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Voting Rights Act Litigation and Los Angeles County Judicial Elections: Myths and Realities

Robert L. Hess

VOTING RIGHTS ACT LITIGATION AND LOS ANGELES COUNTY JUDICIAL ELECTIONS: MYTHS AND REALITIES

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I. INTRODUCTION

In June 1998, 64% of California's voters approved Proposition 220, which permits unification of the state's trial courts on majority vote of both the superior and municipal court judges in each county.[1] A year after that historic election, the Los Angeles Superior Court has voted twice by wide margins to reject unification.[2] Although various concerns have been articulated, the most common issue raised both by judges and by other persons seems to be the possibility that judicial unification in Los Angeles County under the terms of Proposition 220 could lead to a lawsuit brought under the Voting Rights Act of 1965.[3] A settlement or adverse judgment in such a case, they fear, could result in the demise of county-wide elections

* Judge of the Municipal Court of California, Los Angeles Judicial District; B.A., 1970, Pomona College; J.D. 1976, University of Southern California Law Center. The opinions and analysis in this Article are those of the author and are not intended to represent the position of the Los Angeles Municipal Court.

1. Senate Constitutional Amendment 4, 9 Cal. Legis. Serv. (West) Res. ch. 36 (1996), amended Articles I and VI of the California Constitution. The basic unification provision is Article VI Section 5(e).

2. As of this writing, only two of the 58 counties in California—Kern and Los Angeles—have voted against unification, and Los Angeles County is the only one to do so twice. Of the four counties—Kings, Merced, Monterey, and Yuba—which require preclearance from the United States Department of Justice under Section 5 of the Voting Rights Act of 1965, 42 U.S.C. § 1973c, Yuba and Merced Counties have apparently received preclearance, and Kings and Monterey Counties are preparing requests for preclearance. *See* Judicial Council of California, Administrative Office of the Courts, News Release No. 43, July 16, 1999 (on file with the *Loyola of Los Angeles Law Review*).

3. 42 U.S.C. §§ 1973 to 1973gg-10 (1994).

for the Superior Court. Uncertainty over what might replace the current election system, how such a change might affect the independence, accountability, and re-election hopes of the judges, and its possible impact on public perceptions of access to and fairness of the judicial system, are all factors in varying degrees.

The purposes of this Article are to summarize the law relating to the application of Section 2 of the Voting Rights Act to judicial elections, and to discuss the procedures and some of the criteria used in evaluating a challenge to judicial elections under that statute.[4] This Article will not attempt to address the merits of any potential challenge because that is virtually impossible without knowing how the challenge will be stated and what evidence will be presented in support of the claim. Nevertheless, any dispassionate review of the law reveals that a serious Voting Rights Act challenge to judicial unification would require an enormous commitment of time and financial resources by any individual or organization bringing such a case, with a relatively low likelihood of success.

II. THE 1982 AMENDMENTS TO THE VOTING RIGHTS ACT OF 1965

Section 2 of the Voting Rights Act of 1965, as amended, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title,[5] as provided in subsection (b) of this section.

4. This Article will not address any issues arising under Section 5 of the Voting Rights Act, as discussed in *Lopez v. Monterey County*, 525 U.S. 266 (1999), and its predecessors.

5. 42 U.S.C. § 1973b(f)(2) provides: "No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group."

> (b) A violation of subsection (a) . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[6]

This language is the result of the 1982 amendments to the Voting Rights Act, passed in response to the Supreme Court's decision in *City of Mobile v. Bolden*.[7] As the Senate Judiciary Committee's Report demonstrates, those amendments were passed, in part, to make clear that intent to discriminate is *not* an element to be proved by the plaintiffs in a Section 2 case, and that the case could be proved by discriminatory effect alone.[8] However, the 1982 amendments represented a compromise between different interests in Congress,[9] and all the language in Section 2 must be read together.

Construing the text as a whole, several points emerge. First, the statute applies to any state or political subdivision. Los Angeles County is a political subdivision for purposes of Section 2,[10] and the

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6. 42 U.S.C. § 1973.

7. 446 U.S. 55 (1980).

8. *See* S. REP. NO. 97-417, at 28 (1982) [hereinafter SENATE REPORT 417].

9. *See* Thornburg v. Gingles, 478 U.S. 30, 43 n.7 (1986) (rejecting argument that SENATE REPORT 417, *supra* note 8, should therefore be accorded less weight); *id.* at 83-84 (O'Connor, J., concurring in judgment) (referring to 1982 amendments as "compromise legislation"); *see also* Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992) (discussing the congressional compromise).

10. *See* Garza v. County of Los Angeles, 918 F.2d 763 (9th Cir. 1990), *cert denied*, 498 U.S. 1028 (1991).

Supreme Court has held that judicial elections are covered by Section 2.[11]

Second, the statute requires a "totality of the circumstances" test be applied to any alleged violation. While the statute itself is silent on what might constitute relevant circumstances, Senate Report 417 lists "typical factors" which might be probative of a Section 2 violation. These are:

> "1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
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> "2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> "3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions,[12] or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
>
> "4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> "5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> "6. whether political campaigns have been characterized by overt or subtle racial appeals;

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11. *See* Chisom v. Roemer, 501 U.S. 380, 391-404 (1991).

12. "Bullet" or "single-shot" voting may occur in an at-large election where there are more candidates than offices and each voter has the opportunity to vote for more than one candidate. For example, if five at-large city council seats are open and there are 12 candidates, then each voter can vote for up to five candidates. If a minority group concentrates its votes for one or a limited number of candidates, and if the votes of the majority are divided among a number of candidates, the minority may be able to elect one or more at-large candidates even if they represent substantially less than a majority of the voters. *See* City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980).

> "7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.
>
> "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."[13]

Third, the Voting Rights Act applies to every "citizen of the United States." Non-citizens, as part of the general population, may be counted in apportioning districts, that is, in drawing boundaries to equalize population.[14] However, for purposes of determining equality of voting power under the Voting Rights Act, the lower federal courts have held that "citizen voting-age population" is the appropriate criterion.[15]

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13. *Gingles*, 478 U.S. at 36-37 (quoting SENATE REPORT 417, *supra* note 8, at 28-29). These factors were derived from the analytical framework set forth in the Supreme Court's decision in *White v. Regester*, 412 U.S. 755 (1973), as refined in *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (per curiam).

14. *See Garza*, 918 F.2d at 773-76 (rejecting apportionment based on numbers of voting age citizens); *see also* Calderon v. City of Los Angeles, 4 Cal. 3d 251, 258-59, 481 P.2d 489, 493-94, 93 Cal. Rptr. 391, 394-96 (1971) (rejecting apportionment based on numbers of registered voters).

15. *See* Barnett v. City of Chicago, 141 F.3d 699, 703-05 (7th Cir.), *cert. denied sub nom.* Bialczak v. Barnett, 118 S. Ct. 2372 (1998) (reviewing alternatives as to black and Latino claimants); Negron v. City of Miami Beach, 113 F.3d 1563, 1567-69 (11th Cir. 1997); Campos v. City of Houston, 113 F.3d 544, 547-48 (5th Cir. 1997); Romero v. City of Pomona, 883 F.2d 1418, 1425-26 (9th Cir. 1989). In *Johnson v. De Grandy*, 512 U.S. 997 (1994), the Supreme Court noted but expressly declined to resolve the question of whether age, citizenship and other characteristics of minority populations might be relevant to either a dilution claim or to fashioning a remedy. *See De Grandy*, 512 U.S. at 1008-09.

Although some cases use "voting-age population" rather than "citizen voting-age population," they appear to involve situations where non-citizens were not a significant part of the relevant population. *See, e.g.*, African-American Voting Rights Legal Defense Fund, Inc. v. Villa, 54 F.3d 1345,

Fourth, the purpose of the Voting Rights Act is to make sure the election process is equally open to members of the protected classes of racial or language minorities. Often plaintiffs bring a Section 2 claim to redress a districting system which has the effect of impermissibly diluting minority votes.[16] However, the statute itself states that it does not establish any "right to have members of a protected class elected in numbers equal to their proportion in the population."[17]

Fifth, the Voting Rights Act applies only to standards, practices, procedures, qualifications, and prerequisites related to voting. It does not extend to either the appointment of judges by a state's governor or to the pre-appointment screening process.[18]

Although Section 2 explicitly requires application of a totality of the circumstances test, the statute itself provides no guidance on how to balance the factors. However, the courts have developed an

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1352-53 (8th Cir. 1995); McNeil v. Springfield Park Dist., 851 F.2d 937, 944-45 (7th Cir. 1988). An exception is *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990), which compared the numbers of registered voters in each group in its analysis in preference to total population, because no evidence relating to voting age population (and by extension, citizen voting age population) appeared in the record. *See Meek*, 908 F.2d at 1541, 1546-47, nn.5-6.

16. Section 2 "prohibits all forms of voting discrimination, not just vote dilution." *Gingles*, 478 U.S. at 45 n.10 (citing SENATE REPORT 417, *supra* note 8, at 30).

17. 42 U.S.C. § 1973(b). A minority which accounts for 1 percent of a political subdivision's population and is evenly scattered throughout the subdivision has no right under Section 2 to demand that the number of offices be increased to the point where it is able to elect its "own" representative. *See Barnett*, 141 F.3d at 701-04 (giving this example and noting that the 3 percent Asian population of Chicago is so distributed as to make it impossible to create an Asian-majority aldermanic ward).

In *De Grandy*, 512 U.S. at 1013-14 & n.11, the Supreme Court distinguished between the political or electoral power of minority voters, which is within the protection of Section 2, and the success of minority-preferred candidates, which is not.

18. *See* Chisom v. Roemer, 501 U.S. 380, 401 (1991) ("Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed . . . ."); African-American Voting Rights Legal Defense Fund, Inc. v. Missouri, 994 F. Supp. 1105, 1122 (E.D. Mo. 1997) (challenging Missouri's merit selection plan for judicial appointments, which placed all judges on the bench initially by appointment), *aff'd mem.*, 133 F.3d 921 (8th Cir. 1998).

analytical approach to Section 2 cases largely in reference to Senate Report 417; but, they have done nothing to particularize the standard.

III. INTERPRETATION OF SECTION 2 IN *THORNBURG V. GINGLES*

The United States Supreme Court first interpreted the 1982 amendments to Section 2 of the Voting Rights Act in its 1986 decision of *Thornburg v. Gingles*.[19] In *Gingles*, the State of North Carolina had enacted a redistricting scheme for its legislature, which provided a mixture of single- and multi-member electoral districts.[20] The scheme was challenged by black voters who alleged that in particular districts it unlawfully diluted their voting power and consequent ability to elect members of their racial group to office.[21] The three-judge district court held that the use (in a redistricting plan) of multi-member districts in five North Carolina legislative districts violated Section 2 by impairing the opportunity of black voters to participate in the political process and to elect representatives of their choice.[22]

A. Justice Brennan's Opinion

The Supreme Court affirmed in part and reversed in part the decision of the lower court. Justice Brennan's opinion[23] began with an analysis of the 1982 amendments to the Voting Rights Act and approved the Senate Report 417's enumeration of "typical factors."[24] He then reviewed the district court's findings.

The district court had found that blacks were sufficiently numerous and concentrated so that they could constitute effective voting majorities in the districts in question.[25] Reviewing the factors of Senate Report 417, the district court found that official means to discourage black voting since 1900 had included a poll tax, literacy tests, a prohibition against bullet voting, and designated seat plans

19. 478 U.S. 30 (1986).
20. *See id.* at 35.
21. *See id.*
22. *See id.* at 37-38.
23. Joined by Justices Marshall, Blackmun, Stevens, and White as to those portions which form the opinion of the Court.
24. *See Gingles*, 478 U.S. at 34-37, 42-46.
25. *See id.* at 38.

for multi-member districts.[26] There was also evidence of historic discrimination, which the district court found had hindered blacks' ability to participate effectively in the political process; it found other election practices that constituted further barriers and proof that white candidates encouraged voting along racial lines.[27] The district court also evaluated the degree to which black candidates had been successful in elections both statewide and in the challenged districts, and the statistical evidence relating to racial polarization.[28]

Beginning his analysis of Section 2, Justice Brennan emphasized that the list of factors in Senate Report 417 "is neither comprehensive nor exclusive."[29] No specific number of factors needs to be present: "other factors may also be relevant and may be considered," the inquiry is to involve a "searching practical evaluation of the 'past and present reality,'" and it is to be based "on a 'functional' view of the political process."[30]

Justice Brennan then described the limitations on the ways a Section 2 violation may be proved.

> First, electoral devices, such as at-large elections, may not be considered *per se* violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process. Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation. Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.[31]

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26. *See id.* A designated or numbered seat plan requires a candidate for election in a multi-member district to run for a specific seat. *See id.* at 39 n.6; City of Rome v. United States, 446 U.S. 156, 185 n.21 (1980). California's requirement that a candidate for a trial court judgeship run for a specific "office number" when more than one judicial position is up for election in a particular district in a given year is an example of such a plan. *See* CAL. ELEC. CODE §§ 8200, 8202 (Deering 1995).

27. *See Gingles*, 478 U.S. at 39-40.

28. *See id.* at 38-42.

29. *Id.* at 45.

30. *Id.* (quoting SENATE REPORT 417, *supra* note 8, at 30 & n.120).

31. *Id.* at 46 (citations omitted).

Thus, to establish a Section 2 violation, minority members must prove "that the use of a multi-member electoral structure operates to minimize or cancel out their ability to elect their preferred candidates."[32]

Justice Brennan then pointed out that the use of multi-member districts generally would not impede the ability of minority voters to elect their representatives unless "a bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group."[33] The necessary "preconditions" are:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates.[34] Second, the minority group must be able to show that it is politically cohesive. If the minority group is not politically cohesive, it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests. Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate. In establishing this last circumstance, the minority group demonstrates that submergence in a white multimember district impedes its ability to elect its chosen representatives.[35]

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32. *Id.* at 48.

33. *Id.* at 48-49.

34. In a footnote, Justice Brennan emphasized that "[t]he single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected." *Id.* at 50 n.17.

35. *Id.* at 50-51 (footnotes and citations omitted). Justice Brennan further noted that "[t]he usual predictability of the majority's success distinguishes structural dilution from the mere loss of an occasional election." *Id.* at 51.

Justice Brennan then considered the statistical evidence on racial bloc voting relied upon by the district court.[36] There are two reasons why the existence of racially polarized voting is important: first, to determine whether the minority group is a politically cohesive unit; and second, to determine whether whites vote sufficiently as a bloc to usually defeat the minority candidate.[37] This requires separate inquiries into minority and white voting patterns. The analysis must also include inquiries into such factors as the nature of the allegedly dilutive electoral mechanism, whether other potentially dilutive electoral devices are in use, such as majority vote requirements, designated posts, and prohibitions on bullet voting, the percentage of registered voters who are members of the minority group, the size of the district, and the number of seats and the number of candidates in multi-member districts.[38] Even the number of elections which should be examined depends on the circumstances.[39]

Next, in Part IV of the opinion, Justice Brennan considered the extent to which recent black electoral success was probative. He

36. Two methods of analysis were used: extreme case analysis and bivarite ecological regression analysis. The district court had found both to be standard in the literature for analysis of racially polarized voting. *See* Gingles v. Edminsten, 590 F. Supp. 345, 367 n.29, 368 n.32 (E.D.N.C. 1984).

37. *See Gingles*, 478 U.S. at 56. Legally significant white bloc voting normally occurs when the white bloc vote regularly defeats the minority vote plus any white "crossover" votes. *See id.*

38. *See id.*

39. *See id.* at 56-58. Section III.C of Justice Brennan's opinion analyzed racial voting patterns and concluded that the reasons white or black voters voted the way they did, and the race of the candidates, were irrelevant to a Section 2 analysis. *See id.* at 61-74. Justice Brennan argued that these issues were inconsistent with the "effects" test articulated in Section 2, and attempted to resurrect the "intent" test rejected by Congress in the 1982 amendments. *See id.* However, only Justices Marshall, Blackmun, and Stevens joined this part of Justice Brennan's opinion, and therefore, it does not represent the opinion of the Court. *See id.* at 106-08.

Concurring in part, Justice White took issue with Justice Brennan's conclusion that only the race of the voters, and not the race of the candidate, mattered in determining whether racially polarized voting had occurred. *See id.* at 83 (White, J., concurring).

Justice O'Connor's opinion (joined by three other Justices) also concluded that the race of the candidate could be pertinent to the issue of whether racially polarized voting had occurred. *See id.* at 100-01 (O'Connor, J., concurring in judgment).

concluded that the fact that a racial minority might gain near-proportionate representation in one election, particularly one held after the litigation was filed, was not determinative, and the district court did not err by not according it decisive weight.[40] Finally, the Court held that the "clearly-erroneous" standard for review of fact determinations applied to its review of the vote dilution issue.[41]

B. Justice O'Connor's Opinion Concurring in the Judgment

Justice O'Connor concurred in the judgment[42] but did not join Justice Brennan's opinion. The principal points of difference were over how racial bloc voting and minority voting strength should be analyzed in vote dilution cases.

Justice O'Connor characterized the majority's test as containing the following elements: first, that "minority voting strength is to be assessed solely in terms of the minority group's ability to elect [those] candidates it prefers";[43] second, that "undiluted minority voting strength means the maximum feasible minority voting strength";[44] and third, whatever plan the state adopts must be measured against this theoretical maximum, and if the minority is unable to regularly elect as many members of its choice as might be

40. *See id.* at 74-76. In a portion of the opinion joined by Justice White, Justice Brennan found that black voters' "*sustained* success" at achieving proportionate representation in one of the districts did refute the vote dilution claim as to that district. *Id.* at 77. Justice O'Connor (joined by three other Justices) agreed with this analysis. *See id.* at 102-05 (O'Connor, J., concurring in judgment). Justice Stevens (joined by two other Justices) would have affirmed the district court with respect to this district as well. *See id.* at 106-08 (Stevens, J., concurring in part and dissenting in part).

The significance of electoral success was reemphasized in *Johnson v. De Grandy*. 512 U.S. 997, 1012 n.10 (1994) (citing with approval Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 358, 361 (7th Cir. 1992)).

41. *Gingles*, 478 U.S. at 77-80.

42. *See id.* at 83 (O'Connor, J., concurring in judgment) (Burger, C.J., Powell, J., & Rehnquist, J., joining).

43. *Id.* at 87-88 (O'Connor, J., concurring in judgment) (emphasis omitted).

44. *Id.* at 88-90 (O'Connor, J., concurring in judgment). Justice O'Connor was not persuaded that Congress really intended "undiluted minority voting strength" to mean "maximum feasible minority voting strength." *Id.* at 94-95 (O'Connor, J., concurring in judgment). Her position was sustained in *De Grandy*. *See* 512 U.S. at 1015-22 (finding that the district court had erred in holding that anything less than the maximum possible number of minority-majority districts violated Section 2).

theoretically possible, the system adopted dilutes minority voting strength and violates Section 2.[45]

As Justice O'Connor pointed out:

> This measure of vote dilution, taken in conjunction with the Court's standard for measuring undiluted minority voting strength, creates what amounts to a right to *usual, roughly proportional* representation on the part of sizable, compact, cohesive minority groups . . . . Unless minority success under the challenged electoral system regularly approximates this rough version of proportional representation, that system dilutes minority voting strength and violates § 2.[46]

According to Justice O'Connor, the majority's final test—proof of racial bloc voting by the white majority—adds nothing, because it essentially defines legally significant racial bloc voting by the majority in terms of the extent of the racial minority's electoral success.

> If the minority can prove that it could constitute a majority in a single-member district, that it supported certain candidates, and that those candidates have not usually been elected, then a finding that there is "legally significant white bloc voting" will necessarily follow. Otherwise, by definition, those candidates would usually have won rather than lost.[47]

Justice O'Connor argued that by adopting this circular reasoning, the majority had ignored most of the *Zimmer* factors cited by Senate Report 417 as part of the test for a Section 2 claim.[48] In Justice O'Connor's view, the majority had essentially made electoral success the single overriding factor in evaluating a vote dilution claim.[49]

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45. *See Gingles*, 478 U.S. at 90-91 (O'Connor, J., concurring in judgment). Justice O'Connor's suggestion in *Gingles*, 478 U.S. at 89-91, 89 n.1 (O'Connor, J., concurring in judgment), that the majority's analysis was as applicable to single-member districts as to multi-member districts, became the law in *Growe v. Emison*, 507 U.S. 25, 40-41 (1993), and in *Vionovich v. Quilter*, 507 U.S. 146, 157-58 (1993).

46. *Gingles*, 478 U.S. at 91 (O'Connor, J., concurring in judgment) (emphasis added for "proportional").

47. *Id.* at 92 (O'Connor, J., concurring in judgment).

48. *See id.* at 92-93 (O'Connor, J., concurring in judgment).

49. *See id.* at 93 (O'Connor, J., concurring in judgment). Justice

The majority's mistake was in not explicitly using *all* the relevant factors to determine "whether the minority group has 'less opportunity than other members of the electorate to participate in the political process *and* to elect representatives of their choice.'"[50] In multi-member district cases, "evaluation of an alleged impairment of voting strength requires consideration of the minority group's access to the political process generally, not solely consideration of the chances that its preferred candidates will actually be elected."[51] The majority's test therefore violated both the statute's and the legislative history's express statement that there is no right to strict proportional representation created by Section 2.[52]

IV. SELECTED DECISIONS ADDRESSING JUDICIAL ELECTIONS

A. Chisom v. Roemer

The Supreme Court's 1991 decision in *Chisom v. Roemer*[53] resolved the issue whether Section 2 applies to judicial elections. *Chisom* involved a challenge by black voters in Orleans Parish to an election system for Louisiana Supreme Court Justices. Under the challenged system, five justices were elected for ten-year terms from single-member districts; two from a multi-member district encompassing Orleans Parish (majority black); and three surrounding parishes (about three quarters white).[54] In a 6-3 decision written by Justice Stevens, the Court concluded that Section 2 does apply to judicial elections, and specifically to vote dilution claims.[55]

O'Connor's opinion explained at some length why she thought the majority's analysis should have put heavier emphasis on the other factors. *See id.* at 94-100 (O'Connor, J., concurring in judgment).

50. *Id.* at 99 (O'Connor, J., concurring in judgment) (emphasis in original) (quoting 42 U.S.C. § 1973).

51. *Id.* at 105 (O'Connor, J., concurring in judgment).

52. *See id.* at 96-99, 105 (O'Connor, J., concurring in judgment).

53. 501 U.S. 380 (1991).

54. *See id.* at 384-85.

55. *See id.* at 402-04. The Court distinguished *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *summarily aff'd*, 409 U.S. 1095 (1973), in which the district court had held that "the concept of one-man, one-vote apportionment does not apply to the judicial branch of government," on the basis that *Wells* had involved a challenge under the Equal Protection Clause of the Fourteenth Amendment, whereas *Chisom* only involved Section 2 issues. *See Chisom*, 501 U.S. at 389-90, 402-03 (quoting *Wells*, 347 F. Supp. at 454).

The most interesting portion of the *Chisom* opinion, for the purpose of this Article, is the Court's observation—twice repeated—that judges need not be elected at all.[56] The Court noted that "ideally public opinion should be irrelevant to the judge's role because the judge is often called upon to disregard, or even to defy, popular sentiment,"[57] and cited the widespread historical precedent for appointment, life tenure, and salary protection to promote judicial independence.[58]

B. Houston Lawyers' Ass'n v. Attorney General of Texas

A companion case to *Chisom* was *Houston Lawyers' Ass'n v. Attorney General of Texas*.[59] The Texas district courts are that state's trial courts of general jurisdiction.[60] Their electoral districts encompass one or more entire counties, and the geographical area of the judge's jurisdiction is coextensive with the electoral district.[61] In districts with multiple judicial candidates running in an election, each

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The issue presented to the Seventh Circuit in *Bradley v. Work*, 154 F.3d 704 (7th Cir. 1998), was whether a system of appointment plus retention elections for judges violated the Voting Rights Act. *See Bradley*, 154 F.3d at 709-10. The court of appeals held—following *Chisom*—that judicial retention elections were within the scope of Section 2. *See id.* The same conclusion was reached in *African-American Voting Rights Legal Defense Fund, Inc. v. Missouri*, 994 F. Supp. 1105, 1122 (E.D. Mo. 1997), *aff'd mem.*, 133 F.3d 921 (8th Cir. 1998).

56. *See, e.g.*, *Chisom*, 501 U.S. at 400-01 (stating "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and, in that way, it could enable its judges to be indifferent to popular opinion.").

57. *Id.* at 400.

58. *See id.* at 400 & n.28. A second interesting point is a possible modification of *Gingles*. Justice Stevens emphasized the conjunctive in Section 2(b), referring to "an injury to members of the protected class who have less 'opportunity' than others 'to participate in the political process *and* to elect representatives of their choice.'" *Id.* at 397 & n.24 (quoting 42 U.S.C. § 1973) (emphasis in original). In his dissent, Justice Scalia pointed out the issue raised in Justice O'Connor's concurrence in *Gingles*, *viz*, that Justice Brennan's opinion had apparently focused only on the ability to elect candidates, and had ignored the element of participation in the political process. *See id.* at 407-09 & n.1 (Scalia, J., dissenting) (citing *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring in judgment)).

59. 501 U.S. 419 (1991).

60. *See id.* at 422.

61. *See id.* at 426.

runs at-large for a separately numbered seat.[62] Election in the primary requires a majority of the votes cast; however, in the general election, only a plurality of the votes for that numbered position is needed.[63] The petitioners challenged the at-large voting scheme as impermissibly diluting the voting power of black and Hispanic voters, and sought, as the remedy, the creation of election sub-districts or a modified at-large structure.[64]

The Supreme Court's opinion, again written by Justice Stevens, only expressly addressed the issue of whether the judicial election system could be subject to a Section 2 challenge.[65] Following the reasoning in *Chisom*, the Court rejected the state's argument that judicial elections should be automatically exempted from Section 2 coverage because each judgeship is a "single-member office" where the judges' "responsibilities are exercised independently in an area coextensive with the districts from which they are elected."[66]

Like *Chisom*, however, the Court's comments, rather than its holding, are of special interest for purposes of this Article. The Court took pains to address several points raised by Judge Higginbotham's concurrence to the Fifth Circuit's en banc decision,[67] including:

1. Texas trial judges have jurisdiction which is coextensive with the geographic area from which they are elected, and have the sole authority to render final decisions;[68]
2. because judges exercise their authority independently of the others, they are more like single-office holders than members of a multi-member body;[69]
3. the State has a "compelling interest in linking jurisdiction and elective base for judges acting alone";[70] and

62. *See id.* at 422.

63. *See id.* Eight of the nine challenged districts comprised a single county; the ninth comprised two counties. *See id.* The number of judges in the challenged districts ranged from a high of 59 to a low of three. *See id.*

64. *See id.* at 422-24.

65. *See id.* at 425.

66. *Id.* at 425-27.

67. League of United Latin Am. Citizens v. Clements, 914 F.2d 620, 649-51 (5th Cir. 1990) (en banc) (LULAC II) (Higginbotham, J., concurring).

68. *See Houston Lawyers' Ass'n*, 501 U.S. at 424.

69. *See id.*

70. *Id.* As opposed, for example, to appellate judges who may have state-

4. attempting to break the link between jurisdiction and elective base may result in a few judges being principally accountable to a minority electorate rather than making all judges at least partially responsible to the minority, thereby decreasing rather than increasing minority influence.[71]

Although the majority "deliberately avoid[ed] any evaluation of the merits" of these concerns,[72] it stated that these

> are matters that are relevant either to an analysis of the totality of the circumstances that must be considered in an application of the results test embodied in § 2 . . . or to a consideration of possible remedies in the event a violation is proved . . . . [The] State's interest in maintaining an electoral system—in these cases, Texas' interest in maintaining the link between a district judge's jurisdiction and the area of residency of his or her voters—is a legitimate factor to be considered by courts among the "totality of circumstances" in determining whether a § 2 violation has occurred. A State's justification for its electoral system is a proper factor for the courts to assess in a racial vote dilution inquiry . . . .[73]

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wide jurisdiction although they are elected from districts (as was the case with the Louisiana Supreme Court in *Chisom*), and who act collegially. *See id.*

71. *See id.*

72. *Id.* at 426.

73. *Id.* at 426-27. At the end of its opinion, the Court reiterated that it was remanding the case "because the concerns expressed by Judge Higginbotham in distinguishing elections of Texas district court judges from elections of supreme court justices" were pertinent to the issues of the existence of a vote dilution violation and any remedy. *Id.* at 428. The identification of two issues to which these concerns might be relevant has led to somewhat divergent analyses by different courts of appeals. The Fifth, Sixth, and Seventh Circuits have analyzed the interests in linking a judge's territorial jurisdiction and the boundaries of the district from which the judge is elected as part of the totality of the circumstances test in determining whether impermissible vote dilution has occurred. *See infra* text accompanying notes 118-33, 213-18. In contrast, the Eleventh Circuit has analyzed these interests as part of the determination of whether the plaintiffs seek an appropriate remedy after impermissible vote dilution has been found. *See infra* text accompanying notes 140-212.

C. League of United Latin American Citizens v. Attorney General of Texas

Following the Supreme Court's decision, this case went through both a panel of the Fifth Circuit and a further rehearing en banc. In *League of United Latin American Citizens v. Clements*,[74] Judge Higginbotham wrote the majority opinion, which ran fifty-four pages in the Federal Reporter.[75] It addressed a number of issues which are significant to the purposes of this Article.

1. Scope of the Attorney General's authority to settle the case over the defendant's and intervenors' objections

Following the Supreme Court's decision, a panel of the Fifth Circuit had upheld plaintiff's challenges to eight of the nine districts involved.[76] The Fifth Circuit granted rehearing en banc and vacated the panel's decision.[77] However, the Texas Attorney General urged a legislative solution which would have required amending the Texas Constitution.[78] Because he anticipated the possibility that there would be insufficient legislative support—which in fact turned out to be the case—the Attorney General attempted to accomplish the same result without the legislature by drafting a proposed settlement agreement, which was objected to by the judicial defendant and two judges who were intervenors.[79] The Attorney General tried to

74. 999 F.2d 831 (5th Cir. 1993) (en banc) [hereinafter LULAC IV], *cert. denied*, 510 U.S. 1071 (1994).

75. With the one concurring and three dissenting opinions, the case totals 96 printed pages.

76. *See* League of United Latin Am. Citizens v. Clements, 986 F.2d 728 (5th Cir. 1993) (LULAC III).

77. *See LULAC IV*, 999 F.2d at 839.

78. *See id.*

79. *See id.* Although individual judges have successfully sought to intervene in Voting Rights Act cases, and a few have been named in some specific official capacity, it appears that only one case has required that all sitting judges be made parties if they may be affected by the remedy sought. In *Williams v. State Board of Elections*, 696 F. Supp. 1563 (N.D. Ill. 1988), plaintiffs challenged the at-large system for electing Illinois Supreme Court, Appellate Court, and Circuit Court judges. The named defendants' motion to dismiss argued that sitting judges were indispensable parties with a unique interest in the outcome of the suit because the plaintiffs were seeking to have all judicial positions elected from any part of Cook County declared vacant or to shorten the statutory terms of office of the incumbents. The district court agreed and

end-run the judicial officers by having the plaintiffs voluntarily dismiss the judicial defendant and by structuring the plan so that the districts of the two objecting intervenor judges would not be changed, thereby attempting to deny them standing to object.[80] He then moved the Fifth Circuit to remand the case for entry of the settlement in the district court.[81]

The Attorney General argued that he was the exclusive lawyer for the State, that in this role he was sole arbiter of the State's interest in litigation, and that he did not need to represent the State's policy makers; he could ignore them and impose his own views.[82] The Fifth Circuit emphatically rejected this argument.[83] Relying on Texas state law and its prior decisions involving other attempts by the Attorney General to make a policy decision unilaterally on behalf of all who might be affected, the court held that the Attorney General's responsibility was to *represent* state agencies and officials; he could not ignore his clients and bind them against their wishes.[84]

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chose to allow them to be added as a class of defendants rather than as individuals. *See Williams*, 696 F. Supp. at 1570-73. Several weeks later, in *Williams v. State Board of Elections*, 696 F. Supp. 1574 (N.D. Ill. 1988), the district court certified five separate classes of judges and judicial candidates. *See Williams*, 696 F. Supp. at 1576-78. Ultimately, the defendants were granted summary judgment. *See* Williams v. State Bd. of Elections, 718 F. Supp. 1324, 1334 (N.D. Ill. 1989).

80. *See LULAC IV*, 999 F.2d at 839.

81. *See id.* at 839-40.

82. *See id.* at 840.

83. *See id.*

84. *See id.* at 840-43; *see also* Brooks v. State Bd. of Elections, 848 F. Supp. 1548, 1562 (S.D. Ga. 1994) (stating that the Georgia Attorney General has authority to settle cases, as long as it is not in contravention of the wishes of his or her client or of the law).

The Attorney General's late challenge to the status of two judges as intervenors was also rejected. They had intervened in their personal capacities and retained their own counsel long before they played "an important role at trial" and on appeal, and the district court had originally found them to have been elected illegally. *LULAC IV*, 999 F.2d at 844. While the Fifth Circuit mentioned (but did not find it necessary to resolve) the possibility that they also had standing in their official capacities, there was clearly standing to intervene to protect their interests as judges, lawyers, and as a registered voters. *See id.* at 844-45.

This decision on intervention should be contrasted with the attempt by Sarah Flores to intervene in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). She was denied leave to intervene because she did so belatedly

The Fifth Circuit also refused to remand the case for entry of a settlement as requested by the Attorney General.[85] It emphasized that the court is not a rubber stamp, and stated:

> Because the consent decree does not merely validate a compromise but, by virtue of its injunctive provisions, reaches into the future and has continuing effect, its terms require more careful scrutiny. Even when it affects only the parties, the court should, therefore, examine it carefully to *ascertain not only that it is a fair settlement but also that it does not put the court's sanction on and power behind a decree that violates Constitution, statute or jurisprudence. . .* . . If the decree also affects third parties, the court must be satisfied that the effect on them is neither unreasonable nor proscribed.[86]

Moreover, intervenors who do not consent cannot be bound by a consent decree; properly raised intervenor's claims remain and may be litigated by the intervenor.[87]

Finally, the Fifth Circuit noted that "Courts must be especially cautious when parties seek to achieve by consent decree what they cannot achieve by their own authority. Consent is not enough when litigants seek to grant themselves powers they do not hold outside of court."[88]

(two years after the action had been filed, and four months after she declared her candidacy for County Supervisor), despite being on notice that the redistricting remedy sought could affect the outcome of the election. *See id.* at 777. She also apparently failed to show that the interests she claimed to advocate either were not adequately represented or were sufficiently substantial to require her presence in the case. *See id.* at 776-77.

85. *See LULAC IV*, 999 F.2d at 847.

86. *Id.* at 846 (emphasis in original) (quoting United States v. City of Miami, 664 F.2d 435, 441 (5th Cir. 1981) (en banc)).

87. *See id.*; Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 478 U.S. 501, 529 (1986).

88. *LULAC IV*, 999 F.2d at 846. One example offered was a local government attempting to use a consent decree to avoid a referendum required by state law before issuing construction bonds. *See id.* By contrast, *Chisom* was eventually resolved when the Louisiana legislature passed a statute to effectuate a remedy which did not violate the State Constitution. The consent decree resolved the suit in a manner *consistent* with state law. *See id.* at 847-48.

2. Analysis of racial bloc voting

The second major issue addressed by the Fifth Circuit involved evidence of whether racial bloc voting existed. The court of appeals pointed out that under *Gingles*, the test "is not whether white residents tend to vote as a bloc, but whether such bloc voting is 'legally significant.'"[89] At trial, the district court had held that plaintiffs only needed to show that whites and blacks generally supported different candidates to establish legally significant white bloc voting and had refused to consider the nonracial causes for voting preferences offered by the defendants.[90] The court of appeals held that the district court's analysis was in error and required reversal.[91]

The Fifth Circuit agreed with the defendants that

> Unless the tendency among minorities and whites to support different candidates, and the accompanying losses by minority groups at the polls, are somehow tied to race, . . . plaintiffs' attempt to establish legally significant white bloc voting, and thus their vote dilution claim under § 2, must fail.[92]

The court of appeals noted that the protections of Section 2 only extend "to defeats experienced by voters 'on account of race or color.'"[93] The court continued,

> In holding that the failure of minority-preferred candidates to receive support from a majority of whites on a regular basis, without more, sufficed to prove legally significant racial bloc voting, the district court loosed § 2 from its racial tether and fused illegal vote dilution and political defeat.[94]

The Fifth Circuit explained that the approach adopted by the district court had been specifically rejected by the majority in *Gingles*.[95] It went on to analyze the cases, including *Whitcomb v.*

89. *Id.* at 850 (quoting Thornburg v. Gingles, 478 U.S. 30, 55 (1986)).

90. *See id.* The defendants were apparently able to preserve their evidence in the trial record despite the district judge's refusal to consider it.

91. *See id.*

92. *Id.*

93. *Id.*

94. *Id.*

95. *See id.* at 850-51, 855-59. On this point, the majority was composed of Justices White, O'Connor, Powell, Rehnquist, and Chief Justice Burger. *See id.*

Chavis[96] and *White v. Regester,*[97] that Senate Report 417[98] indicated were intended to be codified by the 1982 amendments to the Voting Rights Act.[99] The court of appeals concluded that evidence that divergent voting patterns might be the result of partisan affiliation or other perceived interests—as opposed to race[100]—was highly probative on the issue of whether a minority group may be successful in future elections and hence to the question of whether racial bloc voting existed.[101]

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96. 403 U.S. 124 (1971).

97. 412 U.S. 755 (1973).

98. SENATE REPORT 417, *supra* note 8, at 2, 20-23, 32-33.

99. *See LULAC IV*, 999 F.2d at 851-54. According to the Fifth Circuit's analysis of *Whitcomb*, partisan affiliation rather than race was the predominant factor in black electoral defeats. The fact that a white Republican majority generally outvoted black (and white) Democrats in a Republican majority district was not of constitutional significance where the black residents "did not suffer from a lack of access to the political process." *Id.* at 851-52. The evidence indicated that blacks had been nominated by both parties, some had been elected, and they lost only when their entire party slate was defeated. *See id.* at 853 (citing City of Mobile v. Bolden, 446 U.S. 55, 109 (1980) (Marshall, J., dissenting)).

In contrast, the court of appeals pointed out that the plaintiffs in *White* had proven that black voters in Dallas County and Hispanic voters in Bexar County "each established that they had been effectively excluded from the political processes leading to the nomination and election" of Texas state representatives. *Id.* at 852-53.

100. As the Seventh Circuit cautioned in *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194 (7th Cir. 1997), "[w]hat turns out to be related to race is not easy to know, however." *Milwaukee NAACP*, 116 F.3d at 1199.

101. *See LULAC IV*, 999 F.2d at 858-59 & n.26. The court of appeals noted that an issue existed concerning which factors might actually be at work and how they might factor into partisan affiliation; these factors, it suggested, might require a detailed multivariate analysis. *See id.* A second issue was who should carry the burden and expense of proof: plaintiff to disprove other explanations or defendants to disprove a racial basis. *See id.* However, the court of appeals concluded that resolution of these issues was unnecessary in the case before it because the evidence clearly showed that partisan political affiliation was the dominant factor in explaining election outcomes. *See id.* at 859-61.

The Eleventh Circuit has approached this question slightly differently. In *Nipper v. Smith*, 39 F.3d 1494 (en banc) (11th Cir. 1994), the court said that, "if the evidence shows, under the totality of the circumstances, that the community is not motivated by racial bias in its voting patterns, then a case of vote dilution has not been made [out]." *Nipper*, 39 F.3d at 1515 (plurality opinion).

Indeed, the Eleventh Circuit has been assiduous in analyzing not only

The Fifth Circuit also specifically rejected the suggestion of the United States, as *amicus*, that partisan affiliation or a divergence of interests—including divergence based on socioeconomic status—was irrelevant to the existence of racial bloc voting.[102] The United States argued that divergence of interests is often the result of socioeconomic status, which in turn might be the product of past discrimination, and allowing divergence of interests to be a factor would vitiate the Senate Report 417 factor relating to the impact of low socioeconomic status on the minority group's level of participation.[103] The court of appeals pointed out that Senate Report 417's factor on the effect of past discrimination went to whether the minority's *ability to participate in the political process* had been hindered, *not* to whether bloc voting existed.[104]

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who the preferred minority candidate was (including minority voting patterns, race of the candidates and opponents, and partisan endorsements) in individual judicial elections, but also the individual factors which may have affected the outcome, such as length of residency, community ties, judicial qualification rating, perceived position on non-judicial issues, and so forth. *See, e.g.*, *id.* at 1501-09; *see also* Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281, 1290-93 (11th Cir. 1995) (en banc).

The Seventh Circuit likewise has reviewed in detail all the circumstances relating to particular elections. In *Milwaukee Branch of the NAACP v. Thompson*, the court discussed and warned about the many variables which may affect particular contests, and even the decision to run. *See Milwaukee NAACP*, 116 F.3d at 1196-99. As it noted, "[d]rawing inferences from voting patterns is hazardous, because a *combination* of voters and candidates decides elections—and candidates' choices may mask the inclinations of the electorate." *Id.* at 1198. "[T]he circumstances of individual elections . . . matter to the totality-of-circumstances inquiry even if not to the threshold case, and in principle they are relevant to the threshold case as well." *Id.* at 1199.

In *Magnolia Bar Ass'n v. Lee*, 994 F.2d 1143 (5th Cir. 1993), the court of appeals specifically rejected the argument that, because a black judge was an incumbent against a white challenger, the outcome of the election should be disregarded. *See Magnolia Bar Ass'n*, 994 F.2d at 1149. In addition, the Fifth Circuit concluded that it was not permissible for the plaintiffs to try to satisfy their burden to prove racial bloc voting in a particular district (there, the Central (Judicial) District) by reference to voting statistics in a different, hypothetical district (in that case, to the state of Mississippi as a whole). *See id.* at 1150-51.

102. *See LULAC IV*, 999 F.2d at 862-63.

103. *See id.*

104. *See id.*

3. Other vote dilution issues

The Fifth Circuit also addressed a number of issues relevant to vote dilution claims. These included: (1) whether different racial or ethnic minority groups could be combined; (2) whether the number of minority lawyers could be considered in evaluating judicial races; and (3) whether past discrimination alone proves present inability to participate in the political process.[105]

The plaintiffs contended that in those counties where both blacks and Hispanics alleged dilution, their voting strength could be treated together; however, in those counties where only blacks alleged vote dilution, they should be treated separately.[106] The court of appeals rejected this argument and concluded that where blacks and Hispanics voted cohesively, they should be treated as a single minority group for purposes of determining whether there is a viable minority candidate.[107] Thus, either a black versus white or a Hispanic versus white race was relevant in evaluating the dilution claim, if in that county blacks and Hispanics in fact tended to vote cohesively.[108]

Next, the court of appeals addressed the issue related to the degree to which the percentage of minority lawyers in the population was relevant to the election of minority judges to the district court.[109] The evidence showed that the percentage of minority lawyers in all of the counties was much smaller than the percentage of minority voters and that the percentage of minority judges was higher than their percentage among all eligible lawyers.[110] Since *Gingles* requires an evaluation of the totality of the circumstances with a

105. *See id.* at 863-68.
106. *See id.* at 864.
107. *See id.*
108. *See id.* at 863-65. The concurring opinion questioned the significance of the majority's analysis of this issue. "Although the *en banc* majority opinion *adopt[ed]* the minority coalition theory for certain aspects of its analysis, those points [were] not essential to its result and simply demonstrate that the plaintiffs' own arguments are self-contradictory." *Id.* at 894 n.1 (Jones, J., concurring).
109. *See id.* at 865. Texas's eligibility requirements for the office of district judge included four years' experience as a licensed attorney in the state, and two years' residence in the district. *See id.*
110. *See id.*

"'functional view' of the political process,"[111] the Fifth Circuit observed that, "[t]he cold reality is that few minority citizens can run for and be elected to judicial office" and "[a] functional analysis of the electoral system must recognize the impact of limited pools of eligible candidates on the number of minority judges that has resulted."[112] The court of appeals concluded:

> Plaintiffs cannot emphasize the scarcity of successful minority candidates to support the inference of dilution and simultaneously urge that the number of minorities eligible to run is not relevant. Plaintiffs argue that this factor may not be considered because the limited number of minority lawyers was caused by state discrimination in education. We are not persuaded this argument merits exclusion of the evidence. The Voting Rights Act responds to practices that impact *voting*; it is not a panacea addressing social deficiencies.[113]

Finally, the court addressed the issue related to how evidence of past discrimination should be evaluated. While evidence of past discrimination was undisputed,[114] the court of appeals concluded that these facts alone did not show "these effects of past discrimination actually hamper the ability of minorities to participate" in the political process.[115] While a plaintiff need not prove a direct causal nexus between socioeconomic status and reduced participation, the plaintiff must prove the fact of reduced participation in the political process.[116] Evidence that poverty and lack of education generally depress levels of political participation is not a substitute for proof that

111. *Gingles*, 478 U.S. at 45.
112. *LULAC IV*, 999 F.2d at 865.
113. *Id.* at 866.
114. *See id.* As the court found,

> Texas's long history of discrimination against its black and Hispanic citizens in all areas of public life is not the subject of dispute among the parties. Nor has anyone questioned plaintiff's assertion that disparities between white and minority residents in several socioeconomic categories are the tragic legacies of the State's discriminatory practices.

Id.
115. *Id.*
116. *See id.* at 867.

minority voters in the particular case failed to participate equally in the political process.[117]

4. Texas's interest in linking jurisdiction and electoral bases

In *Houston Lawyers' Ass'n v. Attorney General of Texas*,[118] the Supreme Court clearly indicated that Texas's interest in maintaining a link between electoral and jurisdictional bases was a legitimate factor to be weighed against other relevant factors in determining whether the interest "outweigh[s] proof of racial vote dilution."[119] As the Fifth Circuit phrased it, "[t]he issue we face is determining when the linkage . . . will outweigh other factors and defeat liability under § 2."[120] The court of appeals rejected both extremes: that the linkage interest *always* defeated liability; and that it *never* defeated liability.[121]

The Fifth Circuit pointed out that Texas's interest in the electoral scheme was not tenuous,[122] but instead advanced "objectively substantive goals."[123] The weight or substantiality of that interest was to be determined not as a matter of fact but of law. "A substantial state interest is not inherently preclusive of dilution and is not raised to disprove the existence of dilution. Rather, the state's interest is weighed *against* proven dilution to assess whether such dilution creates § 2 liability."[124]

The Fifth Circuit explored the nature of Texas's interest in the link between the jurisdiction and electoral bases of its district courts.[125] It explained:

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117. *See id.* at 866-68. The evidence did not show reduced levels of black voter registration or turnout, although Hispanic registration was lower. The evidence also did not show that black or Hispanic candidates had difficulty raising adequate funds for their campaigns. *See id.* at 867-68.

118. 501 U.S. 419 (1991).

119. *Id.* at 427.

120. *LULAC IV*, 999 F.2d at 870.

121. *See id.* at 870-71.

122. That is, its interest was "not a pretext masking discriminatory intent in the adoption or maintenance of the scheme." *Id.* at 870.

123. *Id.*

124. *Id.* at 871.

125. *See id.* at 868-69. District judges in Texas had been elected since 1850, and their areas of primary jurisdiction had always been linked to their electoral bases, both of which are drawn along the political boundaries of the counties.

> By making coterminous the electoral and jurisdictional bases of trial courts, Texas advances the effectiveness of its courts by balancing the virtues of accountability with the need for independence. The state attempts 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."[126]

This structure "advances the state's substantial interest in judicial effectiveness," and "balances accountability and judicial independence."[127]

> The court of appeals later elaborated on this theme:
> The decision to make jurisdiction and electoral bases coterminous is more than a decision about how to elect state judges. It is a decision of what *constitutes* a state court judge. Such a decision is as much a decision about the structure of the judicial office as the office's explicit qualifications such as bar membership or the age of judges. The collective voice of generations by their unswerving adherence to the principle of linkage through times of

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Since 1861, the Texas Constitution has called for all voters in a county to elect all the district judges in that county. In their judicial capacity, each judge acts alone, although they may act collegially in certain administrative matters. *See id.*

126. *Id.* at 869 (quoting John L. Hill, Jr., *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, 364 (1988)).

California Attorney General Bill Lockyer has articulated a similar position,

> . . . [T]he State of California has a strong interest in preserving strict linkage between a trial court's jurisdiction and its election constituency, such that all voters within a court's jurisdiction are entitled to vote for the judge(s) thereof.

Letter from Bill Lockyer, Attorney General of California, to Victor E. Chavez, Presiding Judge of the Los Angeles Superior Court, at 1 (Sept. 21, 1999) (on file with the *Loyola of Los Angeles Law Review*).

127. *LULAC IV*, 999 F.2d at 868.

> extraordinary growth and change speaks to us with power. Tradition, of course, does not make right of wrong, but we must be cautious when asked to embrace a new revelation that right has so long been wrong. There is no evidence that linkage was created and consistently maintained to stifle minority votes.
>
> . . . .
>
> The distrust of judicial subdistricts does not rest on paternalism. It recognizes Texas'[s] historic interest in having district judges remain accountable to all voters in their districts. Regardless of the race or residency of particular litigants, judges make choices that affect all county residents. Texas has insisted that trial judges answer to all county voters at the ballot box.[128]

In evaluating the evidence of vote dilution—which was at best weak in the various counties—the court of appeals noted that the evidence showed that a greater percentage of minority lawyers were elected than were in the eligible population.[129] This fact alone did not prove that there was no illegal dilution, but the greatest disparity lay between the minority population and the number of minorities eligible to serve as judges.[130] While the latter fact may cast light on other societal issues, the Fifth Circuit explained that it does not illuminate whether minorities have been denied *voting* rights.[131] Partisan politics, not race, was the overwhelming reason why minority candidates won or lost.[132] Even if the court of appeals could sustain the district court's findings on vote dilution—which it could not—

128. *Id.* at 872-73. The Fifth Circuit analyzed whether minority groups' interests would actually be served by destroying linkage and concluded they would not. If judges were elected from sub-districts there would be no guarantee that a minority group member would have his or her case heard by a judge he or she had voted for, and most judges would then have little or no direct political interest in being responsive to that individual's concerns. *See id.*

The court of appeals also noted that the solutions suggested by the plaintiffs would likely require drastic changes in venue rules, assignment of judges, and jury selection procedures. *See id.* at 875-76.

129. *See id.* at 893.

130. *See id.*

131. *See id.*

132. *See id.*

the evidence on vote dilution was far outweighed by the state's interest in linkage.[133]

5. The concurring opinion

Concurring in the majority opinion, Judge Jones, joined by four other judges, wrote to address an issue which was not specifically resolved by the majority: "whether different racial or language minority groups may be permitted to aggregate their strength in order to pursue a Section 2 vote dilution claim."[134] She concluded they should not.[135]

As Judge Jones analyzed the issue, aggregation of the strength of diverse ethnic and language minorities had the effect of changing the focus of the Voting Rights Act "from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities."[136] The two decisions which had accepted minority coalitions[137] did so without

133. *See id.* at 876-77, 893-94. The court of appeals' county-by-county review of the evidence contains a detailed analysis of the election results. *See id.* at 877-93.

134. *Id.* at 894 (Jones, J., concurring).

135. *See id.* (Jones, J., concurring).

136. *Id.* (Jones, J., concurring).

137. *See* Campos v. City of Baytown, 840 F.2d 1240, 1244, *reh'g denied*, 849 F.2d 943 (5th Cir. 1988); League of United Latin Am. Citizens v. Midland Indep. Sch. Dist., 648 F. Supp. 596, 606 (W.D. Tex. 1986), *aff'd*, 812 F.2d 1494, *aff'd in part on other grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc).

Judge Jones's opinion cites several cases from five different federal circuits, including *Badillo v. City of Stockton*, 956 F.2d 884, 886 (9th Cir. 1992), and *Romero v. City of Pomona*, 665 F. Supp. 853, 859 (C.D. Cal. 1987), *aff'd*, 883 F.2d 1418 (9th Cir. 1989), where the possibility of minority coalition claims was apparently assumed, but the specific claims in those cases were rejected on the facts. *See LULAC IV*, 999 F.2d at 897 (Jones, J., concurring); *see also* DeBaca v. County of San Diego, 794 F. Supp. 990, 998-1000 (S.D. Cal. 1992) (rejecting, on the facts, the alleged cohesiveness of blacks, Hispanics, and Asian-Americans).

The issue raised by Judge Jones's concurrence in *LULAC IV* was squarely addressed by the Sixth Circuit two and one-half years later. In *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996), the plaintiffs sought to aggregate Hispanic and black citizens, who totaled 10.8 percent of the county and 9.2 percent of the voting age population, for the purpose of proving a vote dilution claim under Section 2. *See id.* at 1384. The Sixth Circuit, sitting en banc, reviewed the text of the statute, the legislative history, other judicial decisions, and the various policy concerns, and expressly rejected the aggregation of mi-

looking at Congress's intent and without relying on more than a commonly brought lawsuit and a willingness to work together in specific instances.[138] In Judge Jones's view, "[e]nlarging the permissible boundaries of Section 2 relief to encompass minority coalitions . . . runs headlong into the Section 2 prohibition of proportional representation . . . ."[139]

D. Decisions Involving Weighing the Interests to Fashion Remedies

The Eleventh Circuit has authored many of the most significant decisions concerning what remedies may be available in vote dilution cases involving judicial elections. The starting point to understand these decisions is the principle that it is part of the plaintiff's prima facie case under Section 2 to demonstrate a proper remedy.[140] The failure to demonstrate an appropriate remedy will lead to a judgment for the defendant even if the plaintiff shows vote dilution.

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nority groups in "coalition" suits. *See id.* at 1386-92.

An interesting variation was presented in *Meek v. Metropolitan Dade County*, 908 F.2d 1540 (11th Cir. 1990). Black and Hispanic voters challenged an at-large voting scheme in Dade County as diluting their votes. Non-Latin whites comprised about 37 percent of the population and 48.67 percent of the registered voters; Hispanics comprised about 43 percent of the population and about 32.96 percent of the registered voters; and blacks comprised about 20 percent of the population and 18.37 percent of the registered voters. *See Meek*, 908 F.2d at 1541. The district court had found what it described as "keen hostility" between blacks and Hispanics, such that either would vote for a non-Latin white rather than the other's candidate. *See id.* at 1544-46. The court of appeals ruled that under these circumstances the bloc voting majority could be composed of blacks and non-Latin whites to show dilution of Hispanic votes and could be composed of Hispanics and non-Latin whites to show dilution of black votes. *See id.* at 1544-47. However, there are analytical gaps in the Eleventh Circuit's opinion, and it is not clear how that analysis would work if someone attempted to apply it in Los Angeles County, where there are *at least four* significant racial or ethnic groups.

138. *See LULAC IV*, 999 F.2d at 894-95.

139. *Id.* at 896.

140. *See* Davis v. Chiles, 139 F.3d 1414, 1419-24 (11th Cir. 1998), *cert. denied sub nom.* Davis v. Bush, 119 S. Ct. 1139 (1999); Southern Christian Leadership Conference v. Sessions, 56 F.3d 1281, 1289, 1294-97 (11th Cir. 1995) (en banc); Nipper v. Smith, 39 F.3d 1494, 1530-31 (11th Cir. 1994) (en banc) (plurality opinion); *id.* at 1547 (Edmondson, J., concurring).

1. *Nipper v. Smith*

The Eleventh Circuit's decision in *Nipper v. Smith*[141] is important because the election system for trial court judges at issue had many features in common with Los Angeles County. Florida circuit courts are trial courts of general jurisdiction, with judges elected for a six-year term.[142] County courts are trial courts of limited jurisdiction, with judges elected for a four-year term.[143] All the trial judges are elected in non-partisan, at-large, district-wide elections.[144] These elections are for numbered posts, with staggered terms, and a majority vote is required.[145] Candidates must live in the court district to which they seek election, and they must have been members in good standing of the Florida Bar for at least five years immediately prior to running.[146] The Governor fills mid-term vacancies by appointment.[147] Appointed judges must stand for reelection at the next general election.[148]

After finding vote dilution on the facts before it, the court of appeals analyzed the alternative remedies suggested by the plaintiffs.[149] Plaintiffs' first, and apparently preferred, remedy was the creation of electoral sub-districts, retaining the existing circuit-wide or county-wide territorial jurisdiction.[150] However, the Eleventh Circuit saw several flaws with this plan. First, it would sever the historical link between election base and jurisdiction which ensured judicial accountability to all the people.[151] Second, it would disenfranchise every voter outside the subdistrict.[152] Third, it would leave minority voters with no say in the election of the majority of judges, who would then have little direct political interest in responding to the

141. 39 F.3d 1494 (11th Cir. 1994) (en banc).
142. *See id.* at 1498.
143. *See id.*
144. *See id.* at 1499.
145. *See id.*
146. *See id.*
147. *See id.*
148. *See id.* Another similarity is the fact that if the incumbent is not opposed, his or her name does not even appear on the ballot. *See id.* at 1502 n.12; *see also* CAL. ELEC. CODE § 8203 (West 1995).
149. *See Nipper*, 39 F.3d at 1542.
150. *See id.* at 1543-45.
151. *See id.* at 1543.
152. *See id.*

minority's concerns.[153] Fourth, it would compromise judicial independence.[154] Fifth, because of residency requirements, it would narrow the pool of eligible candidates under Florida's version of the "Missouri Plan."[155] The court of appeals concluded that having black judges primarily accountable to the black section of their district, and white judges primarily accountable to the white section of their district, "would be detrimental to [the] pattern of fair and impartial justice," and thus rejected the proposal.[156]

The plaintiffs' second proposal was to carve out an entirely new circuit representing part of one county with a black majority population.[157] While this remedy would preserve the linkage interest, the Eleventh Circuit noted that it would require a modification of Florida's venue rules and would alter the composition of jury pools.[158] The creation of separate black and white jurisdictions would also result in the establishment of a system of separate justice based on race but no neutral forum when the litigants were of different races.[159] This, too, was unacceptable.[160]

The third proposed remedy was a cumulative voting system[161] which would require abandonment of the numbered post system, and all the judges standing for reelection would be required to run against each other.[162] The Eleventh Circuit also found this proposal objectionable. It would have a detrimental effect on collegiality in administrative matters and would decrease judicial independence, since the judges would be running for reelection from the moment they

153. *See id.*
154. *See id.* at 1544.
155. *See id.* The "Missouri Plan" is a procedure for merit-based selection of state court judges through the use of nominating commissions to recommend candidates for appointment by the Governor. It was originally adopted by Missouri in 1940 and was later copied by approximately 30 states. *See id.* at 1500-01 & n.11.
156. *Id.* at 1543-45.
157. *See id.* at 1545. Since the Florida Constitution requires that county court boundaries follow county lines, the creation of new county courts by this means would require the creation of new counties. *See id.* at 1545 n.92.
158. *See id.* at 1545 nn.93-94.
159. *See id.* at 1545.
160. *See id.*
161. *See id.* at 1545-46.
162. *See id.* at 1545.

took office.[163] It would also reduce lawyer interest in a judicial career by forcing them to compete against all sitting judges and by reducing the power of incumbency (and hence the expectation of stability once elected), thereby reducing the pool of qualified applicants.[164] It would encourage, rather than discourage, racial bloc voting.[165] Finally, it would be antithetical to the merit selection plan for two reasons. First, merit selection "insulates judges from popular pressure and facilitates impartial decision-making in controversial cases."[166] Second, merit selection "helps a qualified individual who lacks political clout or voter recognition both to obtain and to retain a judgeship."[167] Cumulative voting would compromise both of these objectives.

In summary, the court of appeals found that each of plaintiffs' remedial proposals conflicted with strong state interests which were unique to judicial elections.[168] Because each of the suggested remedies "would have the effect of undermining the court's ability to administer justice,"[169] the district court's order denying the plaintiffs

163. *See id.* at 1546.
164. *See id.*
165. *See id.*
166. *Id.*
167. *Id.*
168. *See id.* at 1547.
169. *Id.* The single factor the court of appeals identified in support of any of the remedies was that altering the electoral scheme to allow blacks to elect more black justices would increase their perception that the courts were colorblind. *See id.* at 1546. At the same time, by adopting any of these remedies, the federal court "would be proclaiming that race matters in the administration of justice." *Id.* As the court stated:

> The case at hand, therefore, presents a remedial paradox: A remedy designed to foster a perception of fairness in the administration of justice would likely create, by the public policy statement it would make, perceptions that undermine that very ideal. In the eyes of the public and litigants, at least, justice would not remain colorblind.

Id. (citations omitted).

The panel in *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998), took issue with this statement. Because it found judicial races in the case before it to be "racially polarized" already, it regarded the possible substitution of a different set of racial sensitivities for existing ones a neutral factor, which weighed neither for nor against the plaintiff's proposed remedy. *Davis*, 139 F.3d at 1422-23.

relief was affirmed.[170]

2. *Southern Christian Leadership Conference v. Sessions*

The decision in *Southern Christian Leadership Conference v. Sessions*[171] arose out of a challenge to Alabama's method of electing trial judges. Circuit courts are trial courts of general jurisdiction, each encompassing one or more whole counties.[172] District courts are trial courts of limited jurisdiction, each of which encompasses a single whole county.[173] Judges run for numbered posts in at-large, partisan elections encompassing their entire circuit or district.[174] Twelve months' local residency[175] and membership in the Alabama Bar[176] are required.

Plaintiffs challenged two aspects of the election scheme: (1) the combination of numbered posts and at-large elections, and (2) the judicial circuit boundary lines.[177] They sought to have the judicial boundaries realigned[178] and to create a series of subdistricts within counties to ensure the election of blacks to office.[179] Plaintiffs acknowledged these remedies would disenfranchise the voters who resided outside of the new electoral districts and would eliminate the linkage between the judges' territorial jurisdiction and their electoral base.[180]

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170. *See Nipper*, 39 F.3d at 1547 (Edmondson, J., concurring).

171. 56 F.3d 1281 (11th Cir. 1995) (en banc).

172. *See id.* at 1284. Venue and jury selection are based on counties and most court business is at the county level. *See id.* at 1284 n.4.

173. *See id.* at 1284.

174. *See id.* at 1285. At-large elections date from 1850; numbered posts from 1927. *See id.* at 1285-86.

175. *See id.* at 1285 n.8.

176. *See id.* at 1286. The Eleventh Circuit's opinion details both the slow admission of blacks to practice law in Alabama and their numbers in various districts. *See id.* at 1286-87, 1296.

177. *See id.* at 1289.

178. *See id.* "The Alabama legislature, with the advice of the Alabama Supreme Court, has the authority to change the number and the boundaries of the circuits." *Id.* at 1284 n.3.

179. *See id.* at 1289. Plaintiffs specifically *did not* seek to impose cumulative voting, acknowledging the pernicious effects it could create. *See id.* at 1296 n.24.

180. *See id.* at 1289.

The court of appeals analyzed the proposed remedy in substantially the same manner it had in *Nipper v. Smith*. It concluded that the disenfranchisement and linkage issues,[181] the tendency for race to become the "linchpin" of the judicial system,[182] the relatively limited pool of eligible minority lawyers, and the increased sensitivity to pressure by a limited group of voters and consequent decreased judicial independence,[183] made the proposed remedies unacceptable.[184] The state policy interests in the present system of electing judges outweighed whatever possible vote dilution had been shown by the evidence.[185]

3. *Davis v. Chiles*

In *Davis v. Chiles*,[186] as in *Nipper v. Smith*, the Eleventh Circuit addressed a challenge to Florida's trial court elections.[187] In *Davis*, the plaintiffs proposed a modified subdistricting plan, which would divide the at-large judicial circuits into a combination of single- and multi-member subdistricts, where there would be competitive post-numbered elections.[188] The successful subdistrict candidates would then face a circuit-wide retention election by all citizens over whom they would exercise jurisdiction.[189] If any candidate from a subdistrict did not receive majority support in a retention election, the post would be deemed vacant for the Governor to make an appointment.[190]

The Eleventh Circuit rejected the proposed plan and affirmed the district court's judgment for the defendants.[191] The court pointed out that "[i]n assessing a plaintiff's proposed remedy, a court must look to the totality of the circumstances, weighing both the state's

181. *See id.* at 1295-97.
182. *See id.* at 1295.
183. *See id.* at 1294.
184. *See id.*
185. *See id.*
186. 139 F.3d 1414 (11th Cir. 1998), *cert. denied*, 119 S. Ct. 1139 (1999).
187. *See id.* at 1416. The structure of the courts was identical to that in *Nipper v. Smith*. The court of appeals also noted that these districts had a history of racially polarized voting. *See id.* at 1417-18.
188. *See id.* at 1418.
189. *See id.*
190. *See id.*
191. *See id.* at 1426.

interest in maintaining its election system and the plaintiff's interest in the adoption of his suggested remedial plan." [192]

An issue of great concern to the district court had been the ways in which implementation of the proposed remedy conflicted with the Florida Constitution.[193] The court of appeals reviewed these issues individually, including infringement of the rights of some electors to vote for their judges, the creation of a retention election system for trial court judges where it was not authorized by constitution or statute, and the creation of new and different types of judicial districts without constitutional or legislative sanction.[194] As the panel in *Davis* acknowledged, *Nipper* requires that the court "carefully consider the impact that any remedial proposal would have on the judicial model enshrined in a state's constitution or statutes."[195] Applying the weighing test, the court of appeals rejected the plaintiffs' proposed remedy.[196]

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192. *Id.* at 1419-20.

193. *See id.* at 1420. In contrast, Article VI, section 4 of the California Constitution confers jurisdiction upon one superior court per county; Article VI, section 5 defines the jurisdiction of municipal courts as encompassing one or more districts within a county. *See* CAL. CONST. art. VI, §§ 4-5. Article VI, section 16 sets forth the procedures for at-large election of superior court and municipal court judges from their respective jurisdictions. *See id.* § 16.

194. *See Davis*, 139 F.3d at 1420. A variation on this theme appeared in *Mallory v. Eyrich*, 717 F. Supp. 540 (S.D. Ohio 1989). After the district court denied cross-motions for summary judgment, the parties attempted to resolve the case by having some (but not all) of the defendants offer to allow judgment on liability to be taken against them per Federal Rule of Civil Procedure 68 and have the court fashion a remedy. *See Mallory*, 717 F. Supp. at 541-42. The district court characterized this as some parties having "simply determined that this Court must exercise jurisdiction and remedy an asserted statutory violation while denying the Court an opportunity to inquire whether a violation does exist." *Id.* at 543. The district court declined to act without what it thought was an appropriate basis, and deferred to the state legislature to fashion a solution if it could do so. *See id.* at 544-45.

195. *Davis*, 139 F.3d at 1421.

196. *See id.* at 1423. The panel was troubled by its perception that, through its decisions in *Nipper v. Smith*, *Southern Christian Leadership Conference v. Sessions*, and *White v. Alabama*, 74 F.3d 1058 (11th Cir. 1996), the Eleventh Circuit had effectively foreclosed *any* remedy that might be applied in a Section 2 vote dilution case involving at-large judicial elections. *See Davis*, 139 F.3d at 1423-24.

4. *Brooks v. State Board of Elections* and *White v. Alabama*

The issue of possible conflict between a remedial plan and a state's constitution addressed by the Eleventh Circuit panel in *Davis v. Chiles* also arose in *Brooks v. State Board of Elections*.[197] In *Brooks*, the district court was asked to approve a consent decree to settle the Section 2 claims raised in a multi-faceted challenge to Georgia's judicial system.[198] The proposed consent decree required the establishment of a merit selection system for gubernatorial appointment of all new judges, with retention elections substituted for the prior system of open elections.[199]

The district court, however, rejected the proposed consent decree because it "would violate the Georgia Constitution's requirement that judges be elected, impermissibly alter the structure of power [as between the Governor, the voters, and qualified potential candidates] currently embodied in the 1983 Georgia Constitution regarding the election of judges, and violate several fundamental Georgia statutes."[200] The court concluded that, in a situation where there had been no judicial determination that the present system violated Section 2,[201] and where there had been no voluntary amendment to the Georgia Constitution and statutes, the court would not approve a remedy that contravened existing Georgia law.[202]

Two years later, the Eleventh Circuit addressed the same issue in *White v. Alabama*.[203] Plaintiffs had challenged the at-large partisan election of Alabama's appellate judges under Section 2. Settlement discussions began very early and resulted in a proposed consent decree.[204] As finally approved by the district court, the consent decree preserved at-large elections, but provided that there be at least two black justices on each of the appellate courts. Furthermore, if at least two black justices were not elected, the governor should then appoint them from a list prepared by a commission dominated by

197. 848 F. Supp. 1548 (S.D. Ga. 1994).
198. *See id.* at 1551-52.
199. *See id.* at 1563-64.
200. *Id.* at 1564.
201. The proposed consent decree specifically stated that the defendants were making no admission of liability. *See id.* at 1581.
202. *See id.* at 1569.
203. 74 F.3d 1058 (11th Cir. 1996).
204. *See id.* at 1060-61.

blacks, with the size of the appellate courts being temporarily increased, and as white judges retired, their seats would then be abolished to reduce the size of the court to the original level.[205]

The Court of Appeals for the Eleventh Circuit reversed this decision.[206] It began by observing that the essence of Section 2 was protecting the plaintiffs' right to elect the candidates of their choice. Since the proposed consent decree substituted appointment of judges for election of judges, the remedy effectively eliminated the right to vote; it thereby violated both the spirit and the purposes of the Voting Rights Act and therefore was a remedy foreclosed by the Voting Rights Act.[207]

As an equally fundamental issue, the Eleventh Circuit held that the district court's order was improper because it lacked the authority to require Alabama to increase the size of its appellate courts.[208] Citing *Holder v. Hall*,[209] the court of appeals held that using

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205. *See id.* at 1062-68.

206. *See id.* at 1075.

207. *See id.* at 1069-71. The court also held that specific minimum black membership requirements were a guarantee of proportional representation in violation of the express terms of Section 2. *See id.* at 1071-72.

208. *See id.* at 1072. That authority rested with the Alabama Legislature, qualified by the fact that Alabama was subject to preclearance under Section 5 of the Voting Rights Act. *See id.* at 1061.

The language added by Proposition 220 to Article VI, section 16(b)(1) of the California Constitution, allowing the California Legislature (on a two-thirds vote of each House) to provide for an alternative to countywide elections of superior court judges, applies "as . . . necessary to meet the requirements of federal law." CAL. CONST. art. IV, § 16(b)(1). The use of the words, "necessary to meet the requirements," suggests that a finding of liability for a Section 2 violation is the prerequisite to the Legislature's action, because it is only after a violation has been established that any alternative procedure can be found "necessary."

In a letter to Presiding Judge Victor Chavez of the Los Angeles Superior Court, California Attorney General Bill Lockyer recently came to the same conclusion. He opined that a federal court must first determine that some system other than country-wide election of superior court judges is necessary to comply with federal law before the legislature may change the county-wide electoral system. Letter from Bill Lockyer, Attorney General of California, to Victor E. Chavez, Presiding Judge of the Los Angeles Superior Court, at 2 (Sept. 21, 1999) (on file with the *Loyola of Los Angeles Law Review*).

209. 512 U.S. 874 (1994). In *Holder*, the plaintiffs sought replacement of a single commissioner system for county government, with a multi-member commission of sufficient size to allow creation of at least one single-member

proportional representation as a benchmark for a federal court to increase the number of judges on a particular court was not permitted under Section 2.[210] Even treating the district court's order as a consent decree,[211] the Eleventh Circuit held that the district court could not provide a remedy that was not authorized by the Voting Rights Act.[212]

E. Milwaukee Branch of the NAACP v. Thompson

Discussions of what weight to give to the states' interests have not been confined solely to the Fifth and Eleventh Circuits. The Seventh Circuit applied a fresh approach in *Milwaukee Branch of the*

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district with a black representative. *See id.* at 878. Although not able to agree on an opinion, five members of the Court agreed that the size of a governing body could not be the subject of a vote dilution challenge because there is no principled way for a court to choose among the possible sizes for such a body. *See id.* at 880-85 (Kennedy, J., announcing the judgment), 885-91 (O'Connor, J., concurring), 891-92 (Thomas, J., concurring).

210. *See White*, 74 F.3d at 1072-73.

211. The Eleventh Circuit held it could not be a "consent decree" because some parties objected to it. *See id.* at 1073-74.

212. *See id.* at 1074-75. In a case which did not involve judicial elections, the District of Columbia Circuit struck down a consent decree entered into between the NAACP and a county government changing the structure of the county's government because the procedures adopted violated the North Carolina Constitution and statutes. *See* Cleveland County Ass'n for Gov't by the People v. Board of Commr's, 142 F.3d 468, 469, 475-79 (D.C. Cir. 1998). As in *Brooks*, the consent decree could not be upheld as correcting a violation of federal law because there was no admission of liability. *See id.* at 477 & n.16.

Similarly, in *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995), the court of appeals struck down a consent decree which changed the form of local government without the referendum as required by Illinois state law even though there was no finding of a Voting Rights Act violation. *See Perkins*, 47 F.3d at 216-17. The court distinguished *Perkins* from a situation where a Voting Rights Act violation had been found, in which case state law could not prevent a necessary remedy. *See id.* at 216; *see also* Keith v. Volpe, 118 F.3d 1386, 1393 (9th Cir. 1997) (stating that parties to consent decree which purported to ban billboards along the Century Freeway "could not agree to terms which would exceed their authority and supplant state law").

The Supreme Court upheld a consent decree which implemented changes in voting districts without a finding of liability in *Lawyer v. Department of Justice*, 521 U.S. 567 (1997). The Florida Supreme Court drew-up the plan following a legislative impasse—as permitted by Florida law—and both houses of the Florida Legislature were parties and represented by the state Attorney General. This was deemed to be equivalent to the state making its own redistricting plan. *See id.* at 578.

NAACP v. Thompson.[213] Plaintiffs had challenged an at-large election system for both trial and appellate courts that involved elections for numbered posts in an electoral district coextensive with the area of primary jurisdiction—county-wide for trial judges and covering several counties for appellate judges. The percentage of black judges was substantially below the voting age black population but twice the percentage of eligible black lawyers.[214]

The plaintiffs argued that the district court erred by giving any weight to the state's interest in linking territorial jurisdiction and electoral base. The Seventh Circuit analyzed each of the arguments in favor of plaintiffs' assertion[215] and found that "individually and collectively they are not enough to overcome Wisconsin's interest in electing its trial judges from whole counties." [216] It held:

> At-large elections from the whole of the judge's geographic jurisdiction are designed to balance accountability and independence. . . .
>
> Wisconsin believes that election of judges from subdistricts would lead to a public perception (and perhaps the actuality) that judges serve the interests of constituencies defined by race or other socioeconomic conditions, rather than the interest of the whole populace. . . . To free the judge to follow the law dispassionately, Wisconsin prefers to elect judges from larger areas, diluting the reaction to individual decisions. . . . [T]he Voting Rights Act does not compel a state to disregard a belief that larger jurisdictions promote impartial administration of justice, if that belief is sincerely held—as the district judge concluded that it is in Wisconsin.[217]

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213. 116 F.3d 1194 (7th Cir. 1997).
214. *See id.* at 1196.
215. *See id.* at 1200-01.
216. *Id.* at 1201.
217. *Id.* The Sixth Circuit went even further in *Cousin v. McWherter*, 46 F.3d 568, 576-77 (6th Cir. 1995). While the district court had described Tennessee's interest in maintaining an at-large, circuit wide system of electing trial judges as tenuous and "nebulous at best," the court of appeals disagreed:
[W]e hold, *as a matter of law*, that Tennessee has a legitimate interest in preserving its at-large system of electing trial judges and that this interest must be weighed as a separate factor within the "totality of the circumstances" analysis

The Seventh Circuit's decision is more closely akin to *LULAC IV* than it is to *Nipper v. Smith* and its progeny, because the court of appeals' examination of Wisconsin's interests explicitly was part of the totality of circumstances test, upholding a finding of no vote dilution, as opposed to being an analysis of the proposed remedy.[218]

F. Anthony v. Michigan *and Trial Court Unification*

The issue of the Voting Rights Act implications of trial court unification was presented in the Eastern District of Michigan's recent decision in *Anthony v. Michigan*.[219] Wayne County Circuit Court was the trial court of general jurisdiction in Wayne County, handling civil matters over $10,000 and felony criminal cases outside Detroit.[220] Its judges were elected at-large, in non-partisan county-wide races.[221] The Detroit Recorder's Court, although technically a municipal court, functioned like a circuit court because it handled felony cases occurring in the City of Detroit.[222] Its judges were elected only from within the City of Detroit. The circuit court was 80% white; the Recorder's Court was 76% black.[223] Since 1986, all judges of the two courts were cross-assigned, and there were regular rotations of circuit judges to hear cases in the Recorder's Court.[224]

Since 1980, there had been a move away from local funding toward complete state funding of all trial courts.[225] Wayne County received state support first because of the county's financial problems, but this was seen as a prelude to reorganization of the court structure for greater efficiency. However, full implementation of state trial

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in determining whether a Section 2 violation has occurred. *Cousin*, 46 F.3d at 576 (emphasis added).

218. *See Milwaukee NAACP*, 116 F.3d at 1199-1201.

219. 35 F. Supp. 2d 989 (E.D. Mich. 1999).

220. *See id.* at 992.

221. *See id.*

222. *See id.* at 993. The district court described it as "an anachronism." *Id.* It was the only municipal court in Michigan that handled felonies, and it was the only municipal court that was funded by the state. *See id.* Wayne County was the only county in Michigan that had, in effect, two circuit courts. *See id.*

223. *See id.*

224. *See id.* at 994.

225. *See id.*

court funding failed to pass the legislature.[226] But, in 1996 legislation passed merging the Recorder's Court with the Wayne County Circuit Court, effective October 1, 1997. This legislation also provided for all counties to receive state funding based on caseload.[227] Finally, in anticipation of Voting Rights Act challenges, the legislation provided:

> If the state constitution of 1963 permits the creation of election districts in a county for countywide judicial office, or if, by a final nonreviewable judgment, a court determines that the federal voting rights act requires election districts rather than at-large election for countywide judicial office, the county board of commissioners has authority to create election districts to conform with those requirements.[228]

The plaintiffs challenged the merger on both constitutional[229] and Voting Rights Act grounds. They alleged that, although the City of Detroit's population was approximately 1,030,000, and 76% black and 22% white, it would be difficult for blacks to be elected in countywide judicial elections since Wayne County's population—about 2,110,000—was 57% white and 40% black.[230]

On the defendant's motion for summary judgment, the district court rejected this argument.[231] It analyzed the evidence presented by the three experts: one for plaintiffs, one for the defendant, and one appointed by the court. The court concluded that the first two tests of *Thornburg v. Gingles*[232] were satisfied. First, the black population was sufficiently numerous and geographically compact, and second, whites tended to vote differently than blacks. Plaintiffs failed the third test, however, because the evidence of blacks'

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226. *See id.* at 994-95.
227. *See id.* at 996.
228. *Id.* at 997 (quoting MICH. COMP. LAWS ANN. § 600.9948 (West 1987)).
229. The constitutional claims were dismissed for lack of standing and other defects. *See id.* at 1002-04. Therefore, they will not be discussed further. However, the district court analyzed and specifically rejected plaintiffs' argument of a discriminatory intent behind the merger, finding that the merger "was part of a larger effort to equitably fund the state's trial courts . . . ." *Id.* at 996-99, 1003-04.
230. *See id.* at 997-98.
231. *See id.* at 1002.
232. 478 U.S. 30 (1986).

electoral success in Wayne County precluded a finding of "legally significant" racial bloc voting, i.e., black-preferred judicial candidates were not "generally," or "usually," or "normally" defeated in countywide elections.[233] The evidence showed that eleven out of eleven black-preferred incumbents were elected and four out of eight black-preferred non-incumbents were elected.[234] The district court held that, as a matter of law, these success rates precluded a finding of "legally significant" racial bloc voting by the white majority.[235]

V. CONCLUSION

The discussion above is not intended to be an encyclopedic treatment of Section 2 jurisprudence—only a survey of some of the decisions which might apply to litigation over judicial elections in Los Angeles County. Nevertheless, several points are clear.

Since the 1982 amendments to Section 2, it is not necessary to show an intent to discriminate; rather, discriminatory effect alone is sufficient. However, electoral devices, such as at-large elections, are not per se violative of Section 2. The plaintiffs have the burden to demonstrate that, under the totality of the circumstances, the electoral procedures used result in unequal access to the electoral process. The existence of an allegedly dilutive electoral procedure and the lack of proportional representation alone do not establish a violation. Moreover, because it is the ability to vote that is at issue, the relevant population for the purpose of ascertaining comparative voting strength is not all persons, but rather voting age citizens.

In addition, it is part of the plaintiff's burden to demonstrate both that the minority votes cohesively, and that "legally significant" racial bloc voting exists, whereby the majority is usually able to defeat the minority's preferred candidate. Ordinarily this is done by a sophisticated statistical analysis of a number of elections in the district at issue. Alternative non-racial explanations of voting results, such as incumbency, partisan affiliations of the candidates, or other factors influencing particular elections, can be offered to help interpret the election results. This analysis is both complicated and very

233. *See Anthony*, 35 F. Supp. 2d at 1004-05.
234. *See id.* at 1005.
235. *See id.* at 999-1002, 1004-06.

expensive. Moreover, additional factors—such as the percentage of eligible minority candidates in the population—are also relevant. This analysis is difficult enough where only two significant ethnic groups are involved, e.g., whites and blacks. Only a few cases address the dynamics of three groups, and none have addressed a situation like Los Angeles County where there are *at least* four potentially significant groups—whites, blacks, Hispanics, and Asians—none of whom form a majority of the population. The complexity of the statistical analysis when more than two groups are involved is likely to increase almost geometrically.

If and only if the plaintiffs are able to establish all three of their prima facie elements do the courts employ a balancing test. The Voting Rights Act itself does not articulate precisely what circumstances are relevant to the evaluation of the totality of circumstances. Senate Report 417,[236] which is the principal piece of legislative history to the 1982 amendments, sets forth the non-exclusive list of factors cited by Justice Brennan in *Gingles*.[237]

In the context of judicial elections, a number of factors other than those enumerated by Justice Brennan have been considered in the totality of circumstances analysis. One of the principal factors is the state's interest in maintaining its chosen election system, which in judicial elections is often phrased in terms of "linkage." Linkage is a state's decision to make the judge's jurisdictional base and electoral base coextensive, i.e., a judge is elected by voters from throughout the county, and his or her primary area of jurisdiction is the entire county. Linkage is often described as an attempt to balance judicial independence and judicial accountability, and linkage has long historical roots throughout the country. The federal courts have emphatically recognized linkage as a strong, legitimate interest which has independent weight within the totality of circumstances analysis.[238] Linkage—and the underlying values it serves—has

236. SENATE REPORT 417, *supra* note 8.

237. *See Gingles*, 478 U.S. at 36-37.

238. California Attorney General Bill Lockyer recently noted that any potential

> plaintiff's task would be made more imposing by the several judicial decisions under the [Voting Rights Act] which recognizes state's strong interest in maintaining a state court system and election structure in which the jurisdictional and electoral bases of trial courts are

repeatedly been found to *outweigh* evidence of some degree of vote dilution in judicial election cases, resulting in a finding of *no* Section 2 violation.

Even if some degree of vote dilution is shown, an additional part of the plaintiff's burden is to show the existence of a proper remedy. This has been a stumbling block for many challenges to judicial elections. Among the proposed remedies that the federal appellate courts have *rejected* are:

1. the creation of electoral subdistricts, where (for example) judges are elected from a small part of the county but can hear cases from throughout the county;
2. the subdivision of the larger jurisdiction into smaller districts, with linkage maintained within the smaller districts, which would have additional effects on the state's venue rules and the composition of jury panels;
3. the creation of a combination of single- and multi-member subdistricts, with primaries from the subdistricts followed by retention elections from the entire district; and
4. cumulative voting systems.

An additional issue is whether the federal court may override state constitutional or statutory provisions in fashioning a remedy. Generally, the cases appear to hold that if there is a settlement of litigation without a finding that Section 2 has been violated—for example, under a consent decree where there is no admission of liability—any remedy *must* be consistent with state law. After liability has been found—i.e., after the plaintiff has satisfied the three preconditions, and the totality of circumstances analysis has been resolved in favor of the plaintiffs—the federal court may impose a remedy which overrides or supplants state law. Thus, for example, the constitutional provision of one superior court per county could not be overridden except at the ballot box or after a finding of liability under Section 2.

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coextensive.

Letter from Bill Lockyer, Attorney General of California, to Victor E. Chavez, Presiding Judge of the Los Angeles Superior Court, at 2 (Sept. 21, 1999) (on file with the *Loyola of Los Angeles Law Review*).

These facts suggest the following conclusions:

1. Section 2 litigation is highly fact-intensive. None of the three threshold *Gingles* factors can be assumed; rather, the plaintiff must prove each of them with specific evidence, of suitable depth and recency, tailored to the minority groups and the specific districts at issue. This is an extremely expensive and burdensome undertaking for any plaintiff, and the cases demonstrate that the penalty for any attempt to skimp in the presentation of this evidence is summary judgment against the plaintiff;
2. the burden is also on the plaintiff to show that the specific remedy proffered is appropriate. Failure to articulate an appropriate remedy will defeat an otherwise meritorious Section 2 vote dilution claim;
3. the federal courts have repeatedly recognized that judicial elections involve features and interests that are unique. The courts have been highly protective of those interests; and
4. in judicial election cases, unless a Section 2 violation is actually found, the federal courts rarely approve consent decrees requiring changes in state law unless the state itself has adopted the change by the legislative or electoral process normally required to amend its constitution or laws.

While none of these circumstances necessarily precludes a successful Section 2 challenge to judicial elections in Los Angeles County, individually and collectively, they suggest that such a challenge faces even more serious obstacles than a Section 2 challenge to other types of elections. These difficulties are the reasons that there have apparently been no successful challenges under Section 2 to a judicial election system in the last decade.