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Section 2 of the Voting Rights Act: An Approach to the Results Test

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RECENT DEVELOPMENT

Section 2 of the Voting Rights Act: An Approach to the Results Test

I. INTRODUCTION

The fifteenth amendment[1] guarantees that a citizen's right to vote shall not depend on his or her race. The Voting Rights Act of

1. The fifteenth amendment provides in part: "The right of citizens of the United

1965 (the Act)[2] ended nearly a century of congressional acquiescence to obstruction and subversion of that guarantee by certain state and local governments.[3] The Act was remarkably successful in curbing many race-oriented abuses of the electoral process.[4] Despite this success, however, Congress chose to bolster the 1965 Act with the Voting Rights Act Amendments of 1982.[5] The new legislation's most significant feature[6] was the revision of section 2,[7] which contains the Act's blanket prohibition against "discriminatory" voting procedures.

Parties often challenge allegedly discriminatory voting practices through claims of illegal racial vote dilution. Racial vote dilution claims may attack a variety of electoral practices that tend to dilute minority voting strength and, consequently, overrepresent voting majorities. Examples of these practices include multimember legislative districting schemes and at-large elections for municipal officials.[8] Racial vote dilution claims also may challenge appor-

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States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

2. Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

3. Several southern states had long histories of employing devices designed to prevent blacks from registering to vote. These devices included literacy tests, educational achievement tests, and good moral character requirements. These tests were not unconstitutional per se. *See, e.g.*, Louisiana v. United States, 380 U.S. 145 (1965); Lassiter v. Northhampton County Bd. of Elections, 360 U.S. 45 (1959); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.), *aff'd per curiam*, 336 U.S. 933 (1949). The tests, however, allowed local election officials ample opportunity to keep blacks from voting. *See* Fiss, Gaston County v. United States: *Fruition of the Freezing Principle*, 1969 SUP. CT. REV. 379, 385-408.

4. *See* H.R. REP. No. 227, 97th Cong., 1st Sess. 3 (1981) (asserting that the Voting Rights Act was "the most effective tool for protecting [minorities'] right to vote") [hereinafter cited as HOUSE REPORT]; STAFF OF SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., REPORT ON S. 1992, 20-21 (Comm. Print 1982) (characterizing the 1965 Act as the most important voting rights legislation in the nation's history), *reprinted in* S. REP. No. 417, 97th Cong., 2d Sess. 107 (1982) [hereinafter cited as SUBCOMMITTEE REPORT].

5. Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

6. Other features of the new amendments included extending §§ 4, 5, 42 U.S.C. § 1973b (1976) (banning the use of literacy tests and similar devices), §§ 6, 7, 42 U.S.C. §§ 1973d-1973e (1976) (authorizing federal examiners), and § 8, 42 U.S.C. § 1973f (1976) (authorizing assignment of federal poll observers of election procedures).

7. 42 U.S.C. § 1973 (1976), *amended by* 42 U.S.C. § 1973 (1982).

8. Multimember legislative districts and at-large municipal electoral schemes may allow larger groups within a district or city to outvote members of a discrete socioeconomic group living in a concentrated geographical area, thus diluting the minority group's ability to elect representatives of its choice. *See, e.g.*, Fortson v. Dorsey, 379 U.S. 433 (1965) (challenging a multimember districting plan); Jones v. City of Lubbock, 727 F.2d 364 (5th Cir.), *reh'g denied*, 730 F.2d 233 (5th Cir. 1984) (challenging an at-large municipal system).

tionment plans that allegedly do not provide enough single-member districts[9] in which racial minorities constitute a clear voting majority. Where racial discrimination is pervasive, each of these practices may effectively prevent minorities from electing anyone who will represent their interests.

Prior to the amendment of section 2, plaintiffs based racial vote dilution claims on the fourteenth amendment's guarantee of equal protection.[10] These cases proved quite complex and resistant

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Other examples of potentially vote-diluting devices include majority vote requirements and anti-single shot voting provisions. A majority vote requirement calls for run-off elections when not enough candidates receive votes from a majority of voters. Thus, even if a minority candidate is initially a top vote-getter, the majority vote requirement prevents the candidate from being elected on the strength of minority votes alone. Anti-single shot voting provisions prohibit voters in multimember or at-large districts from casting fewer votes than tbe number of positions open. When fewer minority candidates than open positions exist, single-shot voting allows minority voters to avoid voting for nonminority candidates and therehy avoid diluting their votes for minority candidates.

The hardships imposed on minority voters by at-large systems or multimember districts are exacerbated when there are no suhdistrict residency requirements. Subdistrict residency requirements insure that each geographic segment of a multimember district or at-large scheme has a representative. Representatives of subdistricts still must be elected at large. Nonetheless, hecause minority voters often live in close proximity, subdistrict residency requirements improve tbe chances that some minority candidates will be elected. Without subdistrict residency requirements, an entire district may be represented entirely by candidates who reside in the same neighborhood. For an example of an at-large municipal election scheme with a majority vote requirement, a prohibition of single-shot voting, and no subdistrict residency requirement, see City of Mobile v. Bolden, 446 U.S. 55 (1980).

9. *See* Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2673 (1985). Some debate has arisen over whether redrawing single-member districts dilutes votes. Justice Rehnquist has argued that the phrase "vote dilution" only makes sense with regard to multimember legislative districts (and presumably at-large municipal election schemes) because "the phrase itself suggests a norm [single-member districts] with respect to which the fact of dilution may be ascertained." *See* Mississippi Republican Executive Comm. v. Brooks, 105 S. Ct. 416, 422 (1984) (Rehnquist, J., dissenting). A majority of the Court, however, apparently disagrees, as it gave summary affirmance to a district court jurisdictional ruling which expressly held that § 2 applied to single-member district redistricting decisions. *Id.* at 416. Most commentators appear to take the application of § 2 to single-member districts for granted. *See, e.g.*, Howard & Howard, *The Dilemma of the Voting Rights Act—Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615 (1983); Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189 (1984). Racial vote dilution can occur through the "packing" or "fracturing" of minority voters in single-member schemes in much the same way as racial vote dilution can occur through the use of multimember schemes or at-large election systems. *See* Ketchum v. Byrne, 740 F.2d 1398, 1408-10 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2673 (1985).

10. *See, e.g.*, Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). The fourteenth amendment provides in pertinent part: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens . . . nor deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1.

to systematic analysis.[11] In *City of Mobile v. Bolden*[12] a plurality of the United States Supreme Court resolved the analytical difficulties by imposing an objective standard for racial vote dilution cases. The Court held that to establish a violation of the fourteenth amendment, fifteenth amendment, or section 2 of the 1965 Act,[13] a plaintiff must show that a challenged voting practice or procedure reflected an *intent* to discriminate.[14] Congress quickly denounced *Bolden*. Not only was the intent standard unnecessarily burdensome to plaintiffs, it simply "ask[ed] the wrong question."[15] To Congress, the most pervasive problem, and thus the proper focus of section 2, was not official discriminatory intent but "discriminatory results."[16] Congress, therefore, chose to reword section 2 in a way that requires courts to focus on the *results* achieved under a challenged election procedure. Under the amended section 2, courts are to look at the "totality of circumstances" to determine whether minorities have an equal opportunity to "participate in the political process and to elect representatives of their choice."[17] This sweeping language is checked by a proviso which denies that minorities are granted a substantive right to representation in proportion to their population.[18]

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11. *See infra* notes 20-72 and accompanying text.

12. 446 U.S. 55 (1980); *see infra* notes 79-99 and accompanying text (discussing *Bolden*).

13. The Court held that § 2 was merely a restatement of the fifteenth amendment and, therefore, required the same burden of proof. 446 U.S. at 60-61.

14. *Id.* at 60-74.

15. S. REP. No. 417, 97th Cong., 2d Sess. 36 (1982) [hereinafter cited as SENATE REPORT].

16. *Id.* at 2.

17. As amended, § 2 reads as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

18. *Id.*

The revised section 2 has succeeded in easing the burden for plaintiffs,[19] but has further complicated the task of developing consistent and coherent vote dilution jurisprudence. The purpose of this Recent Development is to arrive at a straightforward and workable approach to section 2. Part II discusses the judicial development of racial vote dilution claims prior to 1982 and describes the congressional reaction that led to the amendment of section 2. Part III examines four recent judicial attempts to apply the new standards of the amended section 2. Part IV argues that the proper approach is to limit section 2's application to situations in which electoral procedures amplify private racial discrimination. Part V concludes that this approach serves Congress' intent in amending section 2 and furthers the ultimate goal of the Voting Rights Act—the elimination of race as a political issue.

II. LEGAL BACKGROUND

A. *Racial Vote Dilution Cases Prior to the Amendment of Section 2*

1. Recoguizing the Vote Dilution Concept

Racial vote dilution claims have their roots in the vote dilution cases of the 1960's. The United States Supreme Court took its first substantial steps[20] into the "political thicket"[21] of vote dilution problems in the landmark case *Reynolds v. Sims*.[22] In *Reynolds* the Court held that the fourteenth amendment requires that no citizen's vote be subject to "dilution or discount."[23] Invalidating a legislative apportionment scheme that contained an uneven distribution of population among districts, the Court articulated a clear, affirmative standard for vote dilution cases: "equal representation for equal numbers of people."[24] The *Reynolds* decision focused pri-

19. *See Amended Voting Law Aids Blacks' Rights Actions*, N.Y. Times, Apr. 2, 1983, at 5, col. 1, 4 (quoting Laughlin MacDonald, Director of Southern Regional Office of the American Civil Liberties Union, as saying, "There is no question that the law is having an immediate and dramatic impact.").

20. The Court held that legislative reapportionment was a justiciable federal question in Baker v. Carr, 369 U.S. 186 (1962). The *Baker* case, however, failed to articulate a standard of review for future vote dilution cases.

21. Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J.).

22. 377 U.S. 533 (1964).

23. *Id.* at 555 n.29 (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).

24. *Id.* at 560-61. The Court indicated that the state has the burden of justifying any departure from this substantive standard by proving that the state has a legitimate interest in the apportionment scheme. *Id.* at 579; *see also* Lucas v. Forty-fourth Gen. Assembly, 377

marily on this quantitative standard of one person, one vote. The Court fashioned this standard in order to serve the overriding goal of "fair and effective representation for all citizens,"[25] thus suggesting a qualitative aspect of voting rights.

The Court began to flirt with the concept of a qualitative aspect of representation in cases concerning the constitutionality of multimember legislative districts. In *Fortson v. Dorsey*[26] the plaintiffs claimed that a multimember apportionment scheme effectively diluted their votes and thus violated the equal protection clause of the fourteenth amendment.[27] The Court rejected this claim, noting that the multimember district did not dilute votes quantitatively.[28] In dictum, however, the Court declared that "[it] might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."[29] The Court thus indicated that while multimember districts meeting the *Reynolds* quantitative standard are not unconstitutional per se, a multimember district might be open to challenge on a qualitative basis.

A year later, in *Burns v. Richardson*,[30] the Court again refused to hold multimember districts unconstitutional per se.[31] The Court, however, took the opportunity to characterize the potential qualitative challenge suggested in *Fortson* as a constitutional violation. According to the Court, if a challenged multimember scheme "designedly or otherwise" worked to "minimize or cancel out the voting strength of racial or political elements," then the scheme would violate the fourteenth amendment's guarantee of equal protection.[32]

U.S. 713, 734-37 (1964).

25. *Reynolds*, 377 U.S. at 565-66.

26. 379 U.S. 433 (1965).

27. *Id.* at 435. For an explanation of how multimember districts allegedly dilute votes, see *supra* note 8.

28. 379 U.S. at 437.

29. *Id.* at 439.

30. 384 U.S. 73 (1966).

31. *Id.* at 88. The district court in *Burns* had struck down the multimember scheme simply because the "monolithic" districts gave voting majorities control over voting minorities both in and out of the districts. Holt v. Richardson, 240 F. Supp. 724, 730 (D. Hawaii 1965). The Supreme Court found this ruling purely conjectural and reinstated the plan. 384 U.S. at 88.

32. *Burns*, 384 U.S. at 88 (citing Fortson v. Dorsey, 329 U.S. 433, 439 (1961)).

2. Racial Vote Dilution Cases: Developing an Analytical Approach

The Supreme Court first addressed a racial vote dilution claim in *Whitcomb v. Chavis*.[33] In *Whitcomb* black residents of Indianapolis seized the provocative dicta of *Fortson* to mount a constitutional challenge to an Indiana reapportionment plan. The plan placed the black residents of the city in a countywide multimember district. The plaintiffs claimed that under the multimember scheme elected officials easily could ignore black residents' "distinctive interests."[34] Accordingly, the plaintiffs asked the court to create single-member districts. The federal district court granted this request, finding that black ghetto residents did indeed have special political and social concerns that were underrepresented in the state legislature.[35] According to the district court, the multimember apportionment scheme unconstitutionally diluted the voting strength of black ghetto residents.[36]

The Supreme Court reversed the district court's holding.[37] The Court found that the plaintiffs had failed to carry their burden of proving that the reapportionment plan unconstitutionally afforded the black ghetto residents "less opportunity than . . . other . . . [c]ounty residents to participate in the political processes and to elect legislators of their choice."[38] The Court, however, failed to articulate what that burden entailed. Instead, the Court listed a variety of considerations that undermined the plaintiffs' claim. First, the plaintiffs had not shown that the reapportionment plan hindered them in any way from voting or participating in party politics.[39] Second, the plaintiffs had not demonstrated that a single-member scheme would have better served their distinct interests.[40] Third, the plaintiffs had offered no proof that suburban whites could not adequately represent black ghetto residents.[41] Last, the plaintiffs had not suggested that the city had

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33. 403 U.S. 124 (1971).

34. *Id.* at 129, 132. These interests included social welfare programs, police protection, urban renewal, and quality education. *Id.* at 132.

35. Cbavis v. Whitcomb, 305 F. Supp. 1364, 1386 (S.D. Ind. 1969), *rev'd and remanded*, 403 U.S. 124 (1971). Tbe district court found an "inequity of representation by the residence of the legislators." *Id.* at 1385.

36. *Id.* at 1391.

37. Whitcomb v. Chavis, 403 U.S. 124 (1971).

38. *Id.* at 149.

39. *Id.*

40. *Id.* at 155.

41. Justice White declared that this assumption was purely speculative. *Id.* at 154-55.

designed or operated the multimember scheme to further racial or economic discrimination.[42]

The Court expressed two related concerns that prompted its focus on these considerations. First, the Court feared that accepting the district court's analysis would encourage groups whose candidates were defeated at the polls to challenge the constitutionality of multimember districts.[43] Second, the Court saw in the challenge to the multimember scheme an implicit claim to a right to proportional representation.[44] The Court rejected this notion outright. Although aware of the harsh "winner-take-all aspects" of multimember districting,[45] the Court declared that it was not prepared to condemn the practice as unconstitutional "simply because supporters of losing candiates have no legislative seats assigned to them."[46] The Court viewed the claim of racial vote dilution as a "mere euphemism for political defeat at the polls."[47] The Court also noted that these defeats may occur in "both single-member *and* multi-member districts."[48] For these reasons, the Court refused to hold Indiana's multimember district unconstitutional.[49]

The dissent in *Whitcomb* strongly objected to the majority's move away from the "fair and effective representation" standard enunciated in *Reynolds v. Sims*.[50] The unlawfulness of qualitative vote dilution was, for the dissent, "the other half of *Reynolds v. Sims*."[51] Because of this concern for qualitative representation, the *Whitcomb* dissent would have affirmed the district court's ruling in

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42. *Id.* at 149. The *Whitcomb* Court did not indicate the precise significance of the plaintiff's failure to offer proof of discriminatory intent. During the debate over the amendment of § 2, a majority of the Senate Judiciary Committee concluded that by taking other factors into consideration, the Court negatively implied that proof of discriminatory intent was not a necessary element of a plaintiff's racial vote dilution claim. SENATE REPORT, *supra* note 15, at 21; *see also* Parker, *The "Results" Test of Section 2 of The Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 721 (1983) (arguing that the factors which the Court suggested might be probative of a constitutional violation did not focus on legislative intent).

43. 403 U.S. at 156-57.

44. *Id.* The Court declared that although the district court had been concerned about the representation of only one racial group, the Court's analysis was "expressive of the more general proposition that any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district." *Id.* at 156.

45. *Id.* at 158-59.

46. *Id.* at 160.

47. *Id.* at 153.

48. *Id.* (emphasis in original).

49. *Id.* at 160.

50. *See supra* text accompanying note 25.

51. 403 U.S. at 176 (Douglas, J., dissenting) (citation omitted).

order to eliminate an election scheme that "weigh[ed] the power of one race more heavily than another."[52]

Two years later, in *White v. Regester*,[53] the Court unanimously sustained vote dilution challenges to two Texas countywide multimember districts.[54] The Court began its vote dilution analysis by reiterating that multimember districts are not unconstitutional per se.[55] The Court again refused to adopt proportional representation as a standard,[56] declaring instead that the proper focus was on *access* to the political process. According to the Court, the plaintiff's burden was to show that "the political processes leading to nomination and election were not equally open to participation . . . , that [they] had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[57]

Examining the evidence supporting this showing, the Court noted that the district court had found histories of official discrimination in the election process in both Dallas and Bexar Counties.[58] The district court had found that in both instances this historical discrimination had the residual effect of low minority interest in voting.[59] The district court also had determined that existing private discrimination, which was evidenced by racial bloc voting,[60]

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52. *Id.*

53. 412 U.S. 755 (1973).

54. The counties in question were Dallas, with 18 seats and a substantial black population, and Bexar, with 11 seats and a substantial Mexican-American population. *See id.* at 770-71.

55. *Id.* at 765.

56. *Id.* at 766. The Court's refusal to adopt a proportional representation standard signified a final rejection of the concept of a qualitative right to "fair and effective representation." *See* Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 672 (1983).

57. 412 U.S. at 766 (citation omitted).

58. *Id.* Texas had been the focus of the *White Primary Cases*, in which the Court systematically had dismantled the official exclusion of blacks from the Texas Democratic Party. *See* Terry v. Adams, 345 U.S. 461 (1953); Smith v. Allwright, 321 U.S. 649 (1944); Nixon v. Cordon, 286 U.S. 73 (1932) (collectively known as the *White Primary Cases*). The *White* Court found that this sort of virulent official discrimination had effectively excluded blacks from the political process. *White*, 412 U.S. at 765-70. The Court also found that in Dallas County the white-controlled candidate slating process of the Democratic Party continued to achieve much the same results as official discrimination had achieved in the past. *Id.* at 766-67. In Bexar County a poll tax and restrictive voter registration procedures had operated to exclude Mexican-Americans from the electoral process. *Id.* at 768-69.

59. 412 U.S. at 767-68.

60. Racial bloc voting was most pervasive in Bexar County. *See* Graves v. Barnes, 343 F. Supp. 704, 731-32 (W.D. Tex. 1972) (three-judge court), *aff'd sub nom.* White v. Regester, 412 U.S. 755 (1973).

discriminatory slating practices,[61] racial appeals in campaigns,[62] and official unresponsiveness to minority needs,[63] further diminished minority opportunity to participate in the political process.[64] After an "intensely local appraisal," the district court had concluded that the multimember districting scheme enhanced this invidious discrimination.[65] The Supreme Court deferred to the district court's findings and agreed that "the totality of the circumstances" revealed that the plaintiffs had been "effectively removed from the political processes . . . in violation of the *Whitcomb* standards."[66] The Court concluded that "[s]ingle-member districts were . . . required to remedy 'the effects of past and present discrimination.' "[67]

Following the *White* decision, the United States Court of Appeals for the Fifth Circuit adopted a similar analytical approach, focusing on the various factors necessary to establish a successful racial vote dilution claim. In *Zimmer v. McKeithen*[68] the Fifth Cir-

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61. *White*, 412 U.S. at 766-67 (discriminatory slating practices limited to Dallas County).

62. *Id.* at 767 (racial appeals plagued Dallas County).

63. *Id.* at 769 (unresponsiveness particularly acute in Bexar County).

64. *Id.* at 766. Extremely few members of either minority group had been successful in seeking political office. *Id.*

65. *Id.* at 769-70. Other structural "enhancing factors" in the Texas apportionment plan included a majority vote requirement, a "place" rule that required candidates to run for a specific, numbered slot (thereby encouraging majority-minority candidate confrontations), and the absence of a subdistrict residency requirement. *Id.* at 766.

66. *Id.* at 769. This "totality of the circumstances" language has come to identify the *White* Court's approach to racial vote dilution claims. *See, e.g.*, United States v. Marengo County Comm'n, 731 F.2d 1546, 1563 (11th Cir.), *cert. denied*, 105 S. Ct. 375 (1984); Gingles v. Edmisten, 590 F. Supp. 345, 354 (E.D.N.C. 1984), *prob. juris. noted*, 105 S. Ct. 2137 (1985). Beyond this description, the *White* Court's analysis has defied clear definition and has created debate over exactly what the *White* Court required to establish a violation. *See, e.g.*, Blumstein, *supra* note 56, at 669 (describing the *White* analysis as "amhiguous"); Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and Legislative "Results" Standards*, 50 GEO. WASH. L. REV. 689, 715 (1982) (describing the *White* analysis as "impressionistic").

One debate over the *White* opinion concerns whether the Court in *White* required a showing of discriminatory intent. This debate stems from two of the Court's declarations. At one point the *White* opinion states that "the multiunember district, as desigued and operated . . . invidiously excluded Mexican-Americans from effective participation in political life." 412 U.S. at 769. Yet the Court also stated that the central issue was "whether the impact of the multimember district on this group constituted invidious discrimination." *Id.* at 767; *see* Blumstein, *supra* note 56, at 669-70. The dispute extended to the Senate debate over the amended § 2. Senator Kennedy challenged Senator Hatch to find the establishment of an intent standard in *White*. 128 CONG. REC. S6997 (daily ed. June 18, 1982).

67. 412 U.S. at 769 (quoting Graves v. Barnes, 343 F. Supp. 704, 733 (W.D. Tex. 1972)).

68. 485 F.2d 1297 (5th Cir. 1973), *aff'd per curiam on other grounds sub nom.* East

cuit asserted that when plaintiffs can show a "lack of access to the process of slating candidates, the unresponsiveness of legislators to [the plaintiffs'] particularized interests, a tenuous state policy underlying the preference for multi-member . . . districting, or that . . . past discrimination in general precludes . . . effective participation in the election system, a strong case is made."[69] The *Zimmer* court also noted that the presence of certain election practices that tend to give voting majorities overrepresentation may enhance a vote dilution claim.[70] The *Zimmer* court declared that demonstrating an aggregate of the enumerated factors would establish an unlawful dilution of minority voting strength.[71] Applying this analytical approach, the Fifth Circuit found an unconstitutional vote dilution in *Zimmer*, primarily because of a history of racial discrimination and a majority vote requirement.[72] At this point in the development of racial vote dilution jurisprudence, *Zimmer* typified the accepted analytical approach to determining racial vote dilution. The prescribed approach was to examine in detail a variety of factors, or the "totality of circumstances," to discern the relation between race and politics in the challenged district.

3. Establishing the Intent Standard

In the six years following these initial vote dilution cases, the Supreme Court decided a succession of civil rights cases that had profound implications for future vote dilution claims. In 1976 the Court in *Washington v. Davis*[73] adopted a discriminatory intent standard for racial discrimination cases. The Court explicitly rejected the notion that a law or official act is unconstitutional "*solely* because it has a racially disproportionate impact."[74] The Court stated that a plaintiff must show discriminatory intent to establish unconstitutional discrimination.[75] In *Village of Arlington*

Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). The *Zimmer* court addressed a challenge to a Louisiana parish that maintained an at-large election scheme.

69. *Zimmer*, 485 F.2d at 1305 (footnote omitted).

70. *Id.* The *Zimmer* court specified that the following election practices enhanced the plaintiff's case: (1) large districts, (2) majority vote requirements, (3) anti-single shot voting provisions, and (4) no subdistrict residency requirements. *Id.*

71. *Id.*

72. *Id.* at 1306-07.

73. 426 U.S. 229 (1976). In *Davis* plaintiffs unsuccessfully challenged a personnel test on due process grounds. The plaintiffs claimed that the test unconstitutionally excluded a disproportionately high number of black applicants. *Id.* at 233.

74. *Id.* at 239 (emphasis in original).

75. *Id.* at 239-40.

Heights v. Metropolitan Housing Development Corp.[76] and *Personnel Adminstrator v. Feeney*[77] the Court again expressed its unwillingness to declare a law or procedure unconstitutional simply because of its discriminatory impact.[78] The establishment of the discriminatory intent standard in racial discrimination cases raised the possibility of a new standard for racial vote dilution cases.

In *City of Mobile v. Bolden*[79] a plurality[80] of the Court explicitly extended the purposeful discrimination standard to racial vote dilution claims. In *Bolden* black residents charged that the city's practice of electing commissioners on an at-large basis diluted minority voting strength. The plaintiffs claimed that this dilution violated not only the equal protection clause, but also the fifteenth amendment and section 2 of the Voting Rights Act.[81] The Fifth Circuit, taking heed of *Washington* and *City of Arlington* had required the plaintiffs to establish purposeful vote dilution.[82] The Fifth Circuit had found that the plaintiffs' demonstration of an aggregate of the *Zimmer* factors raised an inference of the requisite intent sufficient to meet this burden.[83]

The Supreme Court agreed that the discriminatory intent standard was appropriate for vote dilution claims, but rejected the Fifth Circuit's reliance on the *Zimmer* factors to establish that intent.[84] Examining the plaintiffs' case, the plurality noted that although no black had ever been elected to the city commission, this evidence did not prove intentional discrimination absent a showing of official obstacles to black candidacies or to black participation in registration and voting.[85] The plurality also declared that evidence of discrimination in city employment and services provided only the "most tenuous and circumstantial evidence of the constitu-

76. 429 U.S. 252 (1977) (unsuccessful equal protection challenge to city's refusal to grant rezoning request seeking to allow racially mixed, multifamily housing; plaintiffs alleged that denial was racially discriminatory).

77. 442 U.S. 256 (1979) (unsuccessful equal protection challenge by female nonveteran to civil service hiring plan that gave preference to veterans, who were predominantly male).

78. *Arlington Heights*, 429 U.S. at 264-65; *Feeney*, 442 U.S. at 272.

79. 446 U.S. 55 (1980).

80. The plurality included Justice Stewart, who wrote the opinion, Chief Justice Burger, and Justices Powell and Rehnquist.

81. 446 U.S. at 58.

82. Bolden v. City of Mobile, 571 F.2d 238, 245 (5th Cir. 1978), *rev'd*, 446 U.S. 55 (1980).

83. 571 F.2d at 246.

84. City of Mobile v. Bolden, 446 U.S. at 73. The Court declared that "[a]lthough the presence of indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose." *Id.*

85. *Id.*

tional invalidity of the electoral system."[86] Regarding the history of official racial discrimination in the city's electoral system, the Court concluded that this past discrimination could not "in the manner of original sin, condemn governmental action that is not itself unlawful."[87] The *Bolden* plurality also discounted the presence of several *Zimmer* "enhancing" factors[88] as "far from proof" of discrimination.[89] For these reasons the plurality of the Court held that the plaintiffs had not produced sufficient evidence to show discriminatory intent on the part of the city and, therefore, had not proved a violation of the plaintiffs' fourteenth and fifteenth amendment rights.[90] The plurality also concluded that the plaintiffs had failed to prove a violation of section 2 of the Voting Rights Act. Congress "intended [section 2] to have an effect no different from that of the Fifteenth Amendment itself."[91] Finally, in response to Justice Marshall's concern for qualitative representation,[92] the plurality rejected the notion that every minority group has a constitutional right to proportional representation.[93]

Justice White, in dissent,[94] argued that in refusing to allow an inference of discriminatory purpose, the plurality had ignored the trial court's special ability to make "intensely local appraisals."[95]

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86. *Id.* at 74.

87. *Id.*

88. *See supra* note 70 and accompanying text (discussing the *Zimmer* "enhancing" factors). In addition to an at-large scheme, a majority vote requirement, a place rule, and no subdistrict residency requirement, the city's district was very large, making campaigns especially expensive and thus disadvantaging low income candidates. *See* Bolden v. City of Mobile, 423 F. Supp. 384, 389-93 (S.D. Ala. 1976).

89. 446 U.S. at 73-74.

90. *Id.* On remand, the district court heard new evidence that the city had instituted the scheme for the purpose of discriminating against minorities. The court found for the plaintiffs and overturned the scheme. Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982).

91. 446 U.S. at 61. The plurality apparently also felt that the fifteenth amendment, and thus § 2, applied only to the ability to vote and register and not to racial vote dilution claims: "Having found that Negroes in Mobile 'register and vote without hindrance', the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." *Id.* at 65.

92. *See infra* notes 96-98 and accompanying text.

93. 446 U.S. at 75-76.

94. *Id.* at 94 (White, J., dissenting). Justices Brennan and Marshall also filed dissenting opinions. *See id.* at 94 (Brennan, J., dissenting), 103 (Marshall, J., dissenting).

95. *Id.* at 95 (White, J., dissenting). Professor Hartman also has argned that "[t]he most disturbing aspect of the *Bolden* plurality's approach is its adamant refusal to examine the proof in a realistic manner for inferences of discriminatory intent." Hartman, *supra* note 66, at 703. All the dissenting Justices in *Bolden* found that the plaintiffs had shown sufficient proof of discriminatory purpose. *See* 446 U.S. at 94 (Brennan, J., dissenting), 103 (White, J., dissenting), 139 (Marshall, J., dissenting).

Justice Marshall's dissent completely rejected the purposeful discrimination standard.[96] Harking back to Justice Douglas' dissent in *Whitcomb*, which called for a qualitative "fair and effective representation" standard,[97] Justice Marshall urged the Court to recognize a substantive constitutional right to an equitable distribution of political influence.[98]

In addition to these dissenting opinions, the *Bolden* decision received a torrent of criticism from other sources.[99] Two years later, in *Rogers v. Lodge*,[100] the Court seemed to take heed of this criticism and allowed an inference of discriminatory intent to be drawn from the *Zimmer* factors.[101] *Rogers*, however, came much too late to arrest the political repercussions of *Bolden*. Congressional revision of section 2 was already well underway.

B. The Amendment of Section 2

In May of 1981 the approaching expiration of the "preclearance" provisions[102] in section 5 of the original Voting Rights Act gave Congress the opportunity to review the entire Act. This process ultimately took fourteen months, culminating in the passage of the Voting Rights Act Amendments of 1982. The most controversial feature of the new bill, the reworded section 2, represented a direct response to the Supreme Court's decision in *Bolden*. Conceding that the Court had the ultimate authority in

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96. 446 U.S. at 104-05 (Marshall, J., dissenting). Justice Marshall argued that racial vote dilution claims are categorically different from simple allegations of race discrimination. Justice Marshall stated that vote dilution cases are "rooted in a different strand of equal protection jurisprudence"—the fundamental right to vote. *Id.* at 113 (Marshall, J., dissenting); *see also* Blumstein, *supra* note 56, at 676-77 (assessing Justice Marshall's opinion).

97. Whitcomb v. Chavis, 403 U.S. 124, 176 (1971) (Douglas, J., dissenting); *see supra* notes 50-52 and accompanying text.

98. *Bolden*, 446 U.S. at 122 (Marshall, J., dissenting).

99. For a list of some of the critical commentary on *Bolden*, see Parker, *supra* note 42, at 737 n.110.

100. 458 U.S. 613 (1982).

101. *Id.* at 621-27. In finding the fourteenth amendment violation, the Court demonstrated far greater deference to the trial court's appraisals in *Rogers* than the Court had in *Bolden*.

102. Congress has determined objectively that certain jurisdictions which meet the criteria set forth in § 4 of the Act, 42 U.S.C. § 1973b (1976), have histories of racial discrimination in voting. Section 5 requires these jurisdictions to "preclear" any alteration in a voting "standard, practice, or procedure" with the United States Attorney General or the United States District Court for the District of Columbia. *Id.* § 1973c (1976). This provision was due to expire in 1982, but Congress chose to extend it for another 25 years. *See id.* § 1973c (1982).

interpreting the fourteenth and fifteenth amendments,[103] Congress elected to use its enforcement power to circumvent the Court's constitutional interpretations.[104]

1. The House Version

The House Judiciary Committee originated the move to amend section 2.[105] The ensuing House Committee Report criticized the *Bolden* decision[106] and declared that the discriminatory purpose standard "frustrate[d] the basic policies of the Act."[107] The House Committee found that the intent standard was inappropriate because it made proving a violation of the Act too difficult and, therefore, allowed "masked and concealed" discrimination to flourish.[108] Moreover, according to the Report, discriminatory intent was not only too difficult to prove, it was basically irrelevant.[109] The Committee indicated that the proper focus of judicial inquiry was to be on election *outcomes* rather than discriminatory intent.[110] In place of the intent standard, the Committee called for a ban on any voting procedure that "*results* in a denial or abridgement of the right . . . to vote on account of race or color."[111]

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103. SENATE REPORT, *supra* note 15, at 41.

104. *Id.* The Senate Report stated: "[T]he proposed amendment to section 2 does not seek to reverse the Court's constitutional interpretation. Rather, the proposal is a proper statutory exercise of Congress' enforcement power . . . ." *Id.*

105. *Id.* at 3.

106. The Report stated: "[T]he Supreme Court's interpretation of Section 2 in *City of Mobile v. Bolden* has created confusion as to the proof necessary to establish a violation under that section." HOUSE REPORT, *supra* noto 4, at 28-29 (footnotes omitted).

107. *Id.* at 29.

108. The Report stated: "Discriminatory purpose is frequently masked and concealed, and officials have become more subtle and more careful in hiding their motivations when they are racially based." *Id.* at 31 (footnote omitted).

109. *Id.* at 29.

110. *Id.* The Report stated: "By amending Section 2 of the Act Congress intends to restore the pre-*Bolden* understanding of the proper legal standard which focuses on the *result and consequences* of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it." *Id.* at 29-30 (footnote omitted) (emphasis added).

111. *Id.* at 48 (emphasis added). The full text of the House version of § 2 [H.R. 3112] is as follows:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] *in a manner which results in a denial or abridgement of* the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). *The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.*

Id. at 48 (new language in italics, deleted language in brackets).

According to the House Report, the results test was to parallel the "effects" test of the remedial section 5.[112] The Supreme Court has interpreted the effects test of section 5 as embodying a principle of "nonretrogression."[113] The nonretrogression principle prohibits any electoral structure change that diminishes the chances for effective representation of protected groups unless a clearly neutral and legitimate reason justifies the change.[114] The Committee recognized that adopting a similar standard for section 2 might appear to embrace the concept of a race-based entitlement to representation because, unlike section 5,[115] section 2 applies to the whole nation. Because a majority of Congress would never accept race-based entitlements to representation,[116] the Committee added a disclaimer to the proposed new section: "The fact that members of a minority group have not been elected in numbers equal the group's proportion of the population shall not, in and of itself, constitute a violation of this section."[117] With surprisingly little debate, the full House approved the Committee's revision of section 2 and sent it to the Senate.[118]

2. The Senate Debate and the Dole Compromise

The House version of section 2 received a critical review in the Senate. In January of 1982, the Senate Judiciary Committee referred the proposed new section to the Subcommittee on the Constitution for hearings.[119] The Subcommittee, chaired by Senator Hatch, held nine days of intensive hearings to explore the meaning and implications of the House proposal.[120] Members of the Subcommittee, especially Senator Hatch, became convinced that adopting the House version of section 2 would be a grave mistake.

The Hatch Subcommittee Report advanced several arguments against the proposed amendment. The Report decried the results

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112. *Id.* at 29.

113. *See* Beer v. United States, 425 U.S. 130, 141 (1976) (stating that "the purpose of § 5 has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise").

114. *See* City of Richmond v. United States, 422 U.S. 358, 371 (1975).

115. *See supra* note 102 (discussing which jurisdictions are subject to § 5).

116. *See* Blumstein, *supra* note 56, at 692 & n.293.

117. HOUSE REPORT, *supra* note 4, at 48.

118. The final House vote was 389 to 24. *See* 127 CONG. REC. H7011 (daily ed. Oct. 5, 1981).

119. SENATE REPORT, *supra* note 15, at 3.

120. *Id.*

test as one that had "no coherent or understandable meaning" apart from the disavowed standard of proportional representation.[121] With only tenuous analytical moorings, the results test would induce courts to make dangerously intrusive, ad hoc inquiries into state and municipal election procedures.[122] The Subcommittee Report also expressed concern that the amended section would encourage minority bloc voting and thus undermine constructive coalition building.[123] Senator Hatch found especially objectionable the suggestion that section 2 should incorporate the effects test of section 5.[124] Because of these considerations, a majority of the Subcommittee recommended retaining the intent standard and rejecting the House's results test.[125]

The Subcommittee's rejection of the House version of section 2 threatened to kill the measure[126] until Senator Dole stepped in with a proposed modification of the House proposal.[127] The "Dole compromise"[128] retained the results focus of the House proposal, but attempted to define the standard with the "totality of circumstances" language from *White v. Regester*.[129] This modification was

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121. SUBCOMMITTEE REPORT, *supra* note 4, at 2, *reprinted in* SENATE REPORT, *supra* note 15, at 136. The Senate Report declared that the results test would change the core value from "equal *access* to registration and the ballot" to "equal *outcome* in the electoral process." SENATE REPORT, *supra* note 15, at 94. (statement of Sen. Hatch) (emphasis in original). According to the Report, racial and ethnic groups, not individuals, would become the basic unit of protection. *Id.*

122. SENATE REPORT, *supra* note 15, at 103 (statement of Sen. Hatch). Senator Hatch claimed that the House version of § 2 would "enhance enormously the role of the Federal judiciary in the State and municipal governmental process." *Id.*

123. SUBCOMMITTEE REPORT, *supra* note 4, at 42-43, *reprinted in* SENATE REPORT, *supra* note 15, at 149. The House version, according to the Report, could have the "detrimental consequence of establishing racial polarity in voting where none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials." *Id.*

124. *See* 128 CONG. REC. S6920-21 (daily ed. June 17, 1982) (statement of Sen. Hatch) (noting that distinguishing the § 2 test from the § 5 test was necessary for the final version of § 2 to pass). Presumably, a majority of senators would have rejected incorporating the § 5 standard into § 2 because this incorporation automatically would subject each jurisdiction in the country, regardless of whether the jurisdiction had ever been guilty of official discrimination in voting, to a test which presumed that such discrimination had occurred.

125. *See* SUBCOMMITTEE REPORT, *supra* note 4, at 67, *reprinted in* SENATE REPORT, *supra* note 15, at 139.

126. *See* 128 CONG. REC. S6920 (daily ed. June 17, 1982) (statement of Sen. Hatch).

127. Senator Kennedy declared that Senator Dole played "an absolutely essential" role in fashioning a version of the results test that was acceptable to a majority of the Senate Judiciary Committee. 128 CONG. REC. S6964 (daily ed. June 17, 1982) (statement of Sen. Kennedy).

128. See *supra* note 17 for the full text of the Dole compromise version, which eventually became law.

129. 412 U.S. 755, 769 (1973). Subsection (b) of Senater Dole's proposal provided in

in no way to be the equivalent of the section 5 effects test[130] and included a stronger disavowal of the proportional representation standard.[131] The Senate Judiciary Committee approved this version of section 2 and sent it to the full Senate.[132] Senate floor debate focused on the unclear meaning of the new results language. Opponents of the amendment raised the same objections to the compromise version that the Hatch Subcommittee had raised to the House version.[133] Skeptics warned that abandoning the intent standard would result in courts pursuing amorphous, ad hoc reviews that ultimately would gravitate toward an unarticulated standard of proportional representation.[134] The language of the proposed statute guaranteeing minority voters the opportunity to "elect representatives of their choice"[135] expressly called for courts to examine "[t]he extent to which members of a protected class have been elected to office."[136] According to the amendment proponents, this language heightened the danger that courts might develop a proportional representation standard.[137]

Proponents of the new section 2 insisted that the goal of the results test was not to guarantee *outcomes*, as the House version seemed to promote, but to guarantee *access* to the political process.[138] The express disclaimer of a right to proportional represen-

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pertinent part:

> A violation of [§ 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by [§ 2] 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.

SENATE REPORT, *supra* note 15, at 82.

130. *See, e.g.*, 128 CONG. REC. S7095 (statement of Sen. Kennedy); *id.* at S6930 (statement of Sen. DeConcini); *see also supra* note 124.

131. The proposed revision read, in pertinent part, "nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in population." *See* SENATE REPORT, *supra* note 15, at 82.

132. *Id.* at 3-4.

133. *See supra* notes 121-25 and accompanying text.

134. *See* 128 CONG. REC. S6509 (daily ed. June 4, 1982) (statement of Sen. Hatch).

135. SENATE REPORT, *supra* note 15, at 82.

136. *Id.*

137. *Id.*

138. "[T]he essence of the Dole compromise was to draw a basic distinction between the issue of access to the political process and election results. And because the language of the House bill did not unequivocally make this distinction, it does represent a compromise." 128 CONG. REC. S7119 (daily ed. June 18, 1982) (statement of Sen. Dole). A right to access meant a right to "register, vote and to have [that] vote fairly counted." *Id.* at S7119 (daily ed. June 18, 1982) (statement of Sen. Dole).

tation would prevent courts from implementing that concept as a standard and limit the section to guaranteeing access.[139] Responding to the claim that no clear alternative standard existed, supporters of the amended section pointed to *White v. Regester*[140] and *Zimmer v. McKeithen*.[141] These cases demonstrated that the "totality of circumstances" approach was workable.[142] Moreover, Congress would lend further guidance by including, as part of section 2's legislative history, a nonexclusive list of factors for courts to consider. These factors included: (1) past official discrimination, (2) racial polarization, (3) "discrimination enhancing" election practices, (4) minority exclusion from a candidate slating process, (5) education and employment discrimination, (6) racial appeals in campaigns, (7) few successful minority candidates, (8) official unresponsiveness to minority needs, and (9) tenouous rationale for the challenged system.[143] In sum, supporters asserted that the

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139. SENATE REPORT, *supra* note 15, at 33.

140. 412 U.S. 755 (1973); *see supra* notes 53-67 and accompanying text.

141. 485 F.2d 1297 (5th Cir. 1973); *see supra* notes 68-72 and accompanying text.

142. The Senate Report stated that *White* and its progeny provided an "extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify." SENATE REPORT, *supra* note 15, at 32.

143. These "typical factors" appear in the Senate Report as follows:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority voto requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.

problems surrounding the lack of a clear standard were more theoretical than real. The results test was "well conceived, well adjusted, not for the academic, but for reality."[144]

A majority of the Senate voted to accept the Dole compromise version of section 2 verbatim,[145] and the House subsequently approved this version.[146] On June 29, 1982, President Reagan signed into law the Voting Rights Act Amendments, including the new section 2.[147] Thus, the discriminatory intent standard, while still applicable to constitutional claims, no longer applied to claims based on section 2,[148] which imposed a results test. The judiciary now faced the task of determining how to apply this new standard.[149]

The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

SENATE REPORT, *supra* note 15, at 28-29 (footnotes omitted).

144. 128 CONG. REC. S6864 (daily ed. June 16, 1982) (statement of Sen. Hollings).

145. The Senate passed the amended bill by a vote of 85 to 8. *Id.* at S7139 (daily ed. June 18, 1982).

146. 128 CONG. REC. H3839-46 (daily ed. June 23, 1982).

147. 18 WEEKLY COMP. PRES. DOC. 846 (June 29, 1982).

148. By amending § 2, Congress vitiated the Supreme Court's holding in *Bolden* that § 2 is equivalent to the fifteenth amendment, *see supra* text accompanying note 91, and, therefore, nullified the *Bolden* ruling that discriminatory intent is the requisite standard for a § 2 claim. The amendment to § 2, however, does not disturb the Court's holding that discriminatory intent is the requisite standard for vote dilution claims based on the fourteenth and fifteenth amendments. *See supra* note 104.

149. The courts already have settled three threshold issues concerning the amended § 2. This Recent Development will not treat these issues, which include: (1) the constitutionality of the amended § 2, (2) whether the section applies to vote dilution claims, and (3) whether § 2 completely abandons the intent standard. Courts that have considered these issues have decided them affirmatively, in favor of racial vote dilution plaintiffs. *See, e.g.*, Mississippi Republican Executive Comm. v. Brooks, 105 S. Ct. 416 (1984) (summarily affirming district court's ruling that the amended § 2 is constitutional, applies to vote dilution cases, and abandons the intent standard); Ketchum v. Byrne, 740 F.2d 1348 (11th Cir. 1984) (§ 2 abandons intent standard), *cert. denied*, 105 S. Ct. 2673 (1985); United States v. Dallas County Comm'n, 739 F.2d 1529 (11th Cir. 1984) (§ 2 constitutional, applicable to vote dilution, abandons intent standard); United States v. Marengo County Comm'n, 731 F.2d 1546 (11th Cir. 1984) (same); Jones v. City of Lubbock, 727 F.2d 364 (5th Cir. 1984) (same); Chapman v. Nicholson, 579 F. Supp. 1504 (N.D. Ala. 1984) (same); Rybicki v. State Bd. of Elections, 574 F. Supp. 1147 (N.D. Ill. 1983) (§ 2 abandons intent standard); Taylor v. Haywood County, 544 F. Supp. 1122 (E.D. Teun. 1982) (same).

III. Recent Development

A. Jones v. City of Lubbock

In *Jones v. City of Lubbock*[150] black and Mexican-American residents of Lubbock, Texas challenged the city's procedures for electing city officials. The city employed a system in which voters elected all city council members at large[151] and that required council and mayoral candidates to receive a majority of votes to win.[152] No black or Mexican-American had ever successfully run for either of these positions.[153]

The plaintiffs claimed that the at-large system denied blacks and Mexican-Americans equal access to the political process in violation of the fourteenth and fifteenth amendements and section 2 of the Voting Rights Act.[154] The district court sustained the fifteenth amendment and section 2 claims.[155] The court found that the system violated the fifteenth amendment because the plan was purposefully adopted to discriminate against blacks. The plan also violated section 2 because the plan presently denied both minority groups equal access to the electoral process.[156] On appeal, the Fifth Circuit affirmed the district court decision in part, holding that the city's system violated section 2 of the Voting Rights Act.[157]

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150. 727 F.2d 364 (5th Cir.), *reh'g denied*, 730 F.2d 233 (5th Cir. 1984).

151. 727 F.2d at 368.

152. *Id.* The challenged system called for a run-off between the two top vote-getters if no candidate attracted a majority of votes. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 369.

156. *Id.* To remedy this denial of equal access, the district court ordered the institution of an electoral scheme with single-member councilmanic districts. *Id.*

157. *Id.* at 386. The city also had challenged the district court's finding of purposeful discrimination, the district court's finding that § 2 was constitutional, and the district court's remedial plan. *Id.* at 369-70. The Fifth Circuit first addressed the district court's finding that the city originally designed the at-large system to discriminate against blacks. *Id.* at 370. The district court based this finding on several racist editorials printed in a newspaper owned by a charter member of the commission that adopted the plan. *Id.* The Fifth Circuit found this evidence too tenuous to support an inference that the city purposefully designed the system to discriminate against blacks. *Id.* at 371. The Fifth Circuit, therefore, reversed the district court's holding that the system violated the fifteenth amendment. *Id.*

The Fifth Circuit turned next to the constitutional issues. *Id.* at 372. First, the city claimed that § 2 violated the due process requirement that a statute must not be so vague that those whom the statute regulates are uncertain whether their conduct is lawful. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972), *cited in Jones*, 727 F.2d at 372. The Fifth Circuit rejected this argument on the grounds that § 2 does not regulate *conduct*. 727 F.2d at 373 (emphasis added). According to the court, § 2 instead "devises a standard for determining whether an electoral *system* discriminates." *Id.* (emphasis added).

In reaching this decision, the Fifth Circuit focused primarily on the meaning and application of the section 2 results test.[158] After recounting the development of vote dilution jurisprudence,[159] the court described Congress' revision of section 2. Summarizing the amendment process, the court highlighted the "typical objective factors" outlined in the Senate Report as aids to interpreting the results test.[160] Given the amendment's legislative history, the court strongly rejected the city's contention that section 2 merely codified a modification of the *Bolden* intent standard.[161]

Turning to the district court's findings, the Fifth Circuit first addressed the city's claim that the district court was "clearly erroneous" in finding polarized voting.[162] The city claimed that the

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Second, the city claimed that § 2 represented an unconstitutional abuse of congressional authority. *Id.* The Fifth Circuit rejected this argument, finding that Congress could appropriately determine that the results test was necessary to protect and enforce the "core values" of the fourteenth and fifteenth amendments. *Id.* at 373-75. For these reasons, the Fifth Circuit upheld § 2 as constitutional. *Id.* at 375.

Finally, the Fifth Circuit addressed the city's claim that the district court's remedial plan—imposing single-member councilmanic districts—overvalued minority voting stength. *Id.* at 386. The Fifth Circuit rejected this argument as "sheer hyperbole." *Id.* The court noted that while the single-member scheme significantly increased the chances of successful minority participation in the electoral process, the plan gave no minority a majority population in any of the districts created. *Id.* The Court also observed that "no racial or ethnic group could dominate elections without either depending on a coalition with another racial or ethnic group, or depending on substantial cross-over from other racial or ethnic groups." *Id.*; *see infra* text following note 262 (arguing that this type of racial cooperation and coalition building is precisely the result that election systems should promote).

158. 727 F.2d at 375.

159. *Id.* at 376-78. The court recognized that six slightly different standards for racial vote dilution cases had at one time held sway in the Fifth Circuit: (1) Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1974) (en banc) ("results" test based on objective "primary" and "enhancing" factors), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1975); (2) Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir.) (en banc) (*Zimmer* test with additional requirement that plaintiff show continuation of effects of past official discrimination), *cert. denied*, 434 U.S. 968 (1977); (3) Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978) (intent test based on "totality of circumstances" under *Zimmer* factors), *cert. denied*, 446 U.S. 951 (1980); (4) City of Mobile v. Bolden, 446 U.S. 55 (1980) (plurality opinion) (showing of discriminatory purpose through direct or indirect evidence); (5) Rogers v. Lodge, 458 U.S. 613 (1982) (intent test that objective factors of *Zimmer* and *Nevett* can satisfy); and (6) 42 U.S.C.A. § 1973 (West Supp. 1983) ("results" test based on totality of circumstances in light of objective evidentiary factors). *See* 727 F.2d at 376 n.8.

160. 727 F.2d at 379. See *supra* note 143 for the list of these factors given in the Senate Report.

161. 727 F.2d at 380. The court declared that it could not "adopt the City's position that Congress absent-mindedly reimposed a standard that the legislative history so clearly rejects." *Id.*

162. *Id.* The court noted that while the pre-*Bolden* cases had not given primary importance to polarized voting, Congress articulated polarized voting as an objective factor for courts to consider under the results test of the new § 2. *Id.* at 384.

plaintiffs' evidence was inaccurate and insignificant, and that the district court had relied too heavily on polarized voting as a single factor.[163] The Fifth Circuit declined to find any error, stating that the plaintiffs had shown sufficient evidence of polarized voting.[164] The court also rejected the city's claim that evidence of city officials' responsiveness[165] to minority needs made polarized voting insignificant.[166] The court declared that polarized voting remained significant as an indication that race was, "at least subtly," a political issue.[167] Furthermore, the court rejected the notion that unresponsiveness is so crucial to a section 2 claim that evidence of responsiveness automatically destroys a plaintiff's case. Rather, responsiveness is merely one of the factors a court should consider in assessing the "totality of circumstances."[168]

The Fifth Circuit then reviewed the lower court's analysis of the totality of circumstances surrounding the Lubbock system. The court recognized that in many respects the city's system did not disadvantage minorities.[169] The court also acknowledged that at-large schemes, even when operating with racially polarized electorates, do not necessarily "result" in denials of access to the political process.[170] Viewed on the whole, however, the city's scheme clearly failed the results test.[171] The court noted that past official discrimination combined with general private discrimination to force less frequent and less effective minority participation in the city's electoral process.[172] Polarized voting continued to minimize minority political power, signifying that race and ethnicity still influenced the electorate's preferences significantly.[173] The court concluded that the at-large scheme and the majority vote requirement aggravated the effects of racial prejudice among white voters, with the

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163. *Id.*

164. *Id.*

165. Although the Fifth Circuit expressed serious doubts about the district court's finding of responsiveness, the court declined to overturn this ruling as clearly erroneous. *Id.* at 381-83.

166. *Id.* at 381.

167. *Id.*

168. *Id.* The court noted that Congress expressly disapproved of excessive reliance on responsiveness in the results test. *Id.* (citing SENATE REPORT, *supra* note 15, at 29 & n.116).

169. 727 F.2d at 384. The court acknowledged that city officials had not been "especially heedless" of minority needs and that "[e]xcept to the extent that political realities may render the effort pointless, [minorities] may register and vote freely." *Id.*

170. *Id.*

171. *Id.* at 386.

172. *Id.* at 383.

173. *Id.*

"predictable effect" of complete minority exclusion from the city council and the mayor's office.[174]

The Fifth Circuit, to close its analysis, summarized the court's interpretation of the section 2 results test. According to the court, section 2 gave "two commands": (1) courts must not allow election schemes to produce discriminatory results so severe that minorities lose access to the political process, and (2) evidence of discriminatory results must amount to "more than mere judicial enforcement of proportional representation."[175] Focusing on these goals, courts must apply the objective factor test with flexibility and without placing too much emphasis on any particular factor. Courts must determine from the totality of the circumstances whether minority voting strength has been effectively minimized or cancelled out.[176]

B. United States v. Marengo County Commission

In *United States v. Marengo County Commission*[177] the United States Court of Appeals for the Eleventh Circuit reviewed a racial vote dilution challenge to an at-large scheme for electing county commissioners and school board members. Ruling before Congress amended section 2, the district court had upheld the scheme as lawful because the plaintiffs had failed to prove either discriminatory purpose or discriminatory results.[178] On appeal, the Eleventh Circuit held that the new section 2 applied to the case and accordingly remanded the matter for further consideration.[179]

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174. *Id.*

175. *Id.* at 384.

176. *Id.* at 385.

177. 731 F.2d 1546 (11th Cir. 1984).

178. Clark v. Marengo County, 469 F. Supp. 1150 (S.D. Ala. 1979). The district court was "convinced that the lack of black success in Marengo County elections result[ed] not from a lack of access to the political system, but rather from a failure of the blacks to turn out as many of their half of the voters as [did] the whites." *Id.* at 1161 n.7.

179. 731 F.2d at 1556. The defendants contended that § 2 protected only *access* to the political process. *Id.* (emphasis added). The Eleventh Circuit rejected this claim, noting that Congress designed the Voting Rights Act to protect an "*effective* right of participation." *Id.* (emphasis in original). Furthermore, the new results test clearly represented a response to *Bolden*'s increased burden on plaintiffs in vote dilution cases. *Id.* The court stated, "It would defy reason to bold that the amendment was not intended to cover the very type of case that provoked its passage." *Id.* This point of contention is a testament to the confusion surrounding Congress' revision of § 2. Both the defendants and the court can find support in the legislative history for their positions on this issue. *Compare* 128 CONG. REC. S6961 (daily ed. June 17, 1982) (stating "the focus of section 2 is on equal access") *with* SENATE REPORT, *supra* note 15, at 28 (stating that § 2 is violated if plaintiffs do not have "an equal opportunity to participate in the political processes and to elect candidates of their choice").

The court also rejected the defendant's claim that § 2 was unconstitutional, finding § 2

Although the record showed a "clear violation of the results test,"[180] the court recognized that conditions in the county might have changed since the district court's decision and directed the lower court to reevaluate the present political conditions.[181]

Along with the remand, the Eleventh Circuit sent a detailed explanation of how the results test of section 2 should apply to an allegation that an at-large system unlawfully dilutes minority votes. The court found that the langnage and history of section 2 made several things clear: discriminatory intent was not necessary to establish a violation of the statute; the statute did not prohibit at-large elections per se; and the statute did not require proportional representation.[182] Finally, section 2 did not focus on whether minorities received adequate public services, but on whether minorities could *participate* equally in the political process.[183] According to the court, the key to the results test lay in the "typical factors" detailed in the Senate Report.[184] These factors were to guide the totality of circumstances inquiry.[185]

After making these general conclusions about the results test, the court focused on the "typical factors" and their role in analyzing this case. The court declared that racially polarized voting would "ordinarily be the keystone of a dilution case" because polarized voting served as "the surest indication of race-conscious politics."[186] The focus on polarized voting answered the criticism that the results test creates a race issue.[187] Quoting the Senate Report, the court declared that the test applied only where "racial politics [already] dominate the electoral process."[188] Marengo County, where race was the "main issue" in elections, constituted such a situation.[189]

The Eleventh Circuit also asserted that a history of official discrimination is an important consideration in vote dilution cases because past discrimination can have lingering socioeconomic ef-

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clearly within Congress' enforcement power. 731 F.2d at 1557.

180. 731 F.2d at 1574.

181. *Id.*

182. *Id.* at 1564-65.

183. *Id.* at 1565 (emphasis in original).

184. *Id.* at 1565-66 & n.32. See *supra* note 143 for the Senate Report's list of factors.

185. 731 F.2d at 1565-66.

186. *Id.* at 1566; *see also* United States v. Dallas County Comm'n, 739 F.2d 1529, 1535 (11th Cir. 1984) (reasserting that polarized voting is key analytical factor in racial vote dilution claims).

187. *See supra* note 123 and accompanying text.

188. 731 F.2d at 1566 (quoting SENATE REPORT, *supra* note 15, at 33).

189. *Id.* at 1567.

fects that impair the ability of minorities to participate in the political process.[190] In overturning the district court's decision, the court found undisputed evidence of past discrimination[191] and that this discrimination had hindered the ability of Marengo County blacks to vote.[192] This conclusion completely undercut the defendant's claim that apathy accounted for the low black participation in the electoral process.[193]

The court also examined four other factors that strongly suggested that the Marengo County at-large election system violated section 2. First, the court noted that despite the lack of a majority vote requirement and the existence of residency subdistricts, the at-large plan and the large size of the county caused the electoral system, "on balance," to submerge minority interests.[194] Second, the court found that the state policy underlying the at-large requirement was tenuous.[195] According to the Eleventh Circuit, the state enacted the at-large system "in direct response to the prospect of increased black political participation."[196] Third, the court found that the extreme scarcity of black elected officials was "strong evidence of dilution."[197] Last, the court found that Ma-

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190. *Id.*

191. *Id.* The court also suggested that official racial discrimination may not have ended. The court noted that a federal district court, in a separate case, had recently characterized the hoard of education as heing "obdurately obstinate" in its opposition to school desegregation. *Id.* at 1567-68 (citing Lee v. Marengo County Bd. of Educ., 454 F. Supp. 918, 931 (S.D. Ala. 1978)).

192. 731 F.2d at 1568. The court quoted the Senate Report:

> "The courts have recognized that disproportionate educational[,] employment, income level[,] and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation."

Id. at 1568-69 (quoting SENATE REPORT, *supra* note 15, at 29 n.114 (citations omitted)).

193. 731 F.2d at 1568. The court also blamed low minority participation on the paucity of black registration officials and the short hours and single location of the County Board of Registrars. The court noted that the election board refused a black's offer to serve as a deputy registrar. *Id.* at 1569-70.

194. *Id.* at 1570.

195. *Id.* at 1571. The court explained that the "tenuousness" factor is more directly pertinent under the intent standard because a tenuous explanation for a system is circumstantial evidence that the system was designed with discriminatory intent. Tenuousness is still relevant to the results test, however, in that discriminatory purpose is circumstantial evidence that the system produces discriminatory results. *Id.*

196. *Id.* The court noted that the county adopted the system in 1955, just after the Supreme Court decided Brown v. Board of Educ., 347 U.S. 483 (1954). *See* 731 F.2d at 1571.

197. 731 F.2d at 1572.

rengo's county officials were not responsive to minority needs.[198]

According to the court, this analysis compelled a finding that the county's at-large system violated section 2.[199] The court stressed that it had not applied a rigid formula to reach this conclusion and refused to summarize conclusively the totality of circumstances approach. The court simply stated that "when the plaintiffs establish these factors,[200] and no factors weigh strongly against the plaintiffs' case, [unlawful] dilution must be found."[201]

C. Gingles v. Edmisten

In *Gingles v. Edmisten*[202] black residents of North Carolina claimed that the state legislature's plan for redistricting state house and senate seats violated section 2 of the Voting Rights Act, as well as the thirteenth, fourteenth, and fifteentb amendments. Specifically, the plaintiffs charged that the use of multimember districts in certain areas would impermissibly submerge black voting minorities.[203] The plaintiffs also claimed that the plan fractured what would otherwise be effective black voting majorities into separate districts.[204]

The *Gingles* court began its analysis with an inquiry into the purpose and intended operation of the amended section 2. The court noted that removing the intent requirement was the "fundamental purpose" of the amendment.[205] According to the *Gingles* court, Congress intended the new results test to be an abstract of the Supreme Court's approach in *White*.[206] In *White* the Court was concerned that racial polarization would interact with a particular election mechanism to effectively deny political power to mi-

198. *Id.* at 1573. The court declared that the "best evidence of [unresponsiveness] is the racially polarized voting patterns [sic]. Responsiveness is an inherently subjective factor and the best judges are the people themselves. The continuing pattern of polarization is tberefore strong evidence that the elected officials are not meeting the needs of Marengo County blacks." *Id.* This logic ignores, however, that minorities themselves may reflect racial animus in their voting preferences.

199. *Id.* at 1574.

200. The term "these factors" refers to polarized voting, past official discrimination, few minority elected officials, unresponsiveness to minority needs, and election practices that impair minority participation and enhance vote dilution. *See id.*

201. *Id.*

202. 590 F. Supp. 345 (E.D.N.C. 1984), *cert. granted sub nom.* Thornburg v. Gingles, 105 S. Ct. 2137 (1985).

203. *Id.* at 349.

204. *Id.*

205. *Id.* at 353.

206. White v. Regester, 412 U.S. 755 (1973); *see supra* notes 53-67 and accompanying text.

norities.[207] The new section 2, therefore, required courts to look at the challenged mechanism's interaction with "those historical, social and political factors generally suggested as probative of dilution . . . ."[208] The court stressed that the important factors to consider in this analysis are the *Zimmer*[209] factors that Congress incorporated into the amendment's legislative history.[210] The court asserted that among these factors, the "demonstrable unwillingness of substantial numbers of the racial majority to vote for any minority . . . candidate . . . is the linchpin of vote dilution by districting."[211]

Having examined the intended operation of section 2, the court considered the possible risks associated with the results test. First, the court acknowledged section 2's proviso against proportional representation.[212] The court, however, declared that Congress, in adopting a results test, knowingly had created a risk of recognizing "group voting rights" in a race-conscious manner "alien to the American political tradition."[213] Second, the court recognized that Congress had "rejected as unfounded, or assumed as outweighed," the risk that a judicial remedy might ignore political divisions within minority communities.[214] Last, the court stated that Congress also had dismissed the risk that minorities, relying too heavily on the courts to build political power, would neglect "more healthy" means of achieving this end, such as registration drives and coalition building.[215] The court found that because Congress adopted section 2 in spite of these risks, section 2 was designed to correct all present conditions of racial vote dilution immediately.[216] The court concluded that courts applying section 2 should not speculate whether normal political processes are likely to remove present racial vote dilution, or whether some elements

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207. 590 F. Supp. at 355.

208. *Id.* at 354.

209. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam); *see supra* notes 68-72 and accompanying text.

210. *See supra* note 143.

211. 590 F. Supp. at 355.

212. *Id.* The court stated that the disclaimer meant only that (1) multimember districts that contained black voting minorities were not unlawful per se and (2) racial dilution is not established by the mere failure of the voters to elect blacks in numbers corresponding to their percentage of the population. *Id.*

213. *Id.* at 357.

214. *Id.* at 356.

215. *Id.*

216. *Id.* at 356.

of the racial minority prefer to rely on those processes rather than on a judicial remedy.[217]

The court then applied section 2 to the instant case by examining the totality of circumstances surrounding the challenged districts. The court found a long history of official discrimination against blacks in voting matters.[218] This discrimination had left a legacy of depressed black voter registration.[219] Similarly, past de jure and continuing de facto discrimination in such areas as education, employment, and health services forced minorities generally into a low socioeconomic status.[220] This situation, in turn, hindered minority ability to participate effectively in the political process.[221] The court also found that a statewide majority vote requirement in primary elections and a lack of subdistrict residency requirements for candidates in multimember districts further diminished minority political opportunity.[222] Racial appeals in campaigns frequently surfaced in North Carolina elections, most recently in the 1984 United States Senate campaign. The court found that such appeals lessened black citizens' opportunity to participate in the political process.[223] The court also found racially polarized voting in the challenged districts to be "persistent and severe."[224] Finally, the court found that extremely few blacks in each of the challenged districts had managed to mount successful campaigns.[225]

The court then considered the defendants' contention that several factors mitigated against finding that the totality of circumstances revealed unlawful vote dilution. The court agreed that black political participation in North Carolina had recently increased measurably.[226] The court also noted that in some areas, including some of the challenged districts, interracial coalition build-

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217. *Id.* at 357.

218. *Id.* at 359-61. The discrimination took the traditional forms: literacy tests, poll taxes, and multimember districting with anti-single shot voting laws. *Id.*

219. *Id.* at 361.

220. *Id.* at 361-63.

221. *Id.* at 361.

222. *Id.* at 363.

223. *Id.* at 364. The court found that the racial appeals exploited existing fears and prejudices of white citizens regarding black participation in politics and operated to lessen black voters' ability to elect candidates of their choice. *Id.*

224. *Id.* at 367. The court found "substantial racial polarization among the electorate," even in cases in which black candidates received as much as 45% of the white vote. According to the court, certain black candidates would have received a substantially higher percentage of white votes were racial polarization not so prevalent. *See id.* at 371.

225. *See id.* at 372.

226. *Id.*

ing had grown. In the court's view, however, this phenomenon had "not proceeded to the point of overcoming still entrenched racial vote polarization."[227] Similarly, the court rejected the allegation that division within the black community indicated that blacks did not constitute a discrete, disadvantaged voting minority.[228] Finally, the court dismissed both the notion that the election scheme embodied compelling race-neutral policies sufficient to override its racially dilutive effects[229] and the suggestion that a remedial plan would entail unconstitutional race-conscious gerrymandering.[230] After considering all of these factors, the court concluded that the proposed redistricting plan violated section 2.[231]

D. Ketchum v. Byrne

In *Ketchum v. Byrne*[232] black and Hispanic residents of Chicago challenged the city's aldermanic redistricting scheme. The plaintiffs claimed that by reducing the number of wards in which minority groups constituted an effective voting majority, the plan violated the fourteenth and fifteenth amendments and section 2.[233] The district court sustained the section 2 challenge and ordered a plan that restored black voting age majorities in two wards and

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227. *Id.*

228. *Id.* at 373. The court rejected this argument for two reasons. First, the division referred to by the defendants concerned the desirability of the remedy sought, not the existence of racial vote dilution. Second, the division shown was simply insufficient to draw into question the existence of blacks as a discrete voting minority. *Id.* at 372-73.

229. *Id.* at 373-74. The defendants asserted that the multimember system was chosen originally to maintain an historical, functionally sound tradition of using whole counties as "building blocks" for districting. The court acknowledged that these origins were devoid of racial implications, but found that as matters developed, the legislature could not rely on this original policy to justify maintaining a system that resulted in racial vote dilution. *Id.* at 374.

230. *Id.*

231. *Id.* at 376. Finding a § 2 violation, the court considered an inquiry into the plaintiff's constitutional claims unnecessary. *Id.* at 350.

In a supplemental opinion filed three months later, the court upheld a new redistricting plan as sufficient to alleviate all legitimate claims of racial vote dilution. *Id.* at 380. In rejecting the plaintiff's claim that the remedy was insufficient, the court held: (1) a court cannot reject a legislature's redistricting plan simply because the court would have sought to adopt a still more effective remedy for racial vote dilution; (2) even if the desire to protect incumbents is obviously a greater concern to the legislature than the elimination of racial vote dilution, this motivation will not require per se invalidation of a proposed redistricting plan; and (3) the courts cannot give minority voters virtual veto power over all remedial plans that the state submits. *Id.* at 382-84.

232. 740 F.2d 1398 (7th Cir. 1984).

233. *Id.* at 1402.

created similar Hispanic majorities in four wards.[234] The plaintiffs appealed to the United States Court of Appeals for the Seventh Circuit, claiming that the district court's remedial plan did not provide for sufficient black and Hispanic majorities in the wards in question.[235] On appeal, the Seventh Circuit approved the finding of a section 2 violation[236] and agreed that the lower court's remedy was insufficient.[237]

Although the plaintiffs had not appealed the section 2 ruling, the Seventh Circuit took the opportunity to offer its interpretation of the provision. Declaring that the revised section 2 rejected the intent standard,[238] the court stated that the proper focus of inquiry was on the typical factors given in the legislative history.[239] The court acknowledged that Chicago's political situation was obviously different[240] from that in *White v. Regester*,[241] the case from which Congress had drawn many of the factors. Discrimination in Chicago politics had been less "open and notorious," and political officials had been more responsive to minority concerns.[242] In addition, the city had elected numerous black officials, including aldermen, state senators and representatives, congressmen, and the present mayor.[243] The court, however, noted that adverse social and economic conditions still existed. Blacks and Hispanics generally suffered from lower incomes, lower voter registration, employment discrimination, and housing and school segregation.[244]

Turning abruptly from the examination of the "typical fac-

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234. *Id.* The district court, however, did not find enough evidence of official discriminatory intent to establish a constitutional violation. *Id.* The district court had found that the adoption of the plan that reduced tbe number of minority controlled wards sprang from a nonracially-discriminatory desire to protect incumbents. *Id.*

235. *Id.* The plaintiffs also asked the court to declare that the plan violated the fourteenth amendment. *Id.* at 1402-03. The court, however, refused to decide the fourteenth amendment issue, stating tbat finding a constitutional violation would not alter the remedy provided under § 2. *Id.* at 1409-10.

236. *Id.* at 1406.

237. *Id.* at 1419. In reversing and remanding the district court's plan, the court declared that each black majority ward must contain an "effective" voting majority. *Id.* The court suggested a 65% population majority. *Id.* With regard to the Hispanic districts, the Seventh Circuit ordered the lower court to determine if it could create similar majorities in four more wards. *Id.*

238. *Id.* at 1403.

239. *Id.* at 1403-05. See *supra* note 143 for the Senate Report's list of these factors.

240. 740 F.2d at 1405.

241. 412 U.S. 755 (1973); *see supra* notes 53-67 and accompanying text.

242. 740 F.2d at 1405.

243. *Id.* The court noted that Hispanics had much less success at the polls. *Id.* at 1406.

244. *Id.* at 1405.

tors," the Seventh Circuit noted that the district court had failed to find that the redistricting plan was the product of intentional discrimination. Instead, the district court indicated that the plan reflected the severe housing segregation of blacks in certain areas and a desire to protect incumbents.[245] The district court found a section 2 violation because the plan caused a retrogression in the number of black majority wards.[246] The Seventh Circuit approved the adoption of the retrogression principle for section 2 claims.[247] Going beyond the district court's ruling, the Seventh Circuit suggested that the retrogression in question actually reflected intentional discrimination. The Seventh Circuit observed that because preserving white incumbencies amid a high black-percentage population is almost impossible without gerrymandering to limit black representation, many devices used to preserve incumbencies are necessarily racially discriminatory. The court, therefore, found little purpose in distinguishing between discrimination based on the objective of keeping certain incumbent whites in office and discrimination based on "pure racial animus."[248] The court, however, reiterated that discriminatory result, not intent, is the proper focus of a section 2 claim.[249]

IV. Analysis: An Approach to Section 2

A. *Section 2: Banning the Amplification of Private Discrimination*

The four recent vote dilution cases represent judicial attempts to determine the proper application of the results test of the amended section 2 of the Voting Rights Act. An examination of Congess' debate[250] over the amendment of section 2 reveals that the contours of the results test must lie somewhere between the purposeful discrimination and proportional representation standards. These two standards represent two extremes; a challenged election scheme may undeniably reflect no purposeful discrimina-

245. *Id.* at 1406.

246. *Id.*

247. *Id.*

248. *Id.* at 1408. The court's logic represents abject abuse of the racial vote dilution concept. A world of difference exists between a situation in which white candidates avoid predominantly black wards simply because those blacks refuse to support any white candidate and a situation in which predominantly white legislative bodies attempt to dilute black voting strength out of "pure racial animus." The difference lies in who is being racially discriminatory—the voter or the legislators.

249. *Id.* at 1409.

250. *See supra* notes 105-49 and accompanying text.

tion but fall far short of insuring that minority representation mirror minority population. In choosing a standard between these extremes, Congress lost the advantages of certainty, apprehensibility, and consistency that these two standards offered. The results test of the revised section 2 does not possess these characteristics.[251] Despite congressional confidence in the guidance that the legislative history and pre-*Bolden* case law offered,[252] the "totality of circumstances" alternate to the two disavowed standards came to the judiciary largely undefined. Although the decisions following the amendment of section 2 may have ended the debate over the constitutionality and coverage of the section,[253] these cases did not settle the issue of the proper interpretation of the results test.

A coherent interpretation is available. The key to arriving at an analytically sensible approach to the statutory results test lies in closely analyzing a single term. Throughout the congressional debates over the amendment of section 2, proponents of the revised provision continually stressed the need to prohibit electoral practices that engender "discriminatory results."[254] The proponents of the section, however, never made clear what constitutes "discriminatory results." Discriminatory results are clearly something other than instances of official purposeful discrimination. Yet discriminatory results must not be the equivalent of racially disproportionate results, or else prohibiting them would fix proportional representation as the standard for review. Fortunately, the legislative history of the revised section 2 and the *White v.*

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251. Professor Blumstein has severely criticized the use of the term "discriminatory results," labeling it "confusing," "obfuscatory," and "devoid of analytical meaning." *See* Blumstein, *supra* note 56, at 692 n.292. He asserts: "There is discrimination, which hinges on a finding of intentional race-based decisionmaking, and there are disadvantageous consequences, which may affect a racial group disproportionately. Those consequences, however, cannot sensibly be labeled 'discriminatory,' because that term focuses upon process rather than outcome." *Id.* Professor Blumstein has gone beyond this criticism of the "results" standard to suggest that for racial vote dilution claims, no coherent alternative to the proportional respresentation and purposeful discrimination standards exists. Professor Blumstein has expressed doubt whether, in the absence of the discriminatory intent standard, any "analytically sensible way can be found to avoid the Scylla of a pure race-based results approach and the Charybdis of intrusive and standardless judicial oversigbt of state and local political practices and institutions." *Id.* 702-03.

252. *See supra* note 142 and accompanying text. Professor Hartman notes that "[p]roponents of amended section 2 were far too sanguine about the clarity of the pre-*Bolden* results test and the guidance pre-*Bolden* case law would give courts applying the statutory test." Hartman, *supra* note 66, at 732.

253. *See supra* note 149.

254. *See, e.g., supra* text accompanying note 111.

Regester[255] decision, from which the section draws much of its language, offer clues to a third possible meaning.

Congress, through the legislative history of section 2, used the term "discriminatory results" to express frustration with the electoral ramifications of private discrimination. The Senate Report notes that Congress designed section 2 to cover situations in which "racial politics do dominate the electoral process."[256] The Report further notes that "*[i]n the context of . . . racial bloc voting*, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections."[257] Seven of the eight "typical factors" given in the legislative history as interpretive guides directly aid in determining the extent to which private racial discrimination pervades the voting process.[258] These pieces of legislative history demonstrate that Congress' concern focused on situations in which private racial discrimination flourished. Congress, therefore, revised section 2 to prohibit election practices that accommodate or amplify the effect that private discrimination has in the voting process.

The incorporation of the language of *White v. Regester* into section 2 also supports the conclusion that Congress designed the section to combat the amplification of private discrimination in voting. Admittedly, the *White* Court did not expressly adopt this approach in its fourteenth amendment analysis, but this goal is implicit in the Court's approach. Specifically, the *White* Court examined factors that indicated the influence of private discrimination in the election process.[259] The Court then declared that the challenged multimember districts were unlawful, not because they were "in themselves improper [or] invidious," but because they "enhanced the opportunity for racial discrimination."[260]

Congress certainly cannot prohibit individuals from casting their votes in accordance with their racial prejudices, even though this practice, if widespread, subverts the constitutional goal of racial equality.[261] Congress can, however, prohibit certain voting

255. 412 U.S. 755 (1973); *see supra* notes 53-67 and accompanying text.

256. SENATE REPORT, *supra* note 15, at 33.

257. *Id.* (emphasis added).

258. *See supra* note 143. The other factor recognizes that historical official discrimination often has enduring effects that inhibit minority interest in voting.

259. *See supra* notes 58-65 and accompanying text.

260. White v. Regester, 412 U.S. 755, 766 (1973).

261. Professors Alan and Bruce Howard have written a penetrating discussion about the tension between two constitutional norms. *See* Howard & Howard, *supra* note 9. On one hand, the equal protection clause mandates a goal of racial equality in all areas of govern-

practices that accommodate and amplify private racial discrimination. Several cases have demonstrated that certain voting practices, such as at-large election schemes, may have this effect by overrepresenting a racially discriminatory voting majority, thereby precluding any realistic opportunity for minorities to have their views represented.[262] In keeping with congressional intent, section 2 should operate to remedy these situations. Congress never suggested, however, that section 2 should apply to situations in which racial discrimination is not pervasive. In these situations, the same voting practices may serve to enhance constructive coalition building. The natural political incentive to build as broad a base of support as possible will force all candidates to appeal to a wider cross-section of the electorate. This phenomenon will erode race conscious politics. Courts should not use section 2 to frustrate this clearly desirable result.

B. Applying the Results Test

Interpreting section 2 as an effort to minimize the effects of private discrimination in the electoral process will not relieve courts from undertaking a subjective analysis of the relation between race and politics in a challenged jurisdiction. This interpretation cannot match the rigid objectivity of either the discriminatory intent or proportional representation standards. Interpreting section 2 as a ban on amplifying private discrimination, however, gives direction and limitation to an otherwise aimless or improperly aimed approach.

Both *Jones v. City of Lubbock*[263] and *United States v. Ma-*

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mental action, including the maintenance of election systems. The formation of "safe" districts is one way to insure minority effectiveness. Yet blind pursuit of the racial equality norm ultimately runs afoul of another constitutional norm—"political equality." As Professors Howard and Howard state: "Giving some groups safe districts and proportional representation and not others thus necessarily treats the groups, and individual voters, unequally." *Id.* at 1618-19. Safe districting may be necessary in some instances, but Professors Howard and Howard suggest that courts pursue alternate means of serving the racial equality norm that do not "so seriously infring[e on] the political equality norm." *Id.* at 1663. The professors offer cumulative voting (which allows voters in multimember districts to cast multiple votes for a single preferred candidate for one of the at-large positions), single-shot voting (which allows voters to limit their support to one candidate in multimember elections), and plurality rather than majority vote requirements. *Id.* at 1658-59, 60 n.188. As a final alternative the professors offer a system that allows minority voters to "opt-out" of a safe district and vote in another, nonsafe district. *Id.* at 1661.

262. *See supra* note 8 and accompanying text.

263. 727 F.2d 364 (5th Cir.), *reh'g denied*, 730 F.2d 233 (5th Cir. 1984); *see supra* notes 150-76 and accompanying text.

rengo County Commission[264] reflect applications of the results test that are compatible with this interpretation. Although neither court managed to articulate a guiding analytical principle, each court focused on the racial attitudes of the voting majority. Both courts relied heavily on racially polarized voting as a key consideration in determining whether the questioned practices diluted minority voting power.[265] Before striking down the respective at-large election schemes, each court made certain that race was already a major if not overriding issue and that the schemes aggravated this problem.[266] Admittedly, neither court expressly adopted the view that section 2 should operate to strike down electoral practices that amplify private discrimination. A court explicitly adopting this interpretation, however, would follow a similar approach and reach a similar result in each case.

Gingles v. Edmisten[267] also represents an approach that is compatible with the notion that section 2 should operate to prevent the magnification of private voter discrimination. The court's decision focused primarily on the extent to which racial discrimination interacted with the proposed reapportionment scheme to effectively dilute minority voting strength.[268] The *Gingles* court's analysis, however, was seriously flawed in its inflexibility. The court asserted, with virtually no support, that Congress wanted courts to ignore any evidence that methods more "healthy" than judicial intervention might erode racial barriers to the voting process.[269] While the totality of circumstances in several of the dis-

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264. 731 F.2d 1546 (11th Cir. 1984); *see supra* notes 177-201 and accompanying text.

265. *See supra* text accompanying notes 173 (discussing *Jones*) and 186 (discussing *Marengo County*). In his special concurrence to the Fifth Circuit's decision to deny a rehearing of the *Jones* case, Judge Higginbotham advised that statistics showing polarized voting can be misleading. Jones v. City of Lubbock, 730 F.2d 233 (5th Cir. 1984). Judge Higginbotham cautioned that reliance on a raw correlation of statistics may lead to proportional representation and declared that detailed conclusions about race relations must support a finding of polarized voting. *Id.* at 234. Though he did not find an error in the *Jones* case, Judge Higginbotham warned that careless adoption of the *Jones* approach to polarized voting could be dangerous because other nonrace-related variables may be reponsible for similar voting patterns. *Id.* at 235.

266. *See supra* text accompanying notes 172-74 (discussing *Jones*) and text accompanying notes 186-99 (discussing *Marengo County*).

267. 590 F. Supp. 345 (E.D.N.C. 1984), *cert. granted sub nom.* Thornburg v. Gingles, 105 S. Ct. 2137 (1985); *see supra* notes 202-31 and accompanying text.

268. *See supra* text accompanying notes 207-08.

269. *See* 590 F. Supp. at 357. To support this conclusion, the court offered only (1) a statement by Senator Dole that the new § 2 was designed to eradicate "racial discrimination which . . . still exists in the American electoral process," and (2) citations to the Subcommittee report that warned of the risks of adopting § 2, including the risk that judicial reme-

tricts challenged in *Gingles* clearly called for immediate remedial measures, other districts showed promise of developing biracial voting coalitions.[270] The *Gingles* court, however, refused as a matter of law to consider this development in the totality of circumstances analysis.[271] By demanding that the state split these fully biracial multimember districts into smaller, racially-defined segments, the court may have effectively subverted further progress toward alleviating race-conscious politics. This result clearly would frustrate the aims of the Voting Rights Act.[272]

Ketchum v. Byrne[273] represents a completely different approach to the results test. The Seventh Circuit's brief analysis of the totality of circumstances surrounding the challenged redistricting plan was essentially aimless. The court's analysis was not directed toward determining whether the proposed plan would aggravate the effects of pervasive racial discrimination. Instead, the court chose to approve nonretrogression as a guiding principle for section 2 analysis. In doing so, the Seventh Circuit ignored the legislative history of the section.[274] Worse, the *Ketchum* decision suggests that any future redistricting plan that happens to reduce the number of safe minority wards will be presumptively invalid. This test moves perilously close to the expressly disavowed standard of

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dies would supplant healthy trends toward biracial coalition building. *Id.* at 356. The statement by Senator Dole that the target is existing discrimination clearly does not support the conclusion that courts may not consider evidence of potential future improvements in interracial coalition building as one of the "circumstances" in determining whether § 2 prohibits a certain election practice. The court offered the Subcommittee testimony to show that Congress knew of the potential risk when it passed the amendment. The court reasoned that because Congress passed § 2 with knowledge of these risks, Congress intended for courts to ignore the risks completely in applying § 2. This inference simply demonstrates the logical fallacy of black-and-white thinking.

270. 590 F. Supp. at 372. The court recognized that "[i]n some areas of the state, . . . there is increased willingness on the part of influential white politicians openly to draw black citizens into political coalitions . . . [and that] this wholesome development . . . will presumably continue . . . ." *Id.*

271. *See supra* text accompanying note 217.

272. *See* SENATE REPORT, *supra* note 15, at 103 (statement of Sen. Hatch) (noting the "color-blind principles of law" underpinning the Voting Rights Act).

The United States Supreme Court has granted a writ of certiorari for *Gingles v. Edmisten, sub nom.* Thornburg v. Gingles, 105 S. Ct. 2137 (1985). In reviewing *Gingles* the Supreme Court should expressly repudiate this second element of the *Gingles* court's analysis and should encourage courts to include among the "totality of circumstances" the potential for growth of minority participation through nonjudicial means.

273. 740 F.2d 1398 (7th Cir. 1984).

274. Proponents of the Dole compromise, the final version of § 2, adamantly insisted that § 2 did not incorporate the § 5 effects test, which embraces the nonretrogression principle. *See supra* text accompanying note 130.

proportional representation. Moreover, this approach abandons the hope that race relations will improve significantly and ignores the possibility that minorities will become more pluralistic in their political preferences. By adopting nonretrogression as the standard for review in section 2 cases, the *Ketchum* court virtually has insured that race will be fixed permanently as the preeminent redistricting issue in Chicago. The Seventh Circuit's adoption of the nonretrogression principle for section 2 thus reflects a cynical and apathetic view toward the ultimate goal of eliminating race as a political issue.[275] Unlike the *Ketchum* approach, the view that the courts should limit the application of section 2 to situations in which electoral practices amplify private discrimination recognizes the possible virtues of a racially diverse electorate.[276]

The proper application of the new section 2 requires courts to adopt the following approach. Before finding a section 2 violation, courts should seek to determine whether the challenged practice does more to amplify private discrimination than to enhance constructive coalition building. In making this determination, the courts must undertake a balancing process based on an examination of the totality of circumstances. The existence or nonexistence of racially polarized voting should serve as the focus of the "totality of circumstances" analysis because this factor most directly determines whether race consciousness pervades local politics. In addition to the other "typical factors," courts should examine whether the prospect exists for enhancing minority participation in local politics without judicial intervention. Finally, when this analysis indicates that an election scheme violates section 2, courts should fashion remedies that do not foreclose the need and opportunity for interracial cooperation in the political process. Several alternatives to safe districting and complete abandonment of at-large and multimember schemes exist. For example, cumulative voting,[277] single-shot voting,[278] and subdistrict residency requirements may enhance the possibility of effective minority participation in the electoral process without eliminating political incentives to break down racial barriers.[279]

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275. *See supra* note 272 and accompanying text.

276. *See supra* text following note 262.

277. *See supra* note 261.

278. *Id.*

279. For a good discussion of these and other alternatives, see Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144 (1982).

V. CONCLUSION

Congress made two things clear in amending section 2 of the Voting Rights Act. First, plaintiffs in racial vote dilution cases no longer must prove that a challenged electoral practice reflects an official intent to discriminate. Second, these plaintiffs can claim no right to representation in proportion to their population. Apart from these circumscriptions, Congress did little more to define section 2 than to label it a prohibition against election practices that have "discriminatory results." The legislative history of the amended section 2 does not explain adequately what constitutes "discriminatory results." Congress indicated, however, that it intended to prohibit certain electoral procedures when they operate to amplify the political effects of private racial discrimination. Adopting this interpretation of section 2 gives direction and limitation to an inquiry that otherwise will tend to slide either toward standardless, ad hoc adjudications or toward an unarticulated standard of proportional representation. This interpretation also allows courts to recognize the potential benefits of electoral practices that overrepresent voting majorities. These benefits include fostering constructive, interracial coalition building and favoring candidates who appeal to a broad range of voters.

Adopting this interpretation, courts reviewing racial vote dilution claims under section 2 should seek to determine whether a challenged system does more to enhance private discrimination than it does to encourage interracial cooperation. Even when a challenged system clearly disadvantages minorities, courts should not find a section 2 violation automatically. Section 2 should apply only to situations, such as that in *Jones* or *Marengo County*, in which race is a dominant electoral issue. When courts find violations, courts should fashion remedies that least discourage future interracial cooperation. By following this approach, courts can serve the overriding goal of the Voting Rights Act and the fourteenth and fifteenth amendments from which it springs: the elimination of the race issue from the American political process.

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