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Applying Section 2 of the Voting Rights Act to Single-Member Offices

When Congress amended the Voting Rights Act¹ (Act) in 1982, it revised section 2,² the Act's general prohibition against electoral discrimination. Impetus for the changes stemmed, in part, from congressional discontent with the Supreme Court's decision in *City of Mobile v. Bolden*³ which required proof of intentional discrimination to establish a violation of section 2.⁴ The 1982 amendments to section 2 rejected the Court's intent requirement; Congress provided instead that demonstrating the discriminatory results of a political process is sufficient to establish a section 2 violation.⁵ Yet in reshaping section 2,

1. 42 U.S.C. § 1973 (1982). For a history of the amending process, see Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1388-412 (1982). For a civil rights advocate's summary of the § 2 amending process, see Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in MINORITY VOTE DILUTION 151-57 (C. Davidson ed. 1984). *But cf.* A. THERNSTROM, WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 79-137 (1987).

2. Pub. L. No. 97-205, 96 Stat. 134 (codified at 42 U.S.C. § 1973(a) (1982)). 42 U.S.C. § 1973 (1982) states:

(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 the denial or abridgement of the right of any citizen to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

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

3. 446 U.S. 55 (1980).

4. The *Senate Report* discussing the amendments to § 2 states:

S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice or procedure that results in discrimination. This amendment is designed to make clear that proof of discriminatory intents is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied prior to the litigation involved in *Mobile v. Bolden*.

S. REP. NO. 417, 97th Cong., 2d Sess. 27, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 179 [hereinafter SENATE REPORT]; see also *id.* at 193. The Supreme Court has acknowledged that the *Senate Report* is an "authoritative source" for interpreting amended section 2. *Thornburg v. Gingles*, 478 U.S. 30, 43 n.7 (1986).

5. 42 U.S.C. § 1973(a) (1982). "Plaintiffs . . . must show that the challenged system or practice in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process." SENATE REPORT, *supra* note 4, at 205 (emphasis added). For an extended discussion of the shift from a *Bolden* standard to a results test, see Parker, *The "Results Test" of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715 (1983). Essentially, plaintiffs have a choice between proving discriminatory results or intentional discrimination. See, e.g., *Dillard v. Baldwin County Bd. of*

Congress did more than simply revise the standard of proof. Congress also added sweeping language to section 2, guaranteeing equal opportunities for minorities⁶ to participate in the political process (the participation prong) and to elect candidates of their choice (the election prong).⁷

Courts generally have taken a moderate approach when interpreting amended section 2, expanding its scope in some areas⁸ and restricting its scope in others.⁹ The courts have given an especially restrictive interpretation to section 2 as it applies to single-member offices. A single-member office differs from a multi-member office because greater power is concentrated in one individual and no comparable office exists in the jurisdiction. Examples of single-member offices include the mayor of a city and the chairperson of a county commission. A multi-member office, in contrast, has counterparts with equivalent power in the jurisdiction. A city councilperson or a member of a state legislature holds a multi-member office. Two courts of appeals and one district court have held or suggested that single-member offices are exempt from the coverage of the Act.¹⁰

Exempting single-member offices from challenge, however, may impede section 2's goal of ensuring minorities an equal opportunity to elect candidates of their choice and to participate in the political process. Because of their distinct power, single-member offices held by officials unsympathetic to minorities have a greater potential than other offices to diminish minority influence in the political process. At the same time, this distinctive power of single-member offices means that if these offices are held by minorities, or at least open to their participation, these offices may produce greater opportunities for minority influence than would multi-member offices. Yet, courts may be

Educ., 686 F. Supp. 1459, 1467-69 (M.D. Ala. 1988), *aff'd. sub nom. Dillard v. Chilton City Commn.*, 868 F.2d 1274 (11th Cir. 1989); SENATE REPORT, *supra* note 4, at 205.

6. This Note uses the terms blacks, minorities, and minority group interchangeably. Similarly, this Note employs the terms whites, majority, and majority group interchangeably. Black citizens are a subset of the racial and language minority groups protected by the Voting Rights Act. The Act prevents electoral discrimination based on race, color, or membership in a language minority group. 42 U.S.C. §§ 1973(a) and 1973b(f)(2) (1982).

7. 42 U.S.C. § 1973b (1982); *see supra* note 2 for the text of the statute.

8. Most notably, courts have held that amended § 2 covers elections for state court judges. *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988); *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988). *See generally Taylor, Elections for Judges in Turmoil*, Natl. L.J., Dec. 18, 1989, at 3, col. 3.

9. For example, courts have held that a minority group must be able to show it is sufficiently large and geographically compact to constitute a majority in a contested district as a prerequisite to a vote dilution claim under § 2. This requirement makes it difficult for a minority group which is not geographically compact to establish a § 2 violation even though the group has unequal access to the political process. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942, 947 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1769 (1989); *Martin v. Allain*, 658 F. Supp. 1183, 1203-04 (S.D. Miss. 1987).

10. *See infra* notes 42-84 and accompanying text.

reluctant to consider section 2 challenges to single-member offices because courts do not understand how the combination of election for these offices and the conduct of these officeholders after an election can violate the goals of section 2.

This Note questions whether an exemption for single-member offices is justified. Part I provides a brief overview of the Voting Rights Act and the types of discrimination in the political process to which it applies. Part I then reviews the decisions on single-member offices, including the courts' attempts to define single-member offices. This Part concludes neither Congress nor the Supreme Court dictates an exemption for single member offices. Instead, single-member offices should be open to challenge if they hamper the achievement of section 2's goals. Part II identifies the goals of section 2 by developing a number of theories to give meaning to the opportunity to participate and elect language of section 2. This Part concludes the goal of section 2 is to bolster civic inclusion in the political process by eliminating the lingering effects of race discrimination. Part III then tests the exemption for single-member offices against the goal of section 2. This Note concludes that the exemption actually thwarts section 2's goal and, therefore, single-member offices should be open to challenge under section 2. Finally, Part IV develops guidelines for applying section 2 to single-member offices.

I. AN INTRODUCTION TO THE VOTING RIGHTS ACT AND THE DECISIONS REGARDING SINGLE-MEMBER OFFICES

This Part begins with an overview of the Voting Rights Act, including the three forms of electoral discrimination frequently challenged under section 2 of the Act. Section I.A argues that the three forms of electoral discrimination adequately describe some, but not all, violations of section 2 by single-member offices. Section I.B reviews decisions on single-member offices, concentrating on the reasoning used by courts to exempt these offices from section 2 challenges. Section I.C questions the exemption for single-member offices by establishing that neither Congress nor the Court mandated an exemption for these offices.

A. *The Coverage of the Voting Rights Act*

In response to the considerable voting obstacles faced by blacks,¹¹ Congress passed the Voting Rights Act of 1965.¹² The Act contains three key sections aimed at preventing electoral discrimination. Section 2 establishes the basic definition of a violation of the Act.¹³ This

11. For a description of these obstacles, see A. THERNSTROM, *supra* note 1, at 1-2; see also SENATE REPORT, *supra* note 4, at 182.

12. 42 U.S.C. § 1973 (1982).

13. 42 U.S.C. § 1973(a) (1982). See *supra* note 2 for the text of the statute.

section applies nationwide to prohibit electoral discrimination.¹⁴ For example, section 2 prohibits election practices that discourage minority citizens from voting or running for office.¹⁵ Section 2 also attacks election devices, such as at-large elections, that dilute the influence of minority voters.¹⁶ Section 4 of the Act suspends the use of "tests or devices" designed to prevent minorities from registering and voting in jurisdictions specified by a trigger formula.¹⁷ In addition, the Attorney General is authorized to send in federal examiners to register voters or monitor the conduct of elections in covered jurisdictions.¹⁸ Section 5 requires jurisdictions identified by the trigger formula, and therefore covered by section 4, to preclear¹⁹ any changes in voting or election laws with federal authorities.²⁰

Section 4 epitomizes the Act's initial focus on individuals' access to the ballot.²¹ The original Act, however, also recognized and protected group participation in the political process.²² After the Act passed, group participation began to receive attention both from officials in jurisdictions covered by section 4 and from Congress. Officials, while allowing some individual blacks to register and vote, shifted their attention to devices designed to diminish the influence of black voters as a group.²³ These practices are commonly known as vote dilution.²⁴

14. SENATE REPORT, *supra* note 4, at 192 ("Section 2 — the Act's general prohibition against voting discrimination — applies to every state and county.").

15. See *infra* notes 34-36 and accompanying text.

16. See *infra* section III.B.1.

17. 42 U.S.C. § 1973b (1982). For example, if in the 1964 presidential elections a jurisdiction required a literacy test or similar device and if less than half of its electorate registered or voted, then the jurisdiction was covered under § 4. 42 U.S.C. § 1973b(b) (1982).

18. 42 U.S.C. § 1973d-f (1982).

19. 42 U.S.C. § 1973c (1982). All covered jurisdictions must submit any "standard, practice or procedure with respect to voting" to the Civil Rights Division of the Justice Department for advance approval. The Division then has 60 days to determine whether the proposed standard, practice, or procedure has a discriminatory purpose or effect. If so, the Division can prevent the jurisdiction from implementing the change.

20. See SENATE REPORT, *supra* note 4, at 182. For extended discussions of § 5, see Days & Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in MINORITY VOTE DILUTION, *supra* note 1, at 167; Slawsky, *A Local Government's Guide to Section 5 of the Voting Rights Act*, 12 URB. LAW. 700 (1972); MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U. L. REV. 107 (1979); Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1209-21. For a discussion of the interplay between §§ 2 and 5 of the Act, see McKenzie & Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155, 168-71 (1984); see also Jones, *Redistricting and the Voting Rights Act: A Limited but Important Impact*, 73 NATL. CIVIC REV. 176 (1984).

21. See generally A. THERNSTROM, *supra* note 1 (arguing that the Voting Rights Act was only concerned with individual access to the ballot).

22. See Karlan & McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act* (Book Review), 4 J.L. & POL. 751, 756-57 (1988).

23. See SENATE REPORT, *supra* note 4, at 183 ("Following the dramatic rise in registration, a broad array of dilution schemes were employed to cancel the impact of the new black vote.").

24. See, e.g., *Allen v. State Bd. of Elections*, 398 U.S. 544, 569 (1969) ("The right to vote can

Congress reacted by renewing and expanding the coverage of the Act in 1970²⁵ and 1975.²⁶ In this way, Congress concentrated on the quality of a group's enfranchisement, rather than an individual's mere access to the ballot.

After the Supreme Court decided *City of Mobile v. Bolden*²⁷ in 1980, many observers argued that the decision thwarted Congress' desire to expand minority participation in the political process.²⁸ In *Bolden*, the Court held that section 2 of the Act required proof of intentional discrimination.²⁹ Congress responded to this decision in 1982. Along with renewing sections of the Act due to expire,³⁰ Congress also amended section 2 to establish that proof of discriminatory results is adequate to establish a violation of section 2.³¹ Congress framed section 2's results test in the language of equal opportunity.³² Thus, section 2 has become the primary vehicle for combating discrimination in the political process.

Typically, plaintiffs challenge three types of electoral discrimination under section 2.³³ The first type, disenfranchisement, prevents or discourages citizens from voting. Disenfranchisement may be accom-

be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."'). For more information on vote dilution, see *infra* notes 37, 102-16 and accompanying text.

25. Congress renewed the Act in 1970 to attack "obstructionist tactics" employed by Southern jurisdictions to exclude blacks from the political process. See Joint Views of Ten Members of the Judiciary Committee Relating to the Extension of the Voting Rights Act of 1965, 91st Cong., 2d Sess., reprinted in 116 CONG. REC. 5517, 5520-21, 5529 (Mar. 2, 1970).

26. In 1975, congressional hearings demonstrated that covered jurisdictions continued to dilute the votes of minority groups. Congress renewed the Act to counter these practices. Senate Committee on the Judiciary, Report on the Voting Rights Act Extension, S. Rep. No. 295, 94th Cong., 1st Sess. 16-17 (1975). In addition, Congress expanded the coverage of the Act to protect language minority citizens. See 42 U.S.C. § 1973b(f)(1) (1982) (congressional findings of voting discrimination against language minorities). See generally UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 76-88 (1981) [hereinafter U.S. COMMISSION].

27. 446 U.S. 55 (1980).

28. See, e.g., Derfner, *Nondiscrimination in Districting*, in REPRESENTATION AND REDISTRICTING ISSUES 65, 65-66 (B. Grofman, A. Lijphart, R. McKay & H. Scarrow eds. 1982) (arguing that *Bolden's* intent standard made successful § 2 challenges "well-nigh impossible"); Miller & Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1, 9 n.35 (1987) (outlining evidence from *Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights of the House Judiciary Comm.*, 97 Cong., 1st Sess. (1981)); see also SENATE REPORT, *supra* note 4, at 203 ("[A]fter *Bolden* litigators virtually stopped filing new vote dilution cases. Moreover, the decision had a direct impact on voting dilution cases that were making their way through the federal judicial system.").

29. 446 U.S. at 66-68.

30. Congress renewed the coverage of the special provisions of the Act, §§ 4, 5, 6, 7, and 8. 42 U.S.C. § 1973 (1982).

31. See *supra* notes 1-5 and accompanying text.

32. 42 U.S.C. § 1973(b) (1982).

33. See Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION, *supra* note 1, at 3-5.

plished either directly, by prohibiting minorities from voting, or "indirectly by rules and practices that on their face are not discriminatory but in fact discourage a group of potential voters from casting a ballot."³⁴ Examples of disenfranchisement include purges of registration rolls, establishment of difficult registration and voting procedures, and the threat of reprisals against minority voters.³⁵

A second form of electoral discrimination, candidate diminution, occurs when candidates representing the interests of a group of voters are prevented or discouraged from running. Examples of candidate diminution include changing government posts from elective to appointive when a minority candidate has a chance of winning, setting high filing and bonding fees, and increasing the number of signatures required on qualifying petitions.³⁶

Vote dilution is the third form of electoral discrimination often challenged under section 2. Vote dilution is "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting" by a white majority voting group "to diminish the voting strength" of a minority group.³⁷

34. *Id.* at 3.

35. *See, e.g.*, U.S. COMMISSION, *supra* note 26, at 22-24 (harassment and intimidation in registration); *id.* at 27-28 (purging and reregistration); *id.* at 29-31 (inconvenient polling places); *id.* at 34-35 (harassment and intimidation in voting); *see also Voting Rights Act, Runoff Primaries and Registration Barriers: Oversight Hearings Before the Subcommittee on Civil and Constitutional Rights of the House Commission on the Judiciary*, Rep. No. 119, 98th Cong., 2d Sess. 120-24, 209 (1983) [hereinafter *Registration Barriers*]; *Harris v. Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988) (election procedures discriminated against minority groups); *Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987) (cumbersome registration procedures violated § 2); *Brown v. Dean*, 555 F. Supp. 502 (D.R.I. 1982) (proposed location of polling place would be substantial deterrent to voting by blacks); Comment, *The Purging of Empowerment: Voter Purge Laws and the Voting Rights Act*, 23 HARV. C.R.-C.L. L. REV. 483 (1988).

36. *See, e.g.*, U.S. COMMISSION, *supra* note 26, at 59-61 (detailing impediments to minority candidates and their supporters); SENATE REPORT, *supra* note 4, at 183 (noting that elective posts were made appointive to prevent minority candidates from gaining office); *Velasquez v. City of Abilene*, 725 F.2d 1017, 1023 (5th Cir. 1984) (minority candidate for city council testified that he and his family suffered "continuous threats and abuses" during and after his candidacy); L. McDONALD, *VOTING RIGHTS IN THE SOUTH: TEN YEARS OF LITIGATION CHALLENGING CONTINUING DISCRIMINATION AGAINST MINORITIES* 111-12 (1982) (a special report from the American Civil Liberties Union that discusses high filing and bonding fees).

37. Davidson, *Minority Vote Dilution: An Overview*, in *MINORITY VOTE DILUTION*, *supra* note 1, at 4. Davidson identifies a number of distinctive characteristics about vote dilution. First, the process of vote dilution is more subtle than the other forms of discrimination. Nothing in the wording of "dilutionary laws" suggests they are discriminatory and the laws may not produce discriminatory results in every case. *Id.* Second, dilution is a group phenomenon. "It occurs because the propensity of an identifiable group to vote as a bloc waters down the voting strength of another identifiable group, under certain conditions." *Id.* Finally, the diminished power caused by vote dilution does not result from the behavior of the group whose votes are diluted. Instead, electoral practices that operate in a discriminatory fashion when combined with bloc voting by the majority cause vote dilution. *Id.* at 5.

A number of electoral structures and practices can cause vote dilution. At-large elections are probably the most common form of dilutionary device. *See infra* notes 173-97 and accompanying text. Run-off requirements may also cause vote dilution. *See infra* notes 169-70 and accompanying text. Other examples of election practices that may result in vote dilution include anti-

The three traditionally recognized forms of electoral discrimination indicate how a single-member office can violate the Act in ways similar to multi-member offices. For example, a discriminatory slating process can dilute minority voting strength whether the office being slated is a mayor (a single-member office) or city councilperson (a multi-member office).³⁸ Likewise, if an official refuses to distribute registration information to a minority candidate running for either a single- or multi-member office, candidate diminution occurs regardless of whether the official holds a single- or multi-member post.³⁹ The three traditional types of electoral discrimination, however, fail to account adequately for unique violations of the Act caused by single-member officeholders. For instance, a chairperson of a county commission, elected at-large, may employ his enhanced power to diminish the influence of associate commissioners chosen by the minority community. Here, the minority citizens may be having their votes diluted by the at-large elections for the chairperson.⁴⁰ "Vote dilution" describes this effect, but it fails to account for how the concentrated political power of the chairperson's office enables him to dilute the influence of the minority groups' elected representatives. The chairperson's actions produce a hybrid violation of section 2: both "vote dilution" as the at-large elections place the chairperson beyond reach of minority voters and an impermissible "concentration of power" in the chairperson that diminishes a minority group's opportunity to participate in the political process.

single shot devices, decreasing the size of a government body, exclusive slating groups, and gerrymandering. Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION, *supra* note 1, at 6-9.

38. Discriminatory slating is cognizable under § 2. See *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984); *Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1325-27 (N.D. Ill. 1989); *Collins v. City of Norfolk*, 679 F. Supp. 557 (E.D. Va. 1988), *revd.*, 883 F.2d 1232 (4th Cir. 1989), *petition for cert. filed*, 58 U.S.L.W. 3430 (U.S. Dec. 21, 1989) (No. 89-989). A slating process can be used to diminish minority participation in the political process in two ways. First, a slating organization could exclude minorities from any participation in the selection of candidates and select no minority candidates. This is similar to the procedure employed in the "Jaybird primaries." *Terry v. Adams*, 345 U.S. 461 (1953). Second, a slating group could exclude minorities from participation in the slating process, yet choose a "minority" candidate. This candidate, however, often does not represent the interest of the minority community, rather the candidate is weak and owes his allegiance to the slating group. This is particularly insidious because it creates the illusion that the minority group is participating in the political process. See *e.g.*, *Zimmer v. McKeithen*, 485 F.2d 1297, 1307 (5th Cir. 1973) (en banc), *cert. granted sub nom. East Carroll Parish School Bd. v. Marshall*, 422 U.S. 1055 (1975), *affd.*, 424 U.S. 636 (1976):

[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the black vote. . . . [S]uch success might be attributable to political support motivated by different considerations — namely that election of a black candidate will thwart successful challenges to electoral schemes on dilution grounds. 485 F.2d at 1307.

39. See, *e.g.*, *Velasquez v. City of Abilene*, 725 F.2d 1017 (5th Cir. 1984) (hostility towards minority candidates for justice of the peace and county clerk relevant to the § 2 inquiry).

40. See *infra* section III.B.1 for a detailed description of how at-large elections can dilute minority voting strength.

Courts may not recognize this hybrid violation of section 2 because they have held that single-member offices cannot dilute minority voting strength.⁴¹ But focusing narrowly on vote dilution may blind courts to the threat posed by the concentrated power of single-member offices. If a minority group can elect representatives, but these representatives have their influence diminished by single-member offices immunized from section 2's scrutiny, the right to an equal opportunity to participate in the political process becomes an empty right. The next section will review the response of courts to section 2 challenges of single-member offices.

B. *Reviewing the Decisions on Single-Member Offices*

Four courts have considered section 2 challenges to election methods for single-member offices or the structure of these offices. *City of Carrollton Branch of the NAACP v. Stallings*⁴² involved single-member office issues, even though the Eleventh Circuit did not formally recognize the concept.⁴³ Two other cases, *Butts v. City of New York*⁴⁴ and *Dillard v. Crenshaw County*,⁴⁵ recognize the concept of single-member offices without formally defining the term. A fourth case, *Christian Leadership Conference v. Siegelman*,⁴⁶ attempted to synthesize *Butts* and *Dillard* into a more formal definition of single-member office. According to the courts in *Butts*, *Dillard*, and *Siegelman*, if an office qualifies as single-member, it is excluded from the coverage of section 2. With such a drastic result dependent on whether an office is denominated single-member, an understanding of the courts' use of the term is important. Consequently, this section reviews the cases presenting single-member office issues and the courts' understanding of the concept.

1. *City of Carrollton Branch of the NAACP v. Stallings*

Although the Eleventh Circuit in *Stallings* did not specifically recognize the single-member office concept, the case is nevertheless significant because the court considered expanding a single-member post into a multi-member body. Carroll County, located in the west-central part of Georgia, was governed by a single county commissioner.⁴⁷

41. See *infra* notes 53-79 and accompanying text.

42. 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom.* *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988).

43. The Eleventh Circuit did not address the single-member issue. The defendants, however, raised the issue as the principal reason for the Court to grant their petition for a writ of certiorari. Brief for Petitioners at 16-20, *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988) (No. 87-1186) [hereinafter Brief for Petitioners].

44. 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986).

45. 831 F.2d 246 (11th Cir. 1987).

46. 714 F. Supp. 511, 518-20 (M.D. Ala. 1989).

47. The court found:

In 1980, blacks comprised 17 percent of the total population of Carroll County and 15.3 percent of the voting age population. The NAACP alleged that the one-person form of government in Carroll County diluted black voting strength. In fact, "[n]o black person has run successfully for the office of commissioner throughout the history of Carroll County."⁴⁸ Moreover, the evidence demonstrated that the single-member commission was adopted for the discriminatory purpose of limiting black voter strength.⁴⁹

The Eleventh Circuit highlighted the difficulties the at-large election for a single commissioner presented for minority voters.⁵⁰ In Carroll County, black citizens had no opportunity to elect representatives of their choice because their voting strength was submerged by the white majority. The existence of racially polarized voting, combined with at-large elections for the single commissioner, decreased blacks' opportunities to engage in the political process.⁵¹

To cure the discrimination in the Carroll County political process, the Eleventh Circuit ordered the district court to consider expanding the county's single-member commission to a three- or five-person commission chosen by district.⁵² Ordering consideration of an expanded commission is significant because it shows the willingness of a court to consider alternatives to single-member offices. In effect, the court recognizes that single-member offices should not be immunized from challenge.

2. Butts — The "Share of" Representation Concept

In *Butts v. City of New York*,⁵³ the Second Circuit became the first court to exempt single-member offices from section 2's coverage. In *Butts*, plaintiffs challenged a New York statute requiring that if no candidate for the office of mayor, city council president, or comptroller of the City of New York received 40 percent or more of the votes cast in a party's general primary, then the Board of Elections must

The Carroll County Commissioner is the entire governing body for the county. The commissioner is vested with the powers, among other things: to direct, control and convey the county property; to abolish wards, to establish election precincts and militia districts according to law, to select and appoint all minor offices of the county, whose election or appointment is not otherwise fixed by law.

829 F.2d 1547, 1551 n.7 (11th Cir. 1987), cert. denied sub nom. *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988).

48. 829 F.2d at 1551.

49. 829 F.2d at 1551-52.

50. By focusing on the at-large character of the single-member commission, the Eleventh Circuit was able to draw heavily on the Supreme Court's analysis in *Thornburg v. Gingles*, 478 U.S. 30 (1986). The Eleventh Circuit considered the single county commissioner "to be in all essential respects comparable with the multi-member district discussed by the court in *Gingles*." 829 F.2d at 1549. For more on *Gingles*, see *infra* notes 102-16 and accompanying text.

51. 829 F.2d at 1559.

52. 829 F.2d at 1563.

53. 779 F.2d 141 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

conduct a runoff between the two top vote-getters in the general primary.⁵⁴ Minority group voters argued that this runoff requirement diluted their voting strength in violation of section 2. The Second Circuit rejected this challenge, due, in large part, to the court's belief that section 2 did not apply to the offices challenged because they were single-member posts.

The court, without expressly defining single-member offices, outlined some characteristics of these offices by contrasting them with multi-member government bodies. In the court's view:

There can be no equal opportunity for representation within an office filled by one person. Whereas, in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts in which it is dominant, there is no such thing as a "share" of a single-member office.⁵⁵

The court found this distinction implicit in the Supreme Court's *City of Port Arthur v. United States*⁵⁶ decision. In *Port Arthur*, the Court struck down a runoff requirement appended to the city's at-large voting system for seats on the multi-member city council, but made no mention of a similar runoff requirement for the election of mayor.

3. Dillard — *Blending Butts' "Share of" Approach with a Functional Approach*

The significance of the *Dillard v. Crenshaw County*⁵⁷ decision lies in the Eleventh Circuit's creative solution to the voting rights concerns raised by a single-member office. In *Dillard*, black voters challenged Calhoun County, Alabama's commission form of government. Blacks comprised 17.6 percent of the county's population, and 15.9 percent of the voting population. Blacks in the county were "on average educationally and economically less advanced than whites."⁵⁸ In addition, the black community was politically cohesive and geographically insular. The citizens of Calhoun County had never elected a black county

54. 779 F.2d at 143.

55. 779 F.2d at 148 (emphasis added). Similarly, the court stated: "We cannot, however, take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of elections for single-member offices." 779 F.2d at 148.

Although the court never explicitly gives examples of single-member offices, one can assume that the court considered New York City's mayor, city council president, and comptroller to be single-member offices because the challenged primary law applied to them.

The Second Circuit's sweeping language suggests that it exempted all single-member offices from section 2 challenge. However, the actual holding may be narrower. The court stated: "It suffices to rule in this case that a run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act." 779 F.2d at 149.

56. 459 U.S. 159 (1982).

57. 831 F.2d 246 (11th Cir. 1987).

58. 831 F.2d at 247.

commissioner. The lack of black representatives stemmed, in part, from the racially polarized voting in the county.⁵⁹

The parties in *Dillard* agreed that Calhoun County's at-large elections for two associate commissioners and one county commission chairperson violated section 2 by diluting minority voting strength.⁶⁰ The district court invited the parties to respond with acceptable alternatives. Calhoun County proposed expanding the commission to five associate commissioners chosen by district and one chairperson elected at-large.⁶¹ Plaintiffs accepted the five-member proposal, but argued that the at-large chairperson position would continue to dilute minority voting strength. Hence, the only issue on appeal was whether retaining an at-large chairperson would deprive the plaintiffs of an adequate remedy for the admitted section 2 violation.⁶² Calhoun County tried to insulate the chairperson from a section 2 challenge by invoking the *Butts* exemption for single-member offices.⁶³ The county emphasized that the chairperson would serve primarily as an administrator with limited legislative duties within the commission.

The court, while recognizing the single-member office exception, held that it did not apply in this case. The court acknowledged that for some offices, such as sheriffs, probate judges, and tax collectors, "at-large, non-proportional elections are inherent to their nature as single-person officers elected by direct vote. Such single offices are most commonly limited to non-legislative functionaries."⁶⁴

The court denied the proposed Calhoun County chairperson single-member status because "the overlap between the roles of the commission and the chairperson do not allow us to consider this office as a separate, single-office position."⁶⁵ Ultimately, the court believed the other commission members "would have their voting strength and influence diluted" by the chairperson.⁶⁶ As a result, Calhoun County's

59. 831 F.2d at 247.

60. 831 F.2d at 248.

61. 831 F.2d at 248.

62. 831 F.2d at 248.

63. 831 F.2d at 251.

64. 831 F.2d at 251 (citation omitted).

65. 831 F.2d at 251. Similarly, the court stated: "[W]e are not satisfied that the chairperson will be sufficiently uninfluential in the activities initiated and in the decisions made by the commission proper to be evaluated as a single-member office." 831 F.2d at 253. The court also noted that "[t]he history that brought this case to this Court is a commission which over time skewed power heavily into the hands of the chairperson." 831 F.2d at 252.

66. 831 F.2d at 253 (quoting *Dillard v. Crenshaw County*, 649 F. Supp. 289, 296 (M.D. Ala. 1986)). The court stated that under the new plan, the power of the chairperson "stays where it has always been." 831 F.2d at 252 n.13. These powers included broad discretion in appointments for carrying out the prescribed work of the county, including services and construction projects; resolving citizens' complaints about county services; representing the county on various local and state boards; lobbying the county's interests to the legislature; overseeing county construction projects; liaising with military installations in the county; and assuring the execution of commission policies by other county officers. 831 F.2d at 251.

proposal would not completely remedy the section 2 violation. In place of the at-large chairperson, the court proposed a number of alternatives: a rotating chairperson, a hired executive, or "perhaps a clearly delimited job description along with other safeguards" to prevent the chairperson from infringing on the work of the associate commissioners.⁶⁷ Any alternative had to preserve fully the integrity of the elected associate commissioners. On remand, the parties chose, and the district court approved, a rotating chairperson.⁶⁸

4. *Southern Christian Leadership Conference v. Siegelman*

In *Southern Christian Leadership Conference v. Siegelman*,⁶⁹ an Alabama federal district court drew on both *Butts* and *Dillard* in its attempt to characterize the essence of a single-member office. The plaintiffs in *Siegelman* challenged the State of Alabama's use of numbered place, at-large elections for state circuit and district judges, arguing that these elections violated section 2 by diluting black voting strength. The defendants countered that "section 2 does not apply to the Alabama judiciary because state circuit and district judges hold 'single-member offices.'" ⁷⁰ The court, in rejecting the defendant's argument, defined single-member offices and demonstrated why the judges in this case did not fit the definition.

The court, relying on *Butts* and *Dillard*, stated that the "true hallmark of a single-member office is that only one position is being filled for an entire geographic area, and the jurisdiction can therefore be divided no smaller."⁷¹ Here, the court imposed a limit on the coverage of the Act without explicitly announcing it. The court assumed if it could not imagine an office being filled by more than one person, then it must be single-member. For example, the court cannot imagine more than one person holding the office of mayor or city council president.⁷²

The court rejected the defendants' asserted alternative definition of a single-member office as one in which "the full authority of that office

67. 831 F.2d at 253.

68. 679 F. Supp. 1546 (M.D. Ala. 1988).

69. 714 F. Supp. 511 (M.D. Ala. 1989).

70. 714 F. Supp. at 518.

71. 714 F. Supp. at 518 n.19. The court also stated that a single-member office refers to a situation where under no circumstances will there ever be more than one such position in a particular jurisdiction. The court noted it is possible to have more than one district or circuit judge in a particular jurisdiction and, thus, judges could not be single-member offices under its definition.

72. As will be discussed *infra*, this is an incorrect assumption. While technically only one person at a time can serve as mayor or council president, different people can serve during any given term. As the *Dillard* court suggested, an office can be rotated among commission members. *Dillard v. Crenshaw County*, 831 F.2d 246, 253 (11th Cir. 1987). Or additional offices can be created, such as a vice-mayor.

is exercised exclusively by one individual.”⁷³ The court noted that in most cases “any officeholder who wields his authority independently will *coincidentally* also be the only holder of his position in the entire geographic area.”⁷⁴ These two characteristics do not always co-exist,⁷⁵ however, and when they do, they do so only by coincidence.

In addition, the court rejected the defendants’ definition because it did not comport with the court’s view of the relationship between single-member offices and the theoretical justification for section 2. In the case of a single-member office:

the at-large boundaries coincide with the only “district” boundaries possible; because there is only one position to be filled, it becomes impossible to split up the jurisdiction any smaller. The concept of vote dilution is effectively rendered meaningless and such offices are inappropriate for section 2 vote dilution challenges.⁷⁶

In contrast, there is no such rationale for not applying section 2 to elected positions merely because “the full authority of that office is exercised exclusively by one individual,” as the defendants suggested. Thus the court reasoned that the judicial offices challenged in this case were not single-member.

5. *Synthesizing the Concepts of Single-Member Offices Offered in Butts, Dillard, and Siegelman*

The *Siegelman* and *Butts* cases reflect one of the two approaches courts have taken to single-member offices. The approach in these cases may be termed the “share of” approach.⁷⁷ This approach relies on the apparent truism that “there *cannot* be vote dilution where ‘districts in which [the minority] is dominant’ are physically impossible to create.”⁷⁸ For example, if blacks comprise 40 percent of a city, their vote for a mayor’s office, according to the “share of” approach, cannot be diluted because only one district (the entire city) is at stake and this

73. 714 F. Supp. at 518 (quoting the defendants).

74. 714 F. Supp. at 518.

75. For example, in *Butts*, one of the three positions at issue — city council president — was not, according to the court, an office whose full authority was exercised by one individual. Instead, the council president exercised his authority as a co-equal member of the Board of Estimates, a multi-member body. 714 F. Supp. 520 n.26.

76. 714 F. Supp. at 519-20 (footnote omitted). “In other words, where there is only one position at stake, it is impossible that a minority’s voting power has been diluted by the implementation of at-large elections, just as it is impossible to split up the area into districts in order to enhance a minority’s voting power.” 714 F. Supp. at 519.

77. This approach taken in *Siegelman* and *Butts* could also be termed the “Can you imagine?” approach because the court, in effect, is saying, “Can you imagine more than one office of this kind within a jurisdiction?” Since the court, for example, cannot imagine a town with even the functional equivalent of more than one mayor, a mayor is deemed a single-member office. But because the court can imagine more than one judge in a jurisdiction, a judge is not a single-member office.

78. 714 F. Supp. at 519 (emphasis in original) (quoting *Butts v. City of New York*, 779 F. Supp. 141, 148 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986)).

district cannot be subdivided to give minority voters a "share of" the mayor's office.

The second approach, demonstrated in *Dillard*, recognizes the "share of" concept, but casts its definition more in functional terms, and thus can be called the "functional approach." The functional approach suggests that executive or administrative offices, because of the functions they perform, tend to be single-member offices and therefore beyond challenge. The *Dillard* court employs function as a marker of single-member offices in conjunction with the "share of" approach. Thus, an office would qualify as single-member both because of its function and because a minority group could not receive a proportional "share of" the single office.⁷⁹

According to both the "share of" and "functional" approaches, three features typically characterize single-member offices. First, to be considered a single-member office there is traditionally only one such position in a jurisdiction.⁸⁰ For example, a county commission traditionally has only one chairperson and a town has only one mayor.⁸¹

Second, the power exercised by the single-member office must be greater than that exercised by multi-member offices. Although this may be a coincidence of having only one person holding the office, as the *Siegelman* court suggests,⁸² this coincidence is important since the concentration of power in a single-member office provides an opportunity to thwart the goals of section 2.⁸³

79. *Dillard v. Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987) (suggesting that a single-member office is not subject to proportional representation issues).

80. Of course, tradition can be difficult to judge. Consider the *Stallings* case, *supra* notes 47-52. In *Stallings*, a single county commissioner, invested with all of the county's legislative and executive power, governed the county. The county, however, had not always been governed by a single commissioner. At other times, three- and five-member commissions governed the county. *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1551 (11th Cir. 1987), *cert. denied sub nom. Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988). It would be difficult to say whether traditionally there was only one such position in this jurisdiction. This demonstrates the limited value of looking to tradition.

81. "Traditionally" is used because a chairperson could be rotated among commission members, as in *Dillard*. While only one member at a time holds the chair position, many members may hold the position during a legislative term. Alternatively, two persons may share the office of mayor.

82. *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 518 (M.D. Ala. 1989).

83. Power may be concentrated in two ways that raise concern. First, consider the powers exercised by the single county commissioner in *Stallings*. In that case the concentration of all the county's legislative and executive power in one office places the office hopelessly beyond reach of minority voters. Admittedly, this *de jure* total concentration of power is rare. In Georgia, only 24 of 159 counties have a single-member commission. See Respondents' Petition in Opposition to Writ of Certiorari at 13, *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988) (No. 87-1186). But the *de facto* equivalent could occur. That is, all the government power in a jurisdiction could effectively gravitate to a single-member office, like a mayor.

The second, and more typical, concentration of power occurs when a single-member office holder debases the influence of other members of the government organization. The *Dillard* case is illustrative. In *Dillard*, far less concern would have arisen if the chairperson were a mere figurehead instead of an officer with powers greater than those of the other members of the

Finally, an important indicator of a single-member office may be that the position is elected at-large. The *Siegelman* court appears to have this in mind when it mentions at-large boundaries coinciding with the only district lines possible.⁸⁴

C. *Establishing that Neither Congress nor the Court Mandated an Exemption for Single-Member Offices*

With this understanding of the challenges to single-member offices, one can begin to question the opinions exempting these offices from challenge. The first step in this process is to analyze the authority these decisions draw on to support an exemption for single-member offices. As this section will demonstrate, neither Congress nor the Supreme Court mandates an exemption for single-member offices. Rather, applying section 2 to these offices actually furthers the goals of the Act as it has been interpreted both by Congress and the Court.

Congress never made a distinction between single-member offices and all other offices. None of the cases recognizing the single-member issue cite any legislative history to support an exemption for single-member offices. Moreover, Congress did not recognize a distinction among types of offices based on the function an office serves.⁸⁵ This suggests that Congress did not intend that a functional distinction between single-member offices and all others would exempt single-member offices from the Act's coverage.⁸⁶

Yet, a critic of applying the Act to single-member offices may argue that because Congress did not specifically mention single-member offices, it did not intend for the Act to apply to them. Congress' intent to combat racial discrimination in voting, however, requires courts to give section 2 a broad construction. The Fifth Circuit in *Chisom v.*

commission. Similarly, a mayor has power concentrated in his office distinct from all other positions in the government, and he has an opportunity to depreciate the influence of other members of the government.

84. While the at-large character may increase voting rights concerns, election at large should not be essential for single-member status. Consider the office of a city council president elected, not at large by the citizens, but rather by the individual council members. This office could diminish the opportunity of a minority group to participate in the political process. Imagine that there were ten council members in a city comprised of 70 percent white voters and 30 percent black voters. And suppose white voters controlled seven districts and black voters three. The seven council members allied with the white interests would be able to elect the city council president without need of bargaining with the black representatives.

85. As the *Dillard* court notes: "Nowhere in the language of Section 2 nor in the legislative history does Congress condition applicability of Section 2 on the function performed by the elected official. The language is only and uncompromisingly premised on the fact of nomination or election." *Dillard v. Crenshaw County*, 831 F.2d 246, 250-51 (11th Cir. 1987).

86. The *Dillard* court acknowledged the difficulty in drawing lines based on government function. "A search for a definition of what constitutes legislative and what constitutes executive activity in government invariably leads to the conclusion that there is no bright line between the two realms." 831 F.2d at 252; see also *Siegelman*, 714 F. Supp. at 520 (rejecting functional distinctions).

*Edwards*⁸⁷ lends support to the proposition that even without specific congressional consideration, the Voting Rights Act should apply to single member offices. In the context of deciding whether the Act applied to elections for state judges, the court stated:

An overriding principle which guides any analysis of the legislative history behind the Voting Rights Act is that the Act must be interpreted in a broad and comprehensive manner in accordance with congressional intent to combat racial discrimination of any kind in all voting practices and procedures. Thus, in the absence of any legislative history warranting a conclusion that section 2 does not apply to state judge elections, the only acceptable interpretation . . . is that such elections are covered.⁸⁸

Moreover, the Senate Report on amended section 2 notes that while the cases it cites deal with typical situations of vote dilution, "Section 2 remains the major statutory prohibition of all voting rights discrimination."⁸⁹ The Report also states that section 2 "prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members."⁹⁰

Although Congress did not create the single-member office exemption, the *Butts* court argued that the Supreme Court implicitly created the exemption in *City of Port Arthur v. United States*.⁹¹ This interpretation of *Port Arthur* is flawed for a variety of reasons. First, if valid, the "implicit holding" the *Butts* court draws from *Port Arthur* would contravene Congress' desire to have the Act interpreted broadly to combat racial discrimination in all phases of voting.⁹² Second, the *Butts* court, by pointing to the plaintiffs' failure in *Port Arthur* to raise a challenge to the runoff for the mayor's office, proves too much.⁹³ If

87. 839 F.2d 1056 (5th Cir. 1988), cert. denied sub nom. Roemer v. Chisom, 488 U.S. 955 (1988).

88. 839 F.2d at 1061-62 (emphasis in original).

89. SENATE REPORT, *supra* note 4, at 207.

90. *Id.*

91. 459 U.S. 159 (1982). In *Port Arthur*, the city, after expanding in size through annexation, submitted to the district court for preclearance a plan for reorganizing the city government. Under the 4-2-3 plan, the city would be divided into four single-member districts, Districts 1 through 4.

District 5, comprising Districts 1 and 4 would elect another member, as would District 6, which combined Districts 2 and 3. Three additional members would be elected at large, one each from Districts 5 and 6, the third at large seat to be occupied by the mayor and to have no residency requirement. All Council seats would be governed by a majority-vote rule, that is, run-offs would be required if none of the candidates received a majority of the votes cast. 459 U.S. at 165. The district court rejected the proposed plan because of its adverse impact on the minority community. The court added, however, that if the plan were modified to eliminate the majority-vote requirement with respect to the two nonmayoral, at-large candidates, and to permit election to these two seats to be made by plurality vote, the court would consider the defect remedied. The Court affirmed the district court's decision. 459 U.S. at 168.

92. *Chisom v. Edwards*, 839 F.2d at 1061.

93. The Supreme Court "made no mention of a similar run-off requirement for the election of mayor. The later run-off was not even challenged." *Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985), cert. denied, 478 U.S. 1021 (1986).

the plaintiffs never raised a challenge to the mayor's office, the Court should not go out of its way to address an issue the parties never raised.⁹⁴ Third, the *Siegelman* court notes that "the *Port Arthur* decision does not address *why*" the concept of vote dilution was not applied to the position of mayor.⁹⁵ "[T]here is no discussion about which of the attributes of the office of mayor exempted it from a vote dilution challenge."⁹⁶ Without a justification, the *Siegelman* court was unwilling to accept that *Port Arthur* authorized an exemption for single-member offices.⁹⁷ Further, the Court has never endorsed this alleged implicit holding. In sum, the Supreme Court has neither implicitly nor explicitly held that single-member offices are exempt from section 2.

So far this section has demonstrated that neither Congress nor the Supreme Court decreed an exemption for single-member offices. The only remaining possible justification for an exemption is the theoretical justification offered by the "share of" approach. Essentially, this approach argues that allowing challenges to single-member offices is theoretically inconsistent with the concept of vote dilution. But if one could show that elections for single-member offices and the conduct of these officeholders violate the theoretical justifications for section 2, then they should not be exempt. But what is the theory behind section 2, and what are the goals the section was designed to achieve? The next Part addresses these issues.

II. THE GOAL OF SECTION 2: PROVIDING MINORITY GROUPS WITH AN EQUAL OPPORTUNITY TO ELECT AND TO PARTICIPATE IN THE POLITICAL PROCESS

A coherent theory of section 2 must give meaning to both prongs of the section: the opportunity to elect, and the opportunity to participate.⁹⁸ Unfortunately, when Congress amended section 2, it concentrated more on the mechanics of proving a violation than it did on articulating a vision of equality in the political process.⁹⁹ For instance,

94. See *United Parcel Serv., Inc. v. Mitchell*, 451 U.S. 56, 60 n.2 (1981) ("We decline to consider this argument since it was not raised by either of the parties here or below."); see also *United States v. Lovasco*, 431 U.S. 783, 788 n.7 (1977).

95. *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 519 n.21 (M.D. Ala. 1989).

96. *Siegelman*, 714 F. Supp. at 519 n.21.

97. *Siegelman*, 714 F. Supp. at 519 n.21.

98. As the reader will see, thinking about these as separate prongs may create a false dichotomy because one should understand the political process as a whole, not as divided into pieces. But for ease of understanding, this distinction will be maintained for now.

99. The *Senate Report* speaks occasionally about the goals of the Act in general and § 2 in particular. For example, the Report states that the Bill will insure "that the effort to achieve full participation for all Americans in our democracy will continue in the future." SENATE REPORT, *supra* note 4, at 181. But what exactly does Congress mean by "full participation"? The Report does not offer a complete model of full participation. Instead of articulating a vision of equal

the Senate Report develops a totality-of-the-circumstances test for section 2 violations, but it does not define equality of political opportunities.¹⁰⁰ The Supreme Court compounded this lack of guidance in *Thornburg v. Gingles*¹⁰¹ by giving only limited substance to the opportunity-to-elect prong and by not addressing the opportunity-to-participate prong. To compensate for this lack of guidance, this Part draws on the work of a number of commentators in an attempt to state what it means to have an equal opportunity (1) to elect candidates of a group's choice and (2) to participate in the political process.

Section II.A discusses the Supreme Court's treatment of the opportunity to elect. Section II.A also outlines the benefits that flow from an equal opportunity to elect. Ensuring that these benefits accrue to minority groups should be an important goal of section 2. Section II.B, drawing on the work of Professor Kathryn Abrams, provides a model of full participation in the political process that understands the process as more than merely voting. Section II.B then outlines the benefits that flow from ensuring an equal opportunity to participate in the political process. Section II.C concludes that the overarching goal of section 2 should be to increase civic inclusion in the political process by decreasing the effects of racial discrimination in this process.

participation in the political process, Congress seems more interested in emphasizing that a results standard is a return to the pre-*Bolden* understanding of § 2. See, e.g., *id.* at 193.

100. The totality-of-the-circumstances test, which the Senate Report develops, consists of factors for the courts to use in determining whether a particular practice results in an unequal opportunity to participate in the political process or elect a candidate of a minority group's choice. *Id.* at 206-07. The Senate report specifically mentions the following typical factors as evidence of an unequal opportunity to elect candidates and participate in the political process:

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

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.

Id. (footnotes omitted).

101. 478 U.S. 30 (1986).

A. Giving Meaning to the Opportunity To Elect

The Supreme Court's only decision on amended section 2, *Thornburg v. Gingles*, is disappointing for two reasons. First, the opinion addresses just the opportunity to elect, perhaps reserving for another day an opportunity-to-participate claim. And second, the decision creates confusion about the relationship between the Court's test for vote dilution and the statutory test outlined in the Senate Report. Overall, the Court fails to give full meaning to the opportunity to elect. Understanding the benefits produced by equal electoral opportunities gives fuller meaning to the opportunity to elect.

1. The Supreme Court Gives Limited Meaning in *Thornburg v. Gingles*.

In *Thornburg v. Gingles*,¹⁰² plaintiffs challenged the use of six multi-member districts in North Carolina's legislative reapportionment. The Court in *Gingles* focused on the opportunity to elect and did not address the opportunity-to-participate language of section 2.¹⁰³ The Court's characterization of the plaintiff's claim reveals this electoral focus.¹⁰⁴ Moreover, the Court concentrated solely on elections when it discussed the essence of section 2.¹⁰⁵

The Court outlined three factors (the Tripartite Test) required to prove that the use of multi-member districts caused vote dilution. 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. Otherwise, as in the case of an integrated district, the multi-member or at-large structure cannot be responsible for a minority group's inability to elect its candidates.¹⁰⁶ Second, the minority group must be able to show its political cohesiveness.¹⁰⁷ Third, the minority group must demonstrate that the white majority usually votes as a bloc, thus enabling it to defeat the minority's preferred can-

102. 478 U.S. at 30.

103.

We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multi-member district impairs its ability to *influence* elections.

478 U.S. at 46-47 n.12.

104. "Appellees contend that the legislative decision to employ multimember, rather than single-member, districts in the contested jurisdictions dilutes their votes by submerging them in a white majority, thus impairing their ability to *elect* representatives of their choice." 478 U.S. at 46 (footnotes omitted).

105. "The essence of a § 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." 478 U.S. at 47.

106. 478 U.S. at 50.

107. According to the Court: "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." 478 U.S. at 51.

didate.¹⁰⁸ "The latter two of these factors may be demonstrated by a showing that voting in the jurisdiction is highly racially polarized."¹⁰⁹

Although the Court stated a three-element test for vote dilution, it left uncertain the relationship between its test and the Senate Report's totality-of-the-circumstances test.¹¹⁰ The Court added the requirement of a geographically compact majority to the statutory factors.¹¹¹ The Court treated the other elements of the totality-of-the-circumstances test as "supportive of, but *not essential* to," a minority voter's case.¹¹² Justice O'Connor, in her concurring opinion, chastised the majority for replacing the totality-of-the-circumstances test with its tripartite test.¹¹³ The lower courts have treated the uncertain relationship between the Court's test and the totality-of-the-circumstances test in various ways.¹¹⁴

While the relationship between the Court's test and the statutory test may be uncertain, the Court exhibits a clearer understanding of inequality in the opportunity to elect. For the Court, an inequality in the opportunity to elect is rooted in a very traditional concept of vote dilution: a minority group is numerically submerged in a majority jurisdiction.¹¹⁵ If voting is racially polarized, then the preferences of the

108. The interaction of white and black bloc voting produces racially polarized voting. A showing of racially polarized voting demonstrates that a minority group will be thwarted in at-large elections by the majority group voting along racial lines. The court's requirement of the usual predictability of the majority's success distinguished structural dilution from the mere loss of an occasional election. 478 U.S. at 51.

109. *Smith v. Clinton*, 687 F. Supp. 1310, 1315 (E.D. Ark. 1988), *aff'd.*, 488 U.S. 988 (1988).

110. See Abrams, "Raising Politics Up": *Minority Political Participation & Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 464-65 (1988).

111. 478 U.S. at 50.

112. 478 U.S. at 49 n.15.

113. Justice O'Connor noted: "As shaped by the Court today, then, the basic contours of a vote dilution claim require no reference to most of the 'Zimmer factors' . . . which were highlighted in the Senate Report." 478 U.S. at 92 (O'Connor, J., concurring).

114. On the one hand, some courts have downplayed the tripartite test to the point of ignoring its requirements. See, e.g., *Dillard v. Crenshaw County*, 649 F. Supp. 289, 293-94 (M.D. Ala. 1986), *aff'd. in part and remanded in part*, 831 F.2d 246, 253 (11th Cir. 1987), *reinstated on remand*, 679 F. Supp. 1546, 1547 (M.D. Ala. 1988). In contrast, courts have held that satisfying the tripartite test is essential to a vote dilution claim. See, e.g., *Buckanaga v. Sisseton Indep. School Dist.*, 804 F.2d 469, 471-72 (8th Cir. 1986); *Martin v. Allain*, 658 F. Supp. 1183, 1199-204 (S.D. Miss. 1987); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill.), *appeal dismissed*, 818 F.2d 565 (7th Cir. 1987).

115. The Court concentrated on two typical methods of vote dilution caused by the location of minority voters, fracturing and packing. Fracturing occurs when district lines are drawn so that a minority group is dispersed into districts in which the minority cannot constitute a majority. In contrast, packing occurs when a minority group is concentrated in districts in which they comprise an excessive majority. Thus, the minority group may have more than enough votes to win one district, but could win two districts if the districts were drawn differently. For a discussion of these methods, see Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 553 (1973); Engstrom & Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 LEGIS. STUD. Q. 465, 465-66 (1977).

minority group will be cancelled out. Moreover, vote dilution is evil because it

not only deprives minority voters of their preferred representatives, it also leaves them effectively unrepresented because it allows those elected to ignore minority interests without fear of the political consequences. In a very real sense, racially polarized voting perpetuates the effects of past discrimination.¹¹⁶

2. *The Benefits of Equal Opportunities To Elect Candidates of a Minority Group's Choice*

Correcting and preventing the evil produced by vote dilution is obviously one of the benefits of equal electoral opportunity. But to understand how to ensure equal electoral opportunities, one must understand the other benefits that flow from equalizing these opportunities. These are benefits associated with having an elected representative of a minority group's choice in the government. This section discusses those benefits.

Some of the benefits produced by minority elected officials are familiar: they are those benefits traditionally associated with integration.¹¹⁷ The election of minority officials symbolizes that membership on a governing body is not reserved for white citizens.¹¹⁸ And the election of minority officials provides role models for the minority community.¹¹⁹

In addition, the election of minority officials ensures that minority positions will at least be aired in the councils of government.¹²⁰ The election of minority officials may have the practical effect of encouraging interaction between these officials and nonminority officials.¹²¹ Moreover, minority officials may operate as a "crucial lever" for obtaining the benefits that must be bargained for in the political process.¹²² For example, a black city councilmember may help his

116. *Dillard v. Baldwin County Bd. of Educ.*, 686 F. Supp. 1459, 1463 (M.D. Ala. 1988), *affd. sub nom. Dillard v. Chilton City Commn.*, 868 F.2d 1274 (1989) (citation omitted).

117. See, e.g., Howard & Howard, *The Dilemma of the Voting Rights Act — Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615, 1627 & 1631-32 (1983); see also *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 311-15 (1978) (Powell, J.) (recognizing the value of diversity).

118. See, e.g., A. THERNSTROM, *supra* note 1, at 239-40; Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 214-15 (1989).

119. See, e.g., *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (recognizing the role model theory but rejecting it as justification for a race-based layoff plan).

120. See *Abrams*, *supra* note 110, at 500.

121. See L. COLE, *BLACKS IN POWER* 222 (1976) (the presence of black elected officials sensitizes white elected officials); M. JEWELL & S. PATTERSON, *THE LEGISLATIVE PROCESS IN THE UNITED STATES 197-98*, 211-12 (4th ed. 1986) (national and state legislators look to their colleagues with specialized knowledge to guide decision making); Karlan, *supra* note 118, at 216-19.

122. Backstrom, *Problems of Implementing Redistricting*, in REPRESENTATION AND REDIS-

constituents secure better city services. And the election of minority officials may increase grass-roots participation in the political process among the minority community members by creating a sense of connection with minority officials.¹²³ This final benefit illustrates that the opportunity to elect and the opportunity to participate in the political process often overlap.

B. *Giving Meaning to the Opportunity To Participate*

This section, drawing on the work of commentators, depicts a political process that includes more than simply voting. An interpretation of section 2 that gives full meaning to the equal opportunity to participate must protect activities that precede as well as follow elections. Both minority and nonminority citizens receive the benefits of a political process that ensures the equal opportunity to participate.

1. *A Model Giving Meaning to the Opportunity To Participate.*

Although the *Gingles* Court focused exclusively on the opportunity to elect, a number of commentators have been addressing the opportunity-to-participate language of section 2. These scholars stress that the political process concerns more than a single event — the election of a candidate. Instead, taking part in the political process means both pre- and post-election participation, as well as participation not directly linked to an election.¹²⁴ “[C]ourts should consider a variety of activities — from participating in party caucuses to consulting with elected representatives — as important components of political opportunity.”¹²⁵ Similarly, the ability of a minority group’s elected representatives to participate in the governing process should be considered. If a minority group can elect candidates, but these candidates are unable to engage in the process because of racially motivated impediments, then section 2 should protect the minority group.

Professor Abrams suggests that courts replace their current focus solely on electoral opportunity with a model of “interactive participation.”¹²⁶ This model concentrates on group interaction in the broad

TRICTING ISSUES, *supra* note 28, at 58; *see also* Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in MINORITY VOTE DILUTION, *supra* note 1, at 283 (“The evidence from a growing body of research clearly indicates that black electoral participation influences the distribution of public benefits at the local level.”); Campbell & Feagin, *Black Politics in the South: A Descriptive Analysis*, 37 J. POL. 129, 153-56 (1975); McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1276-79 (1989).

123. *See, e.g.*, C. PATEMAN, PARTICIPATION AND DEMOCRATIC THEORY 45-47 (1970); Montague, *The Voting Rights Act Today*, A.B.A. J., Aug. 1, 1988, at 52, 56 (1988); Note, *Affirmative Action and Electoral Reform*, 90 YALE L.J. 1811, 1813-14 (1981).

124. Abrams, *supra* note 110, at 472-74. *See generally* Karlan, *supra* note 118; Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393 (1989).

125. Abrams, *supra* note 110, at 474.

126. *Id.* at 488-94.

range of political activities. Under this expansive view, courts would consider evidence that “minorities had been excluded from caucuses or avoided by candidates, as well as the failure of legislators and legislative policy to respond to the articulated interests of these groups.”¹²⁷ Where direct evidence was unavailable, courts would look to factors likely to produce failures of interaction. Important indicators would be discriminatory attitudes and the current effects of past discrimination.¹²⁸

Though Congress did not articulate a vision of full participation in the political process when it amended the Act, it did identify factors that would be useful in proving a violation of the Act.¹²⁹ These factors encompass an expansive approach to the political process beyond mere voting.¹³⁰ In addition, the Court has incorporated a broad vision of the political process into prior voting rights cases.¹³¹ Similarly, a few lower courts have taken an expanded view of the political process in section 2 cases.¹³²

2. *The Benefits of Equalized Opportunity To Participate*

This section examines the benefits produced by the Abrams model of the equal opportunity to participate. The benefits of equalized op-

127. *Id.* at 493.

128. *Id.* The *Senate Report* (factors 1, 2, 4, 5, 6) also recognizes these as important indicators of unequal opportunities to participate in the political process. See *supra* note 100.

129. See *supra* note 100 for the factors comprising the totality-of-the-circumstances test.

130. See *id.* for a list of the Senate factors. For example, Senate factors 1 and 5 address discrimination in a jurisdiction not necessarily linked to voting. The first additional factor focuses on the responsiveness of elected officials.

131. Professor Abrams identifies three lines of cases in which an expansive understanding of the political process informs the Court's decisions. See Abrams, *supra* note 110, at 472-75. In the “White Primary” cases, the Court viewed the political process as a series of interrelated events, each significant to the outcome of the general election. See *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *United States v. Classic*, 313 U.S. 299 (1941); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

The second line of cases involves candidate access to the ballot. These cases stress that political participation is a form of expression both by candidates and voters. See *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Illinois State Bd. of Elects. v. Socialist Workers Party*, 440 U.S. 173 (1979); *Lubin v. Panish*, 415 U.S. 709 (1974); *Williams v. Rhodes*, 393 U.S. 23 (1968).

The third line of cases involve claims by a political group, rather than a racial group, that an election scheme diluted their votes. In *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court rejected a challenge by the Democratic Party to the plan for Indiana Legislature districts because it found that the Democrats could participate in the full range of the political process even if they could not directly elect a candidate. 478 U.S. at 131-32.

132. For example, the *Dillard* court took an expanded view of the political process when it considered the effect of a proposed chairperson on the influence of commissioners elected by the minority group. “[T]he members elected by a racially fair district election method would have their voting strength and influence diluted.” *Dillard v. Crenshaw County*, 649 F. Supp. 289, 296 (M.D. Ala. 1986); see also *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1561-62 (11th Cir. 1987), *cert. denied sub nom. Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988) (court identifies factors such as racial discrimination that diminish the opportunity of a minority group to participate in the political process).

portunities to participate in the political process accrue not only to minority voters but to all citizens.¹³³ The value to minority citizens includes an enhanced opportunity to alter political outcomes.¹³⁴ A minority group may not have the votes to elect a candidate directly, but if the political process is open, the group may be able to influence specific outcomes by deliberating with others on matters of political importance.¹³⁵ In turn, members of the community may recognize common interests they previously overlooked.¹³⁶ Eventually this may weaken the barriers to coalition building that confront minority groups. This may then lead to an end to the divisiveness of racial politics.¹³⁷

Furthermore, an equal opportunity to engage in the process produces benefits for all citizens by affirming that the political system is legitimate. Professor Abrams states that legitimacy means "those features that make [a government] acceptable to those who live under it, and that make the laws enacted by it worthy of being followed."¹³⁸ A tension is inherent in a republican system: the system understands all citizens to be equal, but a comparatively small number of citizens actually makes the important government decisions.¹³⁹ To retain legitimacy, this system must preserve the "premise of equality."¹⁴⁰ Citizens' abilities to participate in all phases of the political process decrease this tension between representation and equality. Participation in the political process allows all those who do not exercise the

133. See, e.g., D. BELL, *AND WE ARE NOT SAVED* 51-74 (1987) (contending that whites are the primary beneficiaries of civil rights enforcement).

134. See, e.g., *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) ("the power to influence the political process is not limited to winning elections"); see also Alkalimat & Gills, *Chicago — Black Power v. Racism: Harold Washington Becomes Mayor*, in *THE NEW BLACK VOTE* 53-180 (R. Bush ed. 1984) (demonstrating how control over political outcomes can be an inducement to voter registration); Morris, *Black Electoral Participation and the Distribution of Public Benefits in MINORITY VOTE DILUTION*, *supra* note 1, at 271-85 (identifying belief of black activists that increased political participation can affect outcomes).

135. See, e.g., S. VERBA & N. NIE, *PARTICIPATION IN AMERICA* 183-208 (1973) (noting the correlation between membership in private, voluntary organizations and political participation).

136. See, e.g., Bush, *Oakland: Grassroots Organizing Against Reagan*, in *THE NEW BLACK VOTE*, *supra* note 134, at 342-48 (explaining how previously disaffected minority voters were mobilized by the Peace and Justice Organization); Bush, *Black Enfranchisement, Jesse Jackson, and Beyond*, in *id.* at 24-26 (explaining how previously disaffected minority voters were mobilized by the People Organized for Welfare and Economic Reform and the candidacy of Harold Washington).

137. "There is even evidence, although tentative and anecdotal, that increased minority political participation is breaking down patterns of racial polarization and bloc voting." McDonald, *supra* note 122, at 1278 n.166.

138. Abrams, *supra* note 110, at 478-79; see also J. ELY, *DEMOCRACY AND DISTRUST* 105 (1980) (noting that rights to participation in the political process are "critical to the functioning of an open and effective democratic process").

139. "The tension between majority rule and minority representation defines a fundamental dilemma of democratic political theory." Note, *The Constitutional Imperative of Proportional Representation*, 94 *YALE L. REV.* 163, 166 (1984).

140. Abrams, *supra* note 110, at 479-81.

final decision to attempt to influence those who do. Thus, all citizens benefit.¹⁴¹

C. *Combining the Opportunity To Elect and the Opportunity To Participate into an Overarching Theory*

Thus far this Part has treated the opportunity to elect and the opportunity to participate in the political process separately. While treating these prongs separately helps to identify the benefits associated with them, this section combines the prongs to identify an overarching goal for section 2. This section argues that the goal of section 2 is to increase civic inclusion in the entire political process by decreasing racial discrimination in the process.

According to Professor Pamela Karlan, combining the opportunity to elect and the opportunity to participate produces an overarching goal: "civic inclusion."¹⁴² Civic inclusion means access to the broad range of governmental processes from political meetings to election of officials and effective representation by those officials.¹⁴³ The Supreme Court has recognized this goal of civic inclusion on a number of occasions.¹⁴⁴ Additionally, Karlan suggests that Congress, in amending section 2, reaffirmed its commitment to civic inclusion as the goal of section 2.¹⁴⁵

Civic inclusion combines the benefits produced by giving full meaning to the opportunity to elect and participate. Thus, Professor Karlan concludes that civic inclusion promotes "a sense of connectedness to the community . . . ; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable and intelligent decisionmaking."¹⁴⁶

Moreover, Congress recognized that a large barrier to civic inclusion is racial discrimination: both its lingering effects¹⁴⁷ and the pres-

141. See, e.g., Weale, *Representation, Individualism, and Collectivism*, 91 ETHICS 457, 463 (noting participation in the process by a group's members mitigates "the inevitable disappointments of policymaking"); Note, *supra* note 123, at 1825-26 (arguing that increased minority participation in the legislative process will yield greater minority support for government action).

142. Karlan, *supra* note 118, at 179.

143. Karlan, *supra* note 118, at 180.

144. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), *affd. per curiam sub nom. East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976).

145. Karlan, *supra* note 118, at 196-99. Karlan notes that a number of the Senate factors point to civic inclusion as the goal of § 2. For example, the election of minority officials (the seventh factor) and the responsiveness of officials to the minority group (the first additional factor) both point to inclusion as the goal of § 2. In addition, the first factor (a history of discrimination) and the fourth factor (whether minorities have been denied access to candidate slating) both measure exclusion from the political process. See *supra* note 100 (listing the Senate factors).

146. Karlan, *supra* note 118, at 180.

147. Prior discrimination in the political process can have continuing effects by lowering registration and turnout rates among minorities. See, e.g., *Ketchum v. Byrne*, 740 F.2d 1398, 1413-14 (7th Cir. 1984), *cert. denied sub nom. City Council of Chicago v. Ketchum*, 471 U.S.

ent effects of existing discrimination.¹⁴⁸ To attack discrimination, Congress revised section 2 to prohibit not only discrimination by state actors but also to prevent political processes from furthering the effects of private discrimination.¹⁴⁹ A number of the factors in the Senate Report focus on the pervasiveness of private racial discrimination in the political process.¹⁵⁰

In sum, the goal of section 2 is to increase civic inclusion by decreasing the effects of racial discrimination in the political process. This understanding of the goal of section 2 provides a touchstone for determining whether a particular political practice or electoral structure violates the goals of section 2. Part III will use this understanding of section 2 to determine whether techniques used to elect single-member offices and the structure of these offices can frustrate the goals of section 2. If single-member offices hamper the achievement of civic inclusion, then excluding single-member offices from section 2's coverage is unjustified.

III. APPLYING SECTION 2 TO SINGLE-MEMBER OFFICES

To begin this analysis, this Part addresses the preliminary question of how the *Gingles* tripartite test applies to single-member offices. Section III.A argues that the tripartite test should not apply to a claim that challenges both an election practice for a single-member office and the structure of an office. Section III.A also argues that if the test does apply, a challenge to a single-member office can satisfy the test. Section III.B demonstrates how the combination of at-large elections and concentration of power associated with single-member offices can thwart the goals of section 2. This Part concludes single-member offices can diminish the equal opportunity of a minority group to elect

1135 (1985); *United States v. Marengo County Commn.*, 731 F.2d 1546, 1568 (11th Cir.), *appeal dismissed & cert. denied*, 469 U.S. 976 (1984). In addition, discrimination in educational and economic opportunities can also diminish participation in the political process. *See Marengo County Commn.*, 731 F.2d at 1568; SENATE REPORT, *supra* note 4, at 207 n.114 (poor living conditions caused by past discrimination depress minority political participation).

148. When Congress passed the Voting Rights Act in 1965, Senator Javits remarked that the purpose of the Act was "not only to correct an active history of discrimination . . . but also to deal with the accumulation of discrimination." 111 CONG. REC. 8295 (1965). The Senate report also noted "that voting practices and procedures that have discriminatory results perpetuate the effects of past purposeful discrimination." SENATE REPORT, *supra* note 4, at 218.

149. *See, e.g., Note, Section 2 of the Voting Rights Act: An Approach to the Results Test*, 39 VAND. L. REV. 139, 172 (1986) ("Congress, therefore, revised section 2 to prohibit election practices that accommodate or amplify the effect that private discrimination has in the voting process.").

150. For a list of the Senate factors, see *supra* note 100. Factor 2 (racially polarized voting) concentrates on the interplay between election practices and private racial discrimination by voters. Factor 4 (denial of access to slating procedures) also focuses on private racial discrimination. Similarly, factor 6 (racial campaign appeals) highlights the impact of private racial discrimination on the political participation of minority groups.

candidates of its choice and participate in the political process, and, thus, these offices should be open to section 2 suits.

A. *Answering the Preliminary Question: How Does the Tripartite Test Apply to Single-Member Posts?*

Courts have assumed that satisfying the *Gingles* tripartite test is a prerequisite to a finding of vote dilution under section 2.¹⁵¹ Hence, one might assume that satisfying the *Gingles* factors would be a prerequisite to a successful challenge to a single-member office. Advocates of the “share of” approach would quickly embrace this interpretation because it may seem peculiarly difficult for plaintiffs contesting elections for single-member offices to satisfy the first of the *Gingles* factors: a showing of a geographically compact majority in a single-member district. The remaining two *Gingles* factors, essentially a showing of polarized voting, would not present unique problems for plaintiffs alleging that an election practice for a single-member office violated section 2.¹⁵² Consequently, this section will focus on the impact of the first factor on single-member offices.

The first *Gingles* factor requires a minority group to show that it is sufficiently large and geographically compact to constitute a majority in a single-member district.¹⁵³ Advocates of the “share of” approach would argue that this prong bars any challenges to single-member offices because the minority group cannot constitute a majority in the only district possible — the entire jurisdiction.¹⁵⁴ But this reasoning

151. In particular, courts have held that satisfying the first element of the tripartite test, geographic compactness, is an essential condition of a § 2 challenge. See, e.g., *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988), cert. denied, 109 S. Ct. 1769 (1989) (using the geographic compactness as a litmus test); *Martin v. Allain*, 658 F. Supp. 1183, 1199-204 (S.D. Miss. 1987); *Potter v. Washington County*, 653 F. Supp. 121, 129 (N.D. Fla. 1986) (minority group not numerous enough to be entitled to a majority black single-member district).

152. This is not to say that the measurement of polarized voting is uncontroversial, rather it is to say that the techniques for measuring polarized voting would be the same for a multi-member or single-member office. See generally Grofman, Migalski & Novielo, *The “Totality of Circumstances Test” in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 LAW & POLY. 199 (1985); Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 URB. LAW. 369 (1985); Jacobs & O'Rourke, *Racial Polarization in Vote Dilution Cases Under Section 2 of the Voting Rights Act: The Impact of Thornburg v. Gingles*, 3 J.L. & POL. 295, 317-35 (1986).

While a majority of the court in *Thornburg v. Gingles* joined Justice Brennan's statement of the legal test for polarized voting, only three other members of the court accepted his views on whether the reasons underlying patterns of voting by race are a proper subject in assessing polarized voting. See *Thornburg v. Gingles*, 478 U.S. 30, 61-74 (1986). For critiques of the *Gingles* Court's approach to polarized voting, see Engstrom & McDonald, *Definitions, Measurements, and Statistics: Weeding the Thicket*, 20 URB. LAW. 175 (1988); Jacobs & O'Rourke, *supra*, at 347-53; Wildger, *Adding Thornburg to the Thicket: The Ecological Fallacy and Parameter Control in Vote Dilution Cases*, 20 URB. LAW. 155 (1988).

153. For a review of the *Gingles* factors, see *supra* notes 106-09 and accompanying text.

154. For example, a “share of” advocate would argue that if 40% of a town's voters are black, they cannot comprise a majority in the only district relevant for a mayor's election — the entire town.

can be rebutted in two ways. First, the *Gingles* opinion suggests possible limits on the reach of its tripartite test. And second, commentators have argued persuasively that the first prong of the test unjustifiably restricts section 2 challenges.

The tripartite test may not apply to single-member offices because of limiting language in the *Gingles* opinion. The Court limited the potential application of the tripartite test in two respects. The Court noted that it was not dealing with or developing standards for a claim "brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multi-member district impairs its ability to *influence* elections."¹⁵⁵ This caveat leaves undeveloped the standards applicable to a single-member office since a challenge to a single-member office would probably involve a minority group alleging diminished opportunity to influence as well as elect.¹⁵⁶

In addition, the Court reserved judgment on whether the standards developed for a multi-member vote dilution claim in *Gingles* would apply "to other sorts of vote dilution claims."¹⁵⁷ Plaintiffs challenging a single-member office would argue that an at-large election for the office dilutes their voting strength and the structure of the office diminishes their ability to participate in the political process. This would be a hybrid vote dilution-opportunity to influence claim. This may fall under the "other sorts of vote dilution claims" to which the tripartite test may not apply.

At minimum, the limits in the Court's opinion and its focus on elections suggest that the tripartite test would be restricted to vote dilution claims. Thus, if a plaintiff brought a claim of candidate diminution or disenfranchisement, satisfying the tripartite test should not be a prerequisite to a challenge. For example, if the plaintiff challenged a single-member office, like a mayor, for withholding candidate registration information, the plaintiff should not have to show that he was a member of a group that could form a majority in a single-member district.¹⁵⁸

In addition, the first element of the tripartite test unjustifiably restricts section 2 challenges because it focuses exclusively on the oppor-

155. *Gingles*, 478 U.S. at 46-47 n.12.

156. The Court would probably recognize an ability-to-influence claim even if the plaintiffs could not comprise a majority in a single-member district. For a fuller discussion see Karlan, *supra* note 118, at 206 n.129 ("it seems likely that the Supreme Court would hold 'influence' claims to be cognizable under Section 2"). Lower courts have recognized ability-to-influence claims in cases where the minority was not compact enough to constitute a majority. *See, e.g.*, *East Jefferson Coalition v. Parish of Jefferson*, 691 F. Supp. 991 (E.D. La. 1988) (recognizing an influence claim even when the minority could not constitute a majority in a single-member district).

157. 478 U.S. at 47 n.12.

158. *See, e.g.*, *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989) (no showing of a compact majority required in a challenge to a mayor's actions).

tunity to elect, ignoring the opportunity to participate.¹⁵⁹ If a single-member officeholder diminishes the equal opportunity of minority citizens to participate in the political process, this should be remediable whether the minority group comprises 60 percent of the jurisdiction or 20 percent. After all, if the minority group comprised 60 percent of the electorate it could protect itself in the political process by voting the official out of office. In contrast, a minority group comprising 20 percent of the electorate needs the protection of section 2.

Therefore, this Note concludes that the tripartite test should not apply to single-member offices. Instead, a court should draw on the factors outlined in the Senate Report and tailor the factors to single-member offices. Courts should continue to use polarization as a prerequisite for a section 2 violation because it highlights a breakdown in the coalition-building process normally found in politics.¹⁶⁰ In addition, courts should focus on the Senate factors that indicate an inequality in the opportunities to participate in the political process.¹⁶¹

But suppose that the tripartite test does apply to a vote dilution challenge to single-member offices: would this bar challenges to single-member offices? The answer is no, according to the *Stallings* and *Dillard* courts. In *Stallings*, for example, blacks comprised 15.3 percent of the voting age population of the county.¹⁶² If the single-member county commissioner was to remain single-member, blacks could not be a majority in the only district possible: the entire county. But because the court was willing to consider expanding the county commission from one member to three or five members, the plaintiffs, who showed they were a majority in one of the districts, were able to challenge the single-member office.¹⁶³

The *Dillard* court displayed a similar attitude but did not have to face the question of dividing the county into new districts because the parties had already created them. In *Dillard*, blacks constituted 15.9 percent of the voting age population of Calhoun County.¹⁶⁴ If the

159. For criticisms of the geographic compactness requirement, see Karlan, *supra* note 118, at 180-82, 199-205; Abrams, *supra* note 110, at 465-69.

160. See *supra* notes 107-09, 115-16 and accompanying text on polarized voting.

161. For challenges to single-member offices, the Senate factor dealing with the responsiveness of elected officials to a minority group would be important. See *supra* note 100. A court should examine the responsiveness not only of elected officials to a minority group but also to the group's elected representatives. In addition, the presence of discrimination in the political process would indicate an unequal opportunity to participate. See *supra* note 100; Abrams, *supra* note 110, at 510-13.

162. *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1551 (11th Cir. 1987), cert. denied sub nom. *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988).

163. 829 F.2d at 1563. The difficulty with this approach lies in the fact that the court must have a proposed districting scheme in mind when it determines whether the minority group can comprise a majority in a district. For a discussion of this problem, see *Thornburg v. Gingles*, 478 U.S. 30, 88-92 (1986) (O'Connor, J., concurring).

164. *Dillard v. Crenshaw County*, 831 F.2d 246, 247 (11th Cir. 1987).

court had held that the chairperson of the county commission had to remain at-large, then the black voters could never have comprised a majority in the county. But because the court agreed to have the position of chairperson rotate among the five district commissioners, blacks could comprise a majority in one of the districts, and thus the office was open to challenge.¹⁶⁵

From the *Dillard* court's approach, one can see how minority voters could meet the tripartite test for a challenge to an at-large city council president's office, for example.¹⁶⁶ Although it is clear how this approach would apply to a council president's office, it is less obvious how a challenge to a mayor's office would be acceptable under this approach. In a town comprised of 30 percent minority voters, they could not constitute a majority in the only relevant district, the whole town. This assumes, however, that the mayor's office must remain as presently constituted. If, instead, the office could be shared or the mayor-council form of government changed to a city commission with a rotating chairperson,¹⁶⁷ the jurisdiction would be effectively subdivided into more than one district, and minority voters could satisfy the first *Gingles* factor.

B. *Determining How Single-Member Offices Violate the Goals of the Voting Rights Act*

Section III.A argued that satisfying the *Gingles* tripartite test should not be a prerequisite for challenging a single-member office under section 2. Section III.A also demonstrated that if the tripartite test is a prerequisite, a section 2 challenge to a single-member office could satisfy the test's requirements. Section III.B will show how single-member offices may actually violate the goals of section 2. As section II.C. argued, the opportunity to elect and to participate combine to form an overarching goal of civic inclusion. While the opportunity to elect and participate should be thought of as a package, this section will discuss them separately for two reasons. The first is clarity. The second reason is to follow courts who frequently analyze the prongs separately. Yet when a violation of section 2 is associated with a single-member office, this violation diminishes both the opportunity to elect and the opportunity to participate. Thus, the violation hampers civic inclusion.

165. 831 F.2d at 253.

166. Suppose white voters comprise 70% of the population and minorities comprise 30%, with whites a majority in seven of the city districts and blacks a majority in the other three. Suppose that the council consists of ten members chosen by district and the council president chosen at large. If the council president must remain an at-large jurisdiction-wide office, minorities could not comprise a majority in the entire city. But if the council presidency can be rotated among the council members, as in *Dillard*, then blacks do comprise a majority in three of the districts and the at-large election for the office could be challenged.

167. See *infra* notes 245-46.

As this Note has suggested, single-member offices can violate section 2 in ways similar to multi-member offices and in ways unique to single-member offices.¹⁶⁸ As an example of the former, suppose a jurisdiction imposes a primary runoff requirement in an election for an office.¹⁶⁹ This requirement can dilute minority voting strength whether the election is for a single- or multi-member office.¹⁷⁰ Similarly, if the holder of either type of office is unresponsive to his minority constituents, this diminishes equal opportunity to participate in the political process.¹⁷¹ Because these cases could be addressed under the traditional analysis of electoral discrimination,¹⁷² this section will not focus on single-member violations that resemble those caused by multi-member offices.

Instead, this section focuses on violations of section 2 peculiar to single-member offices which require an updated analysis. Specifically, one peculiar violation occurs when a single-member office combines selection by at-large election with a concentration of power that lessens the opportunity of minority voters or their elected officials to participate in the political process. In this way, both the opportunity to elect and to participate are diminished, thwarting civic inclusion.

168. See *supra* text accompanying notes 38-40.

169. Under a run-off requirement, candidates must obtain an absolute majority of the votes to win, rather than a plurality. If no candidate obtains a majority, a run-off election is required between the two top vote-getters. See Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION, *supra* note 1, at 6.

170. Chandler Davidson explains how a runoff requirement can dilute minority voting strength:

The mandatory runoff precludes the possibility that a minority candidate will win office with a mere plurality if the white vote splits among several other candidates. In that situation, the minority candidate is forced into a runoff against a single white, behind whom the white voters can rally to produce a majority.

Id. The discriminatory impact of run-off requirements has been recognized in a variety of contexts and by a variety of authors. See, e.g., *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1983); *City of Rome v. United States*, 446 U.S. 156 (1980); *Registration Barriers*, *supra* note 35; McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 URB. LAW. 429 (1985); Note, *Assessing the Legality of Runoff Elections Under the Voting Rights Act*, 86 COLUM. L. REV. 876 (1986); Note, *The Primary Runoff: Racism's Reprieve?*, 65 N.C. L. REV. 359 (1987); Note, *Runoff Primaries: Is There a Discriminatory Result?*, 2 J.L. & POL. 369 (1985).

But two courts have denied that run-off requirements for single-member offices dilute minority voting strength. See *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986); *Whitfield v. Democratic Party*, 686 F. Supp. 1365 (E.D. Ark. 1988), *affd. in part & revd. in part*, 890 F.2d 1423 (8th Cir. 1989), *affd.*, 902 F.2d 15 (8th Cir. 1990). While the Eighth Circuit recognized that a majority vote primary run-off could dilute minority voting strength, the court did not specifically address the impact of the run-off on single-member offices. Cf. *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 519 n.22 (M.D. Ala. 1989).

Both *Butts* and *Whitfield*, at the district court level, are incorrectly decided because they fail to recognize that a run-off requirement dilutes minority voting strength regardless of whether the underlying office being chosen is single- or multi-member. For a hypothetical example of vote dilution caused by a run-off for a single-member office, see Karlan, *supra* note 118, at 187 n.54.

171. The *Senate Report* suggests that unresponsiveness is one indicator of unequal access to the political process. See *supra* note 100; see also *Abrams*, *supra* note 110, at 510.

172. See *supra* notes 33-38 and accompanying text.

1. *Diminishing an Equal Opportunity To Elect*

This section will demonstrate how single-member offices can produce an unequal opportunity to elect a candidate of a minority group's choice. Vote dilution produced by at-large elections for single-member offices, combined with the lingering animosity to minority candidates, causes this inequality.

The Senate Report on the 1982 amendments to the Act states: "In the context of . . . racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections."¹⁷³ An analysis of at-large election systems will demonstrate how they dilute minority access to the political process in exactly the way Congress intended to prohibit.¹⁷⁴ Single-member offices are generally chosen at large because the jurisdiction as a whole is voting to fill one office. The at-large nature of single-member offices poses a significant barrier to a minority group's equal opportunity to elect.¹⁷⁵

Although at-large systems are not per se unconstitutional,¹⁷⁶ and may help minority groups in some situations,¹⁷⁷ the Court "has long recognized that . . . at-large voting schemes may 'operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.'"¹⁷⁸ Critics of at-large systems argue that they were often

173. SENATE REPORT, *supra* note 4, at 211.

174. Indeed, the *Senate Report* specifically mentions at-large elections. See, e.g., SENATE REPORT, *supra* note 4, at 207 (in discussing the diluting effects of election systems, the Report notes "*Whitcomb, White, Zimmer*, and their progeny dealt with electoral system features such as at-large elections."); Note, *At-Large Elections and Vote Dilution: An Empirical Study*, 19 U. MICH. J. L. REF. 1221 (1986) (arguing that the results test was designed to attack the vote dilution caused by at-large elections).

175. This Note has observed, *supra* note 84 and accompanying text, that an office does not have to be elected at large to be single-member. However, the courts seem to treat at-large, jurisdiction-wide elections as a key component of single-member offices. Consequently, discussion of the at-large character of these offices is appropriate.

176. See, e.g., *White v. Regester*, 412 U.S. 755 (1973); *Kilgarlin v. Hill*, 386 U.S. 120 (1967).

177. In theory, minority voters may benefit from at-large elections because they will hold the "swing" votes. Thus in a tight race between two candidates, the minority voters can determine the outcome by swinging their votes to one candidate. The swing vote theory, however, has a number of defects. First, the margin between the two candidates may be so great that the minority vote lacks influence. Second, the winning candidate may not be able to assess his level of minority support. Third, winning candidates do not always pay attention to minority groups after the election because the candidates are also in debt to white voters, voters whose interests may conflict with the minority's interest. See Davidson, *Minority Vote Dilution: An Overview*, in MINORITY VOTE DILUTION, *supra* note 1, at 9-10. Finally, minority groups often prefer to have at least one candidate of their choice in an election, rather than the opportunity to hold the balance of power in a number of elections. See L. HARRIS & ASSOCIATES, *A STUDY OF RACIAL ATTITUDES, BEHAVIOR, AND TENSIONS IN THE UNITED STATES* Vol. 1 (Jan. 11, 1989) (finding, by a 91 percent majority, that blacks would prefer to have more blacks nominated to high office rather than remaining the swing votes).

178. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (quoting *Burns v. Richardson*, 384 U.S. 73, 88 (1986) (quoting *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965))).

adopted to dilute minority voting strength.¹⁷⁹ At-large elections may diminish the equal opportunity to elect in two ways. First, at-large elections actually dilute minority voting strength by submerging minority voters in majority districts. Second, at-large elections decrease the ability of minority citizens and their candidates to participate in pre-election politics.

The Court, in *Gingles*, explained how an at-large system dilutes minority voting strength. "The theoretical basis for this type of impairment is that where minority and majority voters consistently prefer different candidates, the majority by virtue of its numerical superiority will regularly defeat the choices of minority voters."¹⁸⁰ Racial bloc voting, in the context of an at-large system, allows a white majority to use the electoral structure to dilute minority voting strength.¹⁸¹ A number of studies demonstrate the discriminatory effects of at-large voting schemes.¹⁸² The *Stallings* court recognized the evils of an at-large office in the single-member office challenged in the case. The court linked the at-large character of the office to the office in *Gingles*.¹⁸³

Critics of the view that the at-large character of single-member offices diminishes the equal opportunity to elect might respond that black candidates and black voters are unsuccessful simply because they are affiliated with the wrong political party.¹⁸⁴ Political affilia-

179. See, e.g., Davidson & Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, in MINORITY VOTE DILUTION, *supra* note 1, at 67-71; Note, *The Constitutional Significance of the Discriminatory Effects of At-Large Elections*, 91 YALE L.J. 974, 979 n.25 (1982). The *Stallings* court found that the at-large, single member commission was adopted for discriminatory purposes. *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1552-53 (11th Cir. 1987), *cert. denied sub nom. Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1986). Whether or not an at-large system was adopted for a discriminatory purpose may be considered under the totality of the circumstances test, but intent is not necessary for a violation of § 2. *Gingles*, 478 U.S. at 44.

180. *Gingles*, 478 U.S. at 48.

181. Consider a town with a voting age population of 10,000, governed by a town council of ten members, all elected at large. Seventy percent of the voters are white, while the remaining 30 percent are members of protected minority groups under the Voting Rights Act. Suppose there is strong racial bloc voting, i.e., the whites vote as a group and the minority votes as a group for their preferred candidates and there is little crossover voting. Under this electoral system, whites could elect ten candidates while the minority group would elect none. This demonstrates the theoretical basis of dilution the court had in mind in *Gingles*.

182. See Davidson & Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, in MINORITY VOTE DILUTION, *supra* note 1, at 65-81; Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85, 85 (1979); Note, *supra* note 174.

183. 829 F.2d at 1549.

184. In *Whitcomb v. Chavis*, 403 U.S. 124 (1971), black ghetto residents in Indianapolis, Indiana argued that their votes were being diluted by an at-large voting system for the state legislature. The Court found that the ghetto area voted Democratic, but in four of five elections from 1960 to 1968, Republicans carried the district. When the Democrats carried the district in 1964, ghetto area senators and representatives were elected. The Court concluded:

[T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting

tion, however, plays a diminished role in local elections because the majority are nonpartisan.¹⁸⁵ In addition, a critic might argue that an election is a numbers game lost by minority voters simply because white voters outnumber minority voters. After all, a critic might argue, if a town consisted of 70 percent Republicans and 30 percent Democrats, no one would have a legitimate complaint if the Democrats never elected a mayor; they simply lacked the numbers.¹⁸⁶ Similarly, why should the Voting Rights Act be implicated when, in a town that has 70 percent white voters and 30 percent minorities, the minority group never elects a mayor? Again, they simply lacked the numbers.

The response to this objection is that race is significantly different from political affiliation. In the political party hypothetical, the Democrats' losses do not cause concern because the Court assumes that the normal processes of political give-and-take enable the political minority to influence the process even though they may not be able to elect a candidate directly.¹⁸⁷ In contrast, this influence does not operate in jurisdictions with a history of discrimination and of racially polarized voting.¹⁸⁸ Often the present effects of past discrimination prevent a minority group from combining with majority voters to protect the group's interests.¹⁸⁹

In addition a critic may argue that relying on the at-large character of elections for single-member offices is inappropriate because the at-

power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.

Whitcomb, 403 U.S. at 153; see also *Gingles*, 478 U.S. at 83 (White, J., concurring in part) (arguing that political affiliation should be taken into account). The district court in *Gingles* did take political affiliation into account, but still concluded that race rather than political affiliation played a far larger role in explaining voting patterns. *Gingles v. Edmisten*, 590 F. Supp. 345, 365 (E.D.N.C. 1984).

185. See 49 MUN. Y.B. 181 (1982) (70.2% of municipal elections are nonpartisan).

186. If the Republicans in the hypothetical had employed techniques that diluted Democratic voting strength, however, a court might hold that these techniques violated the Equal Protection clause. See *Davis v. Bandemer*, 478 U.S. 109, 123-24 (1986).

187. See *Davis*, 478 U.S. at 133 (the Court, using this reasoning, refused to find an equal protection violation merely because an apportionment scheme made it difficult for Democrats to elect representatives of their choice.).

188. See *Berry & Dye*, *supra* note 182, at 88; see also *Abrams*, *supra* note 110, at 506 ("The present effects of past discrimination prevent [black voters] from influencing or coalescing with white voters in ways that will preserve their voice in the politics of the district."); Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189, 203 (1984) ("The pluralist model of shifting alliances and coalitions has never, in fact, applied to blacks in American politics.") (footnote omitted).

189. *Abrams*, *supra* note 110, at 506. Professor *Abrams* suggests this breakdown occurs because "[t]he lingering effects of past discrimination can make white voters resistant or insensitive to minority perspectives, and can make minority voters reluctant to exchange views with others they may perceive as hostile or indifferent to their interests." *Id.* at 506 n.287; see also *Guinier*, *supra* note 124, at 424 n.138 ("Because of extreme racial polarization within the electorate, the pluralist model does not work for blacks. The possibility of forming coalitions with like-minded allies to aggregate minority political power into an electable majority fails where members of the majority consistently refuse to vote for minority sponsored candidates.").

large cases focus on multi-member bodies, while single-member offices involve one individual. The critic might add, the premise of a challenge to an at-large election system is that an alternative exists. Usually the alternative is election by districts created to give minority voters an equal opportunity to elect a representative.¹⁹⁰ But in the case of single-member offices, according to the “share of” approach, no alternative to at-large election exists because there is only one district (the entire jurisdiction) and it cannot be divided. For example, how could the at-large, city-wide election of a mayor be changed?

This objection, however, is flawed because it assumes that the jurisdictional lines must remain the same.¹⁹¹ If the boundaries were challenged and changed, it may be possible to create a black majority voting district.¹⁹²

Also, this critique assumes that the office deemed single-member must remain as it is presently constituted. That is, the “share of” approach assumes that a city council president must continue to be held by one person with the same powers originally invested in the office or that a mayor’s office must be held by a single person with all the powers remaining in that office. This assumption, however, is not grounded on the Voting Rights Act or case law. As Part IV will argue and a number of cases have already demonstrated, a court has the power to modify the structure, as well as the power, of a single-member office. If a court restructures a single-member post, then a racial minority group can comprise a majority in one or more districts, thus satisfying even the requirements of the “share of” approach.¹⁹³

At-large elections for single-member offices, besides diluting minority voting strength, also decrease the ability of minority citizens and their candidates to participate in the pre-election political process. Because at-large elections require an appeal to the entire electorate rather than a single district, “such elections require greater financial

190. See *Connor v. Johnson*, 402 U.S. 690, 692 (1971) (noting that single-member districts are the preferred remedy in place of multi-member districts); see also *White v. Regester*, 412 U.S. 755, 765-70 (1973).

191. The *Siegelman* court does recognize this assumption. “This assumes, of course, that the boundaries in place are a given.” *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 519 n.20 (M.D. Ala. 1989).

192. “If those boundaries are challenged, however, the situation changes. By redrawing the city’s external boundaries, it would in some cases be theoretically possible to create a black majority voting jurisdiction.” *Siegelman*, 714 F. Supp. at 519 n.20. Because the chances of this kind of boundary change are minimal, this Note will not focus on that approach to single-member offices.

193. For example, in *Dillard* plaintiffs challenged a proposed county commission chairperson, an office traditionally held by one person and elected at large. The court suggested that this office be rotated among the five commission members chosen by district. *Dillard v. Crenshaw County*, 831 F.2d 246, 253 (11th Cir. 1987). Since minority voters would comprise a majority in one of the districts, their representative would have one opportunity out of five to serve as chairperson. 831 F.2d at 248. In this way, an office and its powers traditionally held by one person were now, in effect, shared by five people. See also *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill. 1987) (doubling size of city council).

resources and put a premium on the endorsement of civic associations and, most important, local newspapers."¹⁹⁴ Because these organizations are generally controlled by the white majority, blacks frequently are unable to obtain the support necessary for success in a city or county wide race. Black candidates who have garnered the support of the "establishment" are rarely "the most effective advocates of black interests."¹⁹⁵ Similarly, an at-large electoral system gives political parties "exceptional power over aspirants and elected officials because of the insurmountable odds confronting an unattached candidate."¹⁹⁶ The elected official will likely be in debt to a political party for his nomination and election. This indebtedness limits his independence. An official with majority support, especially white majority support in a racially polarized town, risks losing that backing if he embraces "minority proposals which are at war with the majority view on the same question."¹⁹⁷

These characteristics of at-large elections often combine with lingering animosity to minority candidates to produce an inequality in the opportunity to elect.¹⁹⁸ Surveys indicate that the higher the office for which a qualified black candidate is running, the less likely white citizens are to vote for the candidate.¹⁹⁹ This makes it particularly difficult for black candidates to be successful in elections for single-member offices because these offices are typically greater in status than multi-member offices in a jurisdiction. The election of minority candidates in a jurisdiction is relevant to the section 2 inquiry.²⁰⁰ The record on the election of black candidates to single-member posts, such as

194. Berry & Dye, *supra* note 182, at 88; *see also* United States v. Dallas County Commn., 850 F.2d 1433, 1439 (11th Cir. 1988) (noting, in the context of at-large election, that "Dallas County's black citizens have a more difficult time garnering political strength than whites because of insurmountable social and economic barriers which separate the races."); Butts v. City of New York, 779 F.2d 141, 156 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) (noting the impact on black candidates of the expense of running citywide in New York City in part because of the need for media coverage).

195. Berry & Dye, *supra* note 182, at 88. This practice is known as co-opting. *See* Davidson & Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, in MINORITY VOTE DILUTION, *supra* note 1, at 79.

196. Washington, *Does The Constitution Guarantee Fair and Effective Representation to All Interest Groups Making Up the Electorate*, 17 How. L.J. 91, 107 (1971).

197. Washington, *supra* note 196, at 108.

198. *See, e.g.*, L. COLE, *supra* note 121, at 114 & 233 (1976) (suggesting that many white citizens and officials believe that black officials work to benefit black citizens without engaging in dialogue with all interest groups); Weinraub, *Jackson Intends to Keep Bid Alive*, N.Y. Times, June 19, 1988, at 20, col. 6 (Jesse Jackson argues that his candidacy is treated with disrespect); J. WILLIAMSON, *A RAGE FOR ORDER: BLACK/WHITE RELATIONS IN THE AMERICAN SOUTH SINCE EMANCIPATION* (1986) (noting the legacy of Reconstruction era stereotypes). Scholars argue that these attitudes may be based on Reconstruction Era fears of "Negro rule." Kennedy, *Reconstruction and the Politics of Scholarship* (Book Review), 98 YALE L.J. 521, 523-24 (1989).

199. *Focus Magazine, Trendletter 2* (1988) (supplement to Vol. 16, No. 4) (reporting results of 1987 Joint Center for Political Studies Gallup Survey).

200. 42 U.S.C. § 1973(a) (1982).

mayors, demonstrates a diminished level of participation.²⁰¹

2. *Diminishing an Equal Opportunity To Participate*

Single-member offices, beside creating an inequality in the opportunity to elect, can also diminish a minority group's equal opportunity to participate in the political process. A court should consider *City of Carrollton Branch of the NAACP v. Stallings*²⁰² and *Dillard v. Crenshaw County*²⁰³ as two paradigms for determining whether a single-member office unlawfully diminishes the equal opportunity to participate in the political process. The common denominator of these violations is a concentration of power in a single-member office. This concentrated power can either directly diminish the opportunity of minority citizens to take part in the political process or indirectly diminish citizens' opportunity by diluting the influence of their elected representatives.²⁰⁴

In *Stallings*, a single county commissioner, elected at large, made all the government decisions for his county. Because the at-large elec-

201. See, e.g., *Focus Magazine*, Joint Center for Political Studies, Vol. 16, No. 4, at 2 (Apr. 1988). "Blacks with political aspirations have begun to saturate the majority-black jurisdictions, but they still have a difficult time winning in places where the majority of the electorate is white." *Id.*; Smothers, *Why the Higher Rungs of Power Elude Black Politicians*, N.Y. Times, Feb. 26, 1989, § 4 at 4, col. 1; Davidson, *Minority Vote Dilution: An Overview*, in *Minority Vote Dilution*, *supra* note 1, at 14 (noting that when a black candidate is elected mayor in Alabama, the town is usually small and blacks usually comprise an overwhelming percentage of the population).

202. 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom.* *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988). See *supra* notes 47-52 and accompanying text for a discussion of the case.

203. 831 F.2d 246 (11th Cir. 1987). See *supra* notes 57-67 and accompanying text for a discussion of the case.

204. This approach might be termed "concentration of power" analysis. To this section's approach, contrast *United States v. Marengo County*, 643 F. Supp. 232 (S.D. Ala. 1986), *affd. sub nom.* *Clark v. Marengo County*, 811 F.2d 610 (11th Cir. 1987). This case raises the issue of whether courts should question concentration of power. The *Marengo County* court suggests that if the chairpersons were distinct from other members of the entities, then that might be a "persuasive justification" for allowing at-large chairpersons. 643 F. Supp. at 235. In contrast, this section suggests that if the chairpersons were distinct in the power they exercised, then they would be single-member offices and subject to this Note's analysis. Under this Note's approach, the chairpersons could violate the *Dillard* rationale because they would possess the power to diminish the influence of black elected officials chosen by district.

To *Marengo County* compare *United States v. Dallas County Commn.*, 661 F. Supp. 955 (S.D. Ala. 1987), also authored by Judge Hand. There the court approved a plan that would provide for a revamped county commission consisting of four commissioners chosen by district, but would retain the probate judge of the county as the at-large chairperson of the commission. 661 F. Supp. at 956-57. The government challenged this plan, arguing that it would not completely cure the violation because the probate judge position would be beyond the reach of black voters. Yet the government apparently conceded that this single-person office was less subject to challenge "because the duties of this single-person office are uniquely executive-judicial." 661 F. Supp. at 957.

Although the court's description of the judge's actual powers as chairperson are sparse, the "chair" presumably exercises greater powers than other members of the commission. Consequently, this office would be considered single-member under this Note's analysis and subject to challenge.

tion for the commissioner in conjunction with racially polarized voting diluted black voting strength, blacks could not directly elect a representative.²⁰⁵ More importantly, concentrating all the government power in one official limited the opportunity of black citizens to participate in the political process. If the single commissioner did not listen to the concerns of black citizens, they had no other outlet to participate in their county's political process.²⁰⁶

Although few governments are organized like the single county commission in *Stallings*,²⁰⁷ the case still teaches an important lesson. A court should be on guard against a situation where power is concentrated, either by law or by practice, in the hands of a single-member officeholder, and this power threatens the opportunity of minority citizens to engage in the political process.

*Dillard*²⁰⁸ provides the second paradigm for understanding how concentrated power in a single-member office can diminish the equal opportunity to participate. In *Dillard*, the court rejected the proposed position of county chairperson elected at large because the court feared that excessive power would gravitate to the chairperson.²⁰⁹ In turn, this power could be used to diminish the opportunity for black elected officials to participate in government.²¹⁰

One can imagine a similar process in which power in a town gravitates to the mayor's office. For instance, a mayor may exercise his authority with little legislative oversight. When the city council does meet, it rubberstamps the mayor's decisions despite objections from beleaguered minority representatives on the council. Moreover, the mayor and the majority white elected councilmembers exclude minority elected councilmembers from important government decisions.²¹¹ These decisions frequently disadvantage the minority community. For instance, their neighborhoods receive less than a proportionate share of spending.²¹²

205. 829 F.2d at 1551-58.

206. "The Carroll County Commissioner is the entire governing body for the county." Included among his powers was the ability to "appoint all minor officials of the county, whose election or appointment is not otherwise fixed by law." 829 F.2d at 1551 n.7. In addition, because the county commissioner was the sole legislative authority in the county, he could pass county ordinances on his own motion. Act of Dec. 13, 1982, No. 485 § 11, 1983 Ga. Laws 4656, 4660.

207. Only 24 or so counties out of 159 within the State of Georgia have authorized the single-commissioner form of government. Brief for Respondents opposing petition for certiorari, at 12.

208. 831 F.2d 246 (11th Cir. 1987).

209. 831 F.2d at 252.

210. 831 F.2d at 253.

211. See, e.g., *Major v. Treen*, 574 F. Supp. 325, 334 (E.D. La. 1983) (all black legislators excluded from a secret meeting on a redistricting proposal held in the basement of the Senate chambers); see also H. BALL, D. KRANE & T. LAUTH, *COMPROMISED COMPLIANCE* 162 (1982) (when the nine-member Richmond, Virginia city council decided to annex areas occupied primarily by whites, the three black council members were excluded from the deliberations).

212. See, e.g., *Rodgers v. Lodge*, 458 U.S. 613, 626 (1982) (court finds roads were unpaved as

Section 2 logically should reach this process known as “legislative exclusion.”²¹³ If minority citizens finally gain the equal opportunity to elect officials of their choice, this achievement should not be nullified by denying their representatives an equal opportunity to participate in the political process.

Thus, single-member offices can cause a violation of section 2 that is unique to these offices, a violation that produces an inequality in both the opportunity to elect and the opportunity to participate in the political process. This unique type of violation thwarts section 2’s goal of increasing civic inclusion in the political process by decreasing the effects of discrimination. Therefore, single-member offices should be open to challenge under section 2. Part IV develops guidelines for remedying violations of section 2 caused by single-member offices.

IV. REMEDYING SECTION 2 VIOLATIONS CAUSED BY SINGLE-MEMBER OFFICES

This Part begins by outlining the powers of a federal court to remedy violations of section 2. Although the defendant jurisdiction has the first opportunity to propose a cure, section IV.A demonstrates that the court retains broad remedial powers to ensure that a violation is completely cured. Section IV.B develops a two-step approach to remedying violations caused by single-member offices. This approach recognizes that violations can be similar to those caused by multi-member offices or peculiar to single-member offices. Section IV.C tailors the remedies to different levels of government and different types of government offices.

A. General Remedial Powers Under the Act

Once a violation of section 2 is established, a district court must afford the defendant jurisdiction the first opportunity to develop satisfactory remedies.²¹⁴ This principle is constrained, however, by the Senate Report’s admonition that a court addressing a section 2 violation “should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.”²¹⁵ The Supreme

soon as they reached the black community); *Hawkins v. Town of Shaw*, 437 F.2d 1286 (5th Cir. 1971), *affd. on reh.*, 461 F.2d 1171 (5th Cir. 1972) (disparity in city services provided to blacks violates the fourteenth amendment).

213. See Karlan, *supra* note 118, at 237-39.

214. See, e.g., *Upham v. Seamon*, 456 U.S. 37, 41-43 (1982) (per curiam); *McDaniel v. Sanchez*, 452 U.S. 130, 138-39 (1981); *Wise v. Lipscomb*, 437 U.S. 535, 539-40 (1978); *Reynolds v. Sims*, 377 U.S. 533, 586 (1964); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985); Ortiz, *Federalism, Reapportionment, and Incumbency: Leading the Legislature to Police Itself*, 4 J.L. & POL. 653 (1988).

215. SENATE REPORT, *supra* note 4, at 208.

Court has noted that a district court has broad remedial powers when curing discrimination:

A district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.²¹⁶

Thus, a court faced with a violation must ensure that any proposed remedy completely cures a violation.²¹⁷

B. *A Two-Step Approach to Remediating Violations of the Act Caused by Single-Member Offices*

"The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated" establishes the guideline for curing a section 2 violation.²¹⁸ To fulfill this requirement, one must recall how single-member offices violate section 2. A single-member office can violate the Act in two different ways. One type of violation, such as a discriminatory slating process or a majority vote runoff primary, is not peculiar to the nature of a single-member office.²¹⁹ In *Stallings* and *Dillard*, by contrast, at-large elections combined with concentrated power to cause a section 2 violation unique to single-member offices. Because single-member offices can violate the Act in two different ways, a variety of remedies are necessary.

A court should take a two-step approach to curing violations of section 2 caused by single-member offices. First, a court should consider remedies that enhance political participation without requiring a restructuring of government. These remedies would be implemented with traditional equitable devices such as injunctions and declaratory judgments. For example, a court might cure a discriminatory slating process for a single-member office by enjoining the process and ordering slating open to all interested parties.²²⁰ Remedies under the first step would be particularly appropriate to cure misconduct by a single-member officeholder that is an isolated violation rather than part of a

216. *United States v. Paradise*, 480 U.S. 149, 183-84 (1987) (citations omitted) (quoting *Louisiana v. United States*, 380 U.S. 145, 154 (1965); *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971)); see also *Missouri v. Jenkins*, 110 S. Ct. 1651 (1990) (embracing broad remedial powers for federal courts to cure constitutional violations involving discrimination, including the power to order a school board to raise taxes to fund a desegregation plan).

217. See SENATE REPORT, *supra* note 4, at 208. A court "cannot authorize [a remedy] that will not with certitude completely remedy the Section 2 violation." *Dillard v. Crenshaw County*, 831 F.2d 246, 252 (11th Cir. 1987).

218. SENATE REPORT, *supra* note 4, at 208.

219. See *supra* notes 38 and 168-72 and accompanying text for a discussion of these devices.

220. See, e.g., *Terry v. Adams*, 345 U.S. 461, 470 (1953) (affirming the district court's grant of a declaratory judgment against discriminatory election practices and remanding for further consideration of remedies).

pattern of violations by the officeholder. If a mayor, for instance, refused to distribute election materials to minority candidates, a court could enjoin the practice and order the mayor to distribute the materials to any interested candidates.²²¹

A second step would be necessary when the violation was peculiar to the powers of a single-member office and part of a pattern of violations that could not appropriately be cured by simply enjoining a practice. This remedy is a restructuring of the role of a single-member office in a government. Restructuring entails a parceling out of political power to diminish the concentration of power in the single-member office. For example, a single-member commission might be expanded to a multi-member commission as in *Stallings*.²²² In the alternative, the court might order that the chair position of a commission be rotated among the commissioners, rather than be held by one individual as in *Dillard*.²²³ Or a court might parcel out the power of a mayor's office by creating an additional office to share power, such as a vice-mayor, filled by councilmembers on a rotating basis.²²⁴ Once this remedial approach to single-member offices is established, one must determine which single-member posts in a state are open to challenge.

C. *Determining Which Single-Member Offices Are Open to Challenge*

The "share of" approach holds that any office that qualifies as single-member is exempt from challenge.²²⁵ The *Dillard* court, with its emphasis on function, adopted a narrower definition of single-member offices than the "share of" approach. The *Dillard* court considers only nonlegislative functionaries to be single-member offices.²²⁶ Despite the *Dillard* court's narrower approach to defining single-member offices, both it and the "share of" approach presume that some single-member offices are exempt from challenge.

This Note, in contrast, presumes that all single-member offices in a

221. See, e.g., *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989) (The mayor intentionally discriminated against black candidates by withholding candidacy requirement information from them. The proper remedy was to enjoin the town to certify blacks as duly elected members of town council.).

222. *City of Carrollton Branch of the NAACP v. Stallings*, 829 F.2d 1547, 1563 (11th Cir. 1987), cert. denied sub nom. *Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988); see also *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill. 1987) (doubling size of city council), appeal dismissed, 818 F.2d 565 (7th Cir. 1987).

223. *Dillard v. Crenshaw County*, 831 F.2d 246, 253 (11th Cir. 1987); see also *Warren v. City of Tampa*, 693 F. Supp. 1051, 1054, 1059 (M.D. Fla. 1988), *aff'd.*, 893 F.2d 347 (11th Cir. 1989) (city agrees to allow any councilperson, not just those elected at-large, to serve as chairman and chairman pro-tem of the city council).

224. See *Buchanan v. City of Jackson*, 683 F. Supp. 1545 (W.D. Tenn. 1988).

225. See *supra* note 77 and accompanying text.

226. Examples include tax collectors, sheriffs, and probate judges. 831 F.2d at 251.

state or political subdivision are open to challenge because these offices can thwart the goals of section 2. The *Dillard* court noted:

Once a post is opened to the electorate, and if it is shown that the context of that election creates a discriminatory but corrigible election practice, it must be open in a way that allows racial groups to participate equally.²²⁷

If a plaintiff challenges a particular single-member office, the plaintiff must, of course, show how it violates the Act. If the plaintiff meets this burden, the defendant cannot escape the challenge simply by claiming an exemption as a single-member office. Instead, the defendant must rebut the charged violation of the Act. This Note recognizes, however, that different levels of government and different types of offices will vary in their susceptibility to successful challenge. Consequently, this section examines how the remedial approach applies to different levels of government and types of offices.

1. State Offices

Congress designed section 2 to cover situations "where racial politics do dominate the political process."²²⁸ While single-member offices elected statewide, like a governor, certainly have the potential to engage in a pattern of abuse peculiar to the power of these offices, discriminatory actions by these officers are more likely to be isolated events. This may be explained by the decline in the negative effects of racial politics for statewide offices.²²⁹ The recent election of Douglas Wilder as governor of Virginia suggests that race may be playing less of a role in statewide elections.²³⁰ In addition, evidence suggests that many Southern senators are becoming responsive to their black con-

227. 831 F.2d at 251.

228. SENATE REPORT, *supra* note 4, at 211.

229. The negative effects of racial politics may be declining on the state level for two reasons. For one, progressive governors are attacking discrimination to enhance the image of their states and the productivity of their citizens. *See* Winbush, *Mississippi Rises Again*, TIME, Nov. 16, 1987, at 32 (noting the election of young progressive governors in both Louisiana and Mississippi: Governor Mabus leads "an awakening movement to free Mississippi from its long-standing image of lethargy and backwardness"); Smother, *3 Southern States Seek Progress Together*, N.Y. Times, May 14, 1988, at A8, col. 1 (governors of Arkansas, Louisiana, and Mississippi meet to coordinate efforts to improve conditions in one of nation's poorest areas); *Civil Rights Caravan to Mark Deaths*, N.Y. Times, Mar. 8, 1989, at A18, col. 4 (Governor Mabus states: "Today, once more, the officials of Mississippi are standing in the schoolhouse door, but this time we are standing in that door to open it wider and to make sure that everybody gets in . . ."). Second, as minority groups begin to participate fully in the political systems, candidates realize they must court these potential voters. *See, e.g.*, Barone, *Civil Rights: An American Revolution*, Wash. Post, Nov. 9, 1987, at A17, col. 1 (Mississippi has "just conducted a governor's race in which evidence of racism seems to have been entirely absent and in which every serious candidate has been striving to win blacks' vote.").

230. Oreskes, *First Black Governor If Recount Upholds Vote*, N.Y. Times, Nov. 8, 1989, at A1, col. 1 (noting the success of Douglas Wilder). *But cf.* Oreskes, *Joy of Democrats Diluted in Virginia*, N.Y. Times, Nov. 9, 1989, at A1, col. 2 (noting that Wilder received a lesser percentage of votes than other successful candidates on his ticket, and concluding that racial considerations explain the difference).

stituents. For example, concern for their black constituencies motivated Southern Democratic senators to vote against the nomination of Robert Bork.²³¹ Anecdotal evidence similarly suggests that responsiveness by state officials to black voters is improving.²³² Yet, single-member state officeholders may still engage in electoral discrimination. For example, in *Major v. Treen*,²³³ the governor of Louisiana, in concert with the state legislature, devised a racial gerrymander of the state's congressional districts.²³⁴

Under this Note's approach to remedies, restructuring of the state single-member office in *Major* would not be the appropriate remedy. In fact, restructuring would probably rarely be appropriate at the state level when section 2 violations are singular events, rather than part of a pattern. In *Major*, other remedies were available to cure the electoral discrimination. For instance, the Justice Department could have denied preclearance under section 5.²³⁵ And the court remedied the section 2 violation through declaratory judgment and injunction.²³⁶

2. Offices in Political Subdivisions

In contrast, if "racial politics do dominate the electoral process," the domination tends to occur more often at the city and county level than at the state.²³⁷ In addition, a district court is probably better

231. Bork received the vote of only one of the 17 Democratic senators from the states of the old Confederacy. See *Senate's Roll-Call on the Bork Vote*, N.Y. Times, Oct. 24, 1987, at 10, col. 3; see also Dowd, *Winning One from the Gipper*, FORTUNE, Nov. 9, 1987, at 125 (coalition of black, environmental, feminist, and labor groups key in Senate rejection of Bork nomination); Garment, *The War Against Robert Bork*, COMMENTARY, Jan. 1988, at 17 (arguing that Southern senators caved in to pressure from black interest groups).

232. See, e.g., *Whitfield v. Democratic Party*, 686 F. Supp. 1365, 1380 (E.D. Ark. 1988), *aff'd.*, 902 F.2d 15 (8th Cir. 1990) (finding that Southern gubernatorial candidates have become more responsive to the interests of black voters); UPI, June 14, 1989 (available on Nexis, keyword Deathrow) (Governor Mabus, "at the urging of a powerful black leader, [] has agreed to conduct a clemency hearing for two-time convicted killer Leo Edwards.").

233. 574 F. Supp. 325 (E.D. La. 1983).

234. 574 F. Supp. at 333-37. For example, the governor threatened to veto a reapportionment plan (the Nunez Plan) that would facilitate the election of a black congressman. "Louisiana's chief executive has considerable power and influence, both *de jure* and *de facto*. Testimony reflects that the Louisiana Legislature has never overridden a gubernatorial veto. A sufficient number of legislators changed their position in response to the threatened veto to assure the demise of the Nunez Plan." 574 F. Supp. at 333.

235. 42 U.S.C. § 1973c (1982). The Justice Department precleared the plan sponsored by Governor Treen. For a criticism of the preclearance, see Guinier, *supra* note 124, at 408-11.

236. 574 F. Supp. at 355-56.

237. For example, a Westlaw search of 42 U.S.C. § 1973 cases decided in 1989-1990 revealed twice as many challenges to county or city practices than to state practices. One explanation for this is simply mathematical. A state contains numerous counties and political subdivisions, each with their own political processes. A state government, however, has a limited number of statewide political processes and a limited number of statewide offices. Thus, plaintiffs have greater opportunities to challenge practices by cities or counties than by states.

Another explanation for the greater number of challenges to the political processes of cities and counties may be that pockets of racial politics persist in political subdivisions but do not taint an entire state. Possibly, Congress had this in mind when it focused on "some communities in

equipped to apply an "intensely local" and functional appraisal to a city or county's political processes than to a state government's.²³⁸ For these reasons, courts should be more receptive of challenges to city or county single-member offices than to state single-member posts. Consequently, the Note focuses greater attention on the city or county level of government than it did on state government.

a. *Legislative and legislative-executive offices.* Consider single-member offices in a legislative or legislative-executive body, such as a city council president or a chairperson of a county commission. Some violations caused by the selection methods for these offices or by the conduct of these officeholders could be cured with injunctions changing the method of selection or preventing particular conduct.²³⁹ But when at-large selection for these offices combines with the use of concentrated power by single-member officeholders and diminishes the influence of racial minorities, an injunction alone will not cure the violation. A court cannot simply order a change from at-large to district elections for single-member posts because the offices being elected cannot be chosen directly by districts.²⁴⁰ Instead of a change in election method, the court should change the distribution of powers of the single-member office. For example, a court could order the chairperson position on a county commission rotated among the commission members chosen by districts.²⁴¹ In this way, the position is held by members elected by district, and all districts are represented.

Similarly, a court should not simply enjoin these single-member offices from using their concentrated power to lessen minority influence, because this would require a constant monitoring of a local government. Instead, a court should deconcentrate the chairperson's power by rotating it among the commission members.²⁴² In this way,

our Nation where racial politics do dominate the electoral process." SENATE REPORT, *supra* note 4, at 211.

238. *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)). The Court in *Gingles* also recognized that it must apply "a 'functional' view of political process mandated by § 2." 478 U.S. at 48 n.15.

239. See *supra* notes 220-21 and accompanying text.

240. When at-large elections produce a violation of § 2, the typical remedy is to switch to election by districts. See *supra* note 190. This remedy is not possible, however, when only one office is to be elected. Consider the election of a chairperson of a county commission in a county divided into five election districts. One district of the five cannot be chosen to elect the chairperson because that would exclude the other four districts from any participation in the selection process. The county as a whole could be considered one district, but that would be an at-large election, a result to be avoided.

241. See, e.g., *Dillard v. Crenshaw County*, 649 F. Supp. 289, 298 (M.D. Ala. 1986), *affid. in part and remanded in part*, 831 F.2d 246, 253 (11th Cir. 1987), *reinstated on remand*, 679 F. Supp. 1546, 1547 (M.D. Ala. 1988); *Warren v. City of Tampa*, 693 F. Supp. 1051, 1054 (M.D. Fla. 1988), *affid.*, 893 F.2d 347 (11th Cir. 1989) (city agrees to allow any council person, not just those elected at large, to serve as chairman and chairman pro-tem of the city council).

242. See *supra* note 241.

the minority group can begin to protect itself in the political process without further supervision by a court.

b. Executive offices. If a plaintiff establishes that an executive single-member office, such as a mayor, violates section 2, the cure may require a greater restructuring of government than the remedy for a chairperson. Isolated incidents of executive single-member offices violating the Act may be cured by the court with a traditional equitable remedy such as an injunction targeted at a specific incident.²⁴³ When violations by an executive single-member office establish a pattern of consistent activity designed to diminish minority participation in the political process, a court might take one of two approaches to restructuring.²⁴⁴

One approach would be to diminish the power of the executive's office by parceling out power to another office. For example, a vice-mayor's office might be created with some of the mayor's former power shifted to that office. This office might be filled by council members on a rotating basis.²⁴⁵ A second approach would be to change a mayor-council form of government to a city commission with a rotating chairperson or a hired executive.²⁴⁶

243. See, e.g., *Dillard v. Town of North Johns*, 717 F. Supp. 1471 (M.D. Ala. 1989) (The mayor intentionally discriminated against black candidates by withholding candidacy requirement information from them. The proper remedy was to enjoin the town to certify blacks as duly elected members of town council.); *Buskey v. Oliver*, 565 F. Supp. 1473 (M.D. Ala. 1983) (The court granted declaratory and injunctive relief against the city's reapportionment plan drawn by the mayor to disadvantage his opponent. The plan resulted in a dilution of minority voting.).

244. Election at large, combined with the use of concentrated power over time by an executive single-member office, produces a unique pattern of violations. This combination also produces violations unique to legislative and legislative-executive single-member offices. Under this Note's approach, single-member offices, depending on branch of government, require different levels of proof of concentrated power necessary to establish a § 2 violation. Legislative and legislative-executive posts require a minimal showing on concentrated power. For example, a county chairperson elected at-large from a county with polarized voting, the presence of a number of the Senate factors, and a showing of concentrated power with the potential to diminish minority influence could violate § 2. Plaintiffs would not have to show that the concentrated power was actually used to diminish minority influence. In contrast, plaintiffs challenging an executive single-member post would be required to show actual use of power by the officeholder to diminish minority influence.

The difference in the required proof of concentrated power stems from the differences in the remedies available to replace at-large elections for these offices. At-large elections for legislative and legislative executive-offices could be modified in ways that interfere minimally with the structures of local governments. For instance, election at-large can be changed to the equivalent of election by district. See *supra* note 241 and accompanying text. In contrast, at-large election for executive single-member posts cannot be simply switched to district elections because the only possible district is the entire jurisdiction, the same as for at-large elections. Instead, to remedy a violation, power from the single-member post must be parceled out to other offices or the local government restructured. See *infra* notes 245-46 and accompanying text. Because these remedies intrude more into the structure of local government than do remedies for legislative single-member posts, the threshold showing on concentrated power is higher for executive single-member offices.

245. See, e.g., *Buchanan v. City of Jackson*, 683 F. Supp. 1545 (W.D. Tenn. 1988) (plan for restructuring the city government included the office of vice-mayor to be held by council members and rotated among them).

246. For the benefits produced by having a commission with a rotating chairperson or some

A critic might claim either of these two approaches clash with the need for a single executive, accountable citywide, with the interests of the entire city at heart.²⁴⁷ This objection, however, ignores the political realities of racial discrimination and racially polarized voting.²⁴⁸ Precisely because these ills exist, a white executive is often not accountable to the entire city, nor does he have the interests of the entire town at heart; rather, he often protects only the interests of the majority voters.

Restructuring or parceling out power will actually increase citywide accountability by giving power to executives who represent majority and minority interests. A critic might counter that this will become a spoils system, with the majority executive favoring his constituents during his term and the minority executive favoring his constituency during his term. More likely, a checking system will result where neither executive is willing to favor his own constituents unduly because he knows that the other executive can undo some favors and reward his own constituents.²⁴⁹ Even if a spoils system developed, minority voters would at least begin to share in the spoils they have been denied.

A critic might also argue that these approaches recognize race to the detriment of a colorblind society.²⁵⁰ The Senate Report, however, rejected this argument.²⁵¹ Courts and commentators, drawing on this congressional intent, have also rejected arguments against the race consciousness of remedies.²⁵² To achieve equal opportunities to elect

other apportionment of power, see Karlan, *supra* note 118, at 241 n.276. For the benefits produced by a hired executive, see *Dillard v. Crenshaw County*, 831 F.2d 246, 251 n.12 (11th Cir. 1987) (hired executive subject to greater control by the commission).

247. See, e.g., *United States v. Marengo County Commn.*, 643 F. Supp. 232, 234-35 (S.D. Ala. 1986), *affd. sub nom. Clark v. Marengo County*, 811 F.2d 610 (11th Cir. 1987) (The county argued that it needed to retain an at-large chairperson for the County Commission and Board of Education because the chairperson must be able to represent the interests of the entire county).

248. See, e.g., *Westwego Citizens for Better Govt. v. City of Westwego*, 872 F.2d 1201 (5th Cir. 1989) (rejecting the cost or administrative upheaval caused by restructuring as factors to consider in determining whether § 2 has been violated).

249. See Karlan, *supra* note 118, at 241 n.276 for an example of how this checking function would work.

250. See, e.g., *Marengo County Commn.*, 643 F. Supp. at 232-33 (district judge expressing his concern that the remedy mandated by the Appeals Court hampers achievement of a colorblind society).

251. See SENATE REPORT, *supra* note 4, at 208-11.

252. *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984) noted:

Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendments urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; the risk that creating "safe" black-majority single member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; and the *fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligations upon gov-*

and to participate in the political process, race must be taken into account.

Finally, a critic may argue that spreading power or restructuring implicates section 2's proviso against proportional representation because these remedies provide a minority group with a proportional share of a single-member office.²⁵³ Certainly, section 2 denies any "right to have members of a protected class elected in numbers equal to their proportion in the population."²⁵⁴ Thus, a lack of proportional representation does not trigger a section 2 violation.²⁵⁵ A minority group does, however, have the right to an equal opportunity to participate in the political process and to elect candidates of its choice.²⁵⁶ When this right is violated, nothing in section 2 prohibits a court from employing proportional representation as a remedy.²⁵⁷

ernment to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.

Gingles, 590 F. Supp. at 356-57 (footnotes omitted) (emphasis added).

See Blacksher, *Drawing Single Member Districts to Comply with the Voting Rights Act Amendments of 1982*, 17 URB. LAW. 347 (1985). "Now Congress has squarely rejected the argument that a race-conscious Voting Rights Act would be bad public policy. The results of amended section 2 of the Act extends the consideration of race beyond mere avoidance of retrogression [(a § 5 requirement)] to full consideration of a plan's racial fairness." *Id.* at 352.

253. 42 U.S.C. § 1973(b) (1982); see, e.g., Brief for Petitioners, *supra* note 43, at 21.

254. 42 U.S.C. § 1973(b) (1982). Similarly, the Court has held that minority groups have no constitutional right to proportional representation. See *City of Mobile v. Bolden*, 446 U.S. 55, 78-79 (1980) (plurality opinion of Stewart, J.); *Bolden*, 446 U.S. at 86 (Stevens, J., concurring); *Chapman v. Meier*, 420 U.S. 1, 17 (1975); *White v. Regester*, 412 U.S. 755, 765-66 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971); see also Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 51 n.320 (1982) (tracing and questioning the Court's resistance to a right of proportional representation).

255. An inequality in the number of candidates elected by a minority group may, however, provide some evidence of vote dilution. See *supra* note 100 (factor 7); see also *Thornburg v. Gingles*, 478 U.S. 30, 74-75 (1986). While the election of a few minority officials does not bar a vote dilution claim, *Gingles*, 478 U.S. at 75, courts have held that persistent proportional representation would preclude a finding of vote dilution. *Gingles*, 478 U.S. at 77.

Even persistent proportional representation should not preclude a minority group from arguing that its elected representatives received an unequal opportunity to participate in the political process. Suppose that a minority group comprising 20 percent of a city consistently elected one of five city council members, but this representative was excluded from key deliberations between the mayor and the other council members. In that case, the minority group should be able to challenge the actions of the mayor and council because their actions deny the minority group's representatives an equal opportunity to participate in the political process.

256. 42 U.S.C. § 1973(b) (1982); see also *Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985), *cert. denied*, 478 U.S. 1021 (1986) ("Although the Act makes clear that a class has no right to elect its members by numerical proportion, the class does have a right to an opportunity, equal to that of other classes to obtain such representation.") (emphasis omitted).

257. Senators East and Helms, during the debates on amending § 2, proposed amendments to prevent federal courts from employing proportional representation as a remedy. Senator East proposed an amendment explicitly proscribing proportional representation as a remedy. 128 CONG. REC. 14137 (June 17, 1982). The Senate rejected the East amendment. *Id.* at 14140. Senator Helms then proposed an amendment specifically allowing courts to employ proportional representation. *Id.* Senator Helms voted against his amendment, explaining that by voting against the amendment Congress would prevent courts from using proportional representation. *Id.* at 14141-42. The Senate defeated the Helm's amendment, not because the Senate rejected

c. *Nonlegislative functionaries.* Objections to applying the Act to single-member offices are less likely to be raised in cases that require less restructuring of local government. For example, challenges to single-member offices falling under the nonlegislative functionary heading would be less likely than executive offices to require restructuring as a remedy. According to the *Dillard* court, examples of nonlegislative functionaries include tax collectors, sheriffs, and probate judges.²⁵⁸ Nonlegislative functionaries would most likely violate the Act in ways not peculiar to single-member offices. For instance, a tax collector might be chosen by a slating process that diminishes minority influence in the process. Nonlegislative functionaries have few opportunities to diminish influence in ways unique to single-member offices. Consider an elected sheriff who makes a number of decisions that harm minority interests. The sheriff hires all white deputies, and he places fewer police patrols in black neighborhoods while enforcing the law more vigorously against accused black criminals.

However, the sheriff would presumably be subject to the control of the executive and legislative branches of his county government.²⁵⁹ This would enable minority officials and voters to influence the sheriff in ways other than direct election. And, while the sheriff's acts are discriminatory, the Voting Rights Act does not apply because the conduct does not interfere with opportunities to participate in the political process. Therefore, the appropriate remedies for the sheriff's conduct would be found in statutes like section 1983²⁶⁰ and Title VII of the Civil Rights Act²⁶¹ rather than in the Voting Rights Act. In general, restructuring will not be an appropriate remedy for nonlegislative functionaries because they rarely exercise power in ways peculiar to single-member offices.

The office of probate judge may, however, challenge that guideline.

proportional representation, but because the amendment was irrelevant since the Bill was not intended to interfere with the equitable remedies employed by federal courts. *Id.* at 14141 (statement of Sen. Edward Kennedy). For further discussion of the congressional activity on the issue of proportional representation, see Boyd & Markman, *supra* note 1, at 1392-404, 1418-19; Howard & Howard, *supra* note 117, at 1624-26; McKenzie & Krauss, *supra* note 20, at 166-67; see also Additional Remarks of Senator Hatch, SENATE REPORT, *supra* note 4, at 270 ("The 'compromise' provision also purports to establish an explicit prohibition upon subsection (a) giving rise to any right to proportional representation. This is not quite the case. Most pointedly, perhaps, there is nothing in the provision that addresses the issue of proportional representation as a remedy.").

258. *Dillard v. Crenshaw County*, 831 F.2d 246, 251 (11th Cir. 1987).

259. See, e.g., *In Re Application of Burlington County Bd. of Chosen Freeholders*, 188 N.J. Super. 343, 457 A.2d 495, *affid.*, 190 N.J. Super. 256, 463 A.2d 351 (1983) (per curiam), *cert. granted*, 94 N.J. 587, 468 A.2d 225 (1983), *affid.*, 99 N.J. 90, 491 A.2d 631 (1985) (per curiam) (the legislature controls the duties of the sheriff and the activities of his office); *Brownstown Township v. County of Wayne*, 68 Mich. App. 244, 242 N.W.2d 538 (1976) (the legislature may vary the duties of a sheriff's office).

260. 42 U.S.C. § 1983 (1982).

261. 42 U.S.C. § 2000e (1982).

Probate judges often serve dual functions, wearing the hats of both judge and chairperson of a county commission.²⁶² When a probate judge acts as a chairperson, he may diminish influence in ways peculiar to single-member offices.²⁶³ In that case, a court should consider removing the probate judge from the county commission or retaining the judge as a member of the commission but order the chairposition rotated. But suppose a probate judge is serving only as a judge and she is the sole probate judge in a jurisdiction. Could this judge, as a single-member office, be open to challenge?²⁶⁴ Judgeships, like other elected positions, are open to challenge under section 2.²⁶⁵ Thus, if the jurisdiction chose the single judge with a discriminatory election method or by a process that otherwise diminished participation in the political process, a court could cure the violation with an injunction targeted at the specific practice.

Rarely, however, would a judge diminish influence in a way peculiar to single-member offices. Yet, a single judge might be challenged under the *Stallings* rationale. Suppose a single judge made all the judicial decisions for a large county, like the 495 square-mile county in *Stallings*, while other counties of comparable size and caseloads had three or more judges assigned. A plaintiff might challenge this judicial assignment, arguing that the policy behind the assignment was tenuous and possibly evidence of intentional discrimination.²⁶⁶ If a plaintiff satisfied the other prerequisites for a challenge, the appropriate remedy might be adding judges to the county and electing them by district.

CONCLUSION

Single-member offices can impede the goals of section 2 both in

262. See, e.g., *United States v. Dallas County Commn.*, 661 F. Supp. 955, 957 (S.D. Ala. 1987) (noting that 33 of 67 counties in Alabama have probate judges who also chair the county commission).

263. See *supra* notes 65-68 and accompanying text for a discussion of *Dillard* chairperson.

264. The court in *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 519-20 & n.25 (M.D. Ala. 1989), draws on the plaintiff's failure to challenge districts and circuits with only one judge as a recognition that these offices are single-member and not open to challenge.

265. See *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988); *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988).

266. The *Senate Report* recognizes a tenuous policy as evidence indicating an unequal opportunity to elect a candidate of the minority group's choice and to participate in the political process. See SENATE REPORT, *supra* note 4, at 207. The Report notes that "[i]f the procedure markedly departs from past practices or from practices elsewhere in the jurisdiction, that bears on the fairness of its impact." *Id.* at n.117. In *City of Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1551-52 (11th Cir. 1987), *cert. denied sub nom. Duncan v. City of Carrollton Branch of the NAACP*, 485 U.S. 936 (1988), the court found that the legislature switched from a five-member commission to a single-member commission for Carroll County to discriminate intentionally against black citizens by preventing them from electing a commissioner.

ways similar to multi-member offices and in ways unique to single-member offices. Therefore, single-member posts should be subject to challenge under section 2, rather than immune from challenge as suggested by some courts.

A traditional understanding of electoral discrimination — with its focus on disenfranchisement, candidate diminution, and vote dilution — explains how a single-member office can violate section 2 in ways similar to a multi-member office. This traditional understanding also teaches that these violations by single-member offices should be cured with remedies similar to those used for violations by multi-member offices.

This traditional understanding of electoral discrimination, however, fails to identify how single-member offices can violate the Act in unique ways. At-large elections for single-member offices can place these offices beyond reach of minority voters. The power concentrated in single-member offices can diminish the opportunity of minority citizens and their elected officials to participate in the political process. Thus, these characteristics of single-member posts combine to create an inequality in both the opportunity to elect and the opportunity to participate. To remedy these unique violations, courts should consider restructuring single-member offices to decrease their concentrated power.

Minority citizens have increased their participation in the political process, but obstacles to full participation remain. Subjecting single-member offices to challenge breaks down a remaining barrier to full participation in the political process.

— *Edward J. Sebold*