional intent behind the amendment of Section 2. Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986).

71. S. REP. No. 417, at 29 n.118, 1982 U.S.C.C.A.N. 177, 207 n.118.

72. *See id.*

73. *See generally* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376, 2381 (1991).

74. S. REP. No. 417, at 29 n.117, 1982 U.S.C.C.A.N. 177, 207 n.117.

75. *Id.* at 28, 1982 U.S.C.C.A.N. 117, 205-06; Thornburg v. Gingles, 478 U.S. 30, 35 (1986).

flict with Congress' decision to eliminate an intent requirement through the 1982 amendment of Section 2.

Elevating the state's interests to a central role in vote dilution cases would also conflict with the Supreme Court's only decision thus far addressing the merits of a challenge to a multi-member election scheme under amended Section 2. In *Thornburg v. Gingles*, the Court canvassed the Senate Report factors and held that two of them—the existence of racial bloc voting and the extent to which minorities have been elected in the jurisdiction—are central to a Section 2 claim.[76] The Court found the other factors "supportive of, but *not essential to*," a showing of a Section 2 violation.[77] The explication in *Gingles* of the Section 2 "results" test has since been applied in many cases challenging election schemes for a variety of elected officers.[78] Given the Supreme Court's holding that the Section 2 results test applies to elections for all offices, including judicial offices, it is difficult to argue that in judicial elections alone the *Gingles* hierarchy of evidentiary factors is inapplicable.

If state interests cannot insulate at-large elections from challenge when the election system is shown to have a racially discriminatory effect, are states then subject to wholesale revision of their judicial systems at the whim of a federal judge? For at least two reasons, this is not a realistic concern.

First, the analysis adopted in *Gingles* has proved extremely effective in targeting election schemes that lock minorities out of a meaningful role in the electoral process while avoiding any broad-brush nullification of state election systems. The *Clark* litigation in Louisiana is a good example of this.[79] The case started out as a statewide challenge

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76. 478 U.S. 30, 48-50 (1986).

77. *Id.* at 49 n.15. At stake in *Gingles* was a long-standing method of electing North Carolina state representatives. Clearly, the selection of such officials is a core state function and implicates compelling state interests. In *Gingles*, the State argued that its clearly expressed preference for using whole counties in legislative districts was a strong, legitimate, and nondiscriminatory basis for the use of multi-member legislative districts. *See* Gingles v. Edmisten, 590 F. Supp. 345, 373-74 (E.D.N.C. 1984). The three-judge district court found this interest inadequate to shield the system from attack. The court pointed out that in some cases the State had split counties in creating legislative districts, and that in any event the State's policy could not justify the racial vote dilution it had found. The court also discounted the State's policy concern about avoiding racial gerrymandering. *Id.* The Supreme Court affirmed the judgment of the district court except in one district where black candidates had been repeatedly elected to office under the multi-member system. Thornburg v. Gingles, 478 U.S. at 80.

78. *See, e.g.*, McNeil v. Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988) (park district commissioners), *cert. denied*, 490 U.S. 1031 (1989); Citizens for a Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 492 U.S. 905 (1989) (city alders); Jackson v. Edgefield County Sch. Dist., 650 F. Supp. 1176 (D.S.C. 1986) (school board members).

79. Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988) (initial findings on liability). *See*

involving more than forty judicial districts used to elect most of the trial and intermediate appellate court judges in Louisiana.[80] Upon conclusion of the litigation in the district court, however, findings of liability extended to only eleven districts.[81] Only those districts where racially polarized voting had virtually excluded a large minority population from an effective voice in judicial elections were found to violate Section 2. Obviously, under the standards set out in *Gingles* and the Senate Report, Section 2 is no blunderbuss that indiscriminately blasts state interests.

Second, state interests in structuring the selection of judicial officers are properly taken into account at the remedy stage of a voting rights lawsuit. Once an election system is found impermissibly to dilute minority voting strength, the state is afforded an opportunity to propose and enact an alternative election system that satisfies the requirements of Section 2.[82] In determining whether to approve the state's remedial plan, the court will consider and defer to the state's policies as long as the remedial plan cures the dilution of minority voting strength.[83] The state's opportunity to take the lead in fashioning a remedial plan thus offers an adequate safeguard for the state's interests, without depriving minority voters of Voting Rights Act protections in judicial elections.

B. Determining the Existence and Strength of Asserted State Interests in Challenged Election Schemes

The discussion thus far has focused on the abstract issue of how state interests fit within the conceptual framework of Section 2. What of the specific state interests that Judge Higginbotham deemed controlling in *Clements* that have since been advanced by a number of states seeking to avoid adverse rulings under Section 2?

The argument advanced most strenuously against changing at-large judicial election systems is that judicial independence will be compromised by electing judges from single-member districts drawn by race. Instead of applying the law fairly and impartially, judges will, accord-

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also Clark v. Roemer, 777 F. Supp. 445 (M.D. La. 1990) (findings of fact and conclusions of law remedy phase), *and* 777 F. Supp. 471 (M.D. La. 1991) (supplemental findings of fact and conclusions of law), *appeal argued*, No. 91-3737 (5th Cir. Nov. 4, 1991).

80. Clark v. Edwards, 725 F. Supp. at 288, 302.

81. Clark v. Roemer, 777 F. Supp. at 479.

82. *See, e.g.*, Martin v. Mabus, 700 F. Supp. 327, 330 (S.D. Miss. 1988).

83. *See* Cook v. Luckett, 735 F.2d 912, 918 (5th Cir. 1984). *See generally* Upham v. Seamon, 456 U.S. 37, 42-43 (1982); White v. Weiser, 412 U.S. 783, 795 (1973).

ing to this argument, cater to the racial groups they perceive as their constituents.[84]

This criticism turns a blind eye to a number of facts that have not escaped the notice of minority voters seeking changes in the electoral system. Perhaps most importantly, the argument assumes that the districts from which judges currently are elected have no racial characteristics. A moment's reflection, however, reveals that the judicial districts used in most states are now comprised solely of electorates with an overwhelming white majority. If the creation of judicial districts composed predominantly of one racial group compromises judicial independence, then judicial independence now exists nowhere.[85] Conversely, if elections from districts that currently are overwhelmingly white do not produce biased judges, then there is no reason to believe that elections from black majority districts will produce biased judges.

This criticism also misses a more fundamental point. Judicial election lawsuits are not centered on the concern that sitting judges are prejudiced in one direction and should be replaced by judges prejudiced in a different direction. Indeed, the notion that minorities have no interest in judicial elections other than their expectation of appearing before a judge someday is fundamentally offensive. Minorities have the same interest in judicial elections as do other voters: elected judges wield important governmental powers, and minorities wish to have some meaningful opportunity to participate in choosing who will exercise those powers. Fairness in voting procedures is important even though most citizens, whether black or white, will never appear as litigants before the judges for whom they vote.

A second argument urged against subdistricts is that states have an overriding interest in what Judge Higginbotham termed "the linking of jurisdiction and elective base."[86] This is based on the fact that judges generally exercise jurisdiction throughout the region from which they are elected. The use of subdistricts, in Judge Higginbotham's view, would interfere with an important state policy of assuring

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84. *See, e.g.*, Pasquale A. Cipollone, Note, *Section 2 of the Voting Rights Act and Judicial Elections: Application and Remedy*, 58 U. CHI. L. REV. 733, 761-63 (1991).

85. It is sometimes casually assumed that the creation of subdistricts to remedy vote dilution involves the creation of all-black subdistricts. In fact, the subdistricts created are generally no more than 65% black in population—sometimes less. *See Martin*, 700 F. Supp. at 332-33. The at-large judicial districts currently in use in Florida are generally far more than 65% white in population. Thus, in many cases the subdistricts that would be created to remedy vote dilution clearly would be *more* racially diverse than the districts used under the current system.

86. League of United Latin Am. Citizens Council No. 4434 v. Clements, 914 F.2d 620, 646 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991).

that litigants appear before judges for whom they had the opportunity to vote.[87]

Arguments based on this "linkage" notion are problematic for several reasons. States generally do not require that a judge exercise jurisdiction only over litigants who have had an opportunity to vote for the judge. Assignment rules generally permit judges elected in one district to sit on cases in a different district when necessary or convenient, and even retired judges who are not accountable to any electorate may be assigned to help with burdensome caseloads.[88] Even when sitting within their own districts, judges are frequently called upon to decide cases involving litigants from other districts; indeed, this happens whenever a resident of one district sues a resident of another district. Judges are assumed to be capable of acting fairly in these situations; if they do not act fairly, the remedy lies in appeal. The assumption that a judge will obey the oath to act impartially surely should not be withheld in the case of judges elected from subdistricts that permit some minority access to the bench.

A further argument, also based on assertions concerning judicial independence, is that states have an interest in avoiding the use of election districts smaller than those currently employed. The assumption is that judges elected from smaller districts will be subject to greater political pressure.[89] Again, the current election systems in many states do not bear out these assertions. The size of judicial election districts may vary widely within a particular state, and subdistricts proposed as remedies in judicial election lawsuits are often larger than some of the districts currently used by the state to elect judges.[90] In addition, in many areas it is unnecessary to use single-member districts in a Sec-

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87. *Id.* at 651.

88. *See, e.g.*, FLA. STAT. § 26.57 (1989) (assignment of county judges to sit as circuit judges); FLA. R. JUD. ADMIN. 2.030(a)(3)(A) (assignment of judges by Chief Justice of Florida Supreme Court). Clearly, Florida recognizes no constitutional or other right for a litigant to appear before a judge for whom the litigant had an opportunity to vote.

89. *See* Clark v. Roemer, 777 F. Supp. 471, 481-82 (M.D. La. 1991) (discussing witnesses' testimony that small election districts threaten state interests).

90. *Id.* at 480. In *Clark*, the district court reasoned:

> The State's own actions refute any argument that there is any actual State policy as to the size of judicial election districts. The smallest subdistrict which will be drawn as a remedy in this matter contains 13,000 people and is larger than three districts that have been created by the State.

Id.

Similarly, Florida counties and judicial circuits vary widely in size. The countries, for example, vary enormously in population from less than 6000 to more than 1,900,000, yet each county elects at least one judge. 1990 CENSUS, *supra* note 14, at 52. It cannot be seriously argued that the judges elected in the smaller counties are less capable of acting impartially than the judges elected in large counties.

tion 2 remedy—multi-member subdistricts electing several judges each are often possible, especially in urban areas.[91] States that currently permit judges to run for election in small counties or election districts surely have no legitimate interest in avoiding the use of similarly populated subdistricts to remedy unlawful dilution of minority voting strength.[92]

Moreover, the dire predictions about the consequences of using subdistricts for judicial elections are generally made with little recognition that such systems are already in use in several jurisdictions, either as a result of voting rights litigation[93] or because the state simply has chosen to set up its courts in that manner.[94] Persons familiar with the operation of judicial subdistricts in Mississippi, the first state where such a remedy was ordered, have not observed threats to the independence of the judiciary or other untoward consequences from the use of subdistricts for judicial elections.[95]

The state interest arguments discussed above rest on objections to the use of subdistricts as a remedy for minority vote dilution in at-large judicial elections. While the use of subdistricts is unlikely to threaten genuine state interests, other remedial options are available. Alternative remedies include modified at-large systems[96] used in a

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91. *See* Clark v. Roemer, Judgment (Aug. 30, 1991).

92. If a state's interests in its current election system are contended to comprise a relevant factor under Section 2's totality of circumstances test, the existence of those interests must be proved, not simply assumed. Otherwise, the mere assertion of a state interest in its current method of electing judges would immunize the election scheme from challenge under Section 2, achieving through the back door an exemption for judicial elections that was clearly rejected by the Supreme Court in *Chisom* and in *Houston Lawyers' Ass'n*. Demonstrating the existence and strength of an asserted state interest is not necessarily an easy matter. In Clark v. Roemer, the first judicial elections case to go to judgment following *Chisom* and *Houston Lawyers' Ass'n*, the court found that little evidence supported the defendants' claims of an overriding state interest in maintaining an at-large election system. Clark v. Roemer, 777 F. Supp. at 479-82.

93. *See* Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988) (court ordered the use of subdistricts after legislature declined opportunity to devise remedial system); 1987 N.C. Sess. Laws 509 (adopting use of subdistricts to nominate superior court judges in response to voting rights litigation). *See also* 1989 Ill. Laws 86-786 (establishing judicial subdistricts in Cook County as a result of voting rights litigation; elections under new system scheduled for 1992).

94. *See* N.Y. CONST. art. VI, § 15(a) (election of judges on citywide court from districts within counties).

95. *See* Clark v. Roemer, 777 F. Supp. at 477 (citing testimony of a judge elected in 1990 from a black majority subdistrict in Hinds County, Mississippi, and of a white lawyer and president of the Bench-Bar Relations Committee of the Hinds County Bar Association).

96. *See* Edward Still, *Voluntary Constituencies: Modified At-Large Voting as a Remedy for Minority Vote Dilution in Judicial Elections*, 9 YALE L. & POL'Y REV. 354 (1991). Modified at-large systems include so-called "limited voting" and "cumulative voting" schemes. Under a limited-voting system, officeholders are elected at-large from a multi-member electoral district; however, each voter is "limited" to casting a total number of votes that is less than the number of seats up for election. If a minority group votes cohesively for a particular candidate or set of

number of jurisdictions and adopted as a remedy in several voting rights cases.[97] These remedies do not involve the creation of subdistricts and therefore do not implicate the concerns canvassed above. The availability of remedies that do not require the creation of subdistricts renders criticisms of subdistricts irrelevant, at least at the liability stage of a Section 2 case.

Moreover, state interest analysis, if relevant, cannot be a one-way street. Florida, for example, has declared through legislative enactments and studies by competent agencies a compelling interest in eliminating racially discriminatory practices and assuring diversity throughout state government.[98] Not only minority voters, but also states themselves, have a strong interest in avoiding the use of election practices that systematically exclude minorities from equal participation in the electoral process. There is, therefore, no intrinsic reason why deference to state interests will necessarily weigh against a finding of unlawful vote dilution.[99]

C. *Do Merit Retention Elections Offer an Escape Route from the Voting Rights Act?*

The Supreme Court in *Chisom* noted that an elected judiciary by its very nature reflects a state's decision to require public accountability

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candidates under such a system, it cannot be prevented from electing at least one candidate of its choice, even if the majority votes for different candidates. Cumulative voting schemes are similar, except that they equalize minority and majority voting strength by allotting each voter a number of votes equal to the number of candidates being elected and permitting the voter to concentrate all of his or her votes on one candidate.

As an example of how limited voting works, consider an election held under the following circumstances. Four seats are up for election; each voter is limited to casting one vote; and all candidates for the four seats run in one pool, with the top four vote getters winning election. If minorities constitute more than 20% of the population and unite behind one candidate, that candidate will be among the top four vote-getters, even if the white majority casts no votes for the minority candidate. This is true because if whites constitute less than four-fifths of the population, they cannot produce enough votes for four different white candidates to fill up all four seats. Of course, different variations are possible depending on the minority population percentage and the number of seats up for election.

97. *See* Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 223-36 (1989).

98. STUDY COMMISSION, *supra* note 1. *See also* Ch. 85-104, 1985 Fla. Laws 627, 628-29, 650 (findings by Legislature concerning discrimination against minorities and minority business enterprises).

99. The post-*Chisom* decision in Clark v. Roemer took note of this aspect of state interest analysis, rejecting "the notion that the State has a greater interest in linking election district and geographical jurisdiction in judicial election districts than in ridding judicial elections of minority vote dilution." 777 F. Supp. at 483-84.

for judges. In effect, the Court chided Louisiana for insisting that elections do not threaten judicial independence but that the Voting Rights Act does. Unfortunately, in making this point the Court may have created confusion on another issue. The Court stated that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed."[100]

The Court's dictum fails to address a number of problems that would arise if a state attempted to avoid Section 2 liability by changing from an elective to an appointive system for selecting judges. First, changes in judicial election procedures, like changes in any other election procedures, are subject to the preclearance requirements of Section 5 of the Voting Rights Act[101] in jurisdictions covered by Section 5.[102] Accordingly, those jurisdictions would have to get approval from the United States Department of Justice or the United States District Court for the District of Columbia before eliminating their election system for judges.[103] Preclearance will be denied unless the jurisdiction meets the burden of establishing that the submitted change does not have a racially discriminatory purpose and will not have a racially discriminatory effect.[104] If an election system is eliminated in favor of an appointive system in response to litigation under Section 2, a jurisdiction will face the difficult task of explaining why such a change was made just at the moment when the election system was about to be opened to meaningful participation by minority voters.

A switch from an elective to an appointive system may also be challenged under Section 2 of the Voting Rights Act, whether or not the state in question is covered by Section 5. The House Judiciary Committee Report that accompanies the 1982 amendment of Section 2 specifically mentions "shifts from elective to appointive office" as an

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100. Chisom v. Roemer, 111 S. Ct. 2354, 2367 (1991).

101. 42 U.S.C. § 1973c (1988). *See* Clark v. Roemer, 111 S. Ct. 2096, 2101 (1991) (Section 5 applies to changes in judicial election laws and practices).

102. Five counties in Florida are subject to the preclearance requirements of Section 5 of the Voting Rights Act: Collier, Hardee, Hendry, Hillsborough, and Monroe. *See* 28 C.F.R. pt. 55 (1991) (app.). This requires Florida to obtain preclearance under Section 5 before implementing any change in its election system for judges.

103. *See* Bunton v. Patterson, 393 U.S. 544 (1969) (companion case to Allen v. State Bd. of Educ., 393 U.S. 544 (1969)) (holding that a change from an elective system to an appointive system requires preclearance under Section 5). In Presley v. Etowah County Commission, the Supreme Court, while holding that certain changes in the internal procedures of governing bodies are not covered by Section 5, reaffirmed in dicta that changes from elective to appointive office are subject to Section 5 preclearance, citing *Bunton* with approval. 60 U.S.L.W. 4135, 4138-40 (1992).

104. 42 U.S.C. § 1973c (1988); Georgia v. United States, 411 U.S. 526, 536-37, 541 (1973).

example of "practices or procedures in the electoral process" that may violate Section 2 under the totality of the circumstances test.[105] Although some cases have rejected Section 2 challenges to appointive systems that have been in effect for many years,[106] a shift from an elective system to an appointive system at a time when minorities are poised to achieve fair participation in the electoral process would be an entirely different matter.[107]

Furthermore, the Court's statement concerning appointive systems may well have been made with reference to the pure appointive systems similar to those used for federal judges, not the merit retention systems often used by states in selecting judges. Merit retention systems include an election component: judges are initially appointed to office but must be approved by the voters at a later election in which voters may vote "yes" or "no" on retention of the judge.[108] Switching to retention elections in areas where there are few or no black judges would effectively exclude minority candidates. Given the broad interpretation of the Voting Rights Act's coverage in *Chisom* and *Houston Lawyers' Ass'n*, judicial selection systems that include an election component are unlikely to be exempted from scrutiny under Section 2.[109]

V. CONCLUSION

In amending Section 2 of the Voting Rights Act in 1982, Congress reaffirmed that assuring racial fairness in election practices remains an important national priority. The effort to exempt judicial elections from the protections of Section 2 clashed directly with the broad language and clear legislative history of the Voting Rights Act. To minority citizens seeking equal opportunity in the election process, racially discriminatory election procedures are no less harmful in judicial elections than in other elections.

There is no warrant for the exaggerated fears that are sometimes expressed concerning the effect of judicial election lawsuits on the ad-

105. H.R. REP. No. 227, 97th Cong., 1st Sess. 18 (1981).

106. Irby v. Virginia State Bd. of Elections, 889 F.2d 1352, 1357-59 (4th Cir. 1989) (long-standing system of appointing school board members), *cert. denied*, 110 S. Ct. 2589 (1990); Williams v. State Bd. of Elections, 696 F. Supp. 1563, 1568-69 (N.D. Ill. 1988) (long-standing system of appointment of associate judges).

107. *Cf.* Bunton v. Patterson, 393 U.S. at 569-70 (holding that Section 5 applied to a state's shift from elective to appointive office because of the discriminatory potential of such a change).

108. This type of combined appointive and elective scheme is also known as the "Missouri Plan." *See generally* Henry R. Glick, *The Promise and Performance of the Missouri Plan: Judicial Selection in the Fifty States*, 32 U. MIAMI L. REV. 509, 512 (1978).

109. A lawsuit challenging retention elections for judges is pending in Indiana. *See* Bradley v. Indiana State Election Bd., No. IP91-898C (S.D. Ind. filed Aug. 9, 1991).

ministration of justice. Remedial schemes that eliminate racially discriminatory features of the election system will not interfere with any legitimate state interest in the functioning of the judicial system. As the report of the Florida Supreme Court's Racial and Ethnic Bias Study Commission illustrates, the states themselves have a strong interest in reforming election practices that operate to deny minorities an effective voice in judicial elections. The protections of Section 2 of the Voting Rights Act can vindicate those interests by opening the judicial system to full participation by minority citizens.