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Section 2 of the Voting Rights Act of 1965 - Non-Voting Purge Statute

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Recent Decisions

SECTION 2 OF THE VOTING RIGHTS ACT OF 1965—NON-VOTING PURGE STATUTE—The United States Court of Appeals for the Third Circuit held that Pennsylvania's non-voting purge statute did not deny minorities equal access to the political process.

Oritz v. City of Philadelphia, 28 F.3d 306 (3d Cir. 1994).

A statistical analysis of Pennsylvania's non-voting purge process revealed that, from 1989 to 1992, more African-American and other minority registrants were taken off the voting rolls than white registrants in the City of Philadelphia.[1] In response to this disparity, Philadelphia City Councilman, Angel Oritz, along with Project Vote! and Service Employees International Union, Local 36, (collectively the "Appellants") brought suit in the United States District Court for the Eastern District of Pennsylvania, against the City of Philadelphia (the "City") to challenge the constitutionality of Pennsylvania's non-voting purge statute (the "Purge Statute").[2] The Appellants claimed

1. Oritz v. City of Philadelphia, 824 F. Supp. 514, 526-30 (E.D. Pa. 1993), *aff'd*, 28 F.3d 306 (3d Cir. 1994). The statistical analysis was performed by the plaintiff's witness, Dr. Allan Lichtman. *Oritz*, 824 F.Supp. at 526 n.8. At trial, the district court found Dr. Lichtman's figures to be a true approximation of the disparate effect the purge statute had on minority registrants as contrasted to white registrants. *Id.* at 530. In 1989, 4.5 percent of African-American and other minorities were slated for purging as contrasted to 4.1 percent of white registrants. *Id.* at 527. In 1990, figures revealed that the purge rate was 11.7 percent of minorities as contrasted to 8.5 percent of white registrants. *Id.* The statistical difference in 1990 amounted to a 38 percent higher cancellation of minority registrants than white registrants. *Id.* The 1991 purge ratio indicated that 20.8 percent of minorities were purged as opposed to 17.3 percent of the white voting population. *Id.* at 529. In 1992, 6.6 percent of minority registrants were slated for purging as contrasted to 6.4 percent of white registrants. *Id.* at 530 n.11. The court found that reinstatement rates would have little impact on Dr. Lichtman's figures. *Id.* at 530.

2. Oritz v. City of Philadelphia Office of the City Commissioners Voter Registration, 28 F.3d 306, 307 (3d Cir. 1994). Registration of Voters; Enrollment of Vot-

that the purge statute violated Section 2 of the Voting Rights Act of 1965[3] ("Section 2") by denying minority electors an equal opportunity to participate in the political process and elect representatives of their choice.[4] The Appellants sought a perma-

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ers, Pub. L. No. 115, § 40, (codified as amended at PA. STAT. ANN. tit. 25, § 623-40 (Supp. 1994)).

A purge statute allows a state to remove voters, who fail to vote in consecutive elections, from its voter registration rolls. The purged voter must then re-register before being permitted to vote. The Pennsylvania Purge Statute at issue in *Oritz* provided:

> During each year, the commission shall cause all of the district registers to be examined, and in the case of each registered elector who is not recorded as having voted at any election or primary during the two calendar years immediately proceeding, the commission shall send to such elector by mail, at his address appearing upon his registration affidavit, a notice, setting forth that the records of the commission indicate that he has not voted during the two immediately proceeding calendar years, and that his registration will be cancelled if he does not vote in the next primary or election or unless he shall, within ten days of the next primary or election, file with the commission, a written request for reinstatement of his registration, signed by him, setting forth his place of residence. . . . The cancellation of the registration of any such elector for failure to vote during two immediately preceding calendar years shall not affect the right of any such elector to subsequently register in the manner provided by this act.

PA. STAT. ANN tit. 25, § 623-40.

3. 42 U.S.C. § 1973 (1988). Section 2 of the Voting Rights Act of 1965 provides:

> (a) No voting qualification or prerequisite to voting or standard, practice . . . 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 the 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.

4. *Oritz*, 824 F. Supp. at 516. Appellants also sued the City under the First and Fourteenth Amendments. *Id.* The district court dismissed these claims because the court had already decided these issues in a previous Memorandum and Order. *Id.* at 540-42. The court dismissed the First Amendment claim holding that Pennsylvania's purge statute did not violate the First Amendment because the government interest in preventing voting fraud justified the regulation of the non-speech element of the voting registration procedure. *Id.* (citing Hoffman v. Maryland, 928 F.2d 646 (4th Cir. 1991)). The court dismissed the Fourteenth Amendment claim holding that Pennsylvania's non-voting purge statute did not violate the Fourteenth Amendment because the restriction was justified by fulfilling the state's interest in

nent injunction to halt the City from purging further registrants.[5]

To establish the Section 2 claim, the district court required that the Appellants demonstrate that the non-voting purge statute operated, in the totality of the circumstances, to deny minorities equal access to the political process.[6] The Appellants submitted evidence of historical, social and electoral conditions which adversely affected minorities[7] to demonstrate that such factors resulted in depressed political participation.[8] The Appel-

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preventing voting fraud and for the reason that the purge was conducted without regard to race. *Oritz*, 824 F. Supp.at 540-42 (citing Williams v. Osser, 326 F. Supp. 1139 (E.D. Pa. 1971)).

5. *Oritz*, 824 F. Supp. at 516.

6. *Id.* at 522. The district court relied on the United States Supreme Court's articulation of the operation of the "totality of circumstances" test of Section 2. *Id.* (citing Thornburg v. Gingles, 478 U.S. 30 (1986)). The Court in *Gingles* stated, "[t]he essence of a section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred candidates." *Gingles*, 478 U.S. at 47.

7. *Oritz*, 824 F. Supp. at 531-39. The Appellants offered extensive evidence attempting to establish historical, social and electoral disadvantage and discrimination. *Id.* Based on election returns from previous elections, the court found that minorities suffered from racially polarized voting. *Id.* The Appellants also established that racial appeals occurred in political campaigns when: white candidates associated African-American candidates with controversial minority candidates; advertisements emphasized race; minority candidates were sometimes omitted from campaign literature; and attacks were made on candidates who spoke to minority issues. *Id.* The court found that minorities suffered from the unresponsiveness of elected officials because the City did not provide community development funding, had inequitably distributed services and that the police force, composed largely of white officers, abused minorities more often than whites. *Id.* Minorities attained lower educational levels as manifested in the fact that 39 percent of African-Americans and 55.3 percent of Latinos failed to graduate from high school as contrasted to 31.9 percent of whites who did not graduate. *Id.* Minorities were less likely to own homes than whites. *Id.* Latino residents of the City were less likely to have adequate health care due to a lower economic status. *Id.* The African-American community suffered from a 14.8 unemployment rate, Latino's from a 15.7 percent unemployment rate, as contrasted to 6.1 percent for the white community. *Id.* The average income of African-American's was $25,544, Latino's earned $20,528 on average, as contrasted to a $35,467 income average for white residents. *Id.* Twenty-nine percent of African-American residents and 45.3 percent of Latinos fell below the poverty level as contrasted to only 11.1 percent of white residents. *Id.*

8. *Id.* at 535. In 1987, 67.2 percent of African American registrants and 48.6 percent of other minority registrants turned out to vote as contrasted to 69.7 percent of white registrants. *Id.* In 1988, 62.1 percent of African-American registrants and 54.2 percent of other minority registrants turned out to vote as contrasted to 72.5 percent of white registrants. *Id.* In 1989, 30.5 percent of African-American registrants and 20.8 percent of other minority registrants voted as contrasted to 45.3 percent of white registrants. *Id.* In 1990, 37.4 percent of African-American registrants and 30.5 percent of other minority registrants voted as contrasted to 54.3 percent of white registrants. *Id.* In 1991, 58.3 percent of African-American registrants and 44.7 percent of other minority registrants voted as contrasted to 67.2

lants reasoned that the non-voting purge statute worked with the adverse conditions to take away the purged registrants right to vote.[9]

The district court found that minorities suffered a socio-economic disadvantage and historical discrimination and that these factors resulted in the depressed political participation.[10] The court, however, held that the Appellants failed to prove that the purge statute was dispositive in denying minorities equal access to the political process.[11]

The district court reasoned that minorities had an opportunity to re-register and that the burden of re-registering was slight.[12] The court noted that the purging process was administered without regard to race and that the purge statute fulfilled its purpose by effectively preventing voting fraud.[13] These factors, the court asserted, negated the Appellants' assertion that the purge statute dispositively caused minorities to be deprived of their voting rights.[14] Thus, the district court concluded that the purge statute did not adversely impact minorities and denied the Appellants' requested relief.[15]

The Appellants appealed to the United States Court of Appeals for the Third Circuit.[16] The issue on appeal was whether the district court erred by requiring the Appellants to prove that, in the totality of circumstances, the non-voting purge statute, itself, caused unequal access to the political process.[17]

The majority opinion, written by Circuit Judge Garth,[18] relied on the United States Supreme Court's decision in *Thornburg v. Gingles*,[19] in which the Supreme Court defined the operation of the "totality of circumstances" test of Section 2.[20] The court interpreted the language of *Gingles* to require a

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percent of white registrants. *Id.*

9. *Id.* at 539.
10. *Id.*
11. *Id.*
12. *Oritz*, 824 F. Supp. at 539.
13. *Id.* at 538-39.
14. *Id.*
15. *Id.* at 539.
16. Oritz v. City of Philadelphia, 28 F.3d 306, 308 (3d Cir. 1994).
17. *Oritz*, 28 F.3d at 310.
18. *Id.* at 307. Circuit Judge Scirica wrote a concurring opinion. *Id.* at 318. Circuit Judge Lewis dissented and contended that the court misinterpreted and misapplied the causation requirement of Section 2. *Id.* at 319-47.
19. 478 U.S. 30 (1986).
20. *Oritz*, 28 F.3d at 310 (citing *Gingles*, 478 U.S. 30). The Supreme Court, in *Gingles*, held that an electoral practice violated Section 2 if it interacted with social and historical conditions to cause minority electoral inequality. *Oritz*, 28 F.3d at 310 (citing *Gingles*, 478 U.S. at 47).

Section 2 plaintiff to show some casual connection between the challenged practice and the alleged deprivation of voting rights.[21] The opinion also cited three other circuit court cases to support the contention that a challenged practice must be shown to cause a deprivation of equal access to the political process in order to violate Section 2.[22] Based on this precedent, the court affirmed the district court's decision that Section 2 required a plaintiff to prove that the challenged electoral practice acted as a dispositive force[23] in causing discrimination.[24]

The majority reviewed the district court's determination that the Appellants failed to demonstrate a Section 2 violation using a clear error standard.[25] Using the results standard provided by Section 2, the court required the Appellants to demonstrate that the purge statute denied minorities equal opportunity to participate in the political process and to elect preferred representatives.[26]

After analyzing the trial record, the court concluded that the purge statute did not cause the disparity between the percentage of the minority and white registrants purged.[27] The court

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21. *Oritz*, 28 F.3d at 310. The Third Circuit also found support for this construction in the Senate Judiciary Reports concerning the 1982 amendment to Section 2. *Id.* at 311 n.6. The Third Circuit quoted the Senate committee's summary of the amendment which provided that, "[i]f *as a result of the challenged practice or structure* plaintiffs do not have an equal opportunity to participate in the political process and to elect candidates of their choice, there is a violation of this section." *Id.* (quoting S. REP. NO. 417, 97th Cong., 2d Sess. 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206 (alteration in original)). The Third Circuit interpreted the committee's language to direct courts to "focus on the challenged procedure and its causal effects on equal opportunity to participate in the political process." *Oritz*, 28 F.3d at 311 n.6.

22. *Oritz*, 28 F.3d at 310-11. *See* Salas v. Southwest Texas Junior College District, 964 F.2d 1542, 1556 (5th Cir. 1992) (holding that a racial group's lack of electoral success resulted from failing to vote rather than from an at-large voting system); Irby v. Virginia State Board of Elections, 889 F.2d 1352, 1359 (4th Cir. 1989) (requiring a plaintiff to show a casual connection between the challenged Virginia appointive system and minority underrepresentation); Wesley v. Collins, 791 F.2d 1255, 1262 (6th Cir. 1986) (holding that the plaintiff failed to establish a causal nexus between a Tennessee law disenfranchising convicted felons and discrimination).

23. *Oritz*, 28 F.3d at 313. The majority interpreted the district court's use of the term "dispositive force" to mean a cause which was legally dispositive. *Id.* at 313 n.11.

24. *Id.* at 313.

25. *Id.* The Third Circuit emphasized that the determination of whether the electoral process was equally open to minority persons, "is peculiarly dependent upon the facts of each case and requires an 'intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Id.* at 308-09 (citing *Gingles*, 478 U.S. at 79).

26. *Oritz*, 28 F.3d at 314 (citing Chisom v. Roemer, 501 U.S. 380, 397 (1991)).

27. *Oritz*, 28 F.3d at 313-14. The Third Circuit stated that "[w]e are not confronted with an electoral device — such as 'race-neutral' literacy tests, grandfather clauses, good-character provisos, racial gerrymandering, and vote dilution — which

attributed the disparity in the purge ratios to the fact that minority groups voted less frequently than white registrants[28] and that the purged registrants failed to overcome the slight burden of having to re-register.[29] The court emphasized that registrants affected by the purge statute had originally overcome any disadvantage to register to vote and reasoned that the adverse conditions could not have affected a registrant who had already registered to vote.[30] The court thus found the adverse factors to be irrelevant and concluded that the depressed minority political participation was caused solely by the individual inaction of the purged registrants.[31] The majority, therefore, affirmed the decision of the district court and held that the purge statute did not cause a deprivation of minority voting rights.[32]

Circuit Judge Scirica concurred with the majority.[33] The concurrence stressed that the non-voting purge statute was effective in preventing voting fraud.[34] In addition, the concurring opinion noted that the purge statute previously withstood an equal protection challenge.[35] The concurrence concluded by criticizing the National Voter Registration Act[36] for making it difficult to terminate ineligible registrants from the voting rolls.[37]

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discriminates against minorities, which has no rational basis, and which is beyond the control of minority voters." *Id.*

28. *Id.* at 313-14.

29. *Id.* at 314 n.14.

30. *Id.* at 315-16. The Third Circuit based this conclusion, in part, on the fact that the procedures for re-registering were the same as when first registering and thus could be no more burdensome or complicated than those used to initially register an individual. *Id.* at 314 n.14 (citing Williams v. Osser, 350 F. Supp. 646, 653 (E.D. Pa. 1972)).

31. *Oritz*, 28 F.3d at 315-16.

32. *Id.* at 318. The majority also placed significance on the race-neutral character of the purge process and the purge statute's effectiveness in preventing voting fraud. *Id.* at 314. The evidence, according to the majority, also indicated that minorities not only had access to the political process and participated in elections but were successful in electing minority representatives. *Id.* at 316. The majority illustrated this point with the fact that minority candidate Wilson Goode won two terms as mayor of Philadelphia in 1983 and 1987. *Id.* at 314-15. Additionally, the majority found the government's interest in preventing voting fraud enough to justify the purge statute and that the purge statute operated without regard to race. *Id.* at 314.

33. *Id.* at 318 (Scirica, J., concurring).

34. *Id.* at 318-19.

35. *Id.* at 318 (citing Williams v. Osser, 350 F. Supp. 646 (E.D. Pa. 1972)). The court in *Williams* stressed the considerable public concern over "phantom voters" and found the state interest to prevent voting fraud to outweigh the minimal burden placed on voters to re-register. *Williams*, 350 F. Supp. at 652-53.

36. 42 U.S.C. §§ 1973gg to 1973gg-10 (Supp. 1994).

37. *Oritz*, 28 F.3d at 318-19 n.4 (Scirica, J., concurring) (citing 42 U.S.C. § 1973gg(b)(2) (Supp. 1994)). By passing the National Voter Registration Act, Congress struck a balance between the need to prevent voting fraud and the governmental

In dissent, Circuit Judge Lewis criticized the majority for incorrectly interpreting the causation requirement of Section 2(b).[38] According to Judge Lewis, while a causal demonstration was required, a Section 2 plaintiff need not prove that the particular electoral practice was a dispositive force in the deprivation of voting rights.[39] The dissent opined that the causation requirement, espoused by the majority, forced the Section 2 plaintiff to do more than was required by Section 2.[40] The dissent contended that a plaintiff need only show that an electoral procedure "interacted" with other surrounding conditions to limit the political opportunities of minorities.[41]

Furthermore, Judge Lewis criticized the majority for failing to assume a practical perspective with a "functional view of the political process," as mandated by Congress.[42] According to the dissent, the majority made speculative, oversimplified conclusions based on minority apathy.[43] The majority, the dissent opined, also made findings of fact concerning the difficulty of the re-registration process[44] and of minority electoral success with-

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interest to ensure a person's voting rights. *See Oritz*, 28 F.3d at 318-19. The National Voter Registration Act requires that as state programs attempt to prevent fraud, such state programs "shall not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the persons failure to vote." 42 U.S.C. § 1973gg-6(b)(2).

38. *Oritz*, 28 F.3d at 323 (Lewis, J., dissenting).

39. *Id.* Judge Lewis stated that, "Section 2 does not require plaintiffs to prove that a challenged voting practice or procedure is 'the dispositive force,' or the only cause, or even the principal cause, of unequal political opportunity." *Id.* To illustrate his conception of the proper operation of the totality of circumstances test, Judge Lewis cited *Operation PUSH v. Allain* and *United States v. Marengo*. *Oritz*, 28 F.3d at 327-29 (Lewis, J., dissenting) (citing Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987), *aff'd sub nom.* Mississippi State Chapter, Operation PUSH, Inc. v. Mabus, 932 F.2d 400 (5th Cir. 1991) and United States v. Marengo, 731 F.2d 1546 (11th Cir. 1984)). Judge Lewis also criticized the majority's acceptance of the term "dispositive" because the term could be interpreted to mean that the challenged practice caused all of the relevant circumstances. *Oritz*, 28 F.3d at 323 n.7 (Lewis, J., dissenting).

40. *Oritz*, 28 F.3d at 323 (Lewis, J., dissenting).

41. *Id.* (citing *Gingles*, 478 U.S. at 47). The dissent explained the concept of "interaction" as follows: "[t]hose circumstances — the 'social and historical conditions' that make up the 'past and present reality' surrounding political processes — create the factual environment in which a challenged voting practice operates. As such, they necessarily contribute to the effect that a practice has on individuals' political opportunities." *Oritz*, 28 F.3d at 323 (Lewis, J., dissenting).

42. *Lewis*, 28 F.3d at 322 (Lewis, J., dissenting) (quoting *Gingles*, 478 U.S. at 45); *see also* S. REP. NO. 417, 97th Cong., 2d Sess. 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208.

43. *Oritz*, 28 F.3d at 325 (Lewis, J., dissenting).

44. *Id.* at 336. Judge Lewis criticized the majority for failing to adopt a practical approach to the analysis of the re-registration process. *Id.* Judge Lewis found that, from a practical perspective, evidence of low minority reinstatement statistics (81 percent of 190,000 persons slated for purging in 1991 failed to reinstate them-

out first engaging in proper and thorough analysis.[45] The dissent argued that it was necessary to conduct a more profound inquiry into the causes of low minority voting levels.[46] The dissent reasoned that, as a result of these errors, the majority incorrectly gave legal significance to unfounded factors.[47]

Judge Lewis also criticized the majority for burdening the Appellants with the task of proving a casual connection between the adverse conditions and depressed minority political participation rates.[48] The dissent argued that once adverse conditions and depressed minority political participation were proven to exist, a Section 2 plaintiff need not prove a casual connection between them.[49] The majority, according to Judge Lewis, erred by speculating on voter apathy when the casual connection had already been presumed to exist in Appellants' favor.[50]

In conclusion, Judge Lewis warned that, although the National Voting Rights Act could remedy the problems of the non-voting purge process, the majority's misinterpretation and misapplication of Section 2 could detrimentally impact other areas of electoral law and thus frustrate the purpose of the Voting Rights Act.[51] According to Judge Lewis, the majority occasioned the perpetuation of discrimination in other electoral laws by making it more difficult to prove a violation of Section 2.[52]

Congress enacted the Voting Rights Act of 1965 (the "Act" or the "Act of 1965")[53] in order to enforce the Fifteenth Amend-

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selves by re-registering to vote) and the trouble language minorities have with registration forms indicate that re-registration may be a substantial obstacle. *Id.* at 338.

45. *Id.* at 340. Judge Lewis took issue with the majority's finding that minorities have had success in electing preferred candidates. *Id.* Judge Lewis did not find the establishment of this fact in the trial record. *Id.* He claimed that the majority committed an error of law for failing to conduct a proper inquiry into the minority electoral success before establishing it as a significant factor. *Id.* at 341. Judge Lewis criticized the majority for measuring the success of minority preferred candidates by the success of a few minority candidates. *Id.* According to Judge Lewis, the majority failed to determine what candidates a minority group preferred. *Id.* at 342. Judge Lewis argued that the majority failed to consider special circumstances which could decrease the legal significance of the few successful minority candidates. *Id.* at 343.

46. *Id.*

47. *Id.* at 325, 329, 336-43.

48. *Oritz*, 28 F.3d at 325 (Lewis, J., dissenting).

49. *Id.* (quoting S. REP. NO. 417, 97th Cong., 2d Sess. 29 n.114 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 207). According to Judge Lewis, Congress reasoned that adverse conditions "tend" to depress minority political participation. *Oritz*, 28 F.3d at 325 (Lewis, J., dissenting).

50. *Oritz*, 28 F.3d at 325 (Lewis, J., dissenting).

51. *Id.* at 346.

52. *Id.*

53. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 439 (1965) (codified at 42 U.S.C. §§ 1971-73 (1988)).

ment.[54] The original draft of Section 2 of the Act was silent as to what test was to be used to establish a violation.[55] During the Senate Hearings concerning the drafting of the Act, Attorney General Katzenbach indicated that the Act covered any electoral practice that purposefully or resultingly affected a denial of a person's right to vote on account of race or color.[56] Following the passage of the Act, the courts applied Attorney General Katzenbach's discriminatory effects test.[57]

In 1982, Congress amended Section 2[58] to incorporate a totality of the circumstances test which was developed from challenges to voting restrictions based upon the Fourteenth Amendment.[59] The appellate courts, which subsequently dealt with Section 2 claims, interpreted the causation requirement of Section 2 differently. This history of Section 2 first discusses the principal Fourteenth Amendment case Congress used as a basis for the 1982 amendment to Section 2 and then discusses the 1982 amendment and the different interpretations and applications that have occurred in subsequent case law.

In 1973, in *White v. Regester*,[60] the United States Supreme Court considered whether the district court had correctly analyzed an equal protection challenge to a Texas multi-member redistricting plan.[61] The district court had conducted an inquiry into the historical, electoral, and socio-economic circumstances of minorities to determine whether the multi-member districting plans diluted[62] minority voting strength.[63] The Court recog-

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54. The Fifteenth Amendment provides that "[t]he right of citizens of the United 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.

55. S. REP. NO. 417, 97th Cong., 2d Sess. 18 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 195.

56. S. REP. NO. 417, 97th Cong., 2d Sess. 17 n.50 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 194-95 (quoting Hearings on S. 1564 before the Committee on the Judiciary, United States Senate, 89th Cong., 1st Sess. 191 (1965)).

57. *See* Toney v. White, 476 F.2d 203, 207 (5th Cir. 1973). In *Toney*, the court of appeals stated that "section 2 of the Voting Rights Act of 1965 . . . prohibits imposition of any practice or procedure which has the effect of denying or abridging the right of any citizen to vote on account of race or color." *Toney*, 476 F.2d at 207.

58. Pub. L. 97-205, 96 Stat. 134 (1982) (codified at 42 U.S.C. § 1973(b)).

59. S. REP. NO. 417, 97th Cong., 2d Sess. 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206.

60. 412 U.S. 755 (1973).

61. *White*, 412 U.S. at 763. In *White*, the plaintiffs sought to enjoin the state from using a legislative redistricting plan on the grounds that the plan failed to conform to population variations and that the plan diluted the voting strength of minorities in two particular counties. *Id.* at 758-59.

62. "Dilution" means that the quality of one's vote does not equal another's. *See* Whitcomb v. Chavis, 403 U.S. 124, 141 (1971). An example of dilution occurs

nized that the use of multi-member districts was not illegal, *per se*, but that their validity could be questioned when a multi-member district scheme minimized voting power.[64] The Court then determined that such factors as historical discrimination and socio-economic disadvantage "overlaid" the multi-member districting plan and, together, they could operate to diminish the quality of the minority vote.[65]

The Court found from the record that minorities in the two counties in question had suffered from historical discrimination and social disadvantage.[66] Because of discrimination and disadvantage, minorities registered to vote at disproportionately low levels.[67] The Court held that the multi-member districting plan operated, in the "totality of circumstances," to dilute minority voting strength.[68]

In 1982, Congress amended Section 2 to make it unnecessary

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when an apportionment scheme gives the same number of representatives to two districts with unequal numbers of voters. *See Whitcomb*, 403 U.S. at 141. Aside from population based apportionment, questions of dilution also concern the quality of one's vote in a multi-member district as contrasted to a single-member district. *Id.* The Supreme Court has stated that "we have deemed the validity of multi-member district systems justiciable, recognizing also that they may be subject to challenge where the circumstances of a particular case may operate to minimize or cancel out the voting strength of racial or political elements of the voting population." *Id.* (citing Forston v. Dorsey, 379 U.S. 433, 439 (1965)). The possibility of dilution increases when the district is large. *See Whitcomb*, 403 U.S. at 143.

63. *White*, 412 U.S. at 765-68. In Dallas County, the district court found evidence of discrimination in such electoral devices as a Texas majority vote rule and a "place" rule. *Id.* Further, only two African-Americans had been slated and elected from Dallas County to the Texas House of Representatives since the days of the Reconstruction. *Id.* Also, in the court's opinion, the Democratic Party failed to respond to the needs of minorities and in the use of racial campaign tactics. *Id.* In Bexas County, the district court found that Mexican-Americans historically and presently suffered disadvantages in the areas of education, employment, housing, health and politics; that Mexican-Americans were concentrated in a specific area of the county and made up a large percentage (over 78 percent) of the areas population; that they suffered from language and cultural differences that made it difficult to participate in the political process; that Mexican-Americans had historically faced poll taxes and difficult registration procedures and because of these obstacles few Mexican-Americans registered to vote; that since 1880, only five Mexican-Americans served in the Texas legislature and that the Texas legislature was unresponsive to the needs of Mexican-Americans. *Id.*

64. *Id.* at 765 (citing *Whitcomb*, 403 U.S. at 142).

65. *White*, 412 U.S. at 769.

66. *Id.* at 766-70.

67. *Id.* at 768-69.

68. *Id.* at 769. As part of its analysis, the Court considered whether a single-member districting plan would help remedy the political weaknesses of minorities by giving them a stronger voice. *Id.* The Court concluded that the single-member districting plans would strengthen the political participation and representation of minorities and thus affirmed the district court's decision to order a single-member districting plan. *Id.*

to prove that a voting practice was purposefully discriminatory.[69] Congress mandated that a Section 2 plaintiff could prove that a particular electoral practice was discriminatory by its results alone.[70] Additionally, Congress incorporated the "totality of circumstances" test into the language of the amendment.[71] In doing so, Congress mandated that a violation of Section 2 could be established by showing that, based on the totality of circumstances, the political process was not equally open to racial minorities in that those protected classes have less of an opportunity than other members of the electorate to participate in the political process and to elect preferred representatives.[72]

In the Senate Report, Congress directed the courts to consider the objective factors surrounding the plaintiff's situation.[73] Congress listed a number of factors that could be considered when applying the Section 2 tests.[74] The Senate Report recognized that the list was not exhaustive and that other unenumerated factors might be considered if they were deemed relevant to the analysis of the particular electoral law in question.[75] The Sen-

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69. S. REP. NO. 417, 97th Cong., 2d. Sess. 16 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 193. Congress amended Section 2 in response to the Supreme Court decision in *Mobile v. Bolden*, which required a showing of discriminatory intent to establish that a voting practice is discriminatory under Section 2. *Id.* (citing Mobile v. Bolden, 446 U.S. 55 (1980)).

70. 42 U.S.C. § 1973(a).

71. *See* 42 U.S.C. § 1973(b).

72. *Id.*

73. S. REP. NO. 417, 97th Cong., 2d Sess. 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205.

74. *Id.* The factors which are relevant to a Section 2 challenge include:

> 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 vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

S. REP. NO. 417, 97th Cong. 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07.

75. S. REP. NO. 417, 97th Cong. 2d Sess. 29 (1982), *reprinted in* 1982

ate Report provided that there was no requirement that a certain factor or a certain number of factors be established.[76] The determination of whether a violation occurred was to be based on the judgment of the court.[77]

The Senate Report directed the courts to conduct a "searching practical evaluation" of the existing political process.[78] To illustrate the functional approach, the Senate Report provided that the fact a minority person voted or registered to vote would not be "dispositive" of the issue of equal access.[79]

Lastly, Congress directed the courts to presume a causal connection between adverse conditions and depressed minority political participation, once these factors were proven to exist.[80] Congress asserted that such adverse conditions tend to reduce political participation rates in minority groups.[81] Congress relieved a Section 2 plaintiff of the burden of establishing such a "causal nexus."[82]

In 1984, the Eleventh Circuit, in *United States v. Marengo County Commission*,[83] used the totality of circumstances test of the amended Section 2 to determine whether an Alabama at-large election system diluted the minority vote in county commissioner and school board elections.[84] The government argued that the at-large system, and not minority apathy, was responsible for the lack of minority electoral success in that the at-large system worked with adverse conditions[85] to dilute minority voting strength.[86]

U.S.C.C.A.N. 177, 207.

76. *Id.*

77. S. REP. No. 417 at 30, 1982 U.S.C.C.A.N. at 207.

78. S. REP. No. 417 at 30, 1982 U.S.C.C.A.N. at 208.

79. S. REP. No. 417 at 30 n.120, 1982 U.S.C.C.A.N. at 208.

80. S. REP. No. 417 at 29 n.114, 1982 U.S.C.C.A.N. at 207.

81. *Id.*

82. S. REP. No. 417 at 29 n.114, 1982 U.S.C.C.A.N. at 207.

83. 731 F.2d 1546 (11th Cir. 1984).

84. *Marengo*, 731 F.2d at 1566.

85. *Id.* at 1567-73. The district court found evidence of racially polarized voting in the vote returns from elections conducted before and up to 1978. *Id.* There were few African-American poll officials and the registrar held short office hours and failed to visit surrounding rural communities where many African-Americans lived. *Id.* African-Americans, on average, earned less than half of the amount white residents earned. *Id.* at 1570. Minorities were found to be subjected to social discrimination in such forms as segregated schools. *Id.*

86. *Id.* The district court discounted the significance of the adverse conditions by attributing the lack of minority representation to minority apathy. *Id.* at 1568-69. The district court reasoned that, based on the fact that there were 7,040 eligible African-American voters in the county and that the winners of previous elections won with a total count of 5000 - 6000 votes, the African-American community could elect a representative if its members turned out to vote. *Id.* at 1568. The district

The Eleventh Circuit found no evidence to support the district court's conclusion of apathy.[87] The court, furthermore, interpreted the Senate Report, accompanying the amendment to Section 2, to reject attempts to blame low minority political participation rates on apathy.[88] The Eleventh Circuit held that once adverse conditions were established, a Section 2 plaintiff was relieved of the burden of proving the causal connection between the adverse conditions and the depressed political participation.[89]

The Eleventh Circuit, in *Marengo*, found that the historical and electoral discrimination suffered by minorities, combined with socio-economic disadvantages, resulted in depressed minority participation in the political process.[90] Before the Eleventh Circuit concluded that dilution occurred, the court considered whether any factors weighed against the government's claim.[91]

Finding no factor to weigh against the government's claim, the Eleventh Circuit found that the at-large system worked with the adverse conditions to weaken minority electoral power by submerging the minority voting population into the dominant white population.[92] The Eleventh Circuit held that dilution occurred, and remanded the case in order to permit the parties to update the record with any recent evidence that would affect the court's determination.[93]

In 1986, in *Wesley v. Collins*,[94] the Sixth Circuit considered whether a Tennessee law disenfranchising convicted felons violated Section 2 by disproportionately impacting the voting strength of the African-American community.[95] The Sixth Circuit asserted that the fact that the African-American community suffered adverse conditions and was disproportionately impacted

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court, consequently, rejected the claim that the at-large system diluted minority voting power. *Id.* at 1550.

87. *Id.* at 1568.

88. *Id.*

89. *Marengo*, 731 F.2d at 1568.

90. *Id.* at 1574. The appeals court stated that the discriminatory and disadvantageous circumstances "impaired the ability of blacks to register and participate actively in the electoral process." *Id.* African-Americans registered and voted in "significantly lower numbers" than white residents. *Id.* at 1568.

91. *Id.* at 1574. Recognizing that the court lacked a formula to carry out this balancing test, the court weighed the various factors by its own judgment. *Id.*

92. *Id.*

93. *Id.* at 1575. On remand, the district court held that county officials failed to establish that circumstances sufficiently changed to effect the Court of Appeals finding of discriminatory results as they related to the relevant electoral practices. Clark v. Marengo County, 623 F. Supp. 33, 34 (D. Ala. 1985).

94. 791 F.2d 1255 (6th Cir. 1986).

95. *Wesley*, 791 F.2d at 1257.

by the challenged law did not necessarily lead to the conclusion that Section 2 was violated.[96] The Sixth Circuit considered other social and governmental interests which weighed strongly in the state's favor.[97] First, the Sixth Circuit found that the state had compelling reasons to disenfranchise convicted felons.[98] Second, the Sixth Circuit noted that a convicted felon was disenfranchised by his own criminal act.[99] Third, the circuit court found the law to be race-neutral.[100] Based on these factors, the court concluded that the disproportionate impact on the African-American community was not the result of the law disenfranchising felons and thus the law did not violate Section 2.[101]

In 1986, in *Thornburg v. Gingles*,[102] the United States Supreme Court first considered a Section 2 challenge to an electoral practice.[103] In *Gingles*, African-American citizens of North Carolina sought to enjoin the state's installation of a multi-member districting plan on the grounds that the plan wrongfully diluted the locally strong minority vote in violation of the Fourteenth and Fifteenth Amendments and the Voting Rights Act.[104]

The Court interpreted Section 2 to require a plaintiff to prove that the challenged practice interacted with social and historical conditions to deny minorities equal access to the political process and to frustrate their ability to elect preferred representatives.[105] The Court held that the challenged practice could be invalidated if shown to act in concert with the surrounding cir-

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96. *Id.* at 1260-61.

97. *Id.* at 1261.

98. *Id.* at 1261-62. The Sixth Circuit concluded that it was not unreasonable for a state to deny criminals the right to vote because criminals should not be permitted to elect legislators, executives, prosecutors or judges who create and maintain the laws which the criminal violates. *Id.* at 1261 (citing Green v. Board of Elections, 380 F.2d 445, 451 (2d Cir. 1967), *cert. denied*, 389 U.S. 1048 (1968)). The court also emphasized the state's interest in preventing the perpetuation of organized crime. *Wesley*, 791 F.2d at 1261.

99. *Wesley*, 791 F.2d at 1262.

100. *Id.*

101. *Id.*

102. 478 U.S. 30 (1986).

103. *Gingles*, 478 U.S. at 34.

104. *Id.* The district court found that minorities were subjected to adverse conditions and after applying the totality of circumstances test of Section 2, found dilution to occur. *Id.* at 37-42. The district court, consequently, enjoined the state from using the plan. *Id.* at 42.

105. *Id.* at 47. The Court stated that "[t]he essence of a [Section] 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.*

cumstances in producing discriminatory results.[106]

The Court also established a tri-partite test which it used to determine whether dilution resulted from the operation of the challenged districting scheme.[107] The Court found that three conditions had to exist in order to establish dilution: the minority group had to be large enough and geographically compact enough to consist of a majority in a single-member district; the minority group had to be politically cohesive; and the majority had to sufficiently act as a bloc to prevent minority groups from electing preferred candidates.[108] The Court asserted that the element of racial polarization was relevant to the establishment of the second precondition, namely whether the minority group was sufficiently cohesive.[109] If a plaintiff could not show racial polarization, the Court could find the lack of cohesiveness, not the challenged law, to be the cause of minority underrepresentation.[110]

The Supreme Court, after a review of the trial record, concluded that the district court's determination that minorities had been subjected to historical, electoral and socio-economic conditions which adversely affected their ability to participate in the political process was proper.[111] The Court found that the white majority vote acted as an obstacle to the success of minority preferred candidates.[112] In this way, the Court determined that the multi-member districting plan diluted the minority vote by

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106. *Id.* at 80.

107. *Id.* at 50-51.

108. *Gingles*, 478 U.S. at 50-51.

109. *Id.* at 56.

110. *Id.* The Court noted that an examination of racial polarization required a "discrete" inquiry into voting practices. *Id.*

111. *Id.* at 80. The district court found that minorities had been, historically discriminated against through the employment of poll taxes and literacy tests, and minority voting registration remained low after the removal of these obstacles. *Id.* at 38-39. In 1982, 52.7 percent of the eligible African-American population registered to vote as contrasted to 66.7 percent of eligible white residents. *Id.* at 39. The court found evidence that African-American residents of North Carolina suffered disadvantages in employment, income, housing and education. *Id.* North Carolina utilized a majority vote requirement in primary elections and lacked a subdistrict residency requirement for members of the general assembly elected from the multi-member districts. *Id.* The district court found evidence of racially polarized voting based on an analysis which revealed that in 51 elections the degree of racial bloc voting was so significant that the results would have been different if the elections were only held between white or black voters. *Id.* at 52-54. Though African-American candidates were successful in the 1982 General Assembly election, the district court found that, overall, the electoral success of minority candidates was low in proportion to the minority population. *Id.* at 41.

112. *Id.* at 80.

acting "in concert" with the surrounding circumstances.[113] After a review of the record, the Court concluded that the district court did not err in its conclusion that the districting plan caused unequal access to the political process.[114]

In 1989, the Fourth Circuit, in *Irby v. Virginia State Board of Elections*,[115] considered a Section 2 challenge to Virginia's appointive system for selecting school board members.[116] In *Irby*, the appellants alleged that the appointive system denied minorities equal access to the political system.[117] The appellants contended that minorities were underrepresented on county school boards in proportion to the minority population.[118] In addition, the appellants alleged that minorities were underrepresented on the governing bodies which appointed members to the school boards.[119] The appellants sought class certification.[120]

The Fourth Circuit determined that the appointive system was open to minority persons and that the disparity was the result of minorities not seeking school board positions.[121] The Fourth Circuit found no proof of a causal link between the appointive system and the fact that minorities were underrepresented.[122] The circuit court held that the appointive system did not cause minority underrepresentation and denied appellant's requested relief.[123]

In *Operation PUSH v. Mabus*,[124] the Eleventh Circuit considered whether a Mississippi legislative enactment sufficiently addressed two electoral practices which were determined to be discriminatory by the "totality of circumstances" test of Section

113. *Gingles*, 478 U.S. at 80.

114. *Id.*

115. 889 F.2d 1352 (4th Cir. 1989).

116. *Irby*, 889 F.2d at 1353.

117. *Id.* at 1358.

118. *Id.* The district court found "significant disparity" in two of the five counties in question. *Id.* In Buckingham County, the district court found that African-Americans constituted 42 percent of the population yet only held 14.2 percent of the counties school board seats. *Id.* at 1355 (citing Irby v. Fitz-Hugh, 693 F. Supp. 424, 430 (E.D. Va. 1988)). In Halifax County, the district court found that African-Americans comprised 40 percent of the population yet only held 22.2 percent of the county's school board seats. *Irby*, 889 F.2d at 1358.

119. *Irby*, 889 F.2d at 1358. Appellants argued that the governing bodies which appointed members to the school board were composed of mostly white officials. *Id.* at 1359.

120. *Id.* at 1353.

121. *Id.* at 1358. The district court found that since 1971, every African-American who had sought a school board position was appointed. *Id.*

122. *Id.* at 1359.

123. *Irby*, 889 F.2d at 1359.

124. 932 F.2d 400 (5th Cir. 1991).

2.[125] The plaintiffs in *Operation PUSH* argued that Mississippi's dual registration process[126] and the lack of a state satellite registration system[127] denied minorities equal access to the political process.[128]

The Eleventh Circuit noted that African-American citizens of Mississippi voted at a twenty-five percent lower rate than whites.[129] The circuit court attributed this disparity to two circumstances.[130] First, a large percentage of African-Americans in Mississippi lacked the needed transportation to reach the registrar's office.[131] Second, the court noted that African-Americans lacked the type of employment that facilitated registering to vote during business hours.[132] The Eleventh Circuit accepted the district court's conclusion that the dual registration system and the lack of satellite registration facilities interacted with the circumstances to deny minorities equal access to the political process.[133] The Eleventh Circuit, however, denied the plaintiff's request to have the new statutes declared unconstitutional, finding that recent legislation sufficiently addressed the problem.[134]

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125. *Operation PUSH*, 932 F.2d at 402.

126. A dual registration process requires citizens to register with the county registrar in order to be eligible to vote in federal, state and county elections and requires them to register with the municipal clerk to vote in local elections. *Id.*

127. A satellite registration system facilitates registration locations outside of the registrar's office. *Id.* In this case, the Mississippi legislature enacted a statute which forbade the registrar to remove the registration books from the county registration office except in limited circumstances. *Id.*

128. *Operation PUSH*, 932 F.2d at 403.

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. *Operation PUSH*, 932 F.2d at 409-13. Applying the "totality of circumstances" test of Section 2, the district court found that the dual registration system and the lack of satellite registration facilities interacted with the circumstances to remove minorities from the political process. *Id.* at 404 (citing Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1251 (N.D. Miss. 1987)). Even though the court found the practices to be discriminatory, the court denied the plaintiffs injunctive relief and instead gave the legislature an opportunity to change the statutes. *Operation PUSH*, 932 F.2d at 404.

134. *Operation PUSH*, 932 F.2d at 413.

In 1992, in *Salas v. Southwest Texas Junior College District*,[135] the Fifth Circuit considered whether the district court erred when it attributed Hispanic underrepresentation to a failure to vote rather than to the at-large voting system.[136] In *Salas*, the plaintiff alleged that the at-large system employed violated Section 2 by diluting the voting strength of the Hispanic voting majority.[137]

At trial, the district court noted that plaintiffs established the first two conditions required by the *Gingles* tri-partite test.[138] Consequently, the Fifth Circuit limited its review to whether plaintiffs met the third condition, namely whether white bloc voting existed.[139] The Fifth Circuit recognized that the underlying inquiry of the third condition concerned whether the at-large system caused the plaintiff's inability to elect preferred representatives.[140] To carry out this inquiry, the Fifth Circuit considered whether the lack of electoral success was attributable to other factors besides the working of the at-large system.[141]

The Fifth Circuit, in *Salas*, found that the Hispanic community did suffer past official discrimination and disadvantage in the areas of education and income.[142] Although the Fifth Circuit found that Hispanic voting turnout was low, voting registration was high.[143] Based on this finding, the Fifth Circuit found no link between low voter turnout and the adverse conditions.[144] The Fifth Circuit emphasized that the high level of Hispanic registration strongly suggested that the Hispanic community did

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135. 964 F.2d 1542 (5th Cir. 1992).

136. *Salas*, 964 F.2d at 1543-44. The district court found that in forty-four years, only two out of twenty-three persons named to the district's Board of Trustees were Hispanic. *Id.* at 1544.

137. *Id.*

138. *Id.* at 1553.

139. *Id.*

140. *Id.* (citing *Gingles*, 478 U.S. at 51).

141. *Salas*, 964 F.2d at 1554.

142. *Id.* at 1552. The Fifth Circuit found that 41.6 percent of the Hispanic community were functionally illiterate or had completed fewer than four years of a formal education, whereas, the white community had only a 4.1 percent illiteracy rate. *Id.* Only 20.5 percent of the Hispanic community had graduated from high school, as contrasted to 64 percent of white residents. *Id.* Eighty-one percent of those who held college degrees were white. *Id.* Approximately 37 percent of Hispanic families were below the poverty level as contrasted to 11 percent of white families. *Id.*

143. *Id.* at 1543, 1556. The plaintiffs submitted evidence that Hispanic turnout was seven percent below that of white registrants. *Id.* at 1556. The district court found that 53 percent of the registered voters in the district had Spanish surnames and that Hispanics constituted a majority of the registered voters in the district. *Id.* at 1544.

144. *Id.* at 1555-56.

not suffer from depressed political participation.[145] The court held that the district court did not err in its conclusion that Hispanic underrepresentation was caused by the failure of Hispanics to vote and not to the operation of the at-large system.[146] Thus, the court concluded that the Texas at-large system did not violate Section 2.[147]

An analysis of the Third Circuit's holding in *Oritz v. Philadelphia* must begin with the term "dispositive force."[148] The majority stated that the term was to be understood in its legal sense.[149] As the dissent correctly noted, the term can be interpreted to mean that a dispositive force is a force which is exclusive of other forces, or principally the force which causes something to occur.[150] Yet, the majority could not have intended such an interpretation, for, the totality of circumstances test of Section 2 precludes such a meaning.

A word is sometimes more clearly understood by analyzing its origin. The court's use of the concept of "dispositive force" arose from the tension between the court's finding of apathy and the Appellants' assertion that the non-voting purge statute was, in part, the cause of minorities being deprived of their right to vote. The concept of dispositive force originated in the court's need for clarity in the evidence that the purge law, and not some other factor, like apathy, caused the deprivation of voting rights. The majority interpreted *Gingles* to require "some causal connection."[151] This quantitative description is inconsistent with the dissent's definition of dispositive force as the only cause or the principal cause of discrimination. The majority approach reasonably requires a showing that the electoral law affects the denial of voting rights.

This construction is not unfounded. While *Wesley* and *Irby* asserted that Section 2 requires the establishment of a causal link between the challenged electoral practice and its discriminatory effects, the vote dilution cases, exemplified by *White* and *Gingles*, more adequately described the relationship between the challenged electoral law and the factors involved and the resultant loss of voting strength. Assuming the pre-conditions of the tri-partite test are present, a multi-member districting scheme

145. *Id.* at 1556.
146. *Salas*, 964 F.2d at 1556.
147. *Id.*
148. *See Oritz*, 28 F.3d at 313 n.11.
149. *Id.*
150. *See Oritz*, 28 F.3d at 323 (Lewis, J., dissenting).
151. *Oritz*, 28 F.3d at 310.

actually weakens the voting strength of minorities by submerging them into the majority. A single member district scheme increases the voting power of minorities. Thus, the schemes clearly and directly affect voting phenomena. When one precondition is not present, the court can attribute the lack of representation to the absence of this condition. The multi-member system cannot then be said to cause the lack of representation.

The term "dispositive" carries unwanted baggage. However, courts should recognize how the district court and the majority used the term. The court did not look for the purge statute as the only cause or as the principal cause. The court required a Section 2 plaintiff to show that it was the purge statute, acting in the circumstances, and not some other supervening factor, that caused the loss of voting rights.

The most troublesome aspects of the majority opinion concern the recognition of apathy as a valid factor and the legal significance the court gave to apathy without inquiring into its validity. One must first question whether the majority could properly consider apathy as the culpable factor after the Appellant established that minorities in Philadelphia suffered from discrimination and disadvantage and that minority political participation was depressed. If respect is to be given to the legislative history accompanying the amendment to Section 2, it would seem that the court was precluded from speculating as to the cause of the depressed political participation. As Judge Lewis and the court in *Marengo* pointed out, according to the guideline announced in the Senate Report, the Section 2 plaintiff is supposed to be relieved of the burden of establishing a causal connection between the adverse conditions and depressed minority political participation.[152] Introducing the possibility of apathy into the analysis creates the burden of disproving apathy. Under this analysis, the only way a Section 2 plaintiff can disprove an alternative causal theory is to produce a causal theory of his or her own. As a result, the Section 2 plaintiff is burdened with establishing a causal connection between the adverse conditions and the depressed political participation.

The majority believes that this inquiry is justified because minorities, who have registered to vote, have overcome or have risen above the adverse conditions typically existent in minority communities. This conclusion is suspect. To conclude that a minority individual who has registered to vote has, through this act, separated himself from the environment in which he lives,

152. *See Oritz*, 28 F.3d at 325; *Marengo*, 731 F.2d at 1568.

defies a practical evaluation of reality if made without strict inquiry. The majority stated that for a variety of historical reasons minorities have voted less than white registrants; in other words, minorities have not taken advantage of their opportunity to vote.[153] Perhaps the *Oritz* conclusion concerning apathy is correct. If the possibility of apathy is to be considered, assuming that its introduction is proper, it seems that further inquiry is needed to establish the proposition.[154]

Perhaps the reason minorities failed to take advantage of their opportunity to vote was because of their frustration with the process;[155] language barriers which did not go away after first registering;[156] or harsh socio-economic conditions which were overcome when they first registered but have since returned. The majority's conclusion that the adverse conditions are irrelevant without further inquiry is improper. Congress specifically stated that even though a minority person votes or registers to vote, such evidence should not be considered dispositive on the issue of equal access.[157]

This criticism could appropriately be raised against the *Salas* opinion, on which the *Oritz* majority relied. *Salas* did not find Hispanic political participation to be depressed because, though voting turnout was low, registration was high.[158] The *Salas* court, like the majority in *Oritz*, considered the act of registering a intervening factor.[159] However, like the majority in *Oritz*, the *Salas* court apparently failed to inquire into the reasons why Hispanics failed to vote. Again, the inclusion of the factor of apathy necessitates more inquiry and the court should avoid such simplified conclusions. As Judge Lewis rightly pointed out, the majority failed to conduct a searching, practical analysis.[160]

The majority of the Third Circuit in *Oritz* unfortunately accepted a term that can be misused. Courts hereafter should understand that the majority used the concept of "dispositive force" with the purpose of clarity and distinction and not with the purpose of emasculating the totality of circumstances test. Of great concern is the courts' apparent tendency to conclude that a minority individual has overcome the adverse conditions

153. *See Oritz*, 28 F.3d at 316.
154. *See Oritz*, 28 F.3d at 325 (Lewis, J., dissenting).
155. *Id.* at 326.
156. *Id.* at 336-40.
157. *See* S. REP. NO. 417, 97th Cong., 2d Sess. 30 n.120 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 208.
158. *Salas*, 964 F.2d at 1556.
159. *Id.* at 1555-56.
160. *See Oritz*, 28 F.3d at 322 (Lewis, J., dissenting).

of his or her environment after he or she simply registers to vote. It is questionable whether this act is sufficient to lead to such a conclusion. Additionally, it is questionable whether apathy is a legitimate consideration once the Section 2 plaintiff establishes adverse conditions and depressed political participation. If apathy is legitimately considered, a thorough analysis should be conducted to determine its true source.

Marc Mellett