

4-1-2001

The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times

Stephen B. Pershing

Recommended Citation

Stephen B. Pershing, *The Voting Rights Act in the Internet Age: An Equal Access Theory for Interesting Times*, 34 Loy. L.A. L. Rev. 1171 (2001).

Available at: <https://digitalcommons.lmu.edu/llr/vol34/iss3/11>

This Symposium is brought to you for free and open access by the Law Reviews at Digital Commons @ Loyola Marymount University and Loyola Law School. It has been accepted for inclusion in Loyola of Los Angeles Law Review by an authorized administrator of Digital Commons@Loyola Marymount University and Loyola Law School. For more information, please contact digitalcommons@lmu.edu.

THE VOTING RIGHTS ACT IN THE INTERNET AGE: AN EQUAL ACCESS THEORY FOR INTERESTING TIMES

*Stephen B. Pershing**

I. INTRODUCTION

Does Internet voting violate the Voting Rights Act? When, how, and why might it do so, and if it did, what else would? As the only participant in this Symposium on Internet Voting and Democracy whose day job is Voting Rights Act litigation, I feel obligated to turn to these questions. But I think they carry implications for voting rights enforcement that reach beyond the new voting technology that is the subject of our Symposium; in fact, they turn out to raise difficult questions of the meaning of the Voting Rights Act and its standards for liability.

So, at the risk of descending into a doctrinal morass that only a voting rights lawyer could love, I will try in this Article to deal with some of those questions, and will focus particularly on a core concept that seems to have received too little attention from courts and commentators: the race-based denial of equal access to the ballot-casting process. For it is this denial of access, not the more often litigated dilution of minority voting strength, that I think explains how the Voting Rights Act should treat online voting—and not only

* Attorney, Voting Section, Civil Rights Division, U.S. Department of Justice; adjunct professor, George Washington University Law School. The opinions expressed in this Article are those of the author in his personal capacity and do not represent the views or policies of the Justice Department, the Civil Rights Division, or the Voting Section. For help with this Article the author is indebted to the other contributors to Loyola's Internet Voting and Democracy Symposium, and to Michelle Aronowitz, Neil Bradley, Jon Greenbaum, Chris Herren, Gerry Hebert, Peyton McCrary, Laughlin McDonald, Tom Reed, Joe Rich, and Dana Shelley.

that provocative procedural innovation, but at least two more familiar practices that are among the liveliest current topics in American voting rights law: the disenfranchisement of felons, and the racially disparate use of error-prone conventional voting equipment.

The short answer to our opening questions is this: the racially selective distribution of benefits or burdens with respect to the act of voting might very well violate section 2 of the Voting Rights Act, by denying racial minorities equal access to the political process—even if the selectivity is not the demonstrable result of discriminatory intent, and even if it does not measurably affect a minority group's ability to influence or control the outcome of elections.

* * *

Internet voting has not yet been tried in a binding general election for public office in the United States. The only binding public election yet held anywhere in the nation that included Internet voting as an option for all voters was the Arizona Democratic Presidential Preference primary of March 7-11, 2000. That election is the focus of Professors Alvarez and Nagler in one of the Symposium's principal papers.¹ I set out here some details of this election for illustrative purposes.

For the Arizona Democratic presidential primary in March 2000, Internet voting was one of three voting methods used; the other two were vote-by-mail and in-person balloting.² The state Democratic Party, which ran the primary without funding from the state, mailed a packet to all voters on its master list of registered Democrats about three weeks before primary day, which was about two weeks before early voting (and Internet voting) began.³ The mail packet included an Internet voting "certificate," with a password for each individual voter that was essential to gain access to the Internet voting site. The packet also included an application for a mail-in ballot, and a

1. See R. Michael Alvarez & Jonathan Nagler, *The Likely Consequences of Internet Voting for Political Representation*, 34 *LOY. L.A. L. REV.* 1115, 1135-48 (2001).

2. See *id.* at 1136.

3. See *id.* at 1137.

letter explaining the three voting methods to be used for the 2000 presidential primary—Internet, mail, and in-person.⁴

The party arranged for in-person voting at more locations than had been used for the most recent previous Arizona Democratic presidential primary in 1996. The party claimed that a number of additional polling places were open, particularly “in or near” Indian reservations.⁵ Shortly before the primary, the party added some additional Election Day polling sites at or near reservation populations.⁶ The party permitted mail-in ballots to be sent in anytime until the close of the polls on election night. The Internet site for online voting was made available for four days up to and including the day set for in-person balloting.⁷

There was no restriction on the location of Internet voting sites; every registered Democrat in Arizona who received an Internet voting password could cast a vote over the Internet from any computer in the world for four days before primary day.⁸ Thus, for those voters whom the state Democratic Party’s master registration list included and whom the mails did not miss, and who had access to the Internet anytime during the four-day window, the bonds of time and geography were made looser than even traditional early voting or absentee voting could make them.

The party’s procedures permitted in-person voters to vote at any polling station in the state regardless of their assigned precinct.⁹ They also permitted late or same-day registration, although voters registered after January 22, 2000, had to vote by paper ballot.¹⁰ In theory, Internet-ready computers were provided for every election day polling site.¹¹

The scheme as a whole increased significantly the convenience of voting for those with ready access to the Internet and familiarity

4. *See id.* at 1136-37. The time provided—about seventeen days—may not have been enough to allow voters to mail back the application, receive a ballot by mail, and return it in time to be counted.

5. *See id.*

6. *See id.*

7. *See id.* at 1136.

8. *See id.*

9. *See id.*

10. *See id.*

11. *See id.*

with its use—call these voters “Internet-capable” or “Internet-privileged.” At the same time, the new scheme somewhat, but not as greatly, increased the convenience of voting by traditional means when compared with the 1996 Arizona Democratic presidential primary. It also greatly increased voting opportunities for all voters when compared with the limited caucus procedure the Party used to select its choice for president in elections before that. According to Alvarez and Nagler, the plan seems to have boosted turnout markedly, especially considering the minimal significance of the Arizona primary to the outcome of the 2000 Democratic presidential nominating process.¹² The plan also apparently made turnout in the primary whiter, as well as younger and better educated, than it would have been had the Internet voting option not been offered.¹³

Stated briefly, the section 2 access question presented on these facts is whether an innovation that makes voting more convenient, or more easily accessible, to some but not all voters introduces an unacceptable disparity into the voting process. Under section 2, if the set of those who enjoy the enhancement are more heavily white than those who do not, a fact finder must determine whether the level of convenience still available to the “have-nots” is sufficient that any gap between them and the “haves” is immaterial. Other section 2 issues are raised if and to the extent that the racial composition of the Election Day electorate is changed.¹⁴

For purposes of determining inequalities of access under section 2, a convenience or benefit to voting should be no different from a burden or other imposition on that activity. A benefit or burden is meaningfully maldistributed by race when it results in demonstrable relative hardship to minority voters even without an effect on turnout or election results—for example, even if those visited with the

12. *See id.*

13. *See id.* at 1142-43 tbl.6.

14. Alvarez and Nagler’s principal effort is to estimate the effect of Internet voting on the composition of the electorate for the 2000 Arizona Democratic presidential primary. *See id.* at 1117-18. Understandably, the focus of Alvarez and Nagler’s work is on changes in the electorate that could affect the outcome of the election; but although proof of such changes would most likely be required to support a vote dilution claim, it might not be necessary to a denial claim.

disadvantage generally manage to overcome it and negate any turnout effect that might otherwise result.¹⁵

II. DENIAL AND DILUTION

A. *The Problem Introduced*

The Voting Rights Act of 1965 began its career at a great moment in our civil rights history¹⁶ by outlawing at a stroke a vast array of exclusionary laws, pretexts, and devices that had kept political participation by nonwhites almost nonexistent across the American South since the turn of the twentieth century.¹⁷ The law achieved part of its purpose almost immediately: rates of black voter registration and voting shot up across the nation, but especially in the states of the old Confederacy.¹⁸ As is well known, of course, so did rates of the use of new devices—chiefly new methods of election—that effectively cancelled out much of the rise in minority voter

15. See *id.* at 1128 (unfairness of a disadvantage is not necessarily negated because those on whom it is imposed manage to overcome it).

16. See Lyndon B. Johnson's Special Message to the Congress on the Right to Vote, 108 PUB. PAPERS 1 (Mar. 15, 1965), available at <http://www.lbjlib.utexas.edu/johnson/archives.hom/speeches.hom/650315.htm> ("I speak tonight for the dignity of man and the destiny of democracy At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom . . . So it was last week in Selma, Alabama The cries of pain and the hymns and protests of oppressed people have summoned into convocation all the majesty of this great Government Our lives have been marked with debate about great issues . . . [b]ut rarely in any time does an issue lay bare the secret heart of America itself The issue of equal rights for American Negroes is such an issue. And should we defeat every enemy, should we double our wealth and conquer the stars, and still be unequal to this issue, then we will have failed as a people and as a nation.").

17. See Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445, amended by 42 U.S.C. §§ 1971, 1973bb-1 (1994); see also Katzenbach v. Morgan, 384 U.S. 641, 649-51 (1966) (discussing the basic test to be applied under the Fifteenth Amendment); JEROME J. HANUS ET AL., CONGRESSIONAL RESEARCH SERVICE, THE VOTING RIGHTS ACT OF 1965, AS AMENDED: HISTORY, EFFECTS, AND ALTERNATIVES 1-21 (1975).

18. See James E. Alt, *The Impact of the Voting Rights Act on Black and White Voter Registration in the South*, in QUIET REVOLUTION IN THE SOUTH: 1965-1990, at 351, 366 (Chandler Davidson & Bernard Grofman eds., 1994).

participation.¹⁹ In 1969, four years after the Act was passed, the U.S. Supreme Court held in *Allen v. State Board of Elections* that the most artful of those new devices—the systematic dilution of the voting power of racial minorities by means of changes to election systems—could be just as unlawful as the traditional, if now slowly abating, physical exclusion of minority voters from the nation's polling places.²⁰

Since *Allen*, the Voting Rights Act's core prohibition on racial discrimination in voting has undergone a number of reinterpretations, most of which have concerned the scope of liability and remedies for unlawful dilution of minority voting power when equality of physical access is nominally unimpaired. In the vote dilution hubbub of the last twenty years—from *City of Mobile v. Bolden*²¹ to the 1982 amendments to the Act,²² to *Thornburg v. Gingles*,²³ *Johnson v. De Grandy*,²⁴ and *Holder v. Hall*,²⁵ to *Shaw v. Reno*,²⁶ *Miller v. Johnson*,²⁷ and *Bossier Parish School Board v. Reno*²⁸—courts and advocates seem to have largely overlooked the power of the Act to address many forms of inequality of access to the electoral process in addition to vote dilution.

Vote dilution, simply defined, is a disproportionate reduction in the voting power of one segment of the electorate relative to that of another segment. This is generally a function, not just of the power of larger groups of voters to outvote smaller ones, but of the tendency of certain majority voting blocs to suppress, systematically and over time, the expression of the minority's preference. A racial vote dilution claim under section 2 of the Voting Rights Act is a claim that votes cast by racial minority voters as a group are

19. See *Allen v. State Bd. of Elections*, 393 U.S. 544, 563-71 (1969) (describing various election methods).

20. See *id.* at 569 ("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot.").

21. 446 U.S. 55 (1980).

22. Pub. L. No. 97-205, 96 Stat. 131 (1982); H.R. REP. NO. 97-227 (1981); S. REP. NO. 97-417 (1982), reprinted in 1982 U.S.C.C.A.N. 177-248.

23. 478 U.S. 30 (1986).

24. 512 U.S. 997 (1994).

25. 512 U.S. 874 (1994).

26. 509 U.S. 630 (1993).

27. 515 U.S. 900 (1995).

28. No. 98-405 (U.S. Jan. 24, 2000) (*Bossier II*).

mathematically diluted or rendered less effective than the votes of whites, i.e., that minority voters are deprived of the same chance as whites to elect their preferred candidates even when every other aspect of the system is “working,” or delivering to all voters an essentially equal opportunity to participate.²⁹ But the immediate goal of equal opportunity to cast votes is just as important to the Act, and is distinct from—even as it also serves—the statute’s further goal of equal opportunity to obtain political power by means of the votes cast. Section 2 was designed at least initially to address racial inequalities in the physical opportunity to cast a vote.³⁰ Such claims today are a tiny subset of the nation’s section 2 litigation; but at

29. See, e.g., *Johnson v. De Grandy*, 512 U.S. 997 (1994); *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Rogers v. Lodge*, 458 U.S. 613 (1982); *City of Mobile v. Bolden*, 446 U.S. 55 (1980); *Connor v. Finch*, 431 U.S. 407 (1977); *White v. Regester*, 412 U.S. 755 (1973); *Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir. 1987); *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *aff’d sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976); see also Chandler Davidson, *The Voting Rights Act: A Brief History*, in *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 24 (Bernard Grofman & Chandler Davidson eds., 1992) (“Ethnic or racial minority vote dilution may be defined as a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group.”).

30. Indeed, as far as Justices Scalia and Thomas are concerned, this is all section 2 should ever address. See *Holder*, 512 U.S. at 891-946 (Thomas, J., joined by Scalia, J., concurring) (noting that section 2, even as amended, was never intended to cover vote dilution, or for that matter other practices beyond the racially selective denial of physical access to the ballot). For comment on this extreme view, see, for example, Laughlin McDonald, *Holder v. Hall: Blinking at Minority Voting Rights*, 3 D.C. L. REV. 61 (1995) (“[S]uch a view, wholly at odds with the Court’s clearly established precedent and the legislative history of the Voting Rights Act, would amount to virtual repeal of section 2.”); David F. Walbert, *Georgia’s Experience with the Voting Rights Act: Past, Present and Future*, 44 EMORY L.J. 979, 980 (1995) (stating that the Scalia-Thomas view of Congress’s intent in amended section 2 was “without doubt, mistaken”); Ralph G. Neas, *Race, Civil Rights, and the United States Supreme Court in the New Millennium*, Ass’n of Trial Lawyers of America Annual Convention Reference Materials, July 2000 (noting that the Hall concurrence “refuse[d] to consider Congressional actions and debates [and] would dramatically diminish the protections provided by the Voting Rights Act of 1965, overturn 30 years of precedent and at least three congressional reauthorizations of the Act”).

bottom all violations of the Act are denials of equal access to the voting process, and all section 2 claims are denial claims.

I recognize that “[t]he Voting Rights Act is not an all-purpose antidiscrimination statute,”³¹ and this Article tries to explore the limits of section 2 claims in that spirit. I also recognize that the standard of liability for claims of denial of equal access is less clear than the more heavily litigated standard of liability in vote dilution actions.³² So I propose in this Article a way to understand some of what courts do, and ought to do, in section 2 cases other than dilution. They should and do measure nonracial justifications for challenged voting practices precisely by the extent of their racial effects on access to the vote. They also sometimes do, but should not, use nonracial justifications as a way of re-importing an intent element into the section 2 discriminatory results test. And they sometimes do, but should not, apply liability criteria peculiar to vote dilution in cases where those criteria are largely irrelevant. I will try in this Article to blend these ideas into a liability standard that I think is workable for denial of access cases under section 2, and then consider how that standard might apply, not just to online voting, but to felon disenfranchisement and to the uneven distribution of infrastructure that makes a vote less likely to be counted.

B. A Review of Existing Case Law

When Congress amended section 2 of the Voting Rights Act in 1982 to remove the intent requirement that the Supreme Court had read into it in *City of Mobile v. Bolden*,³³ it affirmed that the statute prohibited voting procedures that had the result of disadvantaging minority voters regardless of the motivation of the measure or policy.³⁴ Chief among the practices that moved Congress to act was the vote dilution alleged in *Bolden*, which the Court held could not

31. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992).

32. *See Thornburg v. Gingles*, 478 U.S. 30 (1986).

33. 446 U.S. 55 (1980).

34. *See* H.R. REP. NO. 97-227 (1981) (noting that the bill that became amended section 2 “restate[d] Congress’ earlier intent that violations of the Voting Rights Act, including section 2, could be established by showing the discriminatory effect of the challenged practice”); *see also* S. REP. NO. 97-417, at 193 (1982), *reprinted in* 1982 U.S.C.C.A.N. 179.

be redressed under existing section 2 without proof of intent to discriminate.³⁵

As the drafters of amended section 2 probably expected, minority vote dilution has dominated the case law under the Act throughout the 1980s and 1990s, but again it is by no means the only sort of wrong that section 2 recognizes. Section 2 bars the exclusion of any voters, "on account of race, color or membership in a [protected] language minority group," from any voting opportunity to which other voters are admitted.³⁶ In other words, it prohibits inequality of access (by race) to any aspect of the voting process.³⁷ Vote dilution in electoral systems is of course one form—to a 1960s observer, perhaps a novel form—of denial of equal access under section 2, but there were and are many other instances of this general wrong. Denial of access could just as soon consist of a racially selective failure to help voters physically enter the poll or read or fill out a ballot. Or it could be the failure to make polling sites as accessible to minority voters as they are to white voters. Other examples might include legal disqualifications, unjustified on other grounds,³⁸ that disproportionately impact minority voters, or any other racially disproportionate distribution of procedural benefits or burdens with regard to voting. And, as I will discuss further below, whereas vote dilution actions depend on a showing that minority voters' votes as a group are submerged, any individual voter can suffer an unlawful denial of the chance to cast a ballot.³⁹

35. On remand, through extraordinary effort, the plaintiffs in *Bolden* proved discriminatory intent, both as to the creation of the system in 1911 and its maintenance thereafter. See *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1054-68, 1076-77 (S.D. Ala. 1982).

36. Voting Rights Act of 1965 § 2(a), (b), 42 U.S.C. § 1973(a), (b) (1994).

37. See Voting Rights Act of 1965 § 14(b), 42 U.S.C. § 1973l(b) (1994). Under section 14(c) of the Act, the term "voting" throughout the statute includes "all action necessary to make a vote effective . . . including, but not limited to, registration, . . . casting a ballot, and having that ballot counted properly . . ." *Id.* § 14(c).

38. The question of justifications for practices challenged under section 2 will take us to some of the core issues of our discussion. See *infra* text accompanying notes 77-122.

39. Obviously, a selective denial to enough members of a given segment of the electorate—assuming such a group is politically cohesive—will effectively deny that group its voice in the election. But proof of group effects, an essential element of dilution claims, is precisely the proof that section 2 denial

Indeed, both before and after the 1982 amendments, section 2 has been held to reach many practices other than minority vote dilution. Among the voting procedures challenged as denials of equal access under a results test on grounds other than dilution have been the following:⁴⁰ (1) the form of a referendum question on the ballot;⁴¹ (2) a jurisdiction's refusal to appoint black pollworkers;⁴² (3) pollworker harassment of black voters for spending too long in the voting booth;⁴³ (4) a purge of all nonvoters from the registration rolls;⁴⁴ (5) the selective removal of black voters from the rolls because of unreported changes of address;⁴⁵ (6) a jurisdiction's failure to make municipal clerks deputy registrars and to implement satellite registration;⁴⁶ (7) a jurisdiction's limit on the number of minority

claims other than dilution do not require. See *United States v. Jones*, 57 F.3d 1020, 1024 (11th Cir. 1995). See generally *infra* text accompanying notes 53-71.

40. For a list that includes these and a variety of other section 2 cases, see McDonald, *supra* note 30, at 73-76.

41. See *Lucas v. Townsend*, 908 F.2d 851, 852 (11th Cir. 1990), *vacated sub nom.* Bd. of Pub. Educ. v. Lucas, 501 U.S. 1226 (1991). The court of appeals did not rule on whether the denial of access would be subject to a standard of proof different from that applicable to dilution, but implied that all section 2 violations, including polling place relocations and the like, were dilutions because that was the harm caused to minority voters—that their opportunity to elect would be reduced. See *id.* at 855-58.

42. See *Harris v. Graddick*, 593 F. Supp. 128, 132-33 (N.D. Ala. 1984). The court did not comment on whether dilutions and other denials of access were subject to different proofs, but quoted the 1982 Senate Report on other devices beyond formal barriers (language that extends of course to dilution as well) and held that the absence of minority poll officials impaired minority voters' access because it perpetuated the appearance, dating back to Reconstruction, that they were unwelcome at the polls. The court did not require proof that election outcomes would be affected in the least. See *id.* at 132-33.

43. See *Harris v. Siegelman*, 695 F. Supp. 517, 529 (N.D. Ala. 1988).

44. See *Ortiz v. City of Philadelphia*, 824 F. Supp. 514, 522 (E.D. Pa. 1993), *aff'd*, 828 F.2d 306 (3d Cir. 1994).

45. See *Toney v. White*, 476 F.2d 203, 207-08 (5th Cir. 1973), *vacated in part on reh'g*, 488 F.2d 310 (5th Cir. 1973) (upholding the findings of the trial court that the registrar had removed from the voter rolls the names of blacks who had not reported a change of address or who had failed to vote in any election in the last four years, but had not removed the names of similarly situated whites).

46. See *Operation PUSH v. Allain*, 674 F. Supp. 1245, 1268 (N.D. Miss. 1987), *aff'd sub nom.* *Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991); see also *infra* notes 53-58.

deputy registrars;⁴⁷ (8) the invalidation of black voters' absentee ballots without individualized review;⁴⁸ (9) a jurisdiction's failure to inform voters of new ballot-casting procedures;⁴⁹ (10) a jurisdiction's failure to provide absentee ballots to voters;⁵⁰ (11) the location of polling places;⁵¹ and (12) even the withholding of campaign finance information and forms from black candidates.⁵²

In *Operation PUSH v. Allain*, perhaps the most important of this group of cases, the district court distinguished the challenged voter

47. See *Hernandez v. Woodard*, 714 F. Supp. 963, 968 (N.D. Ill. 1989).

48. See *Goodloe v. Madison County Bd. of Election Comm'rs*, 610 F. Supp. 240, 243 (S.D. Miss. 1985). In this case, an election board invalidated the ballots notarized by a certain notary after four of her voters said she had not physically witnessed them filling out the ballots. The court noted that the board's actions may have had an effect on the outcome of the election, but that the fundamental fairness of the electoral process was not in jeopardy; nevertheless, it acknowledged that a large number of black voters, but no white voters, were disenfranchised. See *id.* at 242-43.

49. See *United States v. Post*, 297 F. Supp. 46, 47, 50 (W.D. La. 1969) (finding pre-amended section 2 erroneous instructions on voting equipment prevented a substantial number of black voters from casting effective votes; section 2 held violated despite the lack of discriminatory intent or effect on election outcome).

50. See *Brown v. Post*, 279 F. Supp. 60, 64 (W.D. La. 1968) (illustrating that section 2 can be violated due to a disproportionate benefit to white voters, even without a finding of intent or that the outcome of the election would have changed).

51. See *Brown v. Dean*, 555 F. Supp. 502, 504-06 (D.R.I. 1982) (location of city's polling places interacted with lower rates of minority automobile ownership and lack of public transportation to deter minority voting and work a "constructive disenfranchisement" in violation of section 2). Unresolved by this case is whether enhancement can set up the same inequality. See *Gilmore v. Greene County Democratic Executive Committee*, 435 F.2d 487, 491 (5th Cir. 1970), which held that equal protection was violated by Alabama election officials' practice of permitting literate voters but not illiterate voters to carry sample ballots into voting booth. That practice had no rational basis and "inevitably impose[d] a greater burden on Negroes than whites under existing dominant social patterns" *Id.* (citation omitted); see also *James v. Humphreys County Bd. of Election Comm'rs*, 384 F. Supp. 114 (N.D. Miss. 1974) (practice of offering assistance to voters with visual or mobility impairments but not to illiterate voters, where both types of assistance were discretionary under state law, violated section 2 and the Fourteenth Amendment).

52. See *Dillard v. Town of North Johns*, 717 F. Supp. 1471, 1472 (M.D. Ala. 1989) (holding that a town under section 2 consent decree violated section 2 when the mayor intentionally helped white candidates and hindered the efforts of black candidates).

registration procedure from vote dilution, then held that the Senate Report totality factors were generally applicable to section 2 cases—dilution and otherwise—and proceeded to apply them. The trial court took evidence of racially polarized voting, but observed in its opinion that such evidence was “peripher[al]” and concluded “upon reflection” that it was “not germane” to a section 2 claim against a voter registration procedure.⁵³ The court took the same view of other districting factors, e.g., a history of antisingle shot devices, unusually large districts, access to candidate slating processes, and racial appeals in campaigns.⁵⁴

Interestingly, the district court said the “ability . . . to elect” factor was among the “most important” listed in the Senate Report,⁵⁵ and cited *Thornburg v. Gingles* for this proposition,⁵⁶ but went on to say that the effect of the challenged registration scheme on minority voters’ ability to elect their chosen representatives was proven on a showing that only three out of 521 black elected officials in Mississippi had been elected from white-majority districts.⁵⁷ The court found the “bear the effects” factor present in abundance, and also addressed in detail the tenuousness of the state’s asserted justification for the procedure.⁵⁸

In affirming the district court’s decision, the court of appeals gave no hint that proof of effect on election outcomes would be required to establish a section 2 violation. The court considered the claim that a state legislative remedy would fail to eradicate the disparity between white and black registration rates, and concluded that “[i]f the disparity between black and white voter registration rates remains unreasonably distorted under the new legislation, PUSH may undertake to establish with statistical evidence that the voter registration procedures . . . still violate [section] 2.”⁵⁹

The *PUSH* court had before it a set of practices that effectively suppressed minority turnout. We do not know whether the court

53. *Operation PUSH v. Allain*, 674 F. Supp. 1245, 1264 (N.D. Miss. 1987), *aff’d sub nom.* *Operation PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991).

54. *See id.*

55. *Id.* at 1265.

56. *See id.* (citing *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986)).

57. *See id.*

58. *See id.* at 1257.

59. *Operation PUSH v. Mabus*, 932 F.2d 400, 407 (1991).

would have applied the same section 2 liability standard to measures that stimulated white turnout disproportionately, without affirmatively reducing access by minority voters; but logic suggests there is no difference between the two. At the same time, however, it is important that a practice that makes voting more convenient for whites than for minority voters may deny equal access under section 2 without proof that it makes the election day electorate whiter than it would otherwise be. If a showing of a racial skew of turnout were invariably required, minority voters would have no denial claim under section 2 if they overcame a convenience “handicap” that we could all agree was unjust to impose by race as a matter of principle. Indeed, a showing of effect on the racial composition of the electorate is a small step away from a showing of effect on the ultimate prize, that of group opportunity to affect election outcomes. If every denial claim is made to depend on such a showing, then denial claims, as distinguished from dilution claims, effectively cease to exist under section 2. Thus we arrive at our central question: how the results standard of amended section 2 applies to claims other than dilution. Specifically, we need to know what place, if any, the test accords (whether it should or not) to discriminatory intent or purpose; and what effect must be shown even if intent is not a factor.

One case especially important to our understanding in this regard is *Chisom v. Roemer*,⁶⁰ in which the Court came as close as it ever has—which is not very—to articulating a coherent vision of all results claims under amended section 2. Although mostly by implication, *Chisom* illuminates the standards for section 2 liability in both dilution and nondilution situations. The Court considered whether a section 2 plaintiff, no matter what type of wrong she alleges, must always show an effect on her ability to elect her chosen representatives, or indeed a dispositive impact such that the challenged practice made the difference between presence and absence of that ability. In doctrinal terms, according to the *Chisom* Court, there is “only one cause of action” under amended section 2.⁶¹ That cause of action exists to redress a single harm: the effective denial, by

60. 501 U.S. 380, 384-85 (1991) (involving minority vote dilution claim with regard to Louisiana judicial elections).

61. *Id.* at 397 (stating that the opportunity to participate and elect under section 2 is a single standard and that a plaintiff must prove both to prevail).

race, of equal “opportunity to participate in the political process [and] to elect representatives of one’s choice.”⁶²

Chisom did not decide whether a claim of differential opportunity to participate—like the one a voter would have on proof that she was physically denied access to the polls—could prevail without proof that the challenged practice made the difference between presence and absence of a reasonable opportunity to elect. Nor did *Chisom* hold that a showing of minority voters’ failure to elect proved that the challenged voting method or practice diminished those voters’ opportunity to participate. But, *Chisom* did hold that whenever the opportunity to *participate* is diminished by race, a diminution in opportunity to *elect* necessarily follows.⁶³

This holding becomes clearer if one considers Justice Scalia’s dissent. Justice Scalia argued that not in every case should proof of harm both to the opportunity to cast ballots and to the opportunity to elect candidates of choice be required to make out a section 2 claim.⁶⁴ He seemed to focus—at least in this case, whatever may have been his larger concern⁶⁵—on voters who could not prove they could actually elect if the wrongful procedure were enjoined. The majority in *Chisom* responded on this point by saying that Justice Scalia was mistakenly assuming that minority voting blocs could never influence an election that they could not fully control.⁶⁶ The *Chisom* majority appeared to say that the requirement of harm to a section 2 plaintiff’s “opportunity to elect” would not extinguish the claims of all those who could not prove they could elect, but their reasoning was that proof of ability to influence would suffice in this respect.

It seems the *Chisom* majority, although in pursuit of an unrelated aim, assumed that at least some ability to influence elections was an element of every section 2 claim. If indeed the majority so assumed, it remains unclear whether the Court believed that some

62. *Id.*

63. *See id.* at 403-04.

64. *See id.* at 407-10 (Scalia, J., dissenting).

65. This is, after all, the same Justice Scalia who, three years after *Chisom*, joined Justice Thomas in urging that section 2 be construed not to apply to dilution cases at all. *See Holder v. Hall*, 512 U.S. 874, 891-92 (1994) (Thomas, J., concurring).

66. *See Chisom*, 501 U.S. at 397 n.24.

influence is possible, by definition, for every voter who has the chance to cast a ballot, no matter how small his or her voting bloc, so that diminution of “opportunity to elect” would still automatically follow from (and would not require proof separate from) diminution of opportunity to participate. Perhaps the Court believed that its standard would protect those voters who could prove ability to influence or control, and that section 2 was not to be construed to care about any other class of voters. The majority and Scalia opinions seemed to be talking past one another on this point, and the matter was apparently left unresolved. *Chisom* was a dilution case, and its result did not depend on the answer. In nondilution cases under section 2, however, the question is quite important.

The problem is the one suggested above: If every section 2 allegation, dilution or otherwise, must stand or fall on proof of ability to affect on election outcomes, then the distinction between dilution and other denial of access cases, of which the Thomas concurrence in *Holder v. Hall* makes so much, loses its meaning. It cannot simultaneously be true (a) that section 2 applies to denial claims in general but not to dilution claims in particular, and (b) that every section 2 claim, whether for dilution or not, must demonstrate that dilution occurs, i.e., that the challenged practice makes a cohesive minority voting bloc consistently unable—where “but for” the wrong it would be able—to elect its chosen representatives.

Section 2(b) construed without this distinction would, at a minimum, extinguish *per se* a section 2 dilution claim that the courts until now have not foreclosed, namely a claim based on deprivation of an opportunity to influence outcomes rather than control them.⁶⁷ It would also generally extinguish section 2 challenges to the most egregious—even intentional—denials of equal access, where the plaintiffs could not show that their group could win elections absent the denial. Even a gentler formulation, under which the challenged practice must make the difference between presence or absence of an opportunity to *influence* or elect, would pose the same problem.⁶⁸

67. See *Grove v. Emison*, 507 U.S. 25, 40-41 (1993) (leaving the influence question open).

68. See John A. Earnhardt, *Challenging Episodic Practices Under Section 2 of the Voting Rights Act: Critical Analysis of Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, 52 WASH. & LEE

The difficulty seems best resolved for our purposes if *Chisom* is understood to hold that burdens on the opportunity to participate necessarily burden the opportunity to affect the outcome of elections in at least a theoretical sense. This formulation does not split the conjunct “opportunity to participate . . . and elect” standard of amended section 2, since for dilution claims (which allege an unequal opportunity to elect without alleging inequality of opportunity to participate) both prongs will have to be proven, whereas for denial claims (which allege unequal opportunity to participate in the first place) some quantum, however slight, of effect on opportunity to elect is established on proof of unequal opportunity to participate.⁶⁹

In other words, it appears from *Chisom* that all section 2 claims, at least in a technical sense, depend on a showing of effect on a plaintiff’s ability to elect; but where the alleged wrong is the physical denial of a voter’s opportunity to cast a ballot, the harm, however slight, to that voter’s chance to affect the election outcome is self-evident. Keeping someone from buying a lottery ticket by definition hurts that person’s chance to win. Only where the voter has cast her ballot, and claims that her vote was diluted, that is, made less effective than it should have been once cast—a challenge to the lottery’s method of selecting a winner, as it were—does section 2 require proof of what the challenged voting procedure does to the ability of a group of minority votes to affect election results.⁷⁰

L. REV. 1065, 1076 n.62 (1995) (“If both conditions must be violated before there is any § 2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis ‘elect representatives of their choice’ would be entirely without § 2 protection . . . [A] protected class that with or without the practice will be unable to elect its candidate can be denied equal opportunity to ‘participate in the political process’ with impunity.”) (citing *Chisom*, 501 U.S. at 409 (Scalia, J., dissenting)).

69. I agree with commentator Earnhardt that this is the premise of *Chisom* that the majority in *Ortiz v. City of Philadelphia Office of Commissioners*, 28 F.3d 306 (3d Cir. 1994), failed to understand. See Earnhardt, *supra* note 68, at 1099-100. “[T]he Ortiz majority’s misunderstanding of the Chisom rule—that burdening of political participation necessarily impairs the ability to elect and thus violates section 2—caused it to apply the negative converse of the Chisom rule—that without impairing the ability to elect, a challenged practice cannot violate section 2.” *Id.* at 1099.

70. This, at least, is the rule of the better reasoned cases. See *Operation PUSH v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff’d sub nom.* *Opera-*

In terms of the vote dilution holding of *Gingles*, a plaintiff who alleges that her preferred candidates are consistently defeated, even though she casts her vote the same way everyone else does, must satisfy the three dilution preconditions—size and compactness of her minority group, political cohesion of that group, and a degree of white bloc voting sufficient to overcome that cohesion in most elections—before her section 2 claim can proceed under the totality of circumstances.⁷¹ But *Chisom* does not extinguish section 2 claims other than the discriminatory districting at issue in *Gingles* merely because the *Gingles* preconditions are inapplicable to those claims.

Before leaving the subject of denial claims and the *Gingles* preconditions, let us consider one further problem. In theory, a jurisdiction might be able to prove that an alleged inequality of access actually causes no harm to minority voters, or indeed benefits them, on election day. Take the example of online voting. The “electorate with Internet,” i.e., the set of voters turning out via the Internet and all other voting options combined, might be less polarized by race than the electorate turning out via conventional voting methods alone, if and to the extent that “new” Internet voters—voters who would not have participated at all if not for the online option—were more inclined than their non-Internet counterparts to cross over and vote for minority-preferred candidates. If this were true, then even if whites were disproportionately stimulated to turn out by the availability of online voting, that might not harm minority voters’ opportunity to elect their chosen candidates. Could proof of such a fact defend against a denial claim, i.e., a claim that minority voters were denied equal access to voting because they disproportionately lacked access to the Internet? The totality of circumstances applies to all section 2 claims, so here as elsewhere the ultimate effect on minority voters’ collective choices ought to matter. However, two important considerations should be mentioned. First, the candidate preferences of white voters whose turnout is stimulated should not be permitted to justify a demonstrable impairment to minority voters’ access to the

tion *PUSH v. Mabus*, 932 F.2d 400 (5th Cir. 1991); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982). Not all courts are so careful to avoid irrelevant proof requirements in denial cases. See, e.g., *Williams v. Baldwin County*, No. 00-0082 (S.D. Ala. Nov. 2, 2000) (unpublished) (imposing *Gingles* preconditions on denial claimants).

71. See *Thornburg v. Gingles*, 478 U.S. 30, 48-53 (1986).

voting process, regardless of how they would cast their votes or what influence those votes would have. Second, the possibility of a “no ultimate harm” defense to a denial claim should not be turned into a requirement that all denial claims must meet the bloc voting preconditions of *Gingles*. Just because denial claims can sometimes be negated by proof that the ultimate harm to minority voters’ interests is not in fact occurring does not mean that all denial claimants must anticipate and disprove such a defense in order to state a claim. As a practical matter, to subject denials of equal access to the *Gingles* bloc voting preconditions would give those denials, no matter how egregious, a “free ride” for a period of years at least, since a plaintiff could not proceed without evidence of election history under the allegedly unfair practice. I feel sure that Congress never meant section 2 denial claims to be hobbled in this way, but intended these wrongs to be actionable from their first moment in existence.

The preceding discussion has tried to establish that denial claims do not need to offer proof that is specific to dilution claims, especially proof à la *Gingles* that a cohesive bloc of minority voters would have the ability to control or influence the election of a chosen candidate if not for the wrong alleged. But the existing case law mostly fails to explain just what proof *is* required for section 2 non-dilution cases. So the question arises, what is the standard of liability for such cases?

III. THE DENIAL STANDARD THAT TODAY’S COURTS SEEM TO BE USING

As may appear from the inventory of denial cases given above, the classic section 2 denial of equal access is simply some sort of limitation or restriction on minority-race individuals’ exercise of the franchise that whites enjoy. However, not all section 2 denials of access are equal in the courts. The reader will not be surprised to learn that courts stumble over the hard cases,⁷² and that through the cloud

72. See *Winterbottom v. Wright*, [1842] 152 Eng. Rep. 402, 406 (Exchequer of Pleas) (Rolfe, J.) (“Hard cases, it has been frequently observed, are apt to introduce bad law.”); *Northern Sec. Co. v. United States*, 193 U.S. 197, 400 (1904) (Holmes, J., dissenting) (“Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate over-

of those cases the applicable liability standard is much tougher to discern.

As we try to make sense of these decisions, let us consider a hypothetical. Suppose a state government sets up an investment trust. Suppose that only qualified investors may vote for members of the board of trustees, and that only investments of \$1 million or more qualify for deposit in the trust. Suppose there are thousands of white millionaires in the state and only a handful of minority millionaires. Would the investors-only restriction on the franchise for board elections violate the results test of section 2?

The special purpose of the trust seems to be important here, for two reasons: First, its monetary gains—aside from whatever indirect benefit the legislature thought the investments might realize for the state as a whole—are not universally distributed, but belong solely to the investor beneficiaries; and second, one can fairly expect people to be more willing to invest in the trust if the decision-making board is chosen by people with a direct stake in its decisions. In other words, a governmental interest is present here which apparently figures into the section 2 analysis.

A state interest of some sort also seems prominent in the case—this one drawn from life—of a landowners-only franchise for the governing board of an agricultural district whose chief function is to allocate water and power to area farms. In *Smith v. Salt River Project Agricultural Improvement and Power District*,⁷³ the court of appeals held that restricting the franchise to landowners in such a district did not violate section 2 merely because of the statistical disparity between the proportion of whites and of African Americans who were landowners.⁷⁴ Even though the court was at pains to hold that section 2 applied to special districts of the kind at issue, the panel noted the state's interest in limiting the franchise to landowners who had "risked their lands" to create the district and achieve its goal of land reclamation.⁷⁵

whelming interest which appeals to the feelings and distorts the judgment.").

73. 109 F.3d 586 (9th Cir. 1997).

74. *See id.* at 596.

75. *See id.* at 591. Note that the appeals court affirmed the result reached by a trial court whose principal rationale was that section 2 did not apply to special districts at all. Also, the appeals court remarked on the trial testimony of the plaintiffs' expert that "if forced to identify the variable with the 'largest

Whatever may be the larger significance of *Smith*, it conforms to the idea that denials of equal access should not be analyzed as though they were dilutions, with a review of the *Gingles* preconditions and a finding of no liability if any of them are unsatisfied.⁷⁶ *Smith* was a special-district case in which the court of appeals tried to chart a middle course between invalidating the district on the one hand, and declaring it immune to any and all section 2 challenges on the other. To the court, the virtues of the special district simply outweighed its vices.

Another hard case is *Wesley v. Collins*,⁷⁷ a section 2 challenge to Tennessee's state statute stripping convicted felons, for life, of the right to vote. The plaintiffs' argument was that the racial disparity in felony conviction rates meant that the disenfranchisement statute had the same racially disparate impact, and that section 2 prohibited the lifetime disenfranchisement of felons as a voting practice that interacted with other social realities to produce a racial disparity in voting opportunity. The trial and appeals courts held the disparity insufficient by itself to violate section 2, more or less on causation grounds: "Felons [are not] disenfranchised because of an immutable characteristic, such as race, but rather because of their conscious decision to commit a criminal act for which they assume the risks of detention

net effect' on home ownership, he would point to 'persons per dwelling unit'" rather than race. *Id.* at 590. And the court observed—oddly, since one might have thought this was precisely the plaintiffs' case—that the appellants appeared to "make no claim that the [special district's] voting system discriminates against *non-landowners* (nonvoters), who may disproportionately be African-Americans." *Id.* at 596. For more on the possible hidden determinant in nondilution cases under section 2, see *infra* text accompanying notes 94-109.

76. A handful of cases have applied *Gingles* vote dilution preconditions to nondilution fact patterns, with unsatisfactory results. See *Williams v. Baldwin County Comm'n*, No. 00-0082 (S.D. Ala. Nov. 2, 2000) (unpublished). The *Gingles* Court recognized that vote dilution was only one type of section 2 claim, and that "Section 2 prohibits all forms of voting discrimination, not just vote dilution." *Thornburg v. Gingles*, 478 U.S. 30, 44 n.10 (1986). As indicated *supra*, the *Gingles* Court understood that section 2 claims other than dilution would not be subject to the same standards as discriminatory districting actions—either factors from the Senate Report or the preconditions it was setting forth in its opinion. Even section 2 vote dilution claims for influence districts, the *Gingles* Court held, would be differently treated. See *id.* at 46 n.12.

77. 605 F. Supp. 802 (M.D. Tenn. 1985), *aff'd*, 791 F.2d 1255 (6th Cir. 1986).

and punishment.”⁷⁸ Equally important to the court of appeals was the “legitimate and compelling” justification it believed existed for the statute: “the state’s undisputed authority to disenfranchise felons” under the federal Constitution,⁷⁹ as well as the proposition, not otherwise described or supported in the court’s opinion, that “the disenfranchisement of felons has never been viewed as a device by which a state could discriminatorily exclude a given racial minority from the polls.”⁸⁰ The court of appeals did not specifically affirm, or even mention, the trial court’s holding that “while intent need not be shown [under section 2], the ultimate conclusion that a violation has occurred must be tied to a finding that the scheme unfairly impacts on the minority group—not necessarily purposefully, but at least for reasons deemed more culpable than neutral.”⁸¹

Still another challenging example is *Ortiz v. City of Philadelphia Commissioners*,⁸² in which the trial court noted that the defendant city had an interest in cleansing its voter rolls of voters who had not voted in some time in order to keep vote defrauders from misusing those voters’ names. The case turned on causation, i.e., the causal relationship between the challenged practice and harms to minority voters’ opportunity to participate, but the underlying equation was the same: a balancing of the government’s nonracial interest in carrying out its policy against the severity of the policy’s racial impact. The panel majority held that a denial of equal access was not established merely on a showing that minority voters were purged at a higher rate, and reinstated at a lower rate, than white voters. Rather, the two-judge majority held that a challenge to the city’s purge procedure under section 2 had to prove that the purge statute caused the racial difference in purge rates, instead of interacting with other social factors to bring it about, since only then would the challenged practice—rather than those other societal factors—be responsible for the alleged impact on the racial composition of the electorate. Since the proof demanded was impossible to produce, the

78. *Wesley*, 791 F.2d at 1261.

79. *Id.* (citing *Richardson v. Ramirez*, 418 U.S. 24 (1974)) (other citations omitted).

80. *Id.*

81. *Wesley*, 605 F. Supp. at 810.

82. 824 F. Supp. 514 (E.D. Pa. 1993), *aff’d*, 28 F.3d 306 (3d Cir. 1994).

plaintiffs could not prevail. The ruling in effect imposed a requirement of sole or predominant causation for section 2 denial of access cases, and thus stood on its head the “interacts with” principle of causation embodied in amended section 2⁸³ and the pre-*Bolden*⁸⁴ case law on which it relied.⁸⁵

Although the decision in *Ortiz* drew heated dissent from one member of the three-judge panel⁸⁶ and has been severely criticized as a misapplication of section 2,⁸⁷ it may be that the court reached the right result for the wrong reasons. Even viewed from the wrong end of the telescope, that of relief, purges of nonvoters may be

83. See *Gingles*, 478 U.S. at 47.

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

85. Of further interest is the remarkable suggestion of the appellate majority in *Ortiz* that the only minority voters affected by the challenged purge practice would be those who, by registering in the first place, had overcome the socioeconomic disparities that supposedly disadvantaged them, and that therefore there was no section 2 harm to anyone. A denial claim that alleges a disproportionate allocation of voting convenience by race should not depend on the preexisting disadvantage to minority voters in a world without the convenience enhancement, but sets that equal, and focuses instead only on the racial disproportion of the enhancement. Compare *Operation PUSH v. Allain*, 674 F. Supp. 1245, 1254 (N.D. Miss. 1987) (noting that voter registration procedures resulted in lower registration rate for blacks, which denied equal access), with *Ortiz*, 28 F.3d at 317 (discussing socioeconomic proofs would be relevant to a challenge to the city’s voter registration procedures even though they were irrelevant to the purge claim). See also *Ortiz*, 28 F.3d at 323-24 (Lewis, J., dissenting).

86. See *Ortiz*, 28 F.3d at 323-24 (Lewis, J., dissenting).

87. The chief criticism is that, contrary to the court’s view, section 2 causation was clearly intended by Congress to be “but-for” or contributing causation and not predominant or sole causation. See *id.* at 323 (“interacts with”); see also *id.* at 310-12 (illustrating that the court knew sole causation was not required, but gave no satisfactory explanation for demanding it); Earnhardt, *supra* note 68. The *Ortiz* majority also left unexamined the assumption that purges of persons who had not recently voted would have the desired fraud-deterrent effect. The assumption is understandable, since names taken off the voter rolls are names that defrauders cannot use. However, the court declined to consider whether the least restrictive means of protecting against fraud would be to purge all nonvoters, or whether there were means more narrowly tailored to the antifraud end than a blanket purge rule. See Jeffrey Blomberg, Note, *Protecting the Right Not to Vote from Purge Statutes*, 64 *FORDHAM L. REV.* 1015 (1995) (arguing for strict scrutiny of nonvoter purges under the Fifteenth Amendment as denials of a constitutionally protected right not to vote).

exceptional cases under section 2. A jurisdiction can hardly be expected to hold registrations open forever for minority nonvoters even while eventually canceling white nonvoters' slots to keep defrauders from infiltrating them. If jurisdictions were expected to do this, or if purges after extended lack of contact were held *per se* to violate section 2, then even the cautious no-contact removal procedures sanctioned by Section 8(d) of the National Voter Registration Act of 1993 (NVRA)⁸⁸ would violate section 2 on proof, likely to be available in most urban areas of the United States, that those procedures had the same statistically disparate effect by race that the plaintiffs in *Ortiz* documented for the more abrupt purge at issue in that case.

Again, what seems to be at work is the court's assessment of the justification for the government's policy. A policy against vote fraud is not tenuous, and the gentler the removal procedure the stronger its policy justification. An NVRA-style removal program is presumably more strongly justified than the shorter-term and more abrupt removal procedures upheld in *Ortiz*. It is the same with felons, as in *Wesley*: the courts in both situations held that no matter how obvious or severe the racial disproportion of voter removals triggered by the challenged practice, certain policy justifications for the practice—in *Wesley*⁸⁹ the interest in disqualifying people from voting for so long as the legislature deemed them "undeserving" of the franchise, and in *Ortiz* disqualifying supposed "nonvoters" to prevent defrauders from voting in their names—can trump it. Whatever one's view of the merits of the *Ortiz* and *Wesley* decisions, neither is inconsistent with the idea that the Senate Report totality factors analysis is flexible enough to be applied in every section 2 case, dilution and nondilution claims alike.

What proof might have led the court in *Ortiz* to invalidate the challenged purge procedure under section 2? Would the result in *Ortiz* have been the same if the purge notice mailings to all neighborhoods over, say, thirty percent minority in VAP had been lost, even without proof of anyone's intent to lose them, and never delivered? What if the purge statute had made it more onerous to reregister after removal than to register in the first place—perhaps, for

88. Pub. L. No. 103-31, 107 Stat. 82 (1993).

89. 791 F.2d 1255, 1261 (6th Cir. 1986).

instance, by requiring reregistrants, but not first-time registrants, to bring with them live witnesses or extra documents to prove citizenship or domicile? In each case, the state's proffered antifraud interest in the purge would have been the same, and the underlying disparity in prepurge turnout rates by race would have been the same. The rationale that appears to cover these scenarios best is simply whether the stated governmental end is important and worthwhile enough, independent enough of race, and narrowly enough furthered, to justify the means in spite of the incidental racial effect. Such a rationale appears to confound as many of the Senate Report factors as it elucidates, but it most certainly uses the justification factor.

On the other hand, each of the preceding hypotheticals on the *Ortiz* facts seems to suppose a stronger causal relationship than existed in the actual case between the purge practice and its racially disparate effect, and thus to take us closer to "easy" sole causation. The analytical difficulty is finding a causal link that allows a section 2 claim to proceed against a neutral practice that has no racial disparity of its own to impart, but simply transmits to the voting process the racially disparate effect of some other social inequality. This was the core problem that the *Ortiz* court seems to have found insurmountable.⁹⁰

One final real-world section 2 example must not be overlooked, even though it arises from vote dilution litigation: the supposed state interest in preserving at-large elections for judgeships, an interest in "linkage" between a judge's territorial jurisdiction and his or her electoral constituency.⁹¹ The fear articulated in support of this interest is that judges elected from districts will campaign from the bench, favoring home-district over out-of-district litigants in their rulings

90. See *Ortiz*, 28 F.3d at 308-09.

91. See *LULAC v. Clements*, 999 F.2d 831, 868 (5th Cir. 1993) (noting that the state's linkage interest "must be weighed in the totality of circumstances to determine whether a § 2 violation exists"); *id.* at 869 (noting that by linking territorial and electoral jurisdiction the state seeks to "maintain the fact and appearance of judicial fairness that are central to the judicial task, in part, by insuring that judges remain accountable to the range of people within their jurisdiction. A broad base diminishes the semblance of bias and favoritism towards the parochial interests of a narrow constituency. Appearances are critical because the very perception of impropriety and unfairness undermines the moral authority of the courts.") (quotation marks and citation omitted).

out of concern for future votes, and that judges elected at large from the entire jurisdiction from where they adjudicate will not succumb—and cannot be suspected of succumbing—to this temptation. Federal courts reviewing section 2 vote dilution challenges to at-large election systems for state judges have weighted this “linkage” interest so heavily as to make it conclusive of the claim, or preclusive of a remedy,⁹² and have even attributed the interest to states where the states have not asserted it.⁹³

Again, on the surface, the Senate Report factor at work in all these real and hypothetical examples is the relative strength or “tenuous[ness]”⁹⁴ of the government’s justification for the policy. The special district’s reclamation purpose in *Smith v. Salt River Project Agricultural Improvement and Power District*,⁹⁵ the claimed moral authority to disenfranchise felons in *Wesley*,⁹⁶ the state’s antifraud interest in *Ortiz*,⁹⁷ and the “linkage” interest in the judges’ cases⁹⁸—all of them governmental interests unrelated to race—are all non-“tenuous” justifications in the view of those courts.

However, the reported decisions take variously evasive approaches to facts of record that suggest a disparate racial impact, apparently not wishing to acknowledge such an impact only to discount it. There seems to be a hidden determinant in operation in each of these cases: the court’s feeling, completely out of place in a results case but nonetheless in play, about the presence or absence of intentional discrimination, or at least of a tendency to “accommodate or amplify the effect [of] private [intentional] discrimination.”⁹⁹ The

92. See *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994) (en banc); *LULAC v. Clements*, 999 F.2d 831 (5th Cir. 1993) (en banc).

93. See *Prejean v. Foster*, 227 F.3d 504, 508 (5th Cir. 2000).

94. S. REP. NO. 97-417, at 29 (1982) (quoting *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (“whether the justification . . . is tenuous”)).

95. 109 F.3d at 591.

96. 605 F. Supp. 802, 810 (M.D. Tenn. 1985).

97. See *Ortiz v. City of Phila. Comm’rs*, 28 F.3d 306, 310 (3d Cir. 1994).

98. See *LULAC v. Clements*, 999 F.2d 831, 868-76 (5th Cir. 1993).

99. *Smith*, 109 F.3d at 595 (citing *Solomon v. Liberty County*, 899 F.2d 1012, 1031-32 (11th Cir. 1997) (Tjoflat, J., concurring)). In the judge’s cases under section 2, courts seem particularly reluctant to conclude that the decisions of elected judges might be affected by the race of their constituents, even though the “linkage” interest itself is avowedly based on the idea that unlinked territorial and electoral jurisdictions could result in actual or perceived judicial

trial court in *Wesley* came closest to making intent an explicit element of the results test when it indicated that to support section 2 liability the challenged practice must have been implemented for reasons "more culpable than neutral."¹⁰⁰

In all the cases there is the odor of racially discriminatory intent; that is the nature of a government policy that rests on a tenuous non-discriminatory justification. Indeed, the more-than-just-a-coincidence feature of discriminatory result fact patterns is what legitimates the circumstantial multi-factor analysis of discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*¹⁰¹

In my view, the section 2 results test does not re-import an intent standard, even the circumstantial evidence test of *Arlington Heights* or *Rogers v. Lodge*,¹⁰² and cannot be construed to do so without subverting Congress's clear and overriding purpose in amending section 2 to remove the intent requirement. The intent test of *Arlington Heights* and *Washington v. Davis*¹⁰³ that was held applicable to section 2 cases in *Bolden*, was exactly the limitation that Congress, in amending section 2, was rejecting. The Court in *Washington v. Davis* reasoned:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in

bias. See *LULAC*, 999 F.2d at 868-70; *Nipper v. Smith*, 39 F.3d 1494, 1545 (11th Cir. 1994) (en banc).

100. *Wesley*, 605 F. Supp. at 810.

101. 429 U.S. 252, 266 (1977) (describing the multi-factor test for circumstantial evidence of discriminatory intent in constitutional cases). Evidence as to each factor must be considered by the court in fulfillment of its duty to make "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Id.* Factors probative of discriminatory intent include: (1) the nature and magnitude of the disparity itself (discriminatory impact); (2) foreseeability of the consequences of the government defendant's actions; (3) legislative and administrative history of the decision-making process; and (4) knowledge, in that a defendant's actions would be known to have caused the disparity or discriminatory impact which resulted from their conduct. See *Ammons v. Dade City*, 783 F.2d 982, 987-88 (11th Cir. 1986).

102. 458 U.S. 613, 618 (1982) (discussing that intent to dilute votes of racial minority groups in violation of the Fifteenth Amendment may be inferred from "such circumstantial and direct evidence of intent as may be available") (following *Arlington Heights*, 429 U.S. at 266).

103. 426 U.S. 229 (1976).

practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white.¹⁰⁴

In *Bolden*, the Court turned to the legislative history of original section 2 as passed in 1965 and noted that it was termed by its proponents as “almost a rephrasing of the 15th [A]mendment.”¹⁰⁵ This was the basis for the holding in *Bolden* that section 2 “adds nothing” to claims of vote dilution under the Fifteenth Amendment.¹⁰⁶ The 1982 Senate Report said specifically that amended section 2 would now pick up where the constitutional intent cases left off.¹⁰⁷ The implication is clear that racially disparate effects of neutral state voting practices, even if those disparities were the result of larger social inequalities and were merely transmitted onto voting by the neutral procedure, could be redressed under amended section 2.

A significant body of discriminatory effect caselaw exists under the Fair Housing Act of 1968.¹⁰⁸ Although a comparison of the history and scope of effects tests under that statute and the Voting Rights Act is beyond the scope of this Article, the housing cases as a group are highly instructive.¹⁰⁹ But courts appear quite willing to

104. *Id.* at 248 (footnote omitted).

105. *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980) (citing *Voting Rights Legislation: Hearings Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 89th Cong. 26 (1965) (remarks of Sen. Dirksen and testimony of Attorney General Katzenbach)).

106. *Id.*

107. See S. REP. NO. 97-417, at 2 (1982).

108. 42 U.S.C. § 3604(a) (1994).

109. See, e.g., *Pfaff v. U.S. Dep't of Hous. and Urban Dev.*, 88 F.3d 739 (9th Cir. 1996); *Soules v. U.S. Dep't of Hous. and Urban Dev.*, 967 F.2d 817 (2d Cir. 1992); *Hanson v. Veterans Admin.*, 800 F.2d 1381 (5th Cir. 1986); *Betsey v. Turtle Creek Assocs.*, 736 F.2d 983 (4th Cir. 1984); *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 145 (3d Cir. 1977), *cert. denied sub nom. City of Philadelphia v. Resident Advisory Bd.*, 435 U.S. 908 (1978); *Metro. Hous. Dev. Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977) (*Arlington Heights II*); *Smith v. Anchor Bldg. Corp.*, 536 F.2d 231, 233 (8th Cir. 1976); *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975). See generally Frederic S. Schwartz, *The Fair Housing Act and Discriminatory Effect: A New Perspec-*

consider nonracial justifications for policies affecting voting, and our challenge is to explain that inclination without rendering the section 2 results test incoherent or ineffective.

IV. THE DENIAL STANDARD IMPROVED? AN INVERSE RELATIONSHIP BETWEEN RACIAL IMPACT AND NONRACIAL JUSTIFICATION

The basic analytical difficulty we face in developing liability theories for section 2 denial claims is that section 2 is said not to be an "all-around antidiscrimination statute,"¹¹⁰ yet by its terms it operates against any practice that interacts with past and present social conditions to result in unequal access to the vote by race, either the physical voting process or the larger political process of electing chosen representatives.¹¹¹

The more practices we grant that section 2 can enjoin, and the more attenuated the causal nexus we accept as the basis for a section 2 denial of access claim, the more it appears section 2 is being used only to combat larger social injustices, like the racial gap in income, rather than the effects of those injustices on voting. On the other hand, the fewer practices we say section 2 covers, and the narrower the causation standard we apply, the closer we come to re-importing an intent test into a statute that Congress clearly said has no intent requirement. Somewhere between these poles is the Senate Report multi-factor test: flexible, but how flexible? It requires proof, but what proof in which cases? The Senate Report instructs that section 2 plaintiffs who show that a jurisdiction's minority voters are economically disadvantaged and also that their political participation is depressed need no further proof for a nexus to be established between the poverty and the low turnout.¹¹² "At the same time, the Report says some number of factors will need to be proven, and says prominently that statistical disparities between the races alone do not suffice for a section 2 claim, for vote dilution or otherwise."¹¹³

tive, 11 NOVA L. REV. 71 (1987) (noting that in an effects case under the Fair Housing Act, asserted justifications for the challenged action are balanced against the severity of the racial impact).

110. *Presley v. Etowah County Comm'n*, 502 U.S. 491, 509 (1992).

111. *See* S. REP. NO. 97-417, at 178 (1982).

112. *See id.* (discussing the tenuousness factor).

113. *Id.*

Regardless of which of the Senate Report factors must be proven in a given case, the factors themselves are said to be "objective."¹¹⁴ Perhaps the least so, as we have seen, is the justification factor, which courts have used to implement their own policy preferences in a fashion that is hardly objective. Can any check be imposed on this admittedly salient and important factor to make it operate more rationally?

One commentator has wondered whether the Senate Report's justification factor might operate the way the employer's legitimate nondiscriminatory reason does in Title VII disparate treatment cases: by shifting a burden of production from the defendant back to the plaintiff where the defendant shows a nondiscriminatory reason for the disputed action.¹¹⁵ In Title VII cases, the plaintiff must prove the reason given was a pretext.¹¹⁶

In fact, the Senate Report factors are never so precise as this in their application. The totality of circumstances under section 2 is properly a compound of all the evidence available about the voting procedure at issue. Besides, the difference is obvious between discriminatory intent under Title VII and discriminatory result under section 2. If the proffered justification for a procedure, without more, could presumptively free the jurisdiction from liability unless the plaintiff proved the justification was pretextual, section 2 would in effect be re-importing an intent requirement that Congress's overriding purpose in 1982 was to remove.

In response to the dilemma, I offer the following modest proposal for understanding the section 2 standard when it comes to asserted justifications for practices, other than vote dilution, that result in the denial of equal access: The more severe the racial disparity of voting access that results from a challenged practice, the more tenuous the justification should be seen to be, even if that justification is asserted to have nothing to do with race.

Several points should be made about this formulation. First, it should not be considered a substitute for the Senate Report's flexible,

114. *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (stating that all section 2 claims must be proven by "objective factors").

115. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Earnhardt*, *supra* note 68, at 1092.

116. *See id.*

multi-factor totality of circumstances test for section 2 violations. I suggest it only as a partial clarification of the way the test ought to be applied in cases other than discriminatory redistricting, where the compactness or racial bloc voting preconditions of *Gingles* are not relevant. In particular, I think it explains how section 2 should handle nonracial justifications for challenged voting practices other than dilution. The inverse relation suggested here is rather like the one that prevails between the same two variables in discriminatory effect cases under the Fair Housing Act.¹¹⁷ Indeed, those cases ought to give valuable guidance to section 2 courts that have not previously had to deal with the Senate Report totality test outside the discriminatory districting context.

Second, courts are in fact proceeding in this manner when reviewing those asserted nonracial justifications for procedures affecting voting, whether they so declare or not. The tenuousness factor from *Zimmer v. McKeithen*¹¹⁸ and the Senate Report operates in just this fashion, at least in most of the denial cases mentioned earlier in this Article.

As a check on the validity of the inverse relationship I am suggesting, consider First Amendment ballot access cases like *Burdick v. Takushi*,¹¹⁹ or *Norman v. Reed*.¹²⁰ In these cases, intent to suppress protected individual freedoms is not the issue; the courts perform a balancing test among the personal interests of those seeking ballot access, the extent of the denial of access, and the governmental interests supporting the restriction. If intent were present, there would be no balancing test; the plaintiff would prevail. It seems that balancing such as this is a fairly common analytical resort of the courts where intent evidence is not available.¹²¹

Third, the consideration of nonracial justifications for a disputed action is concededly rather close to the re-introduction of an intent requirement into the section 2 results test. Yet a distinction between

117. See *supra* note 109 and accompanying text.

118. 485 F.2d 1297 (5th Cir. 1973).

119. 504 U.S. 428 (1992) (upholding Hawaii's ban on write-in voting).

120. 502 U.S. 279 (1992) (upholding some signature requirements for placement of candidates' names on local ballots, while striking down others).

121. Cf. *United States v. O'Brien*, 391 U.S. 367 (1968) (balancing governmental interest in administering the draft against the individual's expressive interest in burning a draft card as a form of protest).

the two exists and must be preserved. To accept intent as a required element of proof in a results statute would be precisely to vitiate Congress's purpose in enacting the 1982 amendments to the Voting Rights Act. Because of the preconditions that *Gingles* imposed on discriminatory districting claims under the amended statute, those cases have largely escaped the re-importation of an intent requirement, in part because courts inclined to restrict dilution claims have been able to use the *Gingles* preconditions to great effect even where bloc voting is evident by any traditional measure.¹²² But in denial of access cases other than dilution, i.e., where *Gingles*'s preconditions are inapplicable, advocates and courts must take special care not to accept intent as a prerequisite to liability. The relationship I suggest between severity of racial impact and tenuousness of nonracial justifications ought to reduce the danger of unwitting or sub silentio re-importation, because applying the formula mitigates the need to examine nonracial justifications on their merits; the more severe the racial impact of a practice, the weaker the nonracial justification, whatever it is, for maintaining that practice.

Subject to these qualifications, the inverse relation described here between the strength of a justification for a practice and the severity of its racial effect seems a reasonably satisfactory way to explain and reconcile the unequal access examples given in this Article, and the difficult instances that seem to distort the section 2 results test as conventionally understood, or threaten its coherence.

Now let us try to apply the inverse relationship formula to our lead example, online voting, and then to some of our "hard cases." First, take the Internet voting problem. As described earlier, the question is whether a new enhancement in the convenience of voting presents section 2 denial problems if it is available only, or disproportionately, to white voters. A fact finder would consider the severity of this racial gap in availability against the asserted nonracial justifications for introducing the new voting method. This brings us to the subject of "offsets," or enhancements to existing voting methods that are designed to minimize or eliminate the gap in convenience or accessibility created by the advent of the new voting option.

122. See, e.g., *Lewis v. Alamance County*, 99 F.3d 600 (4th Cir. 1996); *Solomon v. Liberty County*, 899 F.2d 1012, 1031-32 (11th Cir. 1997); *Dillard v. City of Greensboro*, 74 F.3d 230 (11th Cir. 1996).

As noted earlier, the Arizona Democratic Party claimed that for its “Internet primary” in 2000, it considerably increased the number of conventional polling stations, particularly those on Native American reservation lands and other heavily minority areas, at the same time as it made Internet voting available. An “offset” that the Arizona primary did not use, but that could have operated to minimize the access gap between Internet haves and have-nots, would have been to limit the convenience enhancement by limiting Internet access itself, for instance to selected physical locations where computers had password access to the Internet site for the election. We could call this a negative offset, as opposed to the positive offset of providing additional non-Internet voting opportunities to those who could not take advantage of the new online voting option. The question of fact in either case would be whether the offsets were adequate to make the gap *de minimis* in section 2 equal access terms. And though a fact finder might find the task a delicate one, the question in theory is relatively easy, and indeed fits rather neatly into the inverse relation formula for justification and effects: the fewer or less effective the offsets, the more severe the racial disparity in access, and the more tenuous the justification for permitting the disparity to arise.

Felons present a subtler problem. The asserted justification for disenfranchising either incarcerated felons or those who are no longer under state supervision is the state’s supposed moral authority to keep those who break the law from choosing those who make the law. However, even assuming that this justification is adequate to sustain the disenfranchisement of incarcerated felons regardless of the racial composition of the population thus deprived of the vote, ex-felons, i.e., those who have completed their sentences, are not covered by the justification because they are not lawbreakers, at least to the extent that the criminal law deems their debts to society to have been paid. And large-scale purges of supposed felons from voter databases are still less justified, since the lawbreakers-as-lawmakers basis for removal tends to collapse as the proportion increases of persons removed who were never felons, or persons who are erroneously slated for removal where the effort to avoid that fate is disproportionately difficult for minority voters.¹²³ The more

123. See Gregory Palast, *Florida’s “Disappeared Voters”*: Disfranchised by

severe the disparate racial impact of procedures that have weak non-racial justifications, the more likely a court should be able to find a section 2 violation.

Last but not least is a problem that deserves its own article: The racially disparate allocation of error-prone voting equipment.¹²⁴ This is a particularly difficult example, since the allocations are almost always defended on nonracial grounds, and the “errors” we mean are usually those of individual voters. What made this such a hot topic after the November 2000 national elections was the widespread supposition that local jurisdictions with more than one type of ballot-casting system in use had placed their superior equipment—and perhaps other amenities such as better telephone service, or more or better-trained personnel—in more heavily white voting precincts, and sent their more inferior, error-prone hardware or services to more heavily minority precincts. The result of this allocation was said to be a higher incidence of mis- or uncounted votes among racial minority voters than among whites.¹²⁵ The testing of these suppositions as a factual matter is beyond the scope of this article, but it appears that to some extent America’s urban areas have both more antiquated voting systems and more racial minority voters than America’s rural jurisdictions.

In any event, there are many types of voter errors that make ballots uncountable. In a hypothetical zero-error system, undervotes

the GOP, NATION, Feb. 5, 2001, at 20.

124. This Article went to press before the Supreme Court’s ruling in *Bush v. Gore*, 531 U.S. 98 (2000), or *Alexander v. Sandoval*, 2001 WL 408983 (U.S. Apr. 24, 2000) began surfacing in arguments or decisions in the lower courts. Further discussion of the potentially vast implications of these decisions will obviously have to wait.

125. See, e.g., Editorial, “*Make Voting More User-Friendly*”, S. FLA. SUN-SENTINEL, Mar. 12, 2001, at 22A (stating that reforms must “make sure precincts with large numbers of poor people and minorities . . . have the same up-to-date voting machines and the same number of well-trained employees as other precincts”); Testimony of Wade Henderson, Executive Director, Leadership Conference on Civil Rights, before U.S. Senate Committee on Commerce, Science and Transportation (Mar. 7, 2001), available at 2001 WL 2005697 (“The right to vote [is] guaranteed to all Americans, regardless of their race, their neighborhood, their income, or their level of education. . . . We must acknowledge and address widespread evidence that punch-card machines and certain other voting systems carry disproportionately—and unacceptably—high error rates.”).

will be what they appear to be—records of voters' affirmative intent not to vote for any candidate for that office—and overvotes will be rejected automatically before the act of voting is complete while the voter still has a chance to correct his or her ballot quickly, privately, and without assistance. There are various systems in use today that have some of these advantages, but none that has all of them. Punch cards blindly accept overvotes and undervotes, including partial punches, and do not alert the voter to either problem. Lever-style voting machines accept undervotes without alerting, although for better or worse they do not record or preserve evidence of voters' partial attempts to record a choice. On-site scanners at precincts might alert to over- or undervotes on optical-scan paper ballots, but not until the card is filled out and the voter is no longer in private. Those ballots, indeed all paper ballots, accept under- and overvotes at the ballot-marking stage, though they advertise these problems to any voter who examines his or her ballot by eye. Each of these systems has different recovery procedures, with different success rates, in manual recounts: optical scans can be read manually for marks by voters that were unreadable by machine; punch cards can be examined for the now-famous dimpled or hanging chad; and machine ballot counts are virtually impossible to change manually, unless the manual recount introduces errors not present before.

Assume a racially disparate pattern of resource allocation, whether of equipment or of personnel, that results in the disproportionate likelihood that a minority voter, but not a white voter, will be deprived of the resources necessary to prevent or correct an accredited overvote or undervote. Note the distinction between this situation and a more general disparity in which votes cast in heavily minority precincts are disproportionately likely to be over- or undervotes: in the latter the variable is performance, a compound of voter and official action in which neither is easy to isolate from the other, while in the former the variable is resources, regardless of result.

The section 2 equal access issue here is the extent of racial disparities in the propensity of voting systems to dissuade or prevent voters from correcting their clerical mistakes in ballot-casting. A court reviewing a section 2 denial claim against the allocation of user-unfriendly balloting systems ought to consider more than just

the tendencies of white and minority voters to make mistakes in the voting booth, since a system's dissuasive effect on voter self-correction could introduce substantial inequalities even if voters' rates of clerical errors were no different by race. This is a reasonable understanding of the "interacts with" standard of section 2 liability.¹²⁶ Indeed, there may be an equal protection claim against the same disparity under *Bush v. Gore*, if that decision is read to apply to more than just presidential elections in which a Democratic candidate seeks recounts under the state law of Florida.¹²⁷

Suppose a zero-error voting option is made available, and suppose the claims made for the method are true—the system registers a voter's choices without error, shows the voter's choices while there is still time to correct them in private and without assistance, requires the voter to confirm those choices, and does not accept overvotes at all, or undervotes without the voter's express approval, perhaps by means of an extra click on "Do you really mean it?"¹²⁸ What follows under amended section 2, if this system is made available to some but not to all voters? Surely there is a basis to contend that the zero-error system confers a voting advantage on those who have the use of it, by making their votes more likely to be fully counted, and that a racially skewed denial of that advantage to voters—particularly voters whose traditional ballots are more likely to contain errors—creates an inequality of access to the vote by race.¹²⁹

126. See *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) ("The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.").

127. See discussion *infra* at note 140.

128. No cognizable free expression interest is harmed by a system that does not permit overvotes. See *Burdick v. Takushi*, 504 U.S. 428 (1992) (upholding Hawaii's ban on write-ins). Undervotes, on the other hand, are protected. See *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 559 (1985); Earnhardt, *supra* note 68, at 1106 (discussing state's enforcement of nonvoting purge laws with respect to state elections).

129. Such claimants ought to be able to invoke *Bush v. Gore*, 121 S. Ct. 525 (2000), to the same end, but *Bush* did not deal with different levels of accuracy in voting or voting systems, but rather with different standards for determining voter intent in recounting ballots cast under one system—the punch-card system. See *id.* at 529. The Court in *Bush* did not address the question whether voters who voted by punch card were denied equal protection because the system they had to use was more error-prone. That question is taken up in

Now imagine that this hypothetical zero-error system is here today in the form of online voting. The use of the Internet for ballot-casting, assuming it indeed is effectively zero-error, affords two advantages in section 2 terms: it makes voting more accessible as well as more reliable. If the hypothetical racially disparate precinct allocation above is applied, the result will be a doubly severe racial disparity, since the advantages of online voting exaggerate whatever advantage the “error-privileged” voters already enjoy with traditional balloting.

If we apply the inverse relation formulation to these facts under section 2, then the more severe the racial disparity—not of the errors themselves, but of the allocation of hardware that objectively makes errors harder to correct or prevent—the more attenuated is the justification for that allocation. Indeed, evidence that error rates go up as the minority share of precinct population increases should prompt election officials to allocate their more error-proof hardware and resources to those precincts, and should attenuate the jurisdiction’s asserted justification for failing to do so.¹³⁰

NAACP v. Harris, No. 1:01 CV 120 (S.D. Fla., filed Jan. 10, 2001). I suspect the Supreme Court will distinguish the two, though I believe the distinction would be cynical, by saying there is no denial of equal protection in a presidential election where states have different systems from one another or different systems among their own localities.

130. Compare this situation with the example of restroom design in public buildings. If evidence shows that women take longer than men to use restroom facilities during the typical concert or ballgame, women should have more restrooms, not the same number as men and certainly not fewer, if the goal is true equality of opportunity to use the facilities in the same available time. If this is the goal, an affirmative allocation of more facilities to women—which seems to favor them, but in fact merely reflects the reality that they take longer, and thus gives neither gender “extra” or unneeded—should be used, even if state action is not responsible for the difference in time requirements between men and women. Incidentally, for an explanation of the difference as a factual matter, consider the effect of generations of clothing design by male designers. See B. Glenn George, *Title IX and the Scholarship Dilemma*, 9 MARQ. SPORTS L.J. 273, 284 & n.47 (1999) (citing Taunya Lovell Banks, *Toilets as a Feminist Issue: A True Story*, 6 BERKELEY WOMEN’S L.J. 263 (1991)); see also Marc Linder, *Smart Women, Stupid Shoes, and Cynical Employers: The Unlawfulness and Adverse Health Consequences of Sexually Discriminatory Workplace Footwear Requirements for Female Employees*, 22 IOWA J. CORP. L. 295, 304 n.62 (1997) (citing OSCAR WILDE, *Woman’s Dress*, in COMPLETE WORKS OF OSCAR WILDE 945 (1989)).

In the case of Internet voting, in order to keep substantial inequality of access to voting “facilities” from infecting the voting process, jurisdictions wishing to implement Internet voting may be required, not only to provide offsets in the form of enhanced traditional voting opportunities for those who are Internet-noncapable, but also to limit the disproportionate effect of the enhancement by restricting access to the Internet voting site to specified computers available to all, at least until Internet access is more equalized by race than is true today.

Congress was faced with a somewhat similar allocation problem when it devised the NVRA.¹³¹ The “Motor Voter Law,” as the NVRA is still known, was Congress’s effort to supersede, to the extent permissible under the Constitution, a “crazy quilt”¹³² of state voter registration procedures that often denied voters the chance to register easily and conveniently and was judged responsible for low registration rates across the United States.¹³³ The NVRA’s principal innovation, patterned on similar initiatives in the states,¹³⁴ was to make voter registration available to everyone who transacted business at state motor vehicle agencies.

The legislative assumption, of course, was that this step alone would afford almost universal voter registration opportunities because of the almost universal propensity of Americans to visit their local motor vehicle agency. That assumption is flawed to the extent that car ownership is less than universal, and flawed by race to the extent of racial disparities in car ownership. In any event, Congress specifically found that the NVRA was not in conflict with the non-discrimination requirements of the Voting Rights Act.¹³⁵ But the NVRA’s proponents understood that almost-universal access to voter registration was not in fact universal, and the NVRA accordingly balanced its core “motor voter” provision by requiring a host of

131. National Voter Registration Act of 1993, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 42 U.S.C. §§ 1973gg to 1973gg-10).

132. See Peter Dreier, *America’s Urban Crisis: Symptoms, Causes, Solutions*, 71 N.C. L. REV. 1351, 1400 (1993) (“[a] major reason for the low rate of urban voting is the nation’s complex, crazy-quilt voter registration laws”).

133. See S. REP. NO. 103-6, at 1-3 (1993).

134. See *id.* at 7-10.

135. See *id.* at 3.

other state agencies—public benefits and social welfare agencies, among others—to offer voter registration opportunities.¹³⁶

In my judgment these offsets were vital to the purpose of the NVRA to render enhancements in the convenience of voting in an even-handed fashion. If the NVRA had included only a “motor voter” provision without imposing similar voter registration requirements on state government agencies that served those without motor vehicle agency business—including especially the poor and the disabled—it might have perpetuated or even exaggerated the access inequalities it was purporting to remedy.

V. CONCLUSION

To whatever extent the nation’s traditional and emerging voting systems give different racial groups differing degrees of access to the polls, they create problems that seem impossible for the Voting Rights Act to ignore. That is, outcomes under section 2 ought to be affected by the inequitable distribution of publicly provided benefits and advantages in voting when that inequity affects the racial composition of the election-day electorate, and perhaps if it merely risks doing so—as, for example, the prospect of “personal polling places” for the disproportionately white class of voters with Internet access, without equivalent convenience enhancements for the rest of us. Courts determining liability and fashioning remedies under section 2 routinely take into account factors tending to depress minority turnout relative to white turnout.¹³⁷

136. 42 U.S.C. § 1973gg-5 (1994); *see* S. REP. NO. 103-6, at 13 (1993) (rejecting the idea that voter registration opportunities at motor vehicle offices would be enough by themselves to achieve Congress’s purpose); *see also, e.g.*, *Disabled in Action v. Hammons*, 202 F.3d 110 (2d Cir. 2000).

137. In one recent well-known instance, a district court supposed that minority voters were apathetic and declined to order a redistricting remedy that took their low participation rates into account. A panel of the court of appeals reversed in strong language saying the minority group’s lower participation had its proven origin in the history of discrimination, in voting and otherwise, in the locality in question and should not be held against the victims of that discrimination. *See, e.g.*, *Teague v. Attala Co.*, 17 F.3d 796, 796 (5th Cir. 1996); *see also* *Cross v. Baxter*, 604 F.2d 875, 880 (5th Cir. 1979) (reversing dismissal of section 2 claim in part because trial court failed to consider evidence that “after substantial numbers of blacks had begun to register and vote the City moved a polling place from a location convenient to residents of black

In all of these cases, our ability to redress the inequality may be hampered by our limited ability to measure it. We have no easy means of measuring degrees of inconvenience, of polling place locations for instance, and courts typically avoid the practical assessment even as they acknowledge the theoretical problem.¹³⁸ In the Internet case, it is difficult to measure the convenience enhancement that an online voting option gives to an electorate whose Internet-capable voters, for one reason or another, may be disinclined to use their Internet access as a means of voting. I do not believe these admitted difficulties in measuring the extent of inequalities should defeat the concept of redress for those inequalities we can measure, i.e., those that are clear and substantial.¹³⁹

As this Article goes to press, the nation is still uncertain what the fallout will be of the Supreme Court's equal protection decision in *Bush v. Gore*. It may be that inconsistent vote-counting standards violate equal protection when the inconsistency is programmed into computers, not just when it varies the "eyeball tests" used for manually recounting ballots.¹⁴⁰ There arose in the aftermath of the

neighborhoods to a less convenient location farther away"); *Cf.* Political Civil Voters Ass'n v. City of Terrell, 565 F. Supp. 338, 343 (N.D. Tex. 1983) (finding intentional discrimination in violation of section 2 and Fifteenth Amendment in part because local officials had refused to open polling place convenient to heavily minority southern portion of city).

138. See *Perkins v. Matthews*, 400 U.S. 379, 383-84 (1971); *Brown v. Dean*, 555 F. Supp. 502, 502 (D.R.I. 1982).

139. *Cf.* Report to Congress, U.S. Census Monitoring Board, Presidential Members, at <http://w3access.gpo.gov/censusmb/pres/99feb1.html> (last visited Feb. 15, 2001) (rejecting the idea that statistically adjusted population counts should not be used to correct for the acknowledged undercount of minorities because the sampling procedures on which the adjustments are based may not capture everyone who was missed in the original enumeration).

140. In a recent news article, Marcia Coyle, "*Gauging Bush v. Gore Fallout*," NAT'L L.J., Dec. 25, 2000, at A4, Professor Randall Bezanson was quoted as commenting,

Some counties program the [optical] scanners [used at polling places] to reject overvotes When the ballot is rejected, the machine spits it out and the voter, who is still present, is given a new ballot to correct the error. But other counties . . . program the scanners simply to reject the overvotes with no chance for correction. Is the inequality between those counties that follow a different set of programming instructions a violation of the equal protection clause because there's a systematic difference in the kinds of votes that are counted? It's very hard to explain why, as a matter of principle, that isn't every bit as un-

election a clamor for reform of the country's voting systems, though not for the expenditures that would be required to modernize local infrastructure. One reform that received new attention for its promise to register an accurate count at modest cost was Internet voting. I expect that purveyors of this service will find eager new audiences for their sales messages, and that the nation's 2000 general election experience will only hasten calls to introduce such a system.

I am compelled to sound a note of caution: Internet voting without protections for equal access may violate section 2 of the Voting Rights Act. However, it is conceivable that either the section 2 denial of access theory outlined in this Article or the equal protection claim ostensibly recognized in *Bush v. Gore* could ultimately mean that *not* using the Internet—or some other uniform and error-free electronic means of ballot-casting—is unlawful. Many years from now it will be unthinkable to use paper punch-card ballots anywhere, and reliable and secure electronic means of transmitting voters intent from any place of voting to any place of counting will be as ubiquitous and as dependable as the telephone is today, if not more so. In that context, the use of less advanced systems will be indefensible either under section 2 or under equal protection. There is no telling how soon a court will step in and hold that the time for a more advanced uniform system has come,¹⁴¹ and that for anyone to fail to implement it for poor voters as well as rich, for minority voters as well as white, is a denial of the Voting Rights Act's command for equality of voting opportunity by race.

Our shared fascination as a nation at the birth of the Internet is one of the great excitements of life in our time and place. It may be that this brilliant development will change so many of our perspectives that our present-day rules for political and social organization will in a short time seem archaic, and our laws as outmoded as these

constitutional as the different [manual] recounting standards applied in different counties in Florida.

I think Professor Bezanson has it quite right. Court challenges seeking to apply *Bush v. Gore* are inevitable; the question is whether principled rulings will result.

141. *Cf.* *United States v. Carroll Towing*, 159 F.2d 169 (2d Cir. 1947) (holding that duty to install and use shipboard radio, once available, as an aid to harbor navigation in fog, could not be avoided on a tort defense that its use was not yet the industry standard).

descriptions. Nevertheless, as we follow the course of events at the dawn of the information age, we should not lose sight of the human values that created the great civil rights laws of a generation ago, or fail to heed their warnings about how the voice of the people ought to be heard.

