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Articles

Minority Vote Dilution Suits and the Problem of Two Minority Groups: Can a "Rainbow Coalition" Claim the Protection of the Voting Rights Act?

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INTRODUCTION

At-large elections, whereby all the voters of a city, county or other political subdivision vote for all the entity's representatives, are considered to be an impediment to the election of racial and ethnic minority candidates. When blacks or Hispanics are a minority of those voting, their votes alone are usually insufficient to elect a

candidate. Minority candidates will be defeated unless some number of whites also support them. If the minority population is geographically concentrated, dividing the jurisdiction into single member election districts may produce some districts in which the minority group constitutes a majority of the voters, thereby allowing a minority candidate to achieve election without white votes.

In 1982, Congress amended Section 2 of the Voting Rights Act to make it easier for minorities successfully to bring suit to replace at-large election systems with single member districts.[1] As amended, Section 2 prohibits methods of election that result in minorities having "less opportunity than others to participate in the political process, and to elect candidates of their choice."[2] Suits brought under Section 2 are popularly known as "dilution suits."

Prior to the amendment, vote dilution cases were based on the Constitution, and were won about equally by plaintiffs and defendants.[3] Under amended Section 2, the overwhelming majority of cases have been decided in favor of the plaintiffs.[4] The reported decisions tell only part of the story because many jurisdictions threatened with suit simply have settled rather than incur the substantial expense of defending. Although Congress specifically did not outlaw at-large elections, the effect of Section 2 has been to eliminate this electoral system from the political scene in jurisdictions with sizable minority populations.

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1. Section 2 was the preamble to the original 1965 Voting Rights Act, and consisted of little more than a restatement of the fifteenth amendment. Voting Rights Act of 1965, Pub. L. No. 89-110, § 279, 92 Stat. 434, 437 (codified as amended at 42 U.S.C. § 1973 (1982 & Supp. III 1985)). The amendment to Section 2 came in response to a lobbying effort by civil rights organizations upset by the Supreme Court's decision in Bolden v. City of Mobile, 446 U.S. 55 (1980). *Bolden* held that "vote dilution" claims were actionable under the Constitution only if the challenged election structure was the product of purposeful discrimination. *Bolden*, 446 U.S. at 67. Prior to *Bolden*, vote dilution claims were thought to be based on the right to vote, and thus free from the "intent" requirement of equal protection cases such as Washington v. Davis, 426 U.S. 229 (1976). *Id.* at 68.

2. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (1982)).

3. The pre-amendment cases were summarized in the Senate Hearing on the proposed amendments to Section 2 by civil rights lawyer Frank Parker speaking on behalf of the Lawyers' Committee for Civil Rights Under Law. In an effort to dispel the notion that amending Section 2 would lead to automatic victory for plaintiffs, Mr. Parker noted that defendants had prevailed in over half of the cases under the constitutional standard prior to the Supreme Court's decision in *Bolden*. *Voting Rights Act: Hearing on Bills to Amend the Voting Rights Act of 1965 Before the Sub-Comm. on the Constitution, of the Senate Comm. of the Judiciary*, 97th Cong., 2d Sess. Vol. 1, 1205 (the cases are summarized at pages 1216-26).

4. An examination of the cases identified by a computer search conducted in January, 1990 and designed to locate all cases decided under amended Section 2 revealed that over 75% of the cases involving challenges to at-large elections had been decided in favor of the plaintiffs.

The vote dilution suit now is moving into another stage. The obvious candidates for suit—jurisdictions with substantial minority populations and few minority elected officials—have changed, voluntarily or involuntarily, to single member districts. Plaintiffs now are challenging jurisdictions in which the benefits to be gained by a change to single member districts are more speculative. As the minority group's percentage of the population decreases, so does the opportunity to create single member districts in which the group's members can be a majority of those voting. Absent the ability to control at least one single-member district, the group risks trading influence over all the officials in an at-large situation for only a slightly better chance to control the election of a single member of the legislative body. In its first interpretation of Section 2, *Thornburg v. Gingles*,[5] the Supreme Court held that a claim of vote dilution could be made only by those groups that could demonstrate that they had the numbers and the residential patterns potentially to control at least one prospective single-member district.

Thornburg thus created a barrier to maintenance of suit by minorities who comprise only a small portion of a jurisdiction's population. In an effort to overcome this barrier, some minority groups have sought to combine their numbers with those of another minority group, thereby claiming that the voting strength of the "coalition of minorities" was unlawfully diluted by the challenged election system. Thus far, the most common groups to join together for suit have been blacks and Hispanics.[6]

This new "coalition dilution" suit pushes the notion of protection for minority voting rights far beyond that envisioned by Congress when it amended Section 2. This new suit raises questions concerning the underlying "rights" purported to be protected by the dilution suit, as well as difficult questions of proof and of appropriate remedies. Moreover, the coalition suit may have an unintended

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5. 478 U.S. 30 (1986).

6. The term "Hispanic" includes Mexican-Americans, Puerto Ricans, Cubans, and populations with origins in other Central and South American countries. Social scientists agree that these groups cannot appropriately be lumped together as if they shared a common heritage and history. *See generally* GANN & DUIGAN, THE HISPANICS IN THE UNITED STATES (1986). These scholars note that: "The introduction of the term 'Hispanic,' distinct from either 'black' or 'white,' into the U.S. census was the result of specific political and social considerations of a particular era in U.S. history. The term conceals enormous differences of a national and social kind; few 'Hispanics' define themselves as such." *Id.* at 315. As will become apparent in subsequent sections of this article, the "Hispanics" who have brought vote dilution suits primarily have been Mexican-Americans.

impact on more traditional dilution suits, those brought by a single minority group, or by two minority groups, each seeking relief for its members. Defendants may argue that if two or more groups can be combined for purposes of bringing suit, they should be combined for remedy purposes, thereby justifying the creation of a single "minority" district, rather than, say, one predominately black district and another predominately Hispanic district.

Many jurisdictions have "minority" populations of some description that could be "added" together to meet the numerical prerequisite for suit and thus are vulnerable to a "coalition" dilution suit. Moreover, because most election districts must be redrawn after the 1990 Census to comply with one-person, one-vote mandates, jurisdictions that currently elect their representatives from districts very shortly must face compliance with Section 2.[7] The requirements of Section 2 are far from clear when only a single minority is involved. In jurisdictions with multiple minority populations, Section 2 presents a veritable quagmire to those responsible for line drawing.

This Article addresses the issues raised by coalition dilution suits. We hope the Article will assist courts and litigants involved in these cases, as well as legislators who, after the 1990 Census, must balance the interests of potentially competing minority groups, along with the other legitimate concerns that deserve attention when decisions are made about how the people's representatives will be elected. We begin with a brief history of the dilution suit, followed by an elucidation of the Supreme Court's standard for establishing a violation of Section 2. Next we turn to the specific issue of the multi-group dilution suit. Did Congress intend to extend the protection of Section 2 to "coalitions"? How have the courts responded? What does the existing body of knowledge concerning blacks and Mexican-Americans (the most likely combination to bring suit) tell us about the potential for these two groups to become one? What has been the experience to date with black-Hispanic political coalitions?

Ultimately we conclude that the dilution suit, which was conceived initially to provide some measure of political participation for groups excluded by racism from the normal coalition-building essential to electoral success, should be extended to protect a "minority coali-

7. Electing representatives from districts, rather than at-large, does not assure compliance with Section 2. Concentrations of minority population may be divided among several districts, such that the group is unable to control the electoral outcome in any district.

tion" only in the most unusual of circumstances. A coalition dilution suit should be available only if the two groups can establish that they are so bound together by a common history of exclusion, that their political interests are so similar, and their past political behavior so uniform as to make the two groups one for purposes of the group-based relief available under Section 2. As a practical matter, such a merger of interests has rarely, if ever, been documented. Despite the rhetoric of political leaders, and the benefits seemingly to be gained, "Rainbow Coalitions" seldom form, and those that do form seldom last.

II. A Brief History of the Dilution Suit

A. Constitutional Precedents: Whitcomb *to* Mobile

When Congress amended Section 2 of the 1965 Voting Rights Act to provide a new statutory basis for the dilution suit, it directed the lower courts to return to the standard that had governed these cases prior to the Supreme Court's decision in *City of Mobile v. Bolden.*[8] This case held that the "intent" requirement of other equal protection cases applied in vote dilution cases as well.[9] Technically, the principles of these pre-*Bolden* constitutional cases remain legally, if not practically, relevant. At the very least, they form an important backdrop for understanding the "modern" dilution suit, and thus for determining if Section 2 should be extended to protect "coalitions."

The 1965 Voting Rights Act quickly and effectively eliminated barriers that black citizens previously experienced in registration, balloting, and running for office. But, years after the Act had produced monumental gains in registration, the most visible symbol of black political participation remained largely absent; blacks held only a fraction of the elected offices in the nation, including the South, where in many places they constituted a large segment of the

8. 446 U.S. 55 (1980).

9. *See* S. Rep. No. 417, 97th Cong., 2d Sess. 6, at 177, ([hereinafter Senate Report], *reprinted in* U.S. Code Cong. & Admin. News 179) (which indicates that the purpose of the amendment was to eliminate the intent requirement in vote dilution cases, and to "restore the legal standard that governed voting discrimination cases prior to *Mobile v. Bolden.*").

electorate.[10] Black office holding was disproportionately low everywhere, but the problem was most pronounced and a "cure" most readily available where members of the legislative body were elected either from multimember districts[11] or at-large.

The problem these electoral mechanisms posed for black political aspiration was easily stated: To be elected in an at-large system, a candidate usually needed support from a majority of the jurisdiction's voters; minority candidates often could anticipate the support of their racial or ethnic group, but these votes were insufficient to carry the election; absent support from non-group members—the same voters who had so recently endorsed mass disfranchisement of blacks—minority candidates lost; housing patterns often were such that the creation of single-member districts[12] would result in some districts having a majority of black voters, providing the potential for the election of candidates solely with black ballots. Initially, there was no express claim that white officials could not represent blacks, but all-white legislative bodies were a continuing symbol of black exclusion. Understandably, blacks wanted to see blacks in office.

Defining the problem and proposing a solution proved easier than constructing a theory for a group's "right" to avoid the consequences of majority rule. The thread of a theory was suggested by the malapportionment decisions. If an individual's vote could be unconstitutionally diluted because it carried less weight than that of a citizen living in a less populated district, could not that vote be diluted as well by other non- quantitative factors? Dicta in two early Supreme Court malapportionment decisions hinted that such a claim would be entertained.[13] While both cases affirmed that multimember

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10. According to the Joint Center for Political Studies, in 1980, blacks, who were 11% of the nation's population, were one percent of the elected officials. 10 NATIONAL ROSTER OF BLACK ELECTED OFFICIALS 1 (1980).

11. Multimember districts are election units from which more than one office holder is elected. They are employed more commonly in state legislatures than in local governments, counties, municipalities, and school boards. Some states employed multimember districts as a means to retain "county representation" in one or both houses of the legislature after Reynolds v. Sims, 377 U.S. 533 (1964), declared population to be the only basis for assigning representatives. A multimember district is only one of several units of the jurisdiction from which legislators are elected. By contrast, all the jurisdiction's voters vote for all candidates in an at-large system.

12. A single-member district system is one in which the political unit, a county, for example, is divided into a number of sections (districts), each one of which elects a single representative.

13. Burns v. Richardson, 384 U.S. 73, 94 (1966); Fortson v. Dorsey, 379 U.S. 433, 459 (1965).

districts were not per se unconstitutional, the Court indicated that under some circumstances they could operate to minimize or cancel out the voting strength of racial or political groups.[14]

The first serious attempt to rely on this dicta failed, but the case, *Whitcomb v. Chavis*,[15] paved the way for future cases. In *Whitcomb*, the Supreme Court announced the standard that ultimately was incorporated into Section 2.

Whitcomb involved a challenge to the multimember district for electing the state house and senate representatives from Marion County, Indiana. The plaintiffs were black residents of an Indiana ghetto. They alleged that candidates supported by ghetto residents seldom were elected to the legislature and contended that were the county divided into single member districts, the ghetto residents were sufficiently numerous and sufficiently geographically concentrated in their housing patterns to constitute a majority in some of the districts.[16] The lower court accepted the plaintiffs' theory that as poor blacks they constituted a cognizable minority group with needs and interests not shared by the county's white citizens. These interests were possibly subject to amelioration through the political process, but multimember districts prevented the group from electing representatives who were sympathetic to those interests. Thus, the lower court found the cognizable minority status of the group, plus the absence of proportional representation equalled vote dilution in violation of the Constitution.[17]

The Supreme Court reversed, finding no evidence that the petitioners had been denied access to the political process.[18] The absence of proportional representation did not prove discrimination absent evidence that the group had less opportunity than others to participate in the political process and to elect candidates of its choice.[19] The lower court had focused on the group's status as a "cognizable minority," and on its failure to achieve proportional representation.[20] The Supreme Court, however, concentrated on evidence of exclusion from the process: nothing in the record indicated that "poor Negroes were not allowed to register or vote, to choose the political party

14. Burns v. Richardson, 384 U.S. 73, 88 (1966); Fortson v. Dorsey, 379 U.S. 433, 451 (1965).
15. 403 U.S. 124 (1971).
16. *Whitcomb*, 403 U.S. at 139-40.
17. Chavis v. Whitcomb, 305 F. Supp. 1364, 1385 (S.D. Ind. 1969).
18. Whitcomb v. Chavis, 403 U.S. 124, 149-50.
19. *Id.*
20. Chavis v. Whitcomb, 305 F. Supp. 1364, 1384-86.

they desired to support, to participate in its affairs, or to be equally represented on those occasions when legislative candidates were chosen."[21]

In the Court's view, it was politics—in the form of party competition and majority rule—not race, that resulted in very few ghetto residents being elected. Blacks had special concerns, but there was no evidence that they lacked the opportunity to voice them in the electoral process. The Democratic Party regularly slated black candidates who fared no better and no worse in the general election than did white Democrats. In recent elections, all Democrats had lost. The dilution of black voting strength was thus "a mere euphemism for political defeat;" party, not race, determined political outcomes in Marion County.[22]

In *White v. Regester*,[23] blacks in one county and Hispanics in another were successful in attacking multimember districts in the Texas House apportionment scheme. The plaintiffs crafted their attack to distinguish the situation in Texas from that at issue in *Whitcomb*. The district court was convinced. The district court found that in Dallas County black citizens had been excluded from the electoral process by a history of racial discrimination, by a process of candidate slating by white dominated groups, by the use of racist campaign tactics, and by the presence of majority vote and other rules that made the election of minority supported candidates more difficult.[24] In Bexar County, the district court found that Mexican Americans also suffered from a history of discrimination, that language and cultural barriers made political participation extremely difficult, and, combined with restrictive registration procedures, produced a "cultural incompatibility" that denied Mexican Americans political access.[25] In both counties, the evidence indicated that elected officials were not responsive to the interests of their minority constituents, thereby further suggesting that their votes played a relatively minor role in the electoral process.[26]

The rather cryptic opinion of the Supreme Court affirmed the lower court's finding of dilution. The Court concluded that the facts found by the lower court were sufficient to support its conclusion

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21. Whitcomb v. Chavis, 403 U.S. at 149.
22. *Id.* at 153.
23. 412 U.S. 755 (1973).
24. Graves v. Barnes, 343 F. Supp. 704, 726-27 (W.D. Tex. 1972).
25. *Id.* at 733.
26. *Id.* at 731.

that the two groups had been denied an equal opportunity to participate in the political process.[27]

Whitcomb and *White* thus provided the parameters for dilution suits. Both of these cases recognized, as did all subsequent cases, that at-large elections were not per se a violation of the Constitution. *Whitcomb* clearly established that a cognizable minority is not by virtue of its group status entitled to proportional representation. Nor is any group protected from the normal uncertainties of politics—including the consistent defeat of its candidates.[28] In *White*, the Court recognized that not all candidates lose for normal political reasons. Under certain circumstances, groups are "fenced out" of the political process for reasons that have less to do with normal politics, and more to do with a history of discrimination and the present attitudes of the majority toward the group and those who espouse its interests.[29]

The Court's opinion in *White* provided little guidance for making the distinction between normal political defeat and exclusion because of race. Lower courts, in reliance upon the district court opinion in *White*, developed the so-called "totality of the circumstances" test, which set out a number of factors to be weighted in this determination. The primary factors enumerated were: (1) Lack of minority access to the slating of candidates; (2) unresponsiveness of legislators to the particularized interests of minorities; (3) a tenuous state policy underlying the preference for at-large election; and (4) a history of past discrimination that precluded the group from effectively participating in the political process. Other factors included the existence of large districts, majority vote requirements, anti-single shot provisions, and the absence of residency subdistricts.[30]

While the lower courts struggled valiantly to follow both *Whitcomb* and *White*, the totality of the circumstances test remained at best subjective, and at worst arbitrary. Different judges weighed the same facts differently so that the outcome of the cases appeared to depend more upon the assignment of the trial judge than on the facts of the case.[31]

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27. White v. Regester, 412 U.S. 755, 769 (1973).
28. Whitcomb v. Chavis, 403 U.S. 124, 151-54 (1971).
29. White v. Regester, 412 U.S. 755, 770-771.
30. *See, e.g.*, Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).
31. *See* A. THERNSTROM, WHOSE VOTES COUNT? 74-78 (1987), [hereinafter A. THERNSTROM] (for criticism of the "totality of circumstances" test); Butler, *Constitutional and Statutory Challenges to Election Structure: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 886-90 (1982) [hereinafter *Butler-Dilution*].

Plaintiffs in constitutional dilution cases proceeded on the assumption that because effective political participation was the issue, proof of a discriminatory purpose behind the adoption or maintenance of the at-large system was not necessary. However, in 1978, a panel of the Fifth Circuit held in *Nevett v. Sides*[32] that the mandate of *Washington v. Davis*[33] applied with equal force to vote dilution cases. The court went on to say, however, that the "totality of the circumstances" test was sufficient to infer discriminatory intent.[34]

In *City of Mobile v. Bolden*, a majority of the Supreme Court agreed with the decision in *Nevitt* that proof of discriminatory intent was essential to the claim, but disagreed as to the relevance of the "totality of the circumstances" test as evidence of discriminatory purpose.[35] On the basis of facts similar to those found by the lower court in *White*, the trial court in *Bolden* had found that Mobile's commission form of government denied the Alabama city's black citizens an equal opportunity to participate in the electoral process.[36] The high court's reversal of *Bolden* led many observers to argue that *White* had been overruled.

B. Congress Amends the Voting Rights Act

Bolden was decided on the eve of the expiration of certain provisions of the Voting Rights Act, thereby setting the stage for a concerted lobbying effort to develop a statutory substitute for constitutional claims.[37] The battle to amend Section 2, which in the end was decisively one-sided, has been admirably chronicled by others.[38] A very brief summary will suffice for our purposes.

Clearly the civil rights groups sought more from Congress than they dared to ask. They wanted a standard based on the lower

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32. 571 F.2d 209, 218 (5th Cir. 1978).

33. 426 U.S. 229 (1976) (holding that proof of discriminatory purpose was an essential element in an equal protection challenge to a facially neutral state action).

34. Nevett v. Sides, 571 F.2d at 219.

35. City of Mobile v. Bolden, 446 U.S. 55, 71 (1980).

36. Bolden v. City of Mobile, 423 F. Supp. 384, 398-401 (S.D. Ala. 1976).

37. Vote dilution decisions prior to *Bolden* were a mixed bag. Plaintiffs won some cases and lost others, and distinctions between cases finding dilution and those that did not were difficult to discern. *See generally, Butler-Dilution, supra* note 31, at 890. Nevertheless, civil rights groups saw the suit as essential to the attainment of political equality for minorities. *Bolden*, they believed, sounded its death knell.

38. *See generally* A. THERNSTOM, *supra* note 31, chs. 5 & 6; Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983). This portion of the Article is taken primarily from these sources.

court's decision in *Whitcomb*, which in essence was a proportional representation by race standard. What they asked for was a return to *White*, and the totality of the circumstances test. Proponents argued in the congressional hearings that proportional representation would not become the standard, and that at-large elections would not become extinct. In support of these arguments, they cited the numerous pre-*Bolden* decisions in which plaintiffs lost, despite a total absence of black elected officials.

Opponents argued that if the intent test of *Bolden* was replaced with a "results" test, inevitably the standard would become proportional representation. To replace "intent" with "result" would be to substitute a "fair share" for a "fair shake."

In the end Congress compromised. Congress amended Section 2, and gave civil rights groups what they said they wanted. Carefully drafted legislative history in the form of the Senate Judiciary Committee Report recorded that the purpose of the amendment was to restore the *White v. Regester* standard. The report stated, "[i]n adopting the 'results standard' as articulated in *White v. Regester*, the Committee has codified the basic principle in the case as it was applied prior to the *Mobile* litigation."[39] To placate opponents, however, a disclaimer of any right to proportional representation was added to the statute.[40]

Section 2 now reads in pertinent part:

> (a) No voting . . . practice . . . shall be imposed by any . . . political subdivision in a manner which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color, or [membership in language minority groups protected by the Act] . . .
>
> (b) A violation of subsection (a) is established if, based on a totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may

39. SENATE REPORT, *supra* note 9, at 28, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 205-06.

40. The disclaimer was necessary to gain bipartisan support for the bill. SENATE REPORT, *supra*, note 9, at 193-95, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS at 363-66 (additional views of Senator Dole).

> 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.[41]

The first sentence of part (b) of the Section is taken directly from *White v. Regester*.[42] The Report of the Senate Judiciary Committee sets out nine factors, gleaned from *White*, and other pre-*Bolden* dilution cases, that the committee considered to be relevant to the determination of a violation:

> 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 the 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.[43]

Two additional factors might have limited relevance: 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; and whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, standard, practice or procedure is tenuous.[44]

Congress thus opted to continue the vague totality of the circumstances standard. While generally unsatisfactory, this test had not

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41. Voting Rights Act of 1965, Pub. L. No. 89-110 § 279, 92 Stat. 434, 437 (codified as amended at 42 U.S.C. § 1973 (1982 & Supp. III 1985)).
42. White v. Regester, 412 U.S. 755, 771 (1973).
43. SENATE REPORT, *supra* note 9, at 29, *reprinted in* U.S. CODE CONG. & ADMIN. NEWS at 206-207.
44. *Id.*

in the past proved to be a euphemism for proportional representation. If the courts continued as they had before *Bolden*, the opponents' view was not inevitable. A "discriminatory result" did not have to be equated with a "disproportionate impact." However, as will be seen in the next section, the views of the amendment's opponents have proven to be largely correct. While the courts have given lip service to the "totality of the circumstances,"[45] their weighing of the "factors" has almost always been against at-large elections.

III. *Thornburg v. Gingles*: THE SUPREME COURT OUTLINES THE STANDARD[46]

A. The Setting

In 1986, the Supreme Court delivered its first interpretation of amended Section 2 in the case of *Thornburg v. Gingles*.[47] The case began as *Gingles v. Edmisten*[48] before a three-judge court in North Carolina.[49] Black voters challenged six multimember districts, and one single member district in North Carolina's 1980 legislative apportionment plan.[50] The multimember districts "submerged" their voting strength, and the single member district "fragmented" blacks into two districts, they claimed.[51]

The opinion of the lower court began by noting that the pre-*Bolden* racial vote dilution jurisprudence was to be controlling.[52] The essence of these suits, said the court, was that dilution occurs when "the interaction of substantial and persistent racial polarization

45. The lower courts generally have substituted the so-called "Senate Report" factors for the *Zimmer* factors as a guide to their determination under Section 2. *See, e.g.*, Gingles v. Edmisten, 590 F. Supp. 345, 354 (E.D. N.C. 1984).

46. The *Thornburg* decision has been hailed as a major victory by civil rights groups. The various opinions written in this case, including that of the lower court, contain serious flaws. However, a major critique of *Thornburg* is beyond the scope of this article. Our tack therefore is to "accept" the decision, to propose interpretation when important to the future of the "coalition dilution" suit, but otherwise to leave a full exposé of *Thornburg* for another article.

47. 478 U.S. 30 (1986).

48. Gingles v. Edmisten, 590 F. Supp. 345 (E.D. N.C. 1984).

49. Thornburg v. Gingles, 476 U.S. 30, 34, 35 n.3.

50. *Id.* at 35.

51. *Id.* at 46.

52. Gingles v. Edmisten, 590 F. Supp. 345, 351-52.

in voting patterns . . . with a challenged electoral mechanism, [prevents] a racial minority with distinctive group interests that are capable of aid or amelioration by government [from utilizing its] political power to further those interests."[53] The factors set out in *White, Zimmer*, and the Senate report are to be considered, but the unwillingness of large segments of the white electorate to vote for any candidate identified with minority interests is the linchpin of the suit.

The court's seventeen pages of detailed evidentiary findings covered all the Senate report factors. The court recounted North Carolina's history of racial discrimination in voting matters from reconstruction through 1970. The court concluded that past discrimination in the form of literacy tests (not ended in all forms everywhere until 1970) and poll taxes (abolished in 1948) contributed to lower voter registration by blacks, who in 1982 lagged fourteen percentage points behind whites in registration of eligible voters. Good faith efforts by the present administration to improve voter registration had not yet closed the gap.[54]

Discrimination in other areas, such as education, employment, housing, and health facilities produced a black citizenry of lower socioeconomic status than whites. This status gave the group special interests not shared by whites, and at the same time, hampered the group's ability to participate in the political process.[55]

Although the majority vote requirement in primaries had never been solely responsible for the defeat of a black candidate in the challenged districts, the court found it to be an additional structural impediment to the election of black candidates.[56]

The court found racial appeals in political campaigns as recent as the present. No examples appeared in the opinion, but the court found the campaign materials "reveal an unmistakable intention by their dissemination to exploit existing fears and prejudices . . . on the part of white citizens . . ."[57] The racial appeals, concluded the court, contribute to diminished opportunities for blacks to effectively participate in the political process.[58]

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53. *Id.* at 355.
54. *Id.* at 361.
55. *Id.* at 363.
56. *Id.*
57. *Id.*
58. *Id.* at 364.

While blacks had been voted into office at all levels from city councils to judgeships elected state-wide, at no level had they achieved proportional representation.[59] From 1975 to 1983, blacks held 2-4% of the Senate seats and 1.6-3.3% of the House seats.[60] In the first election under the 1982 redistricting plan, eleven blacks, five from challenged districts, were elected to the House.[61]

The voters in each of the challenged districts, except one, had at some time elected blacks to either the House, Senate, or both.[62] In every district blacks had been elected to local offices.[63] The court acknowledged that black citizens could be elected to office at all levels of state government in North Carolina, but found the overall results to be minimal in relation to the percentage of blacks in the total population.[64] The 1982 successes were seen as "aberrational," in part because white leaders might have seen the election of blacks as a means to forestall single member districting.[65] The court's failure to find significance in the election of black candidates was a primary issue on appeal.[66]

The most controversial of the court's findings concerned racial polarization in voting. The court found significant polarization (a term not specifically defined, but apparently meaning that a majority of white voters voted differently from a majority of black voters). This conclusion was based solely on the analysis of black-white election contests. The court discounted white support for black candidates, which varied widely among candidates, but was often above thirty percent in primaries and forty percent in general election. The availability of single shot voting[67] helped blacks to elect candidates of their choice, but, according to the court, any benefit to this was offset by having to forfeit their right to vote for a full slate

59. *Id.* at 364-67.
60. *Id.* at 365-66.
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.* at 367.
65. *Id.* at 367 n.27.
66. *Id.* at 364-67.
67. "Single shot voting" means to vote for fewer than the number of offices up for election. *Butler-Dilution*, *supra* note 31, at 863-76. For example, in a multimember district in which four representatives are to be elected from a field of candidates (i.e., all candidates run against all others with the top four vote-getters achieving election) a black candidate's chances of being elected are increased if black voters vote only for him, rather than casting all four of their votes, three of which would have to be cast for his opponent. For a discussion of the impact of various electoral mechanisms on the ability of a minority group to elect a candidate by its votes alone see *id.*

of candidates.[68] The court did not make any express finding about whether the level of polarization in each district prevented the election of black candidates, who, incidently, won more often than they lost.[69]

In the remainder of the factual findings, the court discounted all evidence of mitigating circumstances. While applauding the state's recent efforts to afford greater political participation for blacks, including "increased willingness on the part of influential white politicians openly to draw black citizens into political coalitions and openly to support their candidates," the court found it to be too little, too late.[70] Views of blacks testifying in opposition to single member districts were rejected as those of a "distinct minority" of the plaintiff class.[71] Legitimate, non-racial, state policies favoring the utilization of multimember districts could not outweigh a racially dilutive result.[72]

Looking at the totality of the circumstances in each multimember district, the court concluded that blacks had less opportunity than others to participate in the political process and to elect representatives of their choice.[73] As to the challenged single member district, the court found a similar result brought about by "fracturing" a minority population concentration into two districts.[74]

Essentially, the court went through the check list of Senate report factors, finding most of them present to one degree or another, then looked to see if black electoral success was nevertheless equal to what could potentially be achieved through the use of single member districts. Although some of the challenged districts had, at the time of trial, achieved this level of black success, the court was not satisfied that future success was guaranteed. Near proportional representation for ten years was insufficient evidence of political participation to satisfy the trial court.

North Carolina's appeal centered on the lower court's failure to give much weight to the record of black candidate success, which by

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68. Gingles v. Edmisten, 590 F. Supp. 345, 369.

69. *Id.* at 367-72. Polarization, according to the court, results in dilution when it interacts with the election structure to prevent a racial minority's furthering its distinctive group interests through the political process. *Id.* The court then evidently equated "furthering of the group's interest" with "electing black candidates," because that was the only "political interest" considered by the court. *Id.* The evidence that even this narrowly defined interest was being thwarted by polarization was weak, in light of the reasonable record of black candidates' success in some of the challenged districts. *Id.*

70. *Id.* at 372.

71. *Id.* at 372-73.

72. *Id.* at 373-74.

73. *Id.* at 374.

74. *Id.* at 374-75. North Carolina justified the use of multimember districts as a means to maintain the political integrity of county lines. *Id.*

any measure was vastly better in most of the challenged districts than that found in any pre-*Bolden* case won by plaintiffs. The state argued that the lower court had utilized an erroneous definition of legally significant polarization, in part because the court deemed election contests "significantly polarized" even when black candidates were elected. Moreover, it argued, the record of black candidate success was so substantial as to render the ultimate conclusion of dilution erroneous.[75]

In six of the seven districts, the Supreme Court affirmed the lower court's conclusion that the districts impaired black voting strength in violation of Section 2.[76] Despite unanimity on the decision, there were four opinions written, one of which sounded more like a dissent than a concurrence.[77] All of the Justices clearly agreed on only two points: The ultimate conclusion that dilution existed was an issue of fact; and the district court's findings of dilution were not clearly erroneous in six of the seven challenged districts. As to the seventh district, one of the multimember districts, a majority of the court agreed with North Carolina. The record of black candidate success was so substantial as to make the lower court's determination of dilution "clearly erroneous."[78] There was no majority view on some issues of importance for subsequent cases.[79]

B. The Prerequisites to Suit

Before addressing the issues actually raised by the appeal in *Thornburg*, the Supreme Court explained the underlying basis for dilution

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75. Appellant's Brief at 61, Supreme Court of the United States, October Term, 1968, Thornburg v. Gingles, 478 U.S. 30 (1986) (No. 83-1968) (Filed July 3, 1985); Appellant's Reply Brief at 19, Supreme Court of the United States, October Term, 1968, Thornburg v. Gingles, 478 U.S. 30 (1986) (No. 83-1968) (filed Nov. 22, 1985).

76. Thornburg v. Gingles, 478 U.S. 30, 73-74 (1986).

77. Justice Brennan, joined by Justices Blackmun, Marshall, Stevens, and White, delivered the five-part opinion of the Court. Justice O'Connor, joined by the Chief Justice, Justice Rehnquist, and Justice Powell, filed an opinion that while sounding like a dissent, concurred with the Court's judgment (but not with its opinion). *Id.* at 81-83 (O'Connor, J., concurring). Justice White disagreed in part with Justice Brennan, and filed a separate opinion on the point of disagreement. *Id.* at 85 (White, J., dissenting in part). Justices Stevens, Marshall, and Blackmun dissented from the portion of the opinion reversing the trial court's determination in one district. *Id.* at 84-85 (Stevens, J., dissenting).

78. *Thornburg*, 478 U.S. at 77.

79. For example, there was no majority view as to whether racial polarization remained legally significant if it could be demonstrated that a majority of white voters had rejected candidates preferred by blacks for reasons unrelated to race. Justices Brennan, Marshall, Blackmun, and Stevens thought the reasons for white voter behavior were irrelevant. Justices O'Connor, Rehnquist, and Powell disagreed. Justice White disagreed with this portion of Justice Brennan's opinion, but did not clearly state his view.

claims under amended Section 2, which it acknowledges was intended to resurrect pre-*Bolden* law:

> The essence of a Sec.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 . . . [Its] theoretical basis . . . 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.[80]

While any of the factors set out in the Senate report may be relevant to a finding of dilution, the Court indicated that:

> These circumstances are necessary preconditions for [a violation] . . . First, the minority group must be . . . sufficiently large and geographically compact to constitute a majority of a single member district . . . Second, the minority group must be . . . politically cohesive . . . Third, . . . the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances . . . usually to defeat the minority's preferred candidate.[81]

While there have been a few post-*Thornburg* decisions that appeared to emphasize these factors to the exclusion of the totality of the circumstances analysis,[82] the better reasoned interpretation of this portion of the Court's opinion is that these factors are essential to the plaintiff's case, but not in and of themselves conclusive of the existence of dilution. Because the lower court made specific findings as to each of the Senate report factors, the Supreme Court clearly was not faced with deciding whether satisfying the prerequisites alone was sufficient to establish dilution.

Without proof of each of the prerequisites, the plaintiffs cannot prevail. Thus, there is no remedy for a group that lacks the numbers, or is too geographically dispersed to benefit from single member districts, even if every additional Senate report factor is present. Likewise, there is no "cognizable minority group" to claim the benefits of Section 2 unless the plaintiffs demonstrate that the jurisdiction's minority citizens are sufficiently unified in their support of particular candidates to take advantage of the creation of a

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80. *Thornburg*, 478 U.S. at 47-48.

81. *Id.* at 50-51.

82. Some may read City of Carrollton Branch of the NAACP v. Stallings, 829 F.2d 1547 (11th Cir. 1987), as such a case. A more reasoned analysis of that case, however, reveals that it does little more than indicate that the lower court's findings, which predated *Gingles*, were based on a standard inconsistent with *Gingles*. NAACP v. Stallings, 829 F.2d 1547, 1561 (11th Cir. 1987).

district in which they would be in the majority. Even if minority citizens are sufficiently numerous, geographically compact, and vote together, the group has not been deprived of equal participation unless the majority votes in such a manner as to consistently defeat the group's political choices.

C. The Totality of the Circumstances Doctrine

Although a majority of cases after *Thornburg* have seemingly turned on the prerequisites,[83] most courts continue to address the remaining Senate report factors. The most logical reading of *Thornburg* is that plaintiffs must first prevail on each prerequisite. Only then is the court faced with determining whether, based on the totality of the circumstances, including not only these factors, and the remaining Senate report factors, but any other relevant evidence, plaintiffs have been denied an equal opportunity to participate in the political process and to elect candidates of their choice. The ultimate question of dilution is one of fact, committed to the trial judge who is to decide it based on "an intensely local appraisal of the design and impact of the . . . multimember district in light of past and present reality, political and otherwise."[84]

In emphasizing the factual, and intensely local, nature of the inquiry, the Court stated:

> As both amended Sec. 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the "totality of the circumstances"

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83. When all three have been present, plaintiffs, with rare exceptions, have won. The few cases decided in favor of the defendants usually have involved situations in which plaintiffs failed to establish one of the three preconditions (usually the first or second). *See, e.g.*, McNeil v. City of Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 1769 (1989) (affirming a decision of the trial court for the defendants because blacks, who were able to constitute a majority of the population of a district, were slightly less than a majority of the voting age population); Brewer v. Ham, 876 F.2d 448 (5th Cir. 1989) (affirming the lower court's denial of relief because the plaintiff's numbers were insufficient); Overton v. City of Austin, 871 F.2d 529 (5th Cir. 1988) (affirming trial court's denial of relief, based in part on neither blacks nor Hispanics being able to command a voting age majority in any district); Williams v. State Board of Elections, 718 F. Supp. 1324 (N.D. Ill. 1989) (dismissing claims of Hispanic subclass because its numbers were insufficient); Romero v. City of Pomona, 665 F. Supp. 853 (C.D. Cal. 1987) (denying relief because neither blacks, nor Hispanics standing alone could satisfy the requirement, and their numbers could not be combined because the two groups were not politically cohesive); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987) (denying relief to plaintiffs from multimember districts for which no "majority-minority" district could be created).

84. *Thornburg*, 478 U.S. at 78 (quoting White v. Regester, 412 U.S. 755, 765-70 (1970)).

> and to determine, based "upon a searching practical evaluation of the 'past and present reality,'. . . whether the political process is equally open to minority voters. This determination is peculiarly dependent upon the facts of each case."[85]

D. *The "Proportional Representation" Defense*

Thornburg contains one additional step in the determination of a violation of Section 2—an evaluation of the extent of electoral success of candidates supported by the minority group. The consistent election of black officials serves as an additional limitation on when plaintiffs may prevail. The Court noted "that unless minority group members experience substantial difficulty in electing candidates of their choice, they cannot prove that a challenged electoral mechanism impairs their ability 'to elect.'"[86]

Even if every single Senate report factor, including the *Thornburg* prerequisites, is present, plaintiffs may not prevail if minority supported candidates consistently have been elected. In all but one district challenged in *Thornburg*, the Court concluded that the record of success was not so substantial as to overcome the trial court's finding of dilution as a matter of law. As to one district, however, the sustained success of black candidates was sufficient to make the lower court's finding of dilution in that district clearly erroneous.[87] Without disturbing the lower court's other finding for that district—which included the existence of all the Senate report factors—the Court reversed the ultimate conclusion of dilution. The import of the decision to reverse is obvious: Consistent election of candidates supported by a majority of the jurisdiction's minority voters is a defense to dilution.[88]

It is important to recognize, however, that the level of black candidate success that will overcome a finding of dilution is very substantial. In the district in which the Supreme Court reversed the lower court's determination, blacks had achieved proportional representation for at least ten years. A lesser, but still substantial, record of success in some of the other districts was not sufficient to overturn the ultimate conclusion of dilution. It is equally impor-

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85. *Id.* at 79.
86. *Id.* at 49 n.15.
87. Thornburg v. Gingles, 478 U.S. at 77.
88. *Id.*

tant to recognize that the issue faced by the Supreme Court was: May a court that has done an analysis based on the totality of the circumstances legitimately find dilution if blacks have enjoyed significant electoral success? The issue was not: Must a court that has done an analysis based on the totality of the circumstances find dilution if blacks have not enjoyed significant electoral success? The failure to recognize this distinction almost certainly will have the effect of reading the "proportional representation" disclaimer right out of the act.[89]

E. The Ultimate Conclusion of Dilution

The standard set out in *Thornburg* is best summarized as follows: Only the prerequisites are essential to plaintiffs' case. No particular aggregate of the other Senate report factors is so essential that the failure to establish some, or even all, of the remaining factors is necessarily fatal to the plaintiffs' case. Likewise, no one factor, including the absence of any minority elected officials, mandates a finding of dilution. If, based on the existence of the *Thornburg* prerequisites, and the totality of the circumstances, it appears that minorities are denied an equal opportunity to participate in the political process, then the election of some candidates preferred by

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89. *See, e.g.*, Collins v. City of Norfolk, 883 F.2d 1282 (1989) (demonstrating the ease with which the distinction is blurred between proportional representation overcoming a finding of dilution as a matter of law, and the absence of proportional representation being deemed significant to a finding of dilution). The lower court's determination for the defendants was remanded for reconsideration in light of *Thornburg*. On remand, the court noted:

> [U]nder *Gingles*, a Section 2 claim will be defeated if the black community is proportionally represented, notwithstanding any other factor . . . On remand, this Court must determine as a factual matter whether black electoral success in Norfolk "has been so consistent and nearly proportional as to overshadow any racially polarized voting and other factors tending to dilute minority access."

Collins v. City of Norfolk, 679 F. Supp. 565, 580-81 (1970).

The lower court reaffirmed its finding in favor of the defendants and *also* concluded that the plaintiffs had achieved proportional representation. *Id.* A majority of the court of appeals panel reversed, based on its finding that the lower court's determination of proportional representation was clearly erroneous. Collins v. City of Norfolk, 883 F.2d 1282, 1303 (1989). The panel failed to note the distinction between the case before it—a case in which the lower court found no dilution—and *Thornburg*—a case in which the Supreme Court actually overturned a finding of dilution by the lower court. Consistent proportional representation is a defense to dilution. The absence of proportional representation, however, clearly does not equal dilution. In light of the lower court's determination that, based on the totality of the circumstances, the at-large system did not dilute black voting strength, the effect of the court of appeals opinion was to reverse the use made of proportional representation by *Thornburg*. Instead of the existence of proportional representation constituting a defense for the city, its absence became the basis for recovery by the plaintiffs.

the minority will not negate that finding unless those candidates have enjoyed a level of success equivalent to that found in District 23 of *Thornburg*. The ultimate conclusion of dilution is a question of fact, and will be reversed on appeal only if clearly erroneous.[90]

IV. Should Section 2 be Extended to Protect the Voting Strength of "Coalitions"?

The essence of a racial vote dilution claim is that members of a previously disfranchised minority group have been denied an opportunity to participate in the political process because of their minority status. The group members' common history of discrimination leads to shared political interests often not embraced by the majority. At-large elections thwart their efforts to elect representatives who would further these interests because their numbers alone are insufficient to elect anyone, and white voters will not provide assistance. The bond of a shared history of discrimination based on race creates the common political interests. Racist attitudes prevent the minority group from engaging in the same coalition building as other interest groups that can take advantage of numbers. The dominance of discrimination and racism as causative factors in the creation of the group, and the disability it experiences in the political process distinguish groups protected by the Voting Rights Act from other ethnic groups whose members also share a common political agenda.[91]

How well does the notion of a "cognizable minority group" with particularized "group" political interests transfer to the notion of a "cognizable coalition" made up of two or more separate and distinct minorities? Aside from the very substantial practical problems, did

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90. A very important aspect of the *Thornburg* decision has generally been ignored by the lower courts. The key point on which all the justices agreed was that the ultimate conclusion of "dilution" was one of fact, to be reversed only if clearly erroneous. Thornburg v. Gingles, 478 U.S. 30, 70-74 (1986). Four members of the Court, those who joined Justice O'Connor's opinion, were highly critical of several aspects of the lower court's decision. It seems clear that *had the lower court concluded that dilution was not present*, at least these four, and quite probably a majority of the Court, still would have voted to affirm. The enormous discretion vested in the trial court leaves open the possibility that a different judge could reach the opposite conclusion on facts very similar to those in *Thornburg*.

91. This paragraph states the "conventional wisdom" that is generally thought to support special "group-based" protection for minority groups that have been victims of discrimination. Of course, the conventional wisdom is not always correct. Not all groups who have occupied disfavored positions in American society become politically cohesive as a result of their shared experience. Nor have all groups that have suffered discrimination been impaired in their ability to participate in the political process. A group seeking relief under Section 2 must prove that the conventional wisdom actually is true for their situation.

Congress envision that Section 2 would be available to rearrange state and local election structures for the benefit a political coalition?

A. Did Congress Intend to Protect "Coalitions" Made Up of Separate Protected Groups?

The voluminous legislative history surrounding the amendment to Section 2 contains no reference to a "coalition" suit. It seems very unlikely that anyone had such suits in mind when the amendment was debated. All indications are that Congress enacted the amendment in an effort to restore the standards of the pre-*Bolden* cases, none of which involved an effort to create a single district for minorities from separate racial or ethnic groups. Several cases, including *White* itself, involved claims of dilution by two minorities. In these cases, however, each group sought its own remedy. The overwhelming majority of pre-*Bolden* cases were brought by single minority groups that clearly had the numbers and geographic compactness to control at least one single member district.

That blacks and Hispanics were considered to be separate groups entitled to the opportunity to "participate in the political process and to elect candidates of their choice," regardless of the effectiveness of the other group's participation, is clear from the history of the Voting Rights Act. The original Act, passed in 1965, was aimed at enfranchisement of blacks in the South. The legislative history is directed toward documentation of the discrimination suffered by blacks primarily at the hands of the governments and white citizens of the deep South. The Act's most stringent provisions were to apply only in those states, although the formula for coverage of these provisions picked up a handful of non-southern counties. None of the "covered" jurisdictions had substantial Hispanic populations, with the possible exception of four counties in Arizona, which were allowed to "bail-out," i.e., exempt themselves from the Act's special provisions. Thus, Hispanics were not considered to be part of the nation's populations that needed the special protection of the Act.[92] Clearly they were not thought to be blacks, or as so similarly situated as to require the same treatment.

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92. The only Hispanics given special protection by the 1965 Act were Puerto Ricans residing in New York but educated in Puerto Rico. Voting Rights Acts of 1965, Pub. L. No. 89-110, § 4, 96 Stat. 140, 142 (codified or amended at 42 U.S.C. § 4(e) (1982)) (designed to allow this group to "pass" the New York literacy requirement).

Another ten years passed before the special protection of the Voting Rights Act was extended to Hispanics.[93] The 1975 amendments to the Act were designed to enfranchise language minorities who had been deprived of effective political participation by the use of English-only elections. The primary target of the 1975 Act was Texas, and, to a lesser extent, California.[94] The special provisions of the 1975 Act were to apply in any jurisdiction that had the following characteristics: (1) more than five percent of the 1970 population belonged to a single language minority group; (2) fewer than fifty percent of the citizens of voting age voted in the 1972 presidential election; and (3) the election was conducted in English only.

The vehicle for discrimination against Hispanics was thought by Congress to be that the election process was closed to those who did not understand English.[95] This is evident not only from the coverage formula, but also from the fact that another part of the 1975 Act provides that some jurisdictions must provide election materials in the language of certain minority groups.

Prior to passage of the 1975 Act, problems of language and cultural incompatibility were recognized as the basis for treating Mexican-Americans as a group eligible for special protection, including protection from dilution of their voting strength. The lower court in *White v. Regester* recognized that Mexican-Americans in Texas suffered from appalling conditions of poverty, exacerbated by

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93. To an ethnologist, a suit brought by Mexican-Americans and Puerto Ricans would be a suit brought by separate minority groups. Although both groups are labelled "Hispanics," they share little more than a common language. For purposes of the Voting Rights Act, however, the two groups "needed" special protection for the same reason: they were at a disadvantage in their utilization of the political process because of their lack of facility in English.

94. Hunter, *The 1975 Voting Rights Act and Language Minorities,* 25 CATH. U.L. REV. 250, 254-56 (1976).

95. S. REP. No. 94-295, Voting Rights Act Extension, Committee on the Judiciary, United States Senate, 94th Congress, 1st Sess. 24 (1975), *reprinted in* U.S. CODE CONG. & ADMIN. NEWS 774, 790. *But see* A. THERNSTROM, *supra* note 25, at 54-62. Dr. Thernstrom argues that the "hidden agenda" of the extension of the Voting Rights Act to Texas was not the elimination of problems of disfranchisement caused by English-only elections—an issue upon which very little hard evidence was introduced at the extension hearings. Rather, she says, the real purpose of the Act's sponsors was to subject redistricting decisions to the scrutiny of Section 5, (the provision of the Voting Rights Act that requires all changes in election laws in certain jurisdictions to be federally approved prior to their implementation), and thereby pressure jurisdictions to create more opportunities for Mexican-American office holding. "Preclearance of all districting plans—whether for local, state, or national office—would undoubtedly alter the level of Hispanic officeholding . . . With districting plans drawn under the watchful eye of the Justice Department, the number of 'safe' minority seats was bound to rise." *Id.* at 58.

often insurmountable cultural disorientation.[96] The court noted, "[t]he fact that they are reared in a sub-culture in which a dialect of Spanish is the primary language provides permanent impediments to their educational and vocational advancement and creates other traumatic problems."[97] The court found it easy to make a connection between language and educational disabilities and depressed political participation. "There is no aspect of human endeavor, in general and of American life in particular, in which the ability to read, write and understand a language is more important than politics."[98] In the opinion of the court, Mexican-Americans were distinguishable from other language groups in that they had been victims of discrimination by way of Texas' poll tax, and "the most restrictive voter registration procedures in the nation."[99]

Blacks and Mexican-Americans thus theoretically required the protection of the Voting Rights Act for different reasons—blacks because of a legacy of discrimination that had its origins in slavery, and Mexican-Americans because of disabilities caused by cultural and language disabilities. While clearly either group could bring a dilution suit, the theory behind such suits is that the group had been fenced out of the political process by virtue of it status *as a racial or ethnic minority*, and for the reasons that justified the special protection afforded the group by the Act. Ethnic groups, such as Irish, Italians, and Iranians are not entitled to protection because there was no congressional finding that their ethnicity had subjected them to disfranchisement, or that English-only elections had hampered their political participation. Interest groups—Republicans, environmentalists, fundamentalists, etc.—are not entitled to the claim dilution either. The ultimate basis for the claim must be that of deprivation of equal political participation because of race or membership in a protected language minority group.[100]

Had Congress considered the issue, would it have viewed blacks and Mexican-Americans who claim dilution of their combined voting

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96. Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972), *rev'd sub nom.*, White v. Regester, 412 U.S. 755 (1973).

97. Graves v. Barnes, 343 F. Supp. at 730.

98. *Id.* at 731.

99. *Id.*

100. Indeed, the difference between the two "grandfather" cases in the area of vote dilution. *Compare* Whitcomb v. Chavis, 403 U.S. 124 (1971) (plaintiffs lost because they were just Democrats whose political fortunes rose and fell with those of other Democrats) *with* White v. Regester, 412 U.S. 755 (1973) (plaintiffs won because electoral defeat was due to their being black and Hispanic).

strength as being like a group brought together by a political agenda not currently shared by a majority of the jurisdiction's voters? Or would Congress have seen the coalition as being more like a discrete minority disabled by racism from utilizing its numbers to ameliorate their condition through the political process?

B. The Response of the Lower Courts

Most courts faced with coalition dilution cases have simply assumed that there was no legal barrier to two groups seeking to be one for purposes of Section 2.[101] Only Judge Higginbotham of the 5th Circuit is on record as recognizing the significant "leap" involved in extending the protection of Section 2 beyond a single minority.

Judge Higginbotham dissented from the affirmation on appeal of two Texas cases in which the lower court had allowed blacks and Hispanics to combine their numbers to bring suit.[102] He expressed alarm that the protection of the Voting Rights Act had been extended "by fiat" to a "newly defined minority—a *coalition* of blacks and Browns" with no citation to any authority that suggested Congress intended such a result, and with no reasoning to support the extension.[103]

In *Campos v. City of Baytown*, the panel had justified the extension through negative implication:

> There is nothing in the law that prevents the plaintiffs from identifying the protected aggrieved minority to include both blacks and Hispanics. Section 1973(a) [Section 2] protects the right to vote of both racial and language minorities . . . If, together, they are of such numbers residing geographically so as to constitute a majority in a single member district, they cross the [*Thornburg*] threshold as potentially disadvantaged voters.[104]

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101. *See* Overton v. City of Austin, 871 F.2d 529 (5th Cir. 1989); Romero v. City of Pomona, 665 F. Supp. 853 (C.D. Cal. 1987) (coalition dilution cases in which plaintiffs were denied relief on the ground that they had failed to demonstrate that blacks and Hispanics were politically cohesive). *See also* Latino Political Action Comm. v. City of Boston, 609 F. Supp. 739, 747 (D.C. Mass. 1985) (court refused to create a district made up of Boston's various minority groups).

102. Campos v. City of Baytown, 849 F.2d 921, 943 (5th Cir. 1988) (en banc), (reh'g denied) (Higginbotham, J., Gee, J., Garwood, J., Jolly, J., Davis, J., and Jones, J., dissenting); LULAC v. Midland Indep. School Dist., 812 F.2d 1494, 1503 (5th Cir. 1987) (Higginbotham, J., dissenting) *vacated* 829 F.2d 546 (1987).

103. *Campos*, 849 F.2d at 944-45 (Higginbotham, J., dissenting).

104. Campos v. City of Baytown, 840 F.2d 1240, 1244 (5th Cir. 1986).

In the other case, *LULAC v. Midland Independent School District*,[105] neither the lower court nor the panel discussed whether the definition of minority "group" should include a coalition of two groups. The lower court recognized that blacks and Hispanics are racially and culturally distinct, but thought that refusing to allow the two groups to aggregate their numbers to satisfy *Thornburg* would be "inherently unjust." The appellate panel justified aggregation of the groups on the grounds that both groups had been victims of Anglo discrimination.[106] Ignoring the conceptual problems with this thesis, both courts decided that any problems with aggregation should be resolved by asking whether the two groups were "politically cohesive."[107]

Judge Higginbotham pointed out the fallacy in the assumption that separate disadvantaged groups who may from time to time display "political cohesiveness" are necessarily entitled to claim special protection for their coalition. He noted that the purpose of the Act was to redress racial and ethnic discrimination in the political process. The *Thornburg* inquiry:

> assumes a group unified by race or national origin and asks if it is cohesive in its voting. If a minority group lacks a common race or ethnicity, cohesion must rely principally on shared values, socio-economic factors, and coalition formation, making the group almost indistinguishable from political minorities as opposed to racial minorities.[108]

Arguing in *Campos* that the issue deserved en banc consideration,[109] Judge Higginbotham pointed out that to ask whether the Voting

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105. 648 F. Supp. 596, 618 (W.D. Tex. 1986).

106. *LULAC*, 812 F.2d at 1500. Neither court explored the question of whether the two groups became "one" because they shared similar discrimination at the hands of the majority, or whether the two groups had formed a political coalition for the convenience of the moment. *Id.*

107. Campos v. City of Baytown, 849 F.2d at 936. A similar conclusion was reached in Concerned Citizens of Hardee County v. Hardee County, Civ. App. No. 86-209-CIV-T-17 (M.D. Fla. April 24, 1989) (Mem. Op.). In *Concerned Citizens*, the court held that *Thornburg* had:

> defined a Section 2 Minority in terms of its 'cohesiveness' rather than a simple ethnic or racial association. A minority group which exists in close economic, social and cultural proximity, cannot be a Section 2 Minority if it is not politically cohesive. But two minorities, generally considered separate identifiable groups, may be a single Section 2 minority if they behave in a politically cohesive manner.

Id. at 20-21. The court found for the defendants on the ground that the plaintiff had not demonstrated "cohesiveness." *Id.*

108. *LULAC*, 812 F.2d at 1504 (Higginbotham, J., dissenting).

109. A peculiar procedural irony prevented en banc consideration of this case. Three judges recused themselves from the deliberations of the case, apparently because of a close relationship with the defendant-appellant's attorney. A majority (six of eleven) of those who considered

Rights Act *prohibited* two groups from seeking protection for their coalitional voting strength was to ask the wrong question. Rather the question should be whether Congress intended to *protect* coalitions. The fact that both groups are protected does not justify the assumption that a new group composed of both minorities is itself a protected minority. "A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition."[110]

Judge Higginbotham's concerns are justified. A statute designed to counteract the effects of racial discrimination in the political process should not be interpreted so as to protect what may be nothing more than ordinary interest group politics. When two distinct groups join together for purposes of achieving political goals, the result is more likely to be coalition politics, rather than the creation of a new "discrete and insular minority."

For the courts to resolve the question of whether a "coalition" is protected by Section 2 by asking whether the two groups are politically cohesive is essentially to ignore the question. If no additional burden is placed on a coalition seeking protection than is imposed on a group that clearly is entitled to recover *if* it can establish its claim, including that its members are politically cohesive, the effect is to assume, quite illogically, that minorities are fungible. A thousand blacks are the legal equivalent of 500 blacks and 300 Hispanics, 150 Indians, and 50 Vietnamese.

C. Is There a Basis to Recognize a "Coalition" as a "Group" Protected by the Act?

Absent congressional guidance, the issue of protection for coalitions should be resolved by reference to the general evil which the amendment to Section 2 addressed—exclusion from meaningful political participation because of racism. By its expressed intention to recognize both *Whitcomb* and *White*, Congress indicated its belief that not all failure of candidates identified with minority groups is the product of racial discrimination. Minority candidates lose for

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the request were prepared to grant it. However, according to the Fifth Circuit rules, a positive vote to consider must come from a majority of all active judges, including those who declined to participate.

110. Campos v. City of Baytown, 849 F.2d at 921, 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting).

the same reasons that other candidates lose. Relief is to be afforded only those who lose for reasons that are not normal, but rather are tied to discrimination and racism.[111]

To the extent that the coalition is the product of shared concerns stemming from essentially similar discriminatory treatment at the hands of the majority, dilution of its voting strength would seem to be within the ambit of Section 2. The basis for the coalition, however, should be crucial. The Voting Rights Act's purpose was to eliminate *racial* discrimination—not to foster particular *political* coalitions. The constitutionality of the Act is tied to its purpose as a device to prevent racial discrimination, and to remedy the effects of past discrimination. A coalition based on a similar political agenda, one drawn from perhaps shared socio-economic status, or neighborhood concerns is not one for which Section 2 should provide protection. Were the rule otherwise, then any coalition could seek Section 2 relief, so long as some number of its members were "protected" minorities.

Thornburg recognized that there are inherent limitations on the ability of any group, racial or otherwise, to influence the political process. Among the "normal" reasons for failure of a group to elect candidates of its choice is group size. In politics, numbers count. Some groups are too small to expect a seat in the legislative body. These groups may not be able to elect a candidate primarily identified with the group, but instead may have to compromise by voting for candidates with a broader base of support who promises to be responsive to the group's concerns.

A *racial* group that becomes a *political* group should be subject to the same political constraints as others who would utilize the political process. A group that is too small to be expected to win a seat, were it a purely political group, cannot legitimately have heightened expectations because the basis for the group's existence

111. One defensible position is that when the Supreme Court referred to a "politically cohesive minority group," it meant just that—a minority group that was politically cohesive. A "group" is generally defined by both internal and external recognition of its existence. The group members "are viewed as a group; they view themselves as a group; their identity is in large part determined by membership in the group; their social status is linked to the status of the group; and much of our action, both institutional and personal, is based on these perceptions." Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. PUB. AFF. 107, 148 (1976). Quite clearly then, by this definition, a "group" cannot be made up of Mexican-Americans and blacks, and except by aid of their amalgamation into "Hispanics" by Congress, Mexican-Americans and Puerto Ricans also could not qualify as a group.

is tied to the race of its members.[112] On the one hand, a "coalition" dilution suit that is merely an attempt by one or both groups involved to avoid the *Thornburg* size limitation should not be within the protection of Section 2.

On the other hand, Section 2 is classic "remedial" legislation, and therefore should be liberally construed.[113] Under this rationale, if past discrimination and present racial attitudes prevent the groups from utilizing their voting coalition, which exists primarily because the two groups share common concerns and political interest derived from similar discriminatory treatment at the hands of the majority, the coalition should be entitled to the protection of Section 2. To "qualify" as a new "minority," however, the group should demonstrate that the "coalition" is not one merely of convenience for the limited purpose of bringing the suit. Thus, to seek protection for a "coalition" the plaintiffs should demonstrate that the two groups are indeed "one," *and* that the reason for their status as a

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112. Technically, "proportional representation" is achieved when the percentage of the votes a political party receives is equal to the percentage of those elected who are party candidates. Countries and the few local jurisdictions in the United States that employ proportional representation systems do not generally use race as a basis for designating representatives. *See generally* A. LIJPHART, PROPORTIONALITY BY NON-PR METHODS: ETHNIC REPRESENTATION IN BELGIUM, CYPRUS, LEBANON, NEW ZEALAND, WEST GERMANY, AND ZIMBABWE (1985); ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES (B. Groffman & A. Lijphart eds., 1986).

Unless representatives are to be allocated on the basis of race, the term "proportional representation" cannot be meaningfully applied to a jurisdiction and the percentage of elected officials who are minorities. In the minds of minorities, the courts, and even the general public, however, there appears to be a notion that "all things being equal" the racial makeup of an elected body should roughly mirror that of the population—although quite clearly such "mirroring" is not seen in other population characteristics, such as sex, occupation, or religion.

A group comprising less than a "seat's worth" of the jurisdiction's population (i.e., the population necessary to support a district for one-person, one-vote purposes), arguably should not be seen as legitimate dilution candidate. Racial dilution cases are a loose extrapolation of the principle of one-person, one-vote. *See generally* Blacksher & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden, 34 HASTINGS L.J. 1 (1982). For one-person, one-vote purposes, the population necessary to support a seat is equal to the total population divided by the number of seats. If the minority population is insufficient to support a seat by its numbers alone, it must "share" that seat with some number of others. Also, considered from the layman's perspective of "mirroring," a group that is only ten percent of the population of a district in which twenty percent is needed to support a seat seems to lack firm justification for a claim to "its own" seat.

113. The counter argument is that this legislation seriously strains traditional notions of federalism by intruding significantly upon the prerogative of the states to determine the methods by which local governments should be elected—a matter in which the courts have generally been loath to interfere. In the words of Judge Higginbotham (see discussion, *infra* note 181), "[p]laying with the structure of local government in an effort to channel political factions is a heady game; we should insist that Congress speak plainly when it would do so." Campos v. City of Baytown, 849 F.2d 944, 945 (5th Cir. 1987).

"combined" discrete minority is their *shared* discriminatory treatment at the hands of the majority.

Perhaps the litmus test should be whether the two groups consider themselves one under circumstances when each group can benefit separately. For example, did the Hispanics who now claim to be "one" with blacks count blacks as Hispanics, and vice versa, when deciding whether affirmative action was necessary to increase minority hiring or admission to competitive programs? Or, more directly on point, in other districting decisions involving both groups did the two agree to "share" a district, if a district could have been created for each?[114]

In *Overton v. City of Austin*,[115] the circumstances surrounding the bringing of the suit and the position of the "individual" groups in the litigation were indications that the two groups were hardly "one." The suit had been filed originally by a group of black plaintiffs; a group of Hispanics intervened. *Thornburg* was decided while the case was on appeal from a decision for the defendants. On remand, to demonstrate that the "minorities" could constitute a majority of a single member district as required by *Thornburg*, the black plaintiffs proposed one plan containing a "minority district" that was 50.7% black, and 13.9% Mexican-American, and a second with a district that was 60.6% black, and 14.7% Mexican-American. The Mexican-American plaintiffs proposed one plan containing a district that was 51.5% Mexican-American, and 8% black, and another with a district that was 57.49% Mexican-American, and 8.45% black. Nevertheless, both groups argued that their numbers should be combined to meet the threshold of *Thornburg*.[116]

The trial judge refused the plaintiff's proposal on the ground that they had not demonstrated political cohesiveness.[117] A decision to the contrary, and a subsequent victory for the plaintiffs would have presented an interesting dilemma. Would the court have "cured" the dilution of the coalitions vote by accepting the black dominated

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114. For example, Hispanics in a challenged county may lack the geographic compactness to make up a majority of a district in the county's legislative body, but may in combination with Hispanics from neighboring counties have the numbers necessary to control a state legislative district. Did Hispanics argue for the creation of an Hispanic district, or were they just as willing to be 30% of a district that was also 30% black?

115. Civ. No. A-84-CA-189 (W.D. Tex. Sep. 15, 1987) (on file at the *Pacific Law Journal*).

116. *Id.* at 26.

117. *Id.* at 28. The court also ruled that at least a "voting age majority" was necessary to satisfy *Thornburg*, so that neither group "qualified" based solely on its own numbers. *Id.* at 24.

district, or the Hispanic dominated district? If in subsequent years one of the group's numbers becomes sufficient to control a district by its numbers alone, could it then insist upon "its own" district? The "group" should also demonstrate that it is the discriminatory behavior of the majority that has made them "one," and not merely political interests that they may share with any number of other groups, such as other Democrats, or poor people, or their neighbors. Perhaps in some parts of the Southwest the two groups were lumped together and treated as "one" by the white majority. Discriminatory housing restrictions may have forced the two groups to live together in barrios. Schools may have been segregated into "Anglos" and "non-Anglos." Isolation from Anglos, and forced close contact with each other may have increased the normally very low social interaction between blacks and Mexican-Americans.

Such circumstances, however, are likely to be the exception and not the rule. Often one group has been in place for several generations, while the second group has arrived more recently. Hardee County, Florida, a jurisdiction against which a coalition suit was brought, is a good example. The County's small black population had occupied the same two neighborhoods for generations. Ninety percent of the county's black population lived in one or the other. Hispanics, primarily Mexican-American migrant workers, began arriving in the mid-1960's. Gradually, more and more of the migrants settled permanently in the county. Very few moved into the black neighborhoods. Almost all lived in census areas that were majority white-Anglo. The differential marriage rates between Hispanics and Anglos, and Hispanics and blacks provided evidence of substantial interaction of Hispanics with whites, not blacks. Over twenty-eight percent of marriages involving Hispanics were to Anglos, and virtually none were to blacks. Blacks in the county could claim to have been victims of some state-imposed past discrimination in housing, education, and employment. Hispanics, however, could point to no state-sanctioned discrimination in Florida, or in the county. Any connection between present depressed levels of education and income for Hispanics and present or past discrimination was extremely tenuous. In short, any interest the two groups shared was by virtue of their somewhat similar socio-economic status, (a condition also shared with a large segment of the white population),[118] and not

118. As a group, blacks and Hispanics were clearly poor. 57.8% of blacks, and 48.9% of

because they had shared similar mistreatment at the hands of the White-Anglo majority of the county.[119]

Mere proof that the two groups were at times victims of discrimination is not sufficient to conclude the often vast differences in experience and attitudes that separate racial and ethnic groups have been overcome. For example, the ancestors of many Japanese now living in California were forced to live in concentration camps during World War II, even though they were American citizens. Today Japanese college-age students charge that colleges discriminate against them by using Asian "quotas." Many blacks now living in California moved west to escape Jim Crow practices in the South. Even in less overtly racist California, blacks were frequently victims of discrimination in employment, housing, and the provision of health care. In short, both groups have been victims of past discrimination. Yet few would suggest that Japanese and blacks are "fungible."

While there may have been greater similarity in the means of discrimination and its effects in the case of blacks and Mexican-Americans, little evidence exists that the two groups have consolidated into one as a result of any commonality in their experience. To be sure, both groups are disproportionately poor, and less well educated than other Americans. Plaintiffs arguing for the existence of a "coalition" often assert that the two groups share similar lower socio-economic status because of past discrimination factors which make blacks and Mexican-Americans "natural" political partners.[120]

Hispanics lived below the poverty line. In sheer numbers however, there were more poor whites. More than half of the persons below the poverty level were white. 1980 CENSUS OF POPULATION AND HOUSING, GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS, PC80-1-C11, FLORIDA, Table 187.

119. Concerned Citizens of Hardee County v. Hardee County, Civ. App. No. 86-209-CIV-T-17 (M.D. Fla. April 24, 1989) (Mem. Op.) at 28-30 (on file at the *Pacific Law Journal*).

120. A causal relationship between past discrimination and present lower socio-economic status is generally assumed to exist, even though the majority of all poor and poorly educated people are white. Taken to its illogical conclusion, we would assume that minorities are poor because they have been victims of discrimination, but whites are poor for the "normal" reasons. A more realistic position is that most of the "causes" of poverty are the same for all groups, but are more prevalent among minorities. For example, marriage and parenthood at a young age are factors that tend to reduce educational opportunity and earning potential, regardless of race or ethnicity. These conditions are far more prevalent among blacks and Hispanics than among Jews and Asians, groups which enjoy higher than average median family incomes. *See generally* T. SOWELL, ETHNIC AMERICA (2d ed. 1981).

To be sure, controlling for production factors and other important variables only reduces the gap in income between whites and Mexican-Americans and Blacks. The remaining gap is more justifiably attributed to past discrimination. Although even here the logic is less than perfect. Those employing the scientific method do not ordinarily assume that differences not readily explained by existing variables must be attributed to discrimination. Just as logically,

However, social scientists recognize, that the factors contributing to their lower than average socio-economic status are different for the two groups.[121] Social scientists who have studied Mexican-Americans generally agree that the group has a unique history. Their experiences are not particularly comparable to those of European immigrants, and are quite different from those of blacks.[122] For Mexican-Americans, the factors that contribute most directly to lower socio-economic status are: Low educational attainment; low levels of English proficiency;[123] an age structure that is disproportionally young;[124] large families, slightly more of which are headed

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remaining differences can be explained by as yet unidentified variables. A more appealing argument might be that some of the variables affecting income potential are themselves the product of past discrimination.

121. *Id.* at 111-15. Sowell and others maintain that ethnic groups differ widely in certain characteristics, which are themselves sufficient to account for income and status differentials among the groups, without resort to discrimination as an explanatory variable. Among these characteristics are the age distribution within the group, age of first marriage and parenthood, fertility rates, and historical and cultural orientation toward education and occupations. *See generally* BLOCK & WALTER, DISCRIMINATION, AFFIRMATIVE ACTION, AND EQUAL OPPORTUNITY (1982). The diversity in socio-economic status among the different groups making up the amalgamated group "Hispanics" demonstrates the importance of these characteristics. Cubans, who are older as a group than other Hispanics, are more likely to be part of two parent, two wage-earner families, were better educated at the time of their immigration, and had an average annual income of $21,300 in 1981. The average income of Puerto Ricans amounted to only $11,400. Among Hispanics groups, Puerto Ricans were the least educated; the least likely to have two wage earners in the family; and the most likely to have come from broken homes, or to be raised by an unwed mother. GANN & DUIGAN, *supra* note 6, at 318-19.

122. *See generally* Horowitz, *Conflict and Accommodation, Mexican-Americans in the Cosmopolis*, MEXICAN AMERICANS IN COMPARATIVE PERSPECTIVE 58 (1985) [hereinafter, *Horowitz*].

123. Most studies have confirmed the obvious negative impact of the inability to speak English. A recent article summarized some of the finding: "There is little doubt that English-language proficiency is essential for success in the U.S. labor market . . . especially for gaining entry into some of the higher-status positions . . . failure to gain command of English during adolescence may result in truncated educational experiences . . . linguistic minorities do not compete well with English proficient majority groups." Tienda & Neidert, *Language, Education, and the Socioeconomic Achievement of Hispanic Origin Men*, in THE MEXICAN AMERICAN EXPERIENCE 359, 390 (R. De La Garza ed. 1985). According to one scholar, a Department of Labor Study found no significant differences in the wages between Anglos and Hispanics in the most English-proficient categories. *Horowitz, supra* note 122, at 80. Another scholar utilizing the same data, however, concluded that "lack of fluency in speaking and understanding English does not definitely lower wage offers in all cases. While the estimates do suggest that English difficulties lower wage offers (within groups having the same levels of education and time in the United States) the margin of error in these estimates is large." Reimers, *The Wage Structure of Hispanic Men: Implications for Policy*, in THE MEXICAN AMERICAN EXPERIENCE 101, 126 (R. De La Garza ed. 1985). Reimers also concluded that "English skills per se make very little difference in wages among Mexican origin men within age and nativity group, immigration cohort, and educational level." *Id.* at 129.

124. In 1980, the median age in the Mexican origin population was 21.9 years, compared to 30.0 years for the total United States population. A much greater proportion of the over eighteen portion of the Mexican origin population is in the 20 to 29 age range, due in large part to the high concentration of males in that age category migrating from Mexico. Bean,

by females than is true for the population generally;[125] and a tradition of early marriage and parenthood, factors which limit opportunities for educational advancement.

Aggregate data present a misleading picture of the status of Mexican-Americans because of the inclusion of the most poverty prone group—legal and illegal immigrants recently arrived from Mexico.[126] A substantial number of these migrants are economic refugees, many with very little education and few job skills. Some are migrant farm workers, who maintain strong ties with Mexico, thereby lessening the more typical tendency of immigrants to assimilate.[127] Their migratory existence diminishes the opportunity for their children to "move up" the economic ladder. Children of migrants have difficulty staying in school because of frequent family moves to follow the crops and because of pressure to add their hands to the family labor pool.[128]

The economic picture is likely to be brighter for second and third generation Mexican-Americans.[129] Educational attainment is

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Stephen, & Opitz, *The Mexican Origin Population in the United States: A demographic Overview* in THE MEXICAN AMERICAN EXPERIENCE 57, 60-63 (De la Garza ed. 1985).

125. Mexican origin families average 4.14 persons per family, compared to 3.27 for the general population. Of these families, 16.4% are headed by females, compared with 14.3% for the total United States population. *Id.* at 65-66.

126. Census Bureau personnel estimate that of the 8.7 million Mexican-Americans counted in the 1980 Census, 1.1 million were undocumented aliens. Warren & Passel, *A Count of the Uncountable: Estimates of Undocumented Aliens Counted in the 1980 Census*, U.S. Bureau of Census Photocopy.

127. The United State Justice Department estimated that almost 65,000 persons per year legally immigrated to the United States from Mexico between 1970 and 1980. STATISTICAL YEARBOOK OF THE IMMIGRATION AND NATURALIZATION SERVICE (1981). Perhaps as many as one-third eventually return to Mexico. BEAN, STEPHEN, & OPITZ, *The Mexican Origin Populations in the United States: A Demographic Overview*, in THE MEXICAN AMERICAN EXPERIENCE 57, 59 (1985) (De La Garza ed., 1985). Return migration is probably even higher among illegal immigrants.

128. The farm worker migrant will play an increasingly less significant role in the overall socio-economic statistics for Mexican-Americans. As of 1980, 79% of Mexican-Americans lived in metropolitan areas. GANN & DUIGAN, *supra*, note 6 at 318.

129. Horowitz summarizes studies from the late 70's and early 80's, which show considerable intragenerational and intergenerational change. "First generation immigrants demonstrate little occupational mobility, but much improvement of income level in the course of working lives . . . A California study shows intergenerational occupational mobility to be common: Fifteen percent of the first generation of Mexican-Americans were in white-collar jobs, compared to 27.4 percent of the second generation and 36.7 percent of the third. Third-generation median income as of 1970 was 74 percent higher than first-generation median income." *Horowitz, supra* note 84, at 73. Researches studying the impact of Mexican immigration into California concluded that later generations achieved higher levels of educations which they were able to translate into upward occupational mobility. K. McCarthy & R. Valdez, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA 60 (1986).

greater.[130] Increases in education generally lead to smaller families.[131]

Poverty among blacks is more intransigent. Despite the well publicized increases in the black middle class in recent years, intergenerational improvement in social status is not common. Moreover, black poverty is less influenced by increased education. Blacks, with a median of 12.3 years of schooling for those aged twenty-five and older, are closing the educational gap between themselves and white Americans, for whom the 1980 median years of schooling completed was 12.7 years.[132] Unfortunately, this has not translated into similar gains in median family income. The 1980 Census reports that black median family income was only 60.5% of white median family income. Hispanic median family income was 70.6% of white median family income, with Mexican-American family income being slightly higher than that for Hispanics generally. (The median years of education completed for Mexican-Americans is 11.5).[133]

Family disorganization—divorce, single-parent families, children living with grandparents, and unwed, often teenage, mothers—is significantly more prevalent among blacks than among Mexican-Americans and explains some of the differences observed in median family income between the two groups, as well as the higher level of dependency of blacks on welfare and other social services.[134]

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130. Horowitz notes: "There is no doubt that Mexican Americans overall have low levels of education, but these are in large part an artifact of ongoing immigration of uneducated adults from Mexico, and they also mask the much higher levels prevailing in younger age cohorts." *Horowitz, supra* note 84, at 72. *See also* K. McCarthy & R. Valdez, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA 56-60 (1986).

131. Mexican origin women show declining fertility rates with increased years of education. Moreover, native-born Mexican origin women have fewer children at all educational levels than do their cohorts born in Mexico, although their fertility rates still exceed those of Anglos. *Bean, Stephen, & Opitz, supra* note 86, at 64-65.

132. SOWELL, *supra* note 120, at 324.

133. U.S. Department of Commerce, Bureau of the Census, STATISTICAL ABSTRACT OF THE UNITED STATES 1987 at 121.

134. In 1975, Sowell observed that:

> Even though the number of American children living in poverty declined sharply during the 1960's, this was *not* true for children living in families headed by a woman—whether that woman was black or white. In short, the disorganized poor are not being lifted out of poverty, even though society as a whole—and especially minorities—may be advancing economically. Well-organized families, with both parents present, not only advanced economically but, outside the South, the younger (under 35) Negro families in this category actually overtook white families in the same category in income in 1970. In general, the Negro population is simultaneously advancing in the upper-income and occupational levels and retrogressing at the lower socioeconomic levels in terms of hard-core unemployment and increasing proportions of broken homes.

T. SOWELL, RACE AND ECONOMICS 156 (1975).

Nearly 10 years later, in 1984, Harvard political economist Glenn Loury observed that the

Controlling for these variables diminishes differences in family income for the three groups.

In short, the chief characteristic that blacks and Mexican-Americans have in common—disproportionate representation among the poor—has, aside from possible discrimination, different contributing causes. Those differences are sufficient to overcome the common concerns brought about by poverty, thus mitigating against a shared political agenda. There is a greater likelihood that the two groups will be competitors for scarce resources, than that they will see united political action as a means for both groups to escape poverty.[135] At any rate, the issue is sufficiently in doubt that shared economic status should not be seen as the basis for merging the two groups.

Another reason often given for seeing the two groups as one is their shared exclusion from white society. Here too, the differences in the experiences of the two groups are greater than their similarities. In most areas Mexican-Americans were not as rigidly segregated into identifiable neighborhoods as were blacks in the South.[136] In fact, the primary obstacle to Mexican-Americans bringing vote dilution

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trend identified by Sowell had escalated. Loury observed that differences in earnings between young, well educated black and white workers had diminished dramatically, and that something close to parity in economic status had been achieved for young intact black families. At the same time, the black underclass was growing at an alarming rate. He described the group, consisting of at least one third of the black population, as mired in social pathologies. Young men leave school at age 16, and often reach their mid-20's without having held a steady job. More than half the babies in some underclass neighborhoods are born out of wedlock. Black girls between the age of 15 and 19 are the most fertile population of that age group in the industrialized world, with birth rates twice as high as any other group of women in the West. In 1984, nearly three of every five black children did not live with both parents. Almost half of black children are supported in part by the state and federal government. Loury, *A New American Dilemma*, THE NEW REPUBLIC, Dec. 31, 1984, at 14.

135. Peter Skerry of the American Enterprise Institute notes that blacks frequently perceive affirmative action programs for Hispanics as a threat to black interests. For example, blacks opposed Los Angeles County's decision to increase Hispanic employment in county jobs, and black leaders were reluctant to endorse extending the coverage of the Voting Rights Act to Hispanics. Skerry, *Immigration and Affirmative-Action Studies*, 96 PUBLIC INTEREST 86, 93, 102 (Summer 1989). Dr. Skerry predicts, "as blacks feel increasingly squeezed by the kinds of redistricting and employment controversies described here, their opposition to Hispanic participation in affirmative action can be expected to increase." *Id.* at 102.

136. *See* Moore & Mittelbach, *Measuring Residential Segregation in 35 Cities*, in THE CHANGING MEXICAN AMERICAN 50, 81-82 (Gomez ed. 1972); D. Massey and N. Denton, *Trends in Residential Segregation of Blacks, Hispanics and Asians*. 52 AM. SOC. REV. 902-25 (1987). For Mexican-Americans, the stay in the barrio is not likely to be permanent. "[W]hereas primary and secondary immigrants settle in immigrant enclaves (barrios), subsequent generations are more likely to follow the traditional tenement trial: from ghettos and barrios to the suburbs. This process of residential dispersion . . . substantially reduces the social isolation of Latinos and helps expedite their integration into the wider society." K. MCCARTHY & R. VALDEZ, CURRENT AND FUTURE EFFECTS OF MEXICAN IMMIGRATION IN CALIFORNIA 63 (1986).

suits has been the inability to create districts in which they were a majority. The ability of Mexican-Americans to live among Anglos is no doubt responsible for the fairly high intermarriage rate. Studies of the exogamy rates for Mexican-Americans report figures ranging from five percent to more than fifty percent, depending upon location and generation of residency within the United States. The figure for blacks marrying Anglos is one to two percent,[137] and even fewer blacks marry Mexican-Americans.

Studies of perceived social distance suggest little reason to believe that common perceptions of discrimination have fostered a sense of shared community among members of the two groups.[138] As to perceptions of discrimination, studies show blacks to be much more likely than Hispanic groups to perceive their groups as being disadvantaged.[139] Although perceptions of discrimination by Mexican-Americans increase with the length of stay among immigrants, and with generations, the levels to which those perceptions rise are modest. Consistent with these studies, government statistics indicate that Hispanics file many fewer charges of discrimination than do blacks.[140]

In summary, plaintiffs in these cases are urging a proposition seldom documented: the melting of two separate and distinct ethnic groups into one. This proposition was not contemplated by Congress when it amended Section 2, and comes very close to crossing the line between protecting racial groups from discrimination in the political process, and protecting a political group, some of whose members are minorities, from political defeat. Moreover the seductive logic of a "Rainbow Coalition" based on lower socio-economic status, shared history of discrimination and exclusion evaporates upon more careful scrutiny of the significant differences in the two groups' experiences and attitudes. Coalitions of minorities should, under some circumstances, be recognized as falling within the pro-

137. *See* E. MURGUIA, CHICANO INTER-MARRIAGE: A THEORETICAL AND EMPIRICAL STUDY (1975). Murguia reports that only five percent of Mexican-Americans married non-group members in heavily Mexican-American Hidalgo County, Texas. In contrast, 34% of Mexican-Americans married exogomously in Southern California. *Id.* at 48-49. Horowitz reports studies that found even higher rates, particularly among native-born Mexican-Americans in Ohio and New York. *Horowitz, supra* note 122, at 81-2.

138. See discussion of social distance studies, Part VI *infra*, and discussion accompanying note 199.

139. See discussion of studies on perceptions of discrimination, Part VI, and text accompanying notes 200-203.

140. *Horowitz, supra* note 122, at 86-87.

tection of Section 2, but the determination that two groups have become one should be made very cautiously.

V. Practical Problems of Proof: Obstacles to Satisfying *Thornburg* and Beyond

If the coalition can get beyond the problem of its qualification as a "group" entitled to protection, or if the courts continue to ignore the problem, difficulties of proof remain. To date, most coalition suits have failed because the groups have been unable to demonstrate "political cohesiveness." In the previous section, we argued that this question should not be considered until the two groups have demonstrated that they are indeed "one" for purposes of Section 2. As a practical matter, if the new "group" is unable to prove any one of the *Thornburg* prerequisites, the case should fail. Proof of political cohesiveness is perhaps somewhat more objective than proof that the two groups are really one. If the groups are not politically cohesive, then determining whether they are otherwise a "group" for Section 2 purposes is unnecessary.[141] In this part of the article, we examine the meaning of "political cohesiveness," the evidence generally considered on the issue, and the special problems presented by a coalition suit. Political cohesiveness is likely to be the most important of the *Thornburg* prerequisites for coalition suits, but the other prerequisites and the Senate report factors are potentially problematic as well. A discussion of these issues completes this section.

A. Can a Coalition Demonstrate Political Cohesiveness?

The term "political cohesiveness" is not expressly defined in *Thornburg*. The Court's comments concerning the requirement, however, suggest that plaintiffs must demonstrate that members of the group vote sufficiently as a group to establish: (a) That there is a "group" political agenda; and (b) that enough members of the

141. Thus the courts in, *Pomona*, *Overton*, and *Hardee County*, that found the two not to be politically cohesive, reached an acceptable result, even though they may have made the unwarranted assumption that a coalition of two minorities was the legal equivalent of one. The two cases, *LULAC* and *Campos*, that allowed the numbers of blacks and Mexican-Americans to be combined "because the two groups were politically cohesive," quite probably confused a political coalition with an ethnic minority.

group can be expected to vote together to elect candidates from single member districts who will further that agenda. The court notes: "[I]f the minority group is not politically cohesive, it cannot be said that [the election system] thwarts distinctive minority group interests."[142] It quotes an article written by two civil rights lawyers:

> To demonstrate [that minority voters are injured by at-large elections] the minority voters must be sufficiently concentrated and politically cohesive that a putative districting plan would result in districts in which members of a racial minority would constitute a majority of the voters, whose clear electoral choices are in fact defeated by at-large voting.[143]

The primary means the Court identified to demonstrate "political cohesiveness" was to show that a "significant number of minority group members usually vote for the same candidates."[144] Problems of interpretation are obvious. Does "significant" mean "majority"? Does "usually" mean more often than not?

Logically, anything less than a "majority" voting together at least "more often than not," would mean that most members of the minority group did not share a common political agenda, or at least were unable to agree on the candidates that would further that agenda. Pragmatically, to benefit from single member districts, the group would have to be "sufficiently cohesive" to control the electoral outcome in at least one district. A group that would constitute only fifty percent of the voters of a district would need to be 100% cohesive to control the outcome. Likewise, groups with a greater percentage of a district's voters would need to demonstrate less cohesiveness.

1. The Evidence Generally Considered on the Issue of Group Voting Behavior[145]

For those accustomed to believing in the secrecy of the ballot, discovering that social scientists can determine how groups of voters have voted in particular election contests comes as somewhat of a

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142. Thornburg v. Gingles, 478 U.S. 30, 51 (1985).

143. *Id.* (quoting Blackshere & Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden, 34 HASTINGS L.J. 1, 55-56 (1982)).

144. *Thornburg*, 478 U.S. at 56.

145. The authors gratefully acknowledge the technical assistance of Dr. Harold Stanley, Professor of Political Science, University of Rochester, in the preparation of this segment of the article. All opinions, and, of course any errors, are our own.

surprise. In the typical single-minority vote dilution case, involving a minority group that is unevenly dispersed throughout the jurisdiction, group voting behavior can be reliably estimated. If the data will permit, social science experts in voting cases use three complementary means for estimation: Homogeneous precinct analysis, regression analysis, and exit poll results.

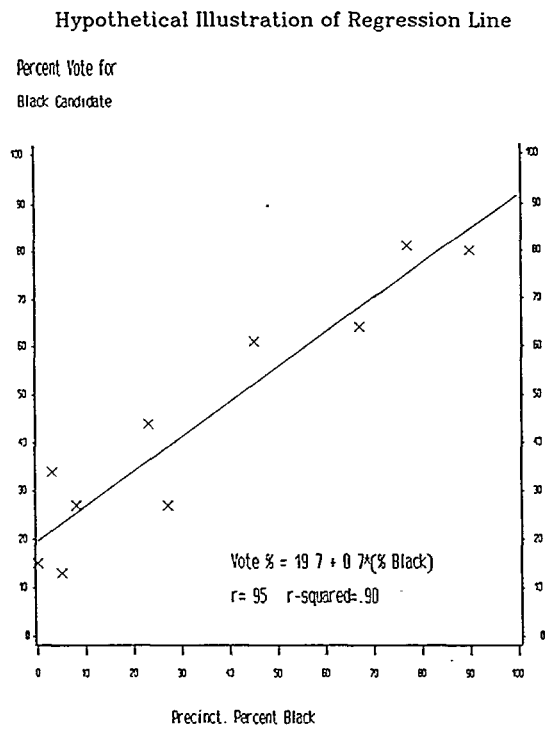
Homogeneous precinct analysis is easily understood. Voting precincts that are overwhelmingly one-race (a frequently used standard is ninety to 100%), are examined to determine which candidates the voters in these precincts supported. If a jurisdiction is highly segregated, and most voters vote in precincts that are roughly ninety to 100% one race, homogeneous precinct analysis obviously provides a very accurate picture of voting behavior by race.[146] This methodology is not available in jurisdictions with no, or limited, one-race precincts. Moreover, the behavior of minorities in homogeneous precincts may not be representative of those living in "mixed-race" precincts. Thus, social scientists may be reluctant to rely solely upon the data provided by a few homogeneous precincts.

The second standard device for determining voter behavior, regression analysis, often is available to supplement homogeneous precinct analysis, or as an alternative analytical device. In early voting cases, regression was utilized merely to show a correlation between the race of the voters and the votes received by candidates identified with the minority. In its most basic form, the first step in the analysis is to plot points on a graph. Each voting precinct represents a point. The coordinates of the points are the black percentage of the precinct, and the percent of the precinct's vote cast for the black candidate. Next a line is constructed that describes the best linear relationship fitting the points. The line produced is the "regression line." The slope of the line is a measure of the relationship between two variables (the percent black of the precinct, and the vote received by a particular candidate). The diagram below demonstrates basic regression:

146. Both homogeneous precinct analysis and regression analysis require the race of the voters to be identified by voting precinct. In the absence of actual voter counts by precinct, by race, derived from voter sign-in sheets, accurate registration records containing racial identifications are reasonable data. Otherwise, it is necessary to extrapolate from census data. Among other things, the quality of the data depends upon the recency of the census. Nine years after the census, the population of the precinct could have changed significantly.

Hypothetical Illustration of Regression Line

Precinct	Percent Black	% Vote for Black Candidate
A	0	15
B	3	34
C	5	13
D	8	27
E	23	44
F	27	27
G	45	61
H	67	64
I	77	81
J	90	80



Correlation coefficients ("r") range from 0 to 1 in magnitude and will be either positive or negative. A correlation coefficient of +1 would indicate a perfect positive correlation between the variables. For example, if in the above graph each increase of the black population was observed to correlate with exactly the same percent increase in the vote for the black candidate, the slope of the line would be +1. Many cases found the relationship between black population and the vote for the black candidate to be quite strong. Correlations in the .90 and above range are common. If "r" is squared, the resulting figure is a measure of the amount of variance in the dependent variable that is explained by changes in the independent variable. In the hypothetical above, "r square" is equal to .90. Therefore, ninety percent of the change in the vote received by the black candidate can be explained by change in the black percentage of the precincts.[147]

147. *See* Romero v. City of Pomona, 665 F. Supp. 853, 869 (C.D. Cal. 1987) (for court endorsement of this explanation).

Despite the tendency of courts to believe otherwise—usually with the substantial assistance of the plaintiffs' statisticians,[148] a high correlation, without more, says little about voter behavior in the jurisdiction.[149] High correlations are possible even though very few blacks voted for the black candidate. Consider the following hypothetical: Ten precincts made up of 100 voters each, ten percent, twenty percent, thirty percent black, and so on up to 100 percent. The black candidate receives one percent of the vote in the ten percent precinct; two percent in the twenty percent precinct, and so on up to ten percent in the 100% precinct. The correlation between the percentage black of the precincts and the percentage of the vote received by the black candidate is +1. For every ten percent increase in the percentage black, there is a one percent increase in the votes received by the black candidate. Despite the perfect correlation, a maximum of ten percent of the black voters voted for him.[150]

The correlation coefficient does not provide information about whether a majority of black voters supported a particular candidate. It is, however, possible to use regression to estimate the percentage of blacks who voted for a particular candidate. Note that in the example above there was no precinct that was 100% black, the most black being ninety percent. But note also that it is possible to determine where a theoretical 100% black precinct would fall on the regression line. Based on the relationship observed between the percent black of the precinct and the vote for the black candidate, and assuming that relationship would continue, then 91.8% of the voters in our theoretical 100% black precinct would have supported the black candidate.[151] In opinions such as *Thornburg*, this is the

148. *E.g.*, Gingles v. Edmisten, 590 F. Supp. 345, 368 n.30 (E.D. N.C. 1984) (the plaintiffs' expert testified that correlation coefficients above .5 are relatively rare, and those above .9 extremely rare). Correlation coefficients for elections analyzed in the case ranged from .7 and .98. This observation (rarity of such correlations) is much ado about nothing. Most social science studies of other kinds of variables assume that there is no correlation between the variables. Such an assumption in the area of voter behavior would be counter to what is generally known to be true, and what is a matter of common sense. Voters generally identify with candidates whom they see as most like themselves. For black people in this country, race is a point of significant identification. That black voters identify more often with black candidates than do white voters can hardly be seen as "rare."

149. However, the converse is not true. A low correlation between race of the voters and the votes for the black candidate would suggest that voting is not along racial lines. Just how high a correlation coefficient must be to be deemed significant is a matter of some disagreement.

150. The correlation coefficient says nothing about which voters in the precincts actually supported the black candidate—except of course in the 100% black precinct where all the votes had to come from black voters. Possibly all the votes received by the black candidate in the other precincts actually came from white voters.

151. This figure can be approximated from a visual examination of the graph. The regression

figure reported as the percentage of the black voters supporting particular candidates.[152]

The accuracy of the estimate produced by regression analysis is influenced by several factors. First is the reliability of the data. If registration or turn-out statistics are not available by race, the racial makeup of precincts will have to be approximated from census data, which may be outdated, or which may not match geographically the voting precincts. Second is the number of voting precincts. The accuracy of the estimate improves with greater numbers of data points. Third is the distribution of the minority population within precincts. If there is little variation in the independent variable (minority percentage of the turn-out, registered voters or voting age population) across precinct lines, the correlation coefficient will generally be low. Even if the correlation coefficient is statistically significant, the estimate of the vote for the minority candidate in a hypothetical 100% minority precinct can be subject to a wide margin of error.[153]

In any given jurisdiction, the presence of some of the factors may make the calculation of "political cohesiveness" problematic even if a single minority group is involved. When statistical evidence is unreliable, or unavailable, other evidence must suffice. Other evidence might include an analysis of the behavior of the group in a larger context. For example, if the jurisdiction challenged is a city with a single polling place, an analysis might be done of the "city's" minorities as a part of a larger jurisdiction, such as a county. Lay testimony is also considered relevant, but should be recognized as very limited in value.[154]

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line crosses the 100% black precinct at the 91+ point on the vertical axis. It can also be determined more precisely by plugging 100% into the equation for the regression line: Percent of blacks voting for the black candidate in 100% black precincts equals 19.7 (the intercept, which equals the vote in 0% black precincts) + 0.721 (the slope of the line) x 100%. The resulting figure is 91.8%.

152. The entire analysis is done by computer and is somewhat more complicated than reported here, but this is the basic idea. There is little disagreement that the methodology will reliably measure the relationship between the race of the voters and the vote received by different candidates, assuming appropriate data are available. There is more disagreement as to whether the estimate derived from extrapolating to a 100% black precinct is a reliable estimate of how black voters actually voted.

153. For example, suppose all voting precincts were between 30% and 40% black. A range of 10 percentage points in the independent variable may be insufficient to justify confidence that any measured correlation with votes for the black candidate is the product of a true relationship between the variables. Even more problematic is extrapolating from the last data point—a 40% black precinct—out to the hypothetical 100% black precinct used to "estimate" the percentage of blacks who voted for the black candidate.

154. *See* Sanchez v. Bond, 875 F.2d 1488, 1493 (10th Cir. 1989). Lay witnesses can generally

When the group involved is black, and the jurisdiction is in the South, political cohesiveness should be subject to proof by any reasonable evidence. Evidence from other voting cases, from exit polls, and from studies by political scientists indicate that high black support for *black* candidates in primaries, and for the Democratic nominee in general elections is the norm.[155] In light of this substantial body of evidence, it is perhaps justifiable to place a light burden of proof of cohesiveness on black plaintiffs, and then shift the burden of producing evidence to the contrary to the defendants, at least in those cases in which blacks constitute a substantial, geographically compact portion of the population.[156] As will be seen in the next section, political cohesiveness of Hispanics is not nearly as well documented, and is much more subject to local conditions. Moreover, documented cases of political coalitions between blacks and Hispanics are very rare. In coalition suits the plaintiffs must argue that a condition seldom observed elsewhere is present in their jurisdiction. Their burden of proof should be heightened accordingly.

2. The Courts' Consideration of Political Cohesiveness in Coalition Dilution Cases

The first case[157] in which black and Mexican-American plaintiffs made an attempt to demonstrate political cohesiveness, *Overton v.*

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be found to testify on both sides of the issue. Lay testimony, and its limits, were discussed by the court in Overton v. City of Austin, Civ. No. A-84-CA-189 (W.D. Tex. Sep. 15, 1987) (Mem. Op.) at 32. The court noted that the plaintiffs had offered lay testimony concerning the cohesiveness of Mexican-Americans and blacks:

> the witnesses are not competent to testify as to why other individuals voted in a certain way. The witnesses do not purport to have performed any sort of survey or analysis to support their views, nor do they purport to be experts in gathering and interpreting data on voting patterns. Rather, they are merely offered as individuals familiar with Austin politics, and with the black and Mexican-American communities. In short, the affidavits offer some evidence of cohesiveness in terms of similarity of concerns, but fail to offer much else.

Id. at 33. About defendants' witnesses, the court noted:

> Like Plaintiffs' affiants, Defendants' witnesses are individuals who have been active in Austin politics. . . . The affidavits of both sides are not particularly helpful, however, because they contain the opinion testimony of a small number of individuals as to how two groups, containing over 107,000 people, will act.

Id. at 33-34. The court added, "[t]he opinion testimony might be of value if it were supported by concrete evidence." *Id.* at 34.

155. *See infra* notes 207-15 and accompanying text.

156. As noted earlier, if the black population is only barely able to satisfy the size and compactness requirements (i.e., it is able to constitute only a slight majority of the voting age population), then black voters would have to be nearly 100% cohesive to take advantage of single-member districts. This kind of cohesiveness should require direct proof.

157. *See* Latino Political Action Comm. v. City of Boston, 609 F. Supp. 739, 747 (D.

City of Austin,[158] was tried before *Thornburg*. The two groups apparently did not seek to establish a "coalition" suit, but rather each argued for a single member district plan that would provide a district for their group. The trial court found for the defendants, but the case was remanded for reconsideration in light of *Thornburg*. The two groups argued for the first time on remand that their numbers should be combined to meet the *Thornburg* prerequisites.[159]

The court's opinion does not contain sufficient detail to permit an evaluation of either side's evidence of cohesiveness. At one point the court notes that the only evidence submitted by the plaintiffs was "various unanalyzed election results, a tabulation of the votes cast in predominantly black and Mexican-American precincts from 1975 to 1983, and the affidavits of two individuals as to their perceptions of the cohesiveness of the two groups."[160]

Earlier the court notes that its polarized voting analysis was based on data from voting precincts that were predominantly one race. Only the Anglo precincts, which were ninety percent or greater would have qualified as "homogeneous precincts." The few predominantly Mexican-American precincts ranged from 60-89%, and the few black precincts from 50-85%. The court noted that these precincts contained only a small portion of the total voters of the three races.[161] Nevertheless, the court utilized the precincts to determine polarization.[162]

It is not clear from the opinion whether the reports of group support for various candidates, which appear in the court's discussion of political cohesiveness, also came from an examination of these precincts.[163] Whatever the source of the data, the court concluded

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Mass. 1985) (court rejected the notion that blacks, Hispanics, and Asians should be grouped together in a district so that their combined numbers would equal a majority). The court stated: "In the absence of any credible evidence that Boston's various minority groups vote as a bloc, however, there is no reason to believe that the creation of a district whose majority consists of a plurality of minorities would, in fact, enhance the voting strength of any one minority group." *Id.* at 748. *See also* Butts v. City of New York, 614 F. Supp. 1527 (S.D. N.Y. 1985). The court noted: "Obviously, if the Black and Hispanic members of the plaintiff class were to combine as one coalition, they could elect a fusion candidate, but this had not heretofore been achieved in New York City, and is unlikely notwithstanding the tendency of the literature to lump them together as if they were a single bloc." *Id.* at 1546.

158. Civ. No. A-84-CA-189 (W.D. Tex. Sep. 15, 1987), *on remand from* Overton v. City of Austin, 798 F.2d 150 (5th Cir. Tex. 1986) (on file at the *Pacific Law Journal*).

159. *Id.* at 24.

160. *Id.* at 30-36.

161. *Id.* at 29.

162. *Id.* at 37.

163. The defendants' experts, Dr. Charles Bullock, and Dr. Susan MacManus later prepared a paper on their analysis of voting behavior in Austin, which contains results consistent with those reported in the opinion. They utilized regression analysis to estimate the voting behavior

that the candidate preferred by Mexican-Americans was supported by an average of sixty-nine percent of the black voters, and the candidate preferred by blacks was supported by an average of seventy-three percent of the Mexican-American voters. ("Preferred candidate" was not defined, but apparently the term was used to refer to the candidate, regardless of race, who received the greatest number of votes from the group). A more careful examination of the data indicated that when a minority candidate ran, "Anglo voters voted with one of the two minorities more often than the two minorities voted together. . . In elections where Anglos ran against minorities and the Anglos supported a different candidate than did the minority groups, minorities voted together 5 times, and differently 4 times."[164] Moreover, in the only contest in which a black ran against a Mexican-American, each group supported its own candidate.

Ultimately, the court concluded that the plaintiffs had failed to carry their burden of proof. It noted that in a district made up of both groups, the most likely outcome based on past performance was that one group's candidate would lose to the other, with Anglos' votes deciding the election outcome.[165] The opinion is too confusing on the matter of who voted for whom under what circumstances, based on what evidence to allow for an evaluation of the determination of cohesiveness. What is crystal clear however, is that a Mexican American had served on the council since 1975, and blacks had served continuously since 1971. Mexican-Americans were thirteen percent of the population, and blacks were twelve percent. Neither districting plan offered by either group was likely to increase the number of minorities serving on the council.

Like *Overton*, the next case, *LULAC v. Midland's Indep. School Dist.*,[166] arose in Texas. Prior to *Thornburg*, the defendant voluntarily

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of each group. No mention is made of this analysis in the opinion. Bullock and MacManus concluded that the most frequent pattern of voting was for all three groups to support the same candidate. In seven of eight contests in which a Hispanic was a majority or plurality leader, Hispanics and blacks voted together. However, Hispanics supported the black candidate in only one of the seven contests won by blacks. In contests in which Hispanic candidates lost, only one involved a situation where blacks and Hispanics united. In the other two, Hispanics and Anglos voted more alike. Black and Anglo voters did not support the Hispanic candidate in five contests. Only four blacks lost to Anglos. Two were supported by blacks, but not by Hispanics or whites. Thus they concluded that a minority coalition was more likely when an Hispanic ran, but quite rare when the candidate was black. Bullock & MacManus, *Tri-Ethnic Voting Coalitions: Conflict or Cohesion? The Case of Austin, Texas, 1975-1985* (unpublished manuscript) (on file at the *Pacific Law Journal*).

164. Overton v. City of Austin, Civ. No. A-84-CA-189, at 32 (W.D. Tex. Sep. 15, 1987) (on file at the *Pacific Law Journal*).

165. *Id.* at 37.

166. 812 F.2d 1494 (5th Cir. 1987).

had agreed to change the at-large method of election, but the parties could not agree on an appropriate replacement. The lower court rejected a mixed plan (four single-member districts and three at-large seats) in favor of a seven member plan proposed by the plaintiffs. This plan contained one district with an Hispanic majority, and a second with a black plurality (not majority). Neither group could independently satisfy *Thornburg*.[167] Therefore, the issue on remand was whether the two groups could be combined.

If evidence on the cohesiveness issue was difficult to evaluate in *City of Austin*, comparable evidence was non-existent in *LULAC*. The only evidence cited by the court was testimony that showed that "Blacks and Hispanics worked together and formed coalitions when their goals were compatible. Additionally, the bringing of this lawsuit provides evidence that blacks and Hispanics have common interests that induce the formation of coalitions."[168] To recognize this "evidence" as "proof" of cohesiveness is shocking. By this court's reasoning, the *Thornburg* prerequisite is satisfied by the fact that suit has been brought! As to working together "when their goals were compatible," do not all groups do that? Is not the problem that their goals may not be compatible very often? Curiously, the court rejected a survey that demonstrated that the two groups had "mutually exclusive interests," and that the two groups were "politically distinct" because those facts were "not relevant to how cohesive people will be" or how they would vote.[169]

As a practical matter, what the court did in *LULAC* was to provide a "remedy" in the form of the best available single member district to each of the *two* groups, even though neither could satisfy *Thornburg*'s requirements of size and compactness. The remedy selected—one majority Mexican-American district, one district in which blacks were a plurality, and five other "Anglo" districts—suggests that neither the plaintiffs nor the court really believed

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167. *Id.* at 1504. The existing school board had five members. Most courts to consider the issue have concluded that the existing number of seats cannot be expanded in order to permit the group to satisfy *Thornburg*. *See* McNeil v. City of Springfield Park Dist., 851 F.2d 937 (7th Cir. 1988) *cert. denied* 109 S. Ct. 1769 (1989). If proportional representation were the law, a group would need to be 20% of the potential voters to be "entitled" to a seat. Blacks were less than nine percent of the total population of the county, and a smaller percentage of the voting age population. Hispanics were 15% of the total population, but their younger average age, and the inclusion of non-voting aliens in that number, would have meant that they were a much smaller percentage of those potentially able to cast a ballot.

168. *See* LULAC v. Midland's Indep. School Dist., 648 F. Supp. 596, 606 (W.D. Tex. 1986).

169. *Id.* at 607.

members of the two groups were politically fungible.[170] Ironically, Section 2, which specifically disavows a right to proportional representation, was used to provide greater than proportional representation for two groups, neither of whom alone would have qualified for a seat had proportional representation actually been the law.[171]

Romero v. City of Pomona,[172] a coalition suit decided in favor of the defendants, is perhaps the best example of the difficulties involved in establishing the voting behavior of groups in a tri-ethnic city. In 1980 the total population of Pomona, California, was 92,742 persons, of whom 30.5% had Hispanic surnames, and 18.6% of whom were black. After adjustments for age and citizenship, the percentage of those eligible to vote who were Hispanic was less than twenty percent. The minority population was not particularly concentrated. Of the twenty-five voting precincts in the city, none had more than a sixty percent Hispanic population, or a sixty-three percent black population. Only three precincts had combined minority populations that exceeded seventy percent when adjusted for age and citizenship.[173]

The absence of any precinct that was close to ninety percent "one race" foreclosed the use of homogeneous precinct analysis,[174] and there were questions about the reliability of the regression analysis. The plaintiffs' expert essentially ignored the problem of cohesiveness

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170. Hispanics were 54% of the population of the first district, which was also 15% black. The generally younger age of the Hispanic population, the probable presence of a substantial number of non-citizens, plus their much lower registration rate would suggest that Hispanics had little chance of controlling the district by their votes alone. Blacks were actually more likely to control the "black" district, even though they were only 42% of the total population. Hispanics who made up 24% of the total population, were a much smaller portion of the actual voters, while black and Anglo registration rates were about equal. A black candidate with strong black support would need only slight support from Hispanics to be elected.

171. The lower court's decision was affirmed by a panel of the 5th Circuit. *See* LULAC v. Midland Indep. School Dist., 812 F.2d 1494 (5th Cir. 1987). However, that opinion was vacated by the en banc court of appeals. Two members of the panel found the lower court's finding of cohesiveness not to be clearly erroneous. That opinion also relied upon a regression analysis performed by an expert for the plaintiffs, which was not specifically mentioned by the lower court. It is not completely clear from the opinion, but apparently the expert combined the two groups for purposes of the regression analysis, and then concluded that the "minorities" voted differently from "non-minorities." *LULAC*, 812 F.2d at 1501. *See also* Campos v. City of Baytown, 849 F.2d 943 (5th Cir. 1988) *cert. denied* 109 S. Ct. 3213 (1989) (same methodology, employed by the same expert).

172. 665 F. Supp. 853 (C.D. Cal. 1987).

173. *Id.* at 861.

174. *Id.* at 860. Plaintiffs' expert apparently did offer such an analysis. He did not have actual precinct registration data by race, so he extrapolated from the census information, a procedure particularly prone to error when dealing with a Hispanic population. The census units making up a precinct could well be ninety percent Hispanic, but because of the low average age, and the presence of a substantial number of non-citizens, can produce a registered voter population that was 60% or less Hispanic.

by combining the two groups as a "minority" group. (In other words, he assumed the blacks and Hispanics were cohesive, and utilized regression analysis to demonstrate that they voted differently than whites). He found a strong correlation (.90) between the percent minority in a precinct, and support for a minority candidate, but admitted that "cross-racial support for candidates [was] concealed in the correlation" by combining the groups.[175]

It should be obvious that a regression analysis that utilizes the combined minorities as the independent variable provides no information about the voting behavior of the two groups vis a vis one another.[176] The proper procedure would have been to perform a regression analysis incorporating each group as a separate variable. Further reliability problems were presented by the absence of precinct level population data by race.

The *Pomona* court recognized the fallacy involved in combining the groups for purposes of regression analysis. Any illusion that the plaintiffs' regression analysis established that the two groups voted together was dispelled by an exit poll, also conducted by plaintiffs' political science expert. The poll was conducted of voters as they left the polling place for an election that included both a black and an Hispanic among the candidates for the city council. The poll established that seventy-one percent of the Hispanics voted for the white opponent of the black candidate, and that sixty percent of the blacks voted for the Anglo opponent of the Hispanic candidate.[177]

This same flawed methodology (combining blacks and Hispanics to create a "minority" category for the regression analysis) was utilized by the plaintiffs' expert in yet another case in Texas, *Campos v. City of Baytown*.[178] There, however, both the trial court and the court of appeals were overcome by the modern day sorcery of statistics. The court of appeals appeared to recognize that *both* groups had to support the same candidates:

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175. *Id.*

176. The fact that a majority of the combined group of blacks and Hispanics vote together is meaningless information. This information certainly is not evidence that *Hispanics* support the same candidates as blacks. And there is no support for the proposition that if any combination of blacks and Hispanics (i.e., 90% of the blacks, and 10% of Hispanics) vote for the same candidates, the requirement has been meet. This would be to treat the two groups as one without any evidence that they are. By that reasoning, all voters in a particular election vote alike because when all voters, blacks, whites and Hispanics, are combined, a majority of them support the same candidates.

177. *Romero*, 665 F. Supp. at 860.

178. Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988), *reh'g denied*, 849 F.2d 943 (1988), *cert. denied*, 109 S. Ct. 3213 (1989).

> The key is the minority group as a whole. Of course, if one part of the group cannot be expected to vote with the other part, the combination is not cohesive. If the evidence were to show that blacks vote against a Hispanic candidate, or vice versa, then the minority group could not be said to be cohesive.[179]

Where the court erred was in its belief that the plaintiffs had demonstrated that blacks supported Hispanics, and vice versa.[180] Unfortunately, there was no exit poll in *Baytown* to clear away the smoke as there had been in *Pomona*. Perhaps the two groups in fact voted together in *Baytown*, but the plaintiffs' regression analysis that combined the two groups was not evidence of that fact.[181]

The lower court in *Campos* rejected the one item of unimpeachable evidence of how some of the jurisdictions black voters had reacted to Hispanic candidates. Only one small precinct qualified as a homogeneous black precinct. This precinct voted overwhelmingly for the white Anglo opponent of the Hispanic candidates. Because that

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179. Campos v. City of Baytown, 840 F.2d 1240, 1245 (5th Cir. 1988). By this statement, the court seemingly rejected any notion that only a majority of the combined "new" group need be cohesive—i.e., that if 65% of a combined group made up of fifty blacks and fifty Hispanics supported a black candidate, the "group" is cohesive, even though it is impossible to tell whether a majority of each group supported the candidate. *Id.* Even this is ambiguous because the court also noted: "Baytown argues that . . . plaintiffs must show that Blacks are cohesive, that Hispanics are cohesive and that Blacks and Hispanics are together cohesive. We think that burden is too great, if not impossible, in certain situations." *Id.* In a footnote, the court explains, "For example, if the heavily minority precincts in an election district have roughly equal percentages of both Blacks and Hispanics, it could prove to be nearly impossible to attribute the votes of those precincts to one minority group or the other but quite possible to determine whether the two minority groups together are politically cohesive." *Id.* at 1243 n.6. These conflicting positions are difficult to reconcile ("only a majority of the combined group must be cohesive," with "if one group cannot be expected to vote with the other, the combination is not cohesive"). Perhaps the court is saying that if a majority of the two groups can be seen to support the same candidates, then it is incumbent upon the defendants to prove the potentially unprovable: How the two groups voted individually—thereby effectively shifting the burden of proof. Perhaps the court was thoroughly confused, or simply disingenuous in its willingness to believe that the two groups were cohesive.

180. As noted earlier, a procedural "catch 22" resulted in the denial of the defendants' request for rehearing en banc. Judge Higginbotham, joined by the five other judges who voted for a rehearing, wrote a scathing dissent, ending with an invitation to the defendants to seek Supreme Court review: "Today we fail to give to protected minorities, district courts, state government, and the bar our best considered reading of the core meaning of legislation that speaks to the essence of our arrangements of governance. We can do better, but if we will not, hopefully, the Supreme Court will do so." *Campos*, 849 F.2d at 946 (Higginbotham, J., dissenting).

181. To test the possibility that a correct statistical analysis might nevertheless support the finding of cohesiveness, the authors obtained the election returns and racial breakdown by precinct used by the plaintiffs expert in his regression analysis. We asked Dr. Harold Stanley, a Political Scientist at the University of Rochester who is experienced in the use of regression analysis, to use this information to perform the correct analysis. He ultimately concluded that from the data available it was not possible to perform an analysis that would produce results sufficiently reliable to serve as the basis for an opinion as to how the two groups had voted.

precinct contained less than thirteen percent of the town's black population, the court concluded the results in this precinct were not representative of the voting behavior of blacks as a whole.[182] Ordinarily, the results in a single homogeneous precinct should be viewed cautiously when offered as representative of the behavior of black voters in mixed precincts. In this case, however, the results in the homogeneous black precinct were in line with those generally documented by the social science literature: black voters ordinarily do not vote in large numbers for Hispanic candidates. The burden of proof on the issue of cohesiveness was on the *plaintiffs*, who were forced to argue that blacks and Hispanics in Baytown behaved differently than those groups had generally been observed to behave in other circumstances. By rejecting the homogeneous precinct analysis, the courts in *Campos* effectively reallocated the burden of proof to the defendants. Moreover, the courts accepted as proof of cohesiveness the results of a methodology that could be described as "smoke and mirrors" statistics. The inappropriateness of combining two minority groups to decide if they vote together is not a matter upon which reasonable experts could legitimately disagree. Rather the analysis upon which the court relied in *Baytown* was simply incorrect—as incorrect as saying that two plus two is equal to five.[183]

One suspects that *Campos* really represents a rejection by this court of the *Thornburg* prerequisites. The *Campos* courts may have believed that single member districts would make it easier for Hispanic candidates to be elected, even if they lacked the geographic compactness necessary to be a majority of a single member district, and even if very few blacks actually supported them.[184] While such

182. Campos v. City of Baytown, 840 F.2d 1240, 1248.

183. The same expert testified for the plaintiffs in both *Campos* and *Pomona*. In *Pomona*, however, he conceded the obvious: His regression analysis using the combined minorities could not be used to determine if blacks supported Hispanic candidates, and vice versa. "The plaintiffs' expert . . . testified that the lack of cross-racial support for candidates is concealed in the correlations because the totals presented combined hispanic and black voters." *See* Romero v. City of Pomona, 665 F. Supp. 853, 860 (C.D. Cal. 1987).

184. Events following the post-*Campos* elections in Baytown provided little support for the unified minority thesis. A Mexican-American was elected in the "minority" district (and a second Mexican American was elected to an at-large seat). However, blacks apparently were not satisfied with the results. An Anglo councilman was quoted as saying "[t]he talk on the street is, Blacks aren't happy because they feel left out of the system." Howell, *Baytown Council Harmonious, But Both Sides Are Watching*, Houston Chronicle, October 30, 1989, § A, at 11. In response to that dissatisfaction, the Mexican-American elected from the "minority" district now favors increasing the size of the council so "Blacks would be guaranteed one district in which they would be a majority of votes." *Id.*

a view may be supportable, it is not the view adopted by the Supreme Court in *Thornburg*.

B. Other Problems of Proof in Coalition Dilution Suits

The primary obstacle to the success of a coalition dilution suit is likely to be the inability to demonstrate cohesiveness. Theoretical and practical problems are, however, presented by the remaining elements of the case.

1. Compactness and numerosity

Courts have tended to lump together two issues that deserve separate consideration: (1) Does the group have the numbers to justify an expectation that it should, in the absence of discrimination, be able to elect a candidate of its choice; and (2) is the group sufficiently concentrated geographically to benefit from single member districts? Courts have generally answered both of these questions by determining if a single member district plan can be created in which the minority group would be a majority of the potential voters.[185]

When two minority groups are involved, there is a strong likelihood that one group, usually blacks, will be residentially concentrated, while the other group will be geographically dispersed. Inevitably, a districting plan will be of greater benefit to the more concentrated group. In *Concerned Citizens v. Hardee County*,[186] a coalition dilution case involving a rural county in southern Florida, more than eighty percent of the black population, which was seven percent of the county total, lived in two neighborhoods that were separated geographically by most of the county's white population. The His-

185. Logically, the two issues should represent separate limitations. A group that lacks sufficient numbers to be "entitled" to a seat (i.e., a 10% minority in a jurisdiction which has a five member legislative body), is not in a position to claim that "but for" discrimination it would be able to elect candidates of its choice. Conceivably, a highly concentrated minority could be a majority of a single member district, even if it has only half the votes necessary to "qualify" for a seat. (This can be accomplished by drawing a district that includes all the minority population, and then keeping the total population on the low side for one-person, one-vote purposes). Thus if "sufficiently large and geographically compact to constitute a majority in a single member district" is interpreted literally, a minority group that would not have been assigned a seat had proportional representation been the law potentially could acquire "double" its voting strength under Section 2.

186. C.A. No. 86-209-CIV-T-17 (M.D. Fla., April 24, 1989) (Mem. Op.) (on file at the *Pacific Law Journal*).

panic population, thirteen percent of the total, was dispersed throughout the county. The "most" minority district that could be drawn was thirty-four percent black and 16.3% Hispanic. Both black neighborhoods, and thus eighty-five percent of the total black population, were in the "minority" district, but seventy percent of Hispanics lived outside the district supposedly created for their benefit as well. If the two minority groups were truly fungible, then the fact that "their" district left out most of the Hispanics, and included most of the blacks would not have mattered. In *Hardee* the judge did not have to address the issue of whether this district satisfied *Thornburg* because he concluded that the two groups were not politically cohesive.[187]

2. A bloc voting majority that defeats the candidates of choice of the minority

The "candidates of choice" must be determined before it is possible to know if they were defeated, a task which can be impossible in some situations.[188] Suppose that the evidence shows that blacks and Hispanics have supported the same candidates a majority of the time. Suppose further that when the "group supported" candidate has been white or Hispanic, the candidate has received enough white votes to be elected, but all "group supported" black candidates have been defeated. Has "bloc voting" resulted in the defeat of the minority's candidates?

3. The proportional representation defense

Carrying the previous hypothetical a step further, suppose that the combined minority voting age population is twenty percent, and that one seat in five has been held by an Hispanic for at least ten years. Has the group achieved proportional representation?

4. The remaining Senate report factors

Similar problems can be presented by the remaining factors. In most of the South, blacks, but not Hispanics, were subject to

187. *Id.* at 31.

188. In *Hardee County*, Hispanics were from zero to 17% of the population in each of the eleven voting precincts. Therefore, neither regression analysis nor homogeneous precinct analysis were available to determine Hispanic voting behavior.

officially sanctioned discrimination, including discriminatory restrictions on the right to vote. Hispanics tend to lag significantly behind others in registration rates[189] while black rates often exceed those for whites. In some areas plaintiffs may possibly demonstrate a history of discrimination against blacks in areas of education, housing and health, but be unable to demonstrate any continuing impact of this discrimination on black rates of political participation. For Hispanics, the political participation rates may be low, but the lack of participation is easily explained by factors unrelated to past discrimination.[190]

The practical problems of proof bring us back to our initial observation. When voters do not share a common racial or ethnic background, which has been their primary source of identity, both within and without the group, a claim that they are "one" for purpose of politics should be viewed skeptically. To determine whether the elements of a dilution suit are present for the "minority," without considering the two groups very different histories, and present day circumstances is impossible. Very seldom has disproportionate representation among the "have-nots" been a sufficient basis for separate ethnic groups to form even political alliances, much less for them to form a new "discrete and insular" minority.

VI. Coalitions Between Blacks and Hispanics: A Political Science Perspective

In the preceding section, we carefully scrutinized the handful of cases in which black and Mexican-Americans have sought to be combined as a single group for Section 2 purposes. In most of those cases the plaintiffs were unable to establish political cohesiveness. Two cases reached a contrary conclusion, *LULAC* and *Campos*. We have suggested that the evidence was insufficient, indeed basically missing entirely, in *LULAC* to support a finding of cohesiveness. In *Campos* our examination of the plaintiffs' expert's voting analysis

189. The differences between Hispanics and others are reduced when citizenship is taken into account.

190. In addition to non-citizens, the Hispanic population may include large numbers of migrants, and persons who are new to the community. Moreover, the adult Hispanic population contains disproportionately more persons than the general adult population in the 18 to 26 year age range, which studies show participate less than older adults. *See* Voting and Registration in the Election of November, 1980 (Advance Report) Bureau of Census, Current Population Reports, Series P-20, No. 435, Feb. 1989, at 4-5.

revealed that the analysis was fatally flawed, and did not establish the blacks and Mexican-Americans had supported the same candidates.

In several of the cases, the available data did not lend itself to the standard statistical devices for determining voter behavior. Thus, the possibility remains that the two groups really were cohesive, but the plaintiffs lacked any reliable means to prove it. Each case must be decided on its particular facts, and the absence of cohesiveness in one jurisdiction does not preclude the possibility of cohesiveness elsewhere. Nevertheless, political scientists recognize, as do those trying to develop a strategy to elect candidates to national or statewide office, that certain groups can be expected to vote together most of the time. If there exists substantial evidence that blacks and Hispanics "normally" do support the same candidates, then perhaps less should be demanded by way of proof in specific cases.[191] If, however, the evidence is to the contrary, then these suits should be viewed very skeptically. In this section we examine the record amassed by social scientists concerning the political behavior of these groups.

In the past ten years, a number of studies in political science have addressed the question of "minority coalitions." Here we will examine, and in some instances extend, that record in order to assess the ability of blacks and Hispanics to form and sustain durable political coalitions that are reflected in voting for the same candidates.

A. Internal Cohesion within the Black and Hispanic Communities

To what extent do the black and Hispanic populations, considered separately, constitute cohesive political groups? If a racial or ethnic group does not demonstrate a high degree of internal cohesion, that group is unlikely to successfully merge with another minority in a durable voting coalition.

The cohesion test is easily met by the American black population. The great majority of blacks share a common history of slavery and have continued to suffer pervasive discrimination late in the twentieth century. Legal barriers to political participation have only gradually been lowered. Given these conditions it is hardly surprising that public opinion research documents that "the most profound political division

191. Of course, the problem of whether the two really should be entitled to claim they are a "new" discrete and insular minority would remain, even if the evidence were to show that routinely the two did support the same candidates.

between groups in the U.S. is the division between blacks and Whites."[192]

Blacks exhibit a very high degree of voting cohesion. In partisan terms they are the most Democratic group in the country, having provided overwhelming support (85%-98%)[193] for Democratic presidential nominees between 1964 and 1988. Blacks usually vote together in state and local elections as well. As black political involvement around the country has increased, an increasing polarization of the electorate along racial lines has occurred. Edward G. Carmines and James A. Stimson recently concluded that race is the most important factor transforming American politics.[194]

In the case of Hispanics, internal cohesion is clearly at a much lower level. A basic difficulty arises from the "Hispanic" categorization. Many persons so classified do not identify themselves as such, in sharp contrast to self-identity patterns among blacks (or "Negroes" or "African Americans" as the fashion changes). Nor can substitute generic labels ("Latinos") be found that most persons of Spanish origin apply to themselves. Group identity among Hispanics is strongly associated with specific origins. Hispanics in the Southwest are overwhelmingly "Mexican-Americans." In the Northeast, "Puerto Ricans" are dominant. "Cuban Americans" are the great majority among Hispanics in Florida. Efforts to homogenize Hispanic populations into a single cultural group are strongly resisted as reflected in the critical comments of Raul Ruiz, professor of Chicano Studies at California State University at Northridge, on Spanish-language television network programming: "These folks are trying to create an electronic Latino culture, an electronic compound of the various groups. But that's not the reality of the Latino populations of this country."[195]

The distinctions within the American Hispanic populations are political as well as cultural. Mexican-Americans, the largest and longest established Hispanic group, are characterized by "significantly lower rates of voter registration and turnout than Anglo and black voters, primarily Democratic party affiliation, and moderately high patterns of party voting."[196] Puerto Ricans also tend to be partisan Democrats,

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192. ERIKSON, LUTTBEG, & TEDIN, AMERICAN PUBLIC OPINION § 179 (3d ed. 1988).

193. *Id.*

194. CARMINES & STIMSON, ISSUE EVOLUTION: THE RACIAL TRANSFORMATION OF AMERICAN POLITICS (1988).

195. Mydans, *Charges of Bias in Spanish-Language Television*, N.Y. Times, July 23, 1989, at 14, col. 2.

196. Garcia & Arce, *Political Orientations and Behaviors of Chicanos: Trying to Make Sense of Attitudes and Participation*, in LATINOS AND THE POLITICAL SYSTEM 101, 128 (F. Garcia ed. 1988).

but have very low levels of political participation, which is partly explained by their continuing ties to the home island and its politics.[197] All Puerto Ricans are United States citizens, many Mexican-Americans are not, which distinguishes the political agendas of the two groups. The third large Hispanic population in the United States, Cuban-Americans, are quite distinct because of their mostly recent arrival (after the Castro revolution in 1959), their relatively high social class, upward mobility, and strong ties to conservative and Republican politics.[198] Most are fiercely anticommunism and greatly concerned about United States policy in Central America, issues of little import to most Puerto Ricans and Mexican-Americans.

The differing backgrounds, patterns of political participation, and issue agendas among the three large Hispanic groups in the United States suggest great difficulty in forging broad black-Hispanic coalitions. With regard to specific Hispanic populations, the lower rates of participation and lack of group cohesiveness among Mexican Americans and Puerto Ricans also create barriers to effective alliances. And with Cuban Americans the lack of common political goals effectively rules out long term coalitions with blacks.

B. Attitudinal Studies Comparing Blacks, Hispanics, and Whites

Some recent survey data have been generated that focus on the possibilities for blacks and Hispanics forging coalitions in an Anglo-dominated political system. James Dyer, Arnold Vedlitz, and Stephen Worchel interviewed over 1200 respondents in Texas in the summer of 1986. Using a "social distance" scale, they found that: "In general, blacks and Mexican-Americans are more accepting of Anglos than they are of each other. Further, in most cases, Anglos are more accepting of Mexican-Americans than are blacks."[199] The fact that blacks and Mexican-Americans in Texas have suffered discrimination in the Anglo-dominated society failed to produce attitudes conducive to forming a coalition against the majority group. Their data argue against the position "that being the target of prejudice is a sufficient

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197. *See* Jennings, *The Puerto Rican Community: Its Political Background*, in LATINOS AND THE POLITICAL SYSTEM 59, 65-80 (F. Garcia ed. 1988).

198. de los Angeles, *From Exiles to Minorities: The Politics of Cuban Americans*, in LATINOS AND THE POLITICAL SYSTEM 81, 98 (F. Garcia ed. 1988).

199. Dyer, Vedlitz, & Worchel, *Social Distance Among Racial and Ethnic Groups: Demographic Correlates*, 70 SOC. SCI. Q. 607, 611 (1989).

condition to bring outgroups together. . . . Indeed, the targets of prejudice maintain greater distances between themselves than they do with the empowered majority group."[200]

Bruce E. Cain and D. Roderick Kiewiet surveyed Californians just after the 1984 election. They found that "the political interests of California's immigrants/minorities diverge in sometimes surprising ways."[201] With specific regard to black-Hispanic patterns, Cain and Kiewiet noted:

> perceived discrimination and lack of opportunity do not automatically generate political alliances. Although such perceptions might make some members of a particular minority group more sympathetic toward California's other minority groups, others might become more antagonistic in response. For blacks the issue is especially poignant. Are newly arrived Latinos fellow victims of discrimination, or just the latest wave of immigrants who serve only to retard black progress as they scramble up the economic ladder.[202]

These differences led Cain and Kiewiet to conclude:

> minority group leaders cannot count on common perceptions of discrimination and justice to foster a natural coalition between their group and other minorities. As a source of political support, liberal Whites would appear to be at least as promising as other minority groups.[203]

C. A National Test: Jesse Jackson's Rainbow Coalition

Nationally, the one strong test of black-Hispanic coalitional possibilities was provided by Reverend Jesse Jackson's presidential bids, particularly his 1988 effort. In his second national campaign Jackson's strategy of building a "Rainbow Coalition" was critically dependent on adding Hispanic support to his strong base in the black community. Confined to a largely black base, Jackson could hope to win only Deep South states and the District of Columbia and take no more than thirty percent of the Democratic primary vote. But if his campaign generated strong Hispanic support, Jackson could get forty percent of the total national vote and win a dozen primaries. Among the winnable primaries were Texas and California where the combined black and

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200. *Id.*
201. B. Cain & D. Kiewiet, *Minorities in California*, paper presented at symposium at California Institute of Technology, March 5, 1986, at I-2.
202. *Id.* at III-99.
203. *Id.* at III-111.

Hispanic vote was expected to exceed forty percent. Accordingly, Reverend Jackson made strenuous and partially successful efforts in 1987 and early 1988 to line up support from Mexican-American and Puerto Rican leaders.

The electoral results, however, were disappointing. The New York Times-CBS News poll of voters in 14 Southern and Border states on Super Tuesday (including Texas and Florida) found Jackson getting ninety-one percent of the black vote, but just twenty-one percent of the Hispanic vote.[204] In California, Governor Dukakis won sixty-one percent of the Hispanic vote on June 7, 1988, compared to Jackson's thirty-six percent.[205]

The failure of Jackson's campaign in the key state of Texas, which he would have won had he carried a majority of the Hispanic vote, is illustrated by election returns from heavily Mexican-American precincts in Congressional District 18 and City Council District I (they overlap) in Houston, Texas. The blue collar precincts were represented by the late Congressman Mickey Leland and on the city council Ben T. Reyes, both strong Jackson backers in 1988. Despite their efforts, the mostly Hispanic voters in their districts gave Michael Dukakis twice as many votes as Jesse Jackson. [See Table 1]

TABLE 1

Democratic Presidential Primary Vote in Heavily Mexican-American Precincts in Houston, Texas: March 8, 1988

Precinct	*Jackson*	*Dukakis*	*Gore*	*Gephardt*
9	54	91	28	7
10	57	188	28	16
11	72	104	34	18
44	59	135	24	17
46	138	217	26	14
62	142	190	44	30
65	57	190	77	24
69	40	97	21	11
79	76	163	43	23
TOTALS	695	1,375	325	160

Source: Office of County Clerk, Harris County, Texas.

204. New York Times, March 10, 1988, § I, at 26.
205. New York Times, June 9, 1988, § II, at 11.

D. The PS Urban Coalition Studies

The Summer issue of *PS*, a journal published by the American Political Science Association, included a series of case studies on minority coalitions in large American cities. The central findings from four of the six with regard to black-Hispanic alliances are summarized below. In the remaining two cities, Atlanta and Philadelphia, the studies indicated the Hispanic population was too small to be a factor in local politics.[206]

(1) Los Angeles. Raphe Sonenshein found that under the leadership of Mayor Tom Bradley, a black-Jewish coalition had dominated city politics since the early 1970s. Hispanics had been drawn into the coalition, but very much as junior partners. Sonenshein concluded that:

> The Los Angeles case illustrates the difficulty of building three-sided coalitions among blacks, White liberals, and Hispanics. Despite huge numbers, Hispanics have been much less successful than blacks in winning political incorporation in Los Angeles. In fact, black-Hispanic alliances have been more prominent in many Eastern and Midwestern cities than in Los Angeles. Competition between blacks and Hispanics for political positions and for White liberal support has weakened the many links blacks and Hispanics have forged over the years of the minority struggle for equality in Los Angeles.[207]

(2) New York. John Mollenkopf found that despite their large combined populations (forty-four percent in 1980), blacks and Hispanics were poorly represented among elected officials in New York City. He found that minority influence in the city had declined since the 1960's and early 1970's despite their population growth. One reason for this was:

> Black and Hispanic political mobilization efforts have often worked at cross purposes in New York City (Falcon, 1985). While Browning, Marshall and Tabb note tensions between the groups in the California cities, they conclude that black incorporation strengthened Hispanic incorporation. No such result has occurred in New York. The small relative size of the black population contributes to this tension. On its own, the black community is simply not large enough

206. Stone, *Atlanta: Protest and Elections are Not Enough*, PS, Summer 1986, 618, 624; Munoz & Henry, *Rainbow Coalitions in Four Big Cities: San Antonio, Denver, Chicago, and Philadelphia*, PS, Summer 1986, 598, 600.

207. Sonenshein, *Biracial Coalition Politics in Los Angeles*, PS, Summer 1986, 582, 589.

> to cause the kind of breakthrough that took place in Chicago, Detroit, or Atlanta. But the divisions between blacks and Hispanics, and indeed between ethnic factions within these groups, runs far deeper. Blacks and Hispanics do not support each other at the polls. An attempt to select a consensus minority challenger to Mayor Koch in the last election floundered because when no strong black candidate agreed to run, the established Harlem leadership would not support Hispanic leader Herman Badillo.[208]

(3) Chicago. Carlos Munoz, Jr. and Charles Henry noted that while Mayor Harold Washington received little Latino support in his crucial 1983 Democratic primary victory (he got 12.7% of the Hispanic vote, twelve percent of the white vote, and eighty percent of the black vote), he quickly moved to broaden his political coalition and gained considerable support from Hispanic leaders. Although Mayor Washington's relatively brief tenure made it difficult for the authors to assess the consequences of his victory, they concluded that "based on his pledges one can presume that Washington's election will further political incorporation and subsequent policies benefitting minorities, both Latinos and blacks."[209]

(4) San Antonio. Mayor Henry Cisneros's political success rested on combining strong support in the Mexican-American community with backing from white business elites. Munoz and Henry found Cisneros enjoyed support from blacks, but their small population (eight percent) made only a modest contribution to Cisneros's success.[210]

(6) Denver. Mayor Frederico Pena's election in 1983 was partly based on the strong support he received from Hispanic voters although he "did not receive the endorsement of the established Chicano politicians and community leaders."[211] Given the small Mexican-American population, Pena needed a much larger coalition to win citywide election. That coalition:

> was comprised of representatives from labor, the elderly, the physically disabled, gays, women, and environmentalists. He was also supported by the incumbent mayor's brother, white millionaires like oilman Marvin Davis and land developer Lee Ambrose, and after the primary the coalition expanded to include blacks.[212]

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208. Mollenkopf, *New York: The Great Anomaly*, PS, Summer 1986, 591, 593.
209. Munoz & Henry, *Rainbow Coalitions in Four Big Cities: San Antonio, Denver, Chicago, and Philadelphia*, PS, Summer 1986, 598, 600.
210. *Id.* at 604.
211. *Id.* at 605.
212. *Id.* at 606.

(6) Miami. Racial politics in this Florida city have a polarized, "zero-sum" quality in which gains by one group are perceived as losses by another. This is especially true in black-Hispanic relations. Christopher L. Warren, John F. Stack, Jr., and John G. Corbett summarized local racial relations in 1986 as follows:

> The contacts, rivalries, and conflicts between the black and Hispanic communities are apparent with regard to virtually all aspects of political, economic, and cultural life in Miami. The internationalization of the community and its issues, the problems faced by blacks related to representation and issue articulation in local political institutions, the divergence of special interest agendas for blacks and Hispanics respectively, questions of local governmental structure, and policies of economic development have all played a part in reshaping minority politics in Miami. Hispanic and black immigration has permanently transformed Miami's black-white racial setting into a much more complex tri-ethnic, indeed, multiethnic international environment. While the analogy is exaggerated to be sure, former City of Miami Mayor Maurice Ferre's description of Miami as the Beirut of the West suggests the level of tension and conflict that exists.[213]

Marshall concluded that:

> The articles also underscore the difficulty of forming multiethnic electoral coalitions involving blacks and Hispanics. The obstacles seem greatest in New York and Miami, where the groups are in direct opposition. Tensions between the two groups are prominent also in Los Angeles, Denver, and San Antonio. The Most successful coalition seems to be in Chicago.[214]

E. The Browning-Marshall-Tabb Study of California Cities

Drawing on research in the late 1970's and early 1980's, Browning, Rogers, and David H. Tabb published *Protest Is Not Enough: The Struggle of Blacks and Hispanics for Equality in Urban Politics* in 1984.[215] They documented a good deal of cooperation and some successful alliances between blacks and Hispanics. However, they also noted:

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213. Warren, Stack, & Corbett, *Minority Mobilization in an International City: Rivalry and Conflict in Miami*, PS, Summer 1986, 626, 632.

214. Browning & Marshall, *Is Anything Enough*, PS, Summer 1986, 635, 637.

215. R. BROWNING, D. MARSHALL, & D. TABB, PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS (1984).

> [I]t would not be accurate to conclude that blacks generally supported the political aspirations of Hispanics or that black incorporation necessarily facilitated the incorporation of Hispanics. Some black activists regarded Hispanics as whites who were achieving political influence with little effort, that is, on the coattails of the black mobilization movement. Where blacks were able to form successful biracial coalitions without explicit Hispanic participation, they did so, and blacks in such coalitions were not notably receptive to Hispanic interests[216]. . . . Even when they supported the same coalition, relationships between the two groups sometimes remained highly competitive, as in San Francisco. Only in Sacramento were they clearly cooperative, perhaps in part because blacks comprised the smallest component of the coalition there and could not afford to alienate their partners.[217]

F. Coalition Politics in Dallas

The 1979 redistricting of Dallas's city council created a tri-ethnic district in West Dallas wherein blacks and Mexican Americans made up two-thirds of the population. The plan's drawers hoped such a district would give Mexican Americans representation on the realigned council, which also included two districts dominated by blacks and seven by Anglos. The strategy worked initially as Ricardo Medrano created a "minority coalition" of blacks, Mexican-Americans, and gay Anglos to win elections in 1979 and 1981. However, the coalition unravelled in 1983 when prominent black leaders in the district refused to support Medrano when he would not commit to stepping down in the future and allowing a black to be the coalition's candidate.[218]

Medrano was defeated by an Anglo who had significant black support in a runoff in April, 1983. After the election a "bitter" Ricardo Medrano blamed black leaders for his defeat. A Dallas Morning News story reported his assessment:

> District 2 has "most definitely gone Anglo for good," he said, blaming black leaders John Wiley Price, Mattie Nash and Jessie Jones for a white winning the minority-district seat.

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216. *Id.* at 122.
217. *Id.* at 124.
218. *See* Fessenden, *Progressive Voters President Says Medrano's Job Is on Line*, Dallas Times Herald, April 14, 1983, § C, at 5.

> "They need to be congratulated. They have torn the foundation (of the Black-Brown coalition) down. . . ."
>
> His loss has hurt the chances for future minority districts, he said. He indicated he would be a candidate in Dallas County commissioner elections in the future. "If minorities can't even support a minority, how can you argue for more minority districts?" said the 28-year-old grocer, who political analysts said had alienated blacks during his tenure on the council.[219]

Medrano's pessimistic forecast has held up. As of January 1990, an Anglo has won four consecutive elections in the "minority coalition" district, and no Hispanic has won elsewhere in the city.

G. The Meier/Stewart Public School Board Study

Political scientists, Kenneth J. Meier and Joseph Stewart examined school board elections and policies in 137 multiracial districts, using a 1986 mail survey of districts with more than 5,000 students and at least five percent Hispanic enrollment. Their conclusions were as follows:

> This research examines the feasibility of rainbow coalitions, particularly those between blacks and Hispanics. We are skeptical that black-Hispanic coalitions are likely because very few appear to exist in urban politics and because the logic of rainbow coalitions assumes that the dominant Anglo coalition must remain passive when confronted with a potential rainbow coalition. We suggest that an alternative view of politics is the power thesis. The power thesis holds that intergroup relations will be characterized more by competition and conflict than by cooperation. This theory predicts that Anglo-Hispanic coalitions will be far more likely to form than black-Hispanic coalitions.
>
> Based on 137 large, multiracial school districts, we find election results that are more consistent with the power thesis than the rainbow thesis . . .
>
> Our research leads us to predict that many more Anglo-Hispanic coalitions will form than black-Hispanic coalitions. This prediction raises an important political question. Because Hispanic representation benefits Hispanic constituents, Hispanic political elites are rational to form coalitions with Anglo politicians. Because black-Anglo coalitions are unlikely, however, Hispanic leaders should

219. Bauer, *Medrano Blames Black Leaders for Defeat*, Dallas Morning News, April 17, 1983, § A, at 20.

drive a hard bargain in terms of public policy benefits before agreeing to coalitions with Anglo politicians.[220]

H. Another Look at Chicago and New York

In 1986 Chicago appeared to offer the most promise for a durable black-Hispanic coalition. That promise seemed to be fulfilled in the 1987 mayoral election in which Mayor Washington carried the heavily Latino 26th and 31st wards by 61.2% and 56.1% against former mayor Jane Byrne in the Democratic primary. Washington also enjoyed strong support from the Latino council members in 1987-1988. But after Harold Washington's death in 1988, his coalition on council fragmented in a bitter battle over the interim mayor position. Black Alderman Eugene Sawyer eventually secured a majority, with most of his votes coming from whites who had opposed Mayor Washington.

Forced to run in a rescheduled Democratic primary in 1989, Sawyer was able to mobilize nearly as strong support in black areas as Washington had received in 1987, but the other parts of the deceased mayor's coalition swung to Richie Daley. This was very much the case in the Latino wards. The 26th went for Daley 6,976 to 2,609 (72.8%), and the 31st by 6,101 to 3,315 (64.8%).[221]

In assessing what happened to the minority coalition Harold Washington had built in the early and mid-1980's, local analyst Charles M. Madigan noted that one "lesson was that the most important parts of Harold Washington's coalition were Harold Washington and the era that presented him to the voters as a mayoral candidate."[222]

A different pattern emerged in the 1989 New York City election. Despite the traditional conflicts between blacks and Hispanics noted in Mollenkopf's 1986 study, David Dinkins pulled together a multiracial coalition to defeat Mayor Ed Koch in the Democratic primary and Republican Ralph Giuliani in the general election. Table 2 summarizes racial voting patterns in the primary and general elections.

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220. K. Meier & J. Stewart, Jr., *In Search of Rainbow Coalitions: Racial Ethnic Representation on Public School Boards*, paper presented at the annual meeting of the American Political Science Association, Atlanta, Georgia, September, 1989, at 13-15.

221. The 1987 and 1989 Chicago returns are from the Chicago Tribune, March 2, 1989, § 2, at 4.

222. Madigan, *Washington Lesson Fell on Deaf Ears*, Chicago Tribune, March 1, 1989, § 1, at 1.

Table 2

Racial Voting Patterns in 1989 New York Mayoral Elections

	Dem. Primary Vote % For		Gen. Election Vote % For	
	Dinkins	Koch	Dinkins	Giuliani
Blacks	93%	3%	91%	7%
Hispanics	54%	41%	65%	34%
Whites	29%	61%	27%	71%

Source: *New York Times* exit polls, September 14, 1989, p. B4; November 9, 1989, P. B11.

Dinkins' victories reflected near unanimous support from fellow blacks, majorities from Hispanics, and a significant minority of white voters (Jesse Jackson got only about fourteen percent of the white vote in the April 1988 New York primary). Do these results herald the emergence of a unified minority bloc vote in New York City? No election analyst has drawn such a conclusion. Rather, explanations of Dinkins' success stress his style and personality, the widespread dislike for Mayor Koch, and a sense that Dinkins could best reduce racial tensions in a polarized city.[223]

I. Summary

This review of available studies on black-Hispanic coalitional prospects has established several basic patterns.

(1) Black-Hispanic voters (Cuban-Americans excepted) share a commitment to the Democratic party. Blacks are very strongly Democratic, Mexican-Americans and Puerto Ricans less so.

(2) When partisan considerations are removed, as is the case in most local elections which are either decided in the party primaries or non-partisan elections, the coalitional tendencies of black and Hispanic voters vary greatly. In a few instances, as in Chicago from 1983-87, a reasonably strong alliance has been forged. But in other cases (New York in the 1970's and 1980's, Miami in the 1980's), conflict, not cooperation, characterizes black-Hispanic relations.

(3) When alliances have been built, keeping them together is no small task, as the experience of Chicago in 1988-89 and Dallas attest.

223. Sam Roberts, *Finding a Way to Win*, New York Times, September 14, 1989, at 1, col. 3.

(4) Several conditions seem to enhance the prospects for successful black-Hispanic coalitions. Skilled leadership seems especially critical, and is often in short supply. In many cases successful minority interaction has occurred as part of a larger "liberal" coalition that includes whites (Jews in Los Angeles, business leaders in San Antonio, environmentalists in Denver). These whites have often added critical organizational skills and financial resources that have facilitated the coalition's survival. The prospects for successful coalitions are enhanced when the elements of the coalition are sufficiently large to have a realistic chance of winning important elective offices.

In sum, the empirical evidence indicates that black-Hispanic coalitions can be created, but it is a difficult task. Certainly there is no "natural" tendency for black and Hispanic voters to support the same candidates, just as there is "natural" tendency for them to support different candidates. That being the case, it would seem to require exceptional circumstances for blacks and Hispanics to form such durable political coalitions that, for Section 2 purposes, they can be combined to meet the *Thornburg* test.

VII. Conclusion

In this Article we have attempted to answer the question, under what circumstances should a "rainbow coalition" be entitled to claim dilution of its voting strength? In short, the answer is "very seldom." The purpose of Section 2 of the Voting Rights Act was to provide relief to minority groups whose racial or ethnic status placed them at a disadvantage in the political process. Section 2 was not meant to insulate minorities from the normal perils faced by any group seeking to utilize the political process to advance group interests, one of which is that the group's numbers may be insufficient to provide a base from which candidates identified primarily with the group can achieve election. The Supreme Court formally recognized the importance of numbers in *Thornburg v. Gingles* when it declared that groups too small to constitute a majority of a single-member district could not claim that at-large elections were responsible for the defeat of "their" candidates.

"Coalition dilution" suits that are attempts by one or both groups to overcome the group size limitations of *Thornburg* should not be recognized. The reasons, we have suggested, are twofold—one theoretical, the other practical. The theoretical difficulty with these suits is that the Voting Rights Act provides no protection from dilution

for the voting strength of a *political* group. Only racial or ethnic groups that have become political groups in an effort to alleviate the difficulties they share as result of discrimination and exclusion are entitled to the extraordinary relief available under the Act. The underlying assumption of the Voting Rights Act is that members of certain racial or ethnic groups have common needs by virtue of their shared experience as members of a group that suffered discrimination. Even these groups cannot claim dilution unless they can demonstrate that group members recognize their common needs and are united in their efforts to meet those needs through the political process.

To be distinguished from mere political allies, distinct groups seeking to claim dilution of their combined voting strength must share much more than temporal political goals. To be within the protection afforded by the act, these groups should be required to establish that they have interests that transcend politics—interests roughly equivalent to those shared by members of a single minority group. Perhaps the litmus test should be whether the two groups consider themselves "one" when each group could have benefited separately. Did blacks consider Mexican-Americans to be "black" in evaluating the need for affirmative action? In other apportionment situations in which Mexican-Americans had the opportunity to be a majority of a district, were they just as happy to be thirty percent of a district that was also thirty percent black?

The practical problem with coalition suits is that only rarely do discrete minority groups form even temporary political alliances. Most coalition suits have failed because the plaintiffs have been unable to demonstrate that members of the two groups were politically cohesive, as required by *Thornburg*. The findings of these cases are consistent with the pattern of political interaction generally observed between blacks and Mexican-Americans. A careful review of the social science literature reveals only rare instances of political coalitions between blacks and Hispanics.

Proponents of coalition dilution suits argue that minority groups are natural allies because of their shared exclusion from the dominant society, and their similar lower socioeconomic status, which, proponents maintain, is the product of past discrimination. Despite the simplistic logic of this position, it does not comport with the reality revealed by social science studies. Those studies suggest just the opposite. The rarity of documented political alliances between minority groups is the natural consequence of differences in their attitudes and perceptions. Studies indicate that minorities in fact

identify more closely with the dominant group than with other minorities. Moreover, perceptions of discrimination vary widely among groups. Blacks, for example, are much more likely than Mexican Americans to perceive themselves to be victims of discrimination. Still other studies suggest that the underlying causes of lowered socioeconomic status differ among minority groups. Different root causes of poverty are likely to lead to different, possibly even conflicting, demands on the government.

The appeal of the Rainbow Coalition is no doubt based in part on the much older notion that all "oppressed" groups could overcome their difficulties if only they would unite against their oppressors. "If only" turns out to have been a big "if." History provides few concrete examples of the oppressed joining together to rid themselves of a common oppressor. Those who did often experienced a serious falling out, once the oppression was lifted. Unfortunately, so it has been with groups in this country who find themselves "disadvantaged" in the political arena because of their identity as racial or ethnic minorities.

In most instances, a coalition suit is less likely to be based on a genuine notion of brotherhood among disadvantaged groups than upon a shared desire to be rid of a common oppressor: At-large elections. Unless over the long term the two groups see themselves as one, and actually vote together, a change to single member districts cannot benefit both groups, and may not benefit either.