St. Mary's Law Journal

Volume 26 | Number 2 Article 7

1-1-1995

The Size of a Government Body is Not Subject To a Vote Dilution Challenge under Section 2 of the Voting Rights Act of 1965.

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CASENOTES

CONSTITUTIONAL LAW—Elections—The Size of a Government Body Is Not Subject to a Vote Dilution Challenge Under Section 2 of the Voting Rights Act of 1965.

Holder v. Hall,
___ U.S. ___, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994).

Bleckley County, one of 159 counties in the State of Georgia, maintains a single-commissioner form of government empowered with county-governing authority.[1] Although African-American residents compose almost twenty percent of the voting population in Bleckley County, no African-American has ever run for or been elected to the office of Bleckley County Commissioner.[2] After voters rejected a 1986 referendum designed to create a multimember commission, respondents—six African-American Bleckley County voters and the local NAACP chapter—filed suit against the incumbent county commissioner, Jackie Holder, and the superintendent of elections, Probate Judge Robert Johnson, challenging the single-commissioner system under the United States Constitution and Section 2 of the Voting Rights Act of 1965 (the Act).[3] The respondents' constitutional claim maintained that Bleckley County had originally designed and implemented the single-commissioner system in an effort to dilute minority voting effectiveness in violation of the Equal Pro-

1. Holder v. Hall, 757 F. Supp. 1560 (M.D. Ga. 1991), *rev'd*, 955 F.2d 1563 (1992), *rev'd*, ___ U.S. ___, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994). The Bleckley County Commissioner carries out both executive and legislative responsibilities, including the levying of general and special taxes, the controlling of county property, and the settling of claims against the county. Holder v. Hall, ___ U.S. ___, ___, 114 S. Ct. 2581, 2584, 129 L. Ed. 2d 687, 692–93 (1994).

2. *Id.* at ___, 114 S. Ct. at 2584, 129 L. Ed. 2d at 692–93.

3. *Id.* at ___, 114 S. Ct. at 2584, 129 L. Ed. 2d at 693–94. The referendum resembled an election held four years earlier when Bleckley County voted to change the single superintendent of education to a five-member board. *Id.* at ___, 114 S. Ct. at 2584, 129 L. Ed. 2d at 693.

tection Clause of the Fourteenth Amendment and the right to vote guaranteed by the Fifteenth Amendment.[4] The respondents' statutory claim alleged that Bleckley County's single-member commission violated Section 2 of the Act.[5] The United States District Court for the Middle District of Georgia rejected the constitutional claim, citing respondents' failure to submit any evidence establishing that Bleckley County had adopted the single-commissioner form of government for the purpose of discriminating against African-American voters.[6] The district court also rejected the respondents' Section 2 claim, applying a three-component test developed by the United States Supreme Court in *Thornburg v. Gingles*.[7] The district court determined that the respondents satisfied the first element of the *Gingles* test—that a minority group is of sufficient size to constitute a majority in a single-member district; however, the court found that they failed to satisfy the remaining two elements—that they were politically cohesive and that the majority group voted as a bloc to defeat the minority group's preferred candidate.[8] The United States Court of Appeals for the Eleventh Circuit reversed, finding that the respondents' evidence satisfied all three preconditions of *Gingles* and that the proposed system of five single-member districts was the appropriate remedial solution.[9] The Supreme Court granted certiorari to review whether the size of a government body is subject to a vote-dilution challenge under Section 2 of the Act.[10] HELD—*Reversed*. The size of a government body is not subject to a vote dilution challenge under Section 2 of the Voting Rights Act of 1965.[11]

The right to vote constitutes an essential element of democracy.[12] The electoral process imparts to voters the power to elect representatives re-

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4. *Id.*

5. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2584, 129 L. Ed. 2d at 693–94.

6. *Holder*, 757 F. Supp. at 1569. The district court reviewed extensive historical evidence revealing that until the passage of the Civil Rights Acts beginning in 1957, Bleckley County consistently enforced racial segregation in all aspects of local government. *Id.* at 1562. When Bleckley County implemented the single-member commission form of government in 1912, however, few African-Americans could vote. *Id.* Thus, the district court reasoned that Bleckley County would have had little incentive to create a single-member system for the purpose of excluding, or diluting, the virtually non-existent African-American vote. *See id.* (emphasizing formation of single-county commission in 1911 at time when small percentage of African-Americans were registered to vote).

7. 478 U.S. 30 (1986); *see Holder*, 757 F. Supp. at 1584 (holding that single-commissioner form of government does not violate § 2 of Voting Rights Act).

8. *Gingles*, 478 U.S. at 50.

9. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2585, 129 L. Ed. 2d at 694.

10. *Id.*

11. *Id.* at ___, 114 S. Ct. at 2588, 129 L. Ed. 2d at 698.

12. *See, e.g.*, Burns v. Richardson, 384 U.S. 73, 88 (1966) (emphasizing that right to vote is at heart of democratic government); Reynolds v. Sims, 377 U.S. 533, 555 (1964)

sponsive to their needs and interests.[13] The power to vote depends upon the will of the majority and is easily abused.[14] Voting rights legislation has systematically evolved in response to the sustained misuse of this

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(declaring right to vote freely as "essence of a democratic society"); Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886) (concluding that right to vote, though not strictly natural right, is fundamental political right that is "preservative of all rights"); The Ku Klux Cases, 110 U.S. 651, 664 (1884) (affirming that right of suffrage is of supreme importance). President Ronald Reagan deemed the right to vote as "the crown jewel of American liberties . . . ." Remarks of President Reagan on Signing H.R. 3112 into Law, 18 WEEKLY COMP. PRES. DOC. 846 (June 29, 1982). One need only observe the recent elections in South Africa to appreciate the significance of the privilege to participate in self-government. *See* Bruce W. Nelan, *Time to Take Charge*, TIME, May 9, 1994, at 27 (describing reaction of nationals following elections). After being denied the right to vote for more than 300 years, thousands of black South Africans flocked to voting booths, sometimes waiting in lines of more than 4,000 eager voters. *Id.* Voting was extended to a fourth day in six rural areas. *Id.* One local magistrate commented that "[i]t's like the birth of a baby—problems, anxiety and joy." *Id.* at 28.

13. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23, 30 (1968) (explaining use of voting privilege for advancement of political beliefs); Wesberry v. Sanders, 376 U.S. 1, 17 (1964) (stressing importance of right to have voice in electing representatives who make law); *The Ku Klux Cases*, 110 U.S. at 657 (distinguishing character of government as republican with elected executive and legislative representatives); Burdick v. Takushi, 937 F.2d 415, 419 (9th Cir. 1991) (stating that nature of right to vote is based on citizen's right to participate in choosing representatives), *aff'd*, 112 S. Ct. 2059 (1992); HOWARD BALL ET AL., COMPROMISED COMPLIANCE 21 (1982) (describing citizens as sovereigns authorizing representatives to act on behalf of their individual and collective interests). The concept of representative government is important to the study of voting rights. *See* ANDREW R. CECIL, EQUALITY, TOLERANCE, AND LOYALTY 139 (1990) (concluding that representative government serves needs of majority to exclusion of some groups). Power is conferred not on individuals, but on groups who are collectively able to form majorities for the purpose of electing representatives who act according to the will of the people. *Id.* Consequently, the will of the people is not necessarily the will of all of the people. *Id.* As Justice Powell stated in *Davis v. Bandemer*, "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not." Davis v. Bandemer, 478 U.S. 109, 167 (1986) (Powell, J., concurring and dissenting).

14. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 553 (1946) (discussing history of right to vote and intent to honor desires of numerical majorities); *The Ku Klux Cases*, 110 U.S. at 666 (recognizing temptation to control elections in republican government with violence and corruption as constant source of danger); NAACP v. Leon County, 827 F.2d 1436, 1438 (11th Cir. 1987) (explaining that federalism empowers majorities to determine state policies and laws), *cert. denied*, 488 U.S. 960 (1988); J. Morgan Kousser, *The Undermining of the First Reconstruction, Lessons for the Second* (explaining how power retained by South following Civil War was used to exact racial discrimination despite democratic platform in 1875 promising equality for all people), *in* MINORITY VOTE DILUTION 27, 29 (Chandler Davidson ed., 1984). *See generally* Don Edwards, *The Voting Rights Act of 1965, As Amended* (discussing history of white dominance and democratic legislature used to disenfranchise African-Americans), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 4 (Lorn S. Foster ed., 1985).

power by majority groups to prevent members of racial minorities from effectively participating in the electoral process.[15]

Although majority groups have used electoral power to adversely impact almost all racial minorities,[16] the interplay between racial prejudice[17] and divergent interests emanating from America's legacy of slavery has historically resulted in African-Americans enduring the greatest hard-

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15. *See, e.g.*, Presley v. Etowah County Comm'n, 112 S. Ct. 820, 835 (1992) (Stevens, J., dissenting) (describing Act as Congress's response to "unremitting and ingenious defiance" to command of Fifteenth Amendment); South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966) (explaining that Congress passed Act to combat continued resistance of black voter registration in South); Terry v. Adams, 345 U.S. 461, 466–67 (1953) (explaining that Fifteenth Amendment was response to discriminatory voting practices such as white primaries used in South Carolina); J. Morgan Kousser, *The Undermining of the First Reconstruction, Lessons for the Second* (pointing out correlation between Southern resistance to African-American voter participation and enactment of voting rights legislation), *in* MINORITY VOTE DILUTION 27 (Chandler Davidson ed., 1984). *See generally* HOWARD BALL ET AL., COMPROMISED COMPLIANCE 44-50 (1982) (discussing history of discrimination in South and legislation designed by Congress to eradicate barriers to voting process).

16. *See* LULAC v. Midland Indep. Sch. Dist., 812 F.2d 1494, 1496 (5th Cir.) (acknowledging history of discrimination against Mexican-Americans in Midland, Texas), *vacated*, 829 F.2d 546 (5th Cir. 1987); Windy Boy v. County of Big Horn, 647 F. Supp. 1002, 1007 (D. Mont. 1986) (referring to congressional findings that discrimination against Native-Americans diluted voting strength). *Compare* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1251 (1989) (observing combined efforts of African-American, Hispanic, and Native-American minorities to take voting rights challenge to cities of North, West, and Southwest) *with* Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote,* 42 LA. L. REV. 851, 862 (1982) (noting that ethnic minorities other than African-Americans, such as Mexican-Americans and Native-Americans, have faced similar patterns of exclusion and discrimination). Although Congress primarily intended the Act to address discrimination against African-Americans, a subsequent amendment in 1975 extended protection to language minorities. *See* Voting Rights Act of 1965, Pub. L. No. 89-110, § 301, 89 Stat. 402 (codified as amended at 42 U.S.C. § 1973aa-1a (b)(1976)) (extending protection of Act to language minorities).

17. *See, e.g.*, *Katzenbach*, 383 U.S. at 310–11 (summarizing discriminatory voting techniques employed against African-Americans because of racial prejudice); *Ex parte* Siebold, 100 U.S. 371, 382 (1880) (reviewing history of violence, fraud, and corruption promulgated by white Southerners prevailing at elections); United States v. Dallas County Comm'n, 739 F.2d 1529, 1539 (11th Cir. 1984) (concluding that history of unequal voting access is attributable to racial prejudice toward African-American minority), *cert. denied*, 490 U.S. 1030 (1989); Mack H. Jones, *The Voting Rights Act as an Intervention Strategy for Social Change: Symbolism or Substance?* (characterizing South as repressive apartheid system in which blacks had no rights that whites were bound to respect), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 66 (Lorn S. Foster ed., 1985); Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 421 (1989) (reporting continued struggle of African-Americans to overcome deep-seated prejudice harbored by Caucasians against African-American political leaders).

ship.[18] Importantly, however, African-Americans have accomplished much of the significant progress in voting rights jurisprudence.[19] African-American suffrage has traditionally developed in two stages: (1) elimination of physical barriers to ballot access; and (2) eradication of subtle

18. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 64 (1986) (commenting on different interests often shared by "members of geographically insular racial and ethnic groups," such as income level, employment status, and living status); Rogers v. Lodge, 458 U.S. 613, 626 (1982) (noting divergent interests resulting from depressed economic state of African-American community due to lingering effects of past discrimination); LULAC v. Clements, 999 F.2d 831, 856 (5th Cir. 1993) (acknowledging that polarized voting exists in some communities not because of racial hostility, but because of divergent interests), *cert. denied*, 114 S. Ct. 878 (1994); *cf.* Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH L. REV. 1077, 1145 (1991) (asserting that African-American and Caucasian interests are not fungible). A minority movement, self-named "Black Power," led by a young civil rights leader named Stokely Carmichael, represented the sentiment of numerous African-Americans during the mid-to-late 1960s. *See* E.J. DIONNE, JR., WHY AMERICANS HATE POLITICS 82–83 (1991) (detailing views of several prominent civil rights leaders). Angered by inequitable treatment by Caucasians, Carmichael advocated African-American advancement "not as individuals but as groups conscious of their own special interests and identity." *Id.* at 83.

19. *See* Drew S. Days, III & Lani Guinier, *Enforcement of Section 5 of the Voting Rights Act* (noting need for minority involvement in initiating lawsuits to protect Act provisions), *in* MINORITY VOTE DILUTION 170 (Chandler Davidson ed., 1984); Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 404 (1989) (describing history of African-American struggle to elect representatives responsive to their interests). Minority groups first challenged the extremely blatant forms of voting discrimination. *See, e.g.*, Guinn v. United States, 238 U.S. 347, 365 (1915) (invalidating Oklahoma's grandfather clause that exempted Caucasian citizens, registered to vote prior to 1866, from literacy tests); *The Ku Klux Cases*, 110 U.S. at 667 (upholding conviction of Ku Klux Klan members prosecuted under federal laws that forbade physical interference with minority right to vote); United States v. Reese, 92 U.S. 214, 215–16 (1876) (construing Enforcement Act provisions). Following the eradication of facially discriminatory voting practices, African-Americans brought suits challenging indirect barriers to voting access. *See* Smith v. Allwright, 321 U.S. 649, 664 (1944) (classifying discriminatory white primaries staged by private political party as state action, prohibited by Fifteenth Amendment); Lane v. Wilson, 307 U.S. 268, 275 (1939) (concluding that Oklahoma's registration statute had disproportionate impact on African-American voters). Finally, African-American minorities challenged dilutive electoral systems. *See, e.g.*, *Gingles*, 478 U.S. at 47 (explaining that multimember electoral system can be used to dilute minority voting strength); *Reynolds*, 377 U.S. at 562 (commenting that legislative reapportionment might dilute minority vote); Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (noting Fifteenth Amendment violation when state draws district boundaries in manner to exclude voters based on race). The Enforcement Act, which made it unlawful for private individuals or public officials to interfere with the right to vote, was passed by Congress in 1870, almost immediately following the ratification of the Fifteenth Amendment. Enforcement Act of 1870, ch. 114, 16 Stat. 140; *see* South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (noting that Congress passed Enforcement Act promptly after ratification of Fifteenth Amendment). Largely ineffective, a majority of the Enforcement Act's provisions were repealed in 1894. Election Law Repeal Act of 1894, ch. 25, 28 Stat. 36.

electoral methods employed to dilute the effectiveness of minority voters.[20]

The Fifteenth Amendment to the United States Constitution served as Congress's first significant attempt to address the issue of racial discrimination in the voting process.[21] In addition to forbidding the denial or abridgment of the right to vote based on race, the Fifteenth Amendment also authorized Congress to enact legislation ensuring its enforcement.[22]

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20. *See, e.g.*, Lorn S. Foster, *Political Symbols and the Enactment of the 1982 Voting Rights Act* (observing shift in emphasis from disenfranchisement to vote dilution following Act's passage), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 85, 86 (Lorn S. Foster ed., 1985); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1838-39 (1992) (explaining that challenges to physical barriers to voting have been referred to as "first generation" of voting rights challenges, while extension of protective scope of Act to claims of vote dilution have been referred to as "second generation" of voting rights challenges); Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 MISS. L.J. 591, 667 (1987) (describing 75-year struggle from right to register shifting to right to cast effective vote). *Compare* Giles v. Harris, 189 U.S. 475, 479 (1903) (describing arbitrary refusal of state to register qualified African-American citizens to vote) *and* Davis v. Schnell, 81 F. Supp. 872, 878 (S.D. Ala. 1949) (concluding that Alabama's literacy requirement resulted in arbitrary power in violation of Fourteenth Amendment) *with* Perkins v. Matthews, 400 U.S. 379, 388 (1971) (stating that change in district boundary lines subtly diluted minority voting effectiveness) *and Reynolds*, 377 U.S. at 555 (addressing unconstitutional nature of electoral methods that diminish effectiveness of minority voters).

21. *See* WILLIAM GILLETTE, THE RIGHT TO VOTE: POLITICS AND THE PASSAGE OF THE FIFTEENTH AMENDMENT 77 (1965) (explaining dual purpose of Fifteenth Amendment: to enfranchise Northern African-Americans, while protecting Southern African-Americans from disenfranchisement); *cf. id.* at 165 (asserting that Republican moderates crafted Fifteenth Amendment to bring ballot primarily to Northern African-Americans). *Compare Reese*, 92 U.S. at 218 (concluding that creation of new constitutional right was within protecting power of Congress) *with Guinn*, 238 U.S. at 362 (finding that Fifteenth Amendment had practical effect of creating constitutional right of suffrage, though not in express terms). The Fifteenth Amendment specifically 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, § 1.

22. *See, e.g.*, *Katzenbach*, 383 U.S. at 310 (explaining enforcement acts enacted by Congress under authority of Fifteenth Amendment); *Siebold*, 100 U.S. at 397–98 (emphasizing importance of congressional power to enforce provisions of Fifteenth Amendment); *Reese*, 92 U.S. at 218 (confirming that second section of Fifteenth Amendment confers congressional power to enact enforcement legislation); Daniel A. Klein, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 92 L. Ed. 2d 809, 813-14 (1986) (reviewing history of voting rights legislation enacted by Congress under authority of Fifteenth Amendment). Intending to make African-American suffrage a reality, Congress passed the Enforcement Act of 1870, a statute prohibiting public or private interference with a citizen's right to vote. Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the*

However, even with the assistance of enforcement statutes criminalizing unlawful interference with voting procedures, the Fifteenth Amendment was unsuccessful in effectively addressing the subtle forms of discrimination employed by the South to avoid more obvious forms of discrimination.[23] Aided by the United States Supreme Court's reluctance to extend the scope of the Fifteenth Amendment to invalidate facially neutral voting laws,[24] numerous states employed invidious techniques, such as poll taxes, white primaries, and literacy requirements, to effectively deny African-Americans the right to vote.[25] Failing to obtain the desired redress

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Value of the Right to Vote, 42 LA. L. REV. 851, 855 (1982). A violation of the Enforcement Act subjected the perpetrator to criminal prosecution. *Id.*

23. *See Katzenbach*, 383 U.S. at 310 (attributing ineffectiveness of Fifteenth Amendment, and subsequent repeal of Enforcement Act, to reduced fervor for racial equality during late 1800s and early 1900s); *Siebold*, 100 U.S. at 382 (referring to continuous efforts by Southern states to circumvent Fifteenth Amendment despite enforcement statutes); *see also* Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 863 (1982) (noting that Congress deferred enforcement of voting rights to states following repeal of enforcement acts). *But see Lane*, 307 U.S. at 277 (upholding plaintiff's cause of action alleging violation of enforcement statute resulting in denial of right to vote). *See generally* Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 MISS. L.J. 591, 593–94 (1987) (attributing failure of Civil War Amendments to continued Southern resistance and Supreme Court's refusal to grant relief absent showing of facially discriminatory voting laws).

24. *See* Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959) (rejecting claim that facially neutral literacy test violated Fifteenth Amendment); Jones v. City of Lubbock, 727 F.2d 364, 370 (5th Cir. 1984) (noting that decisions made by Court prior to 1982 addressing Fifteenth Amendment required showing of intentional discrimination); Nevett v. Sides, 571 F.2d 209, 220 (5th Cir. 1978) (concluding that Fifteenth Amendment may only be invoked to challenge purposeful discrimination), *cert. denied*, 446 U.S. 951 (1980); Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 MISS. L.J. 591, 607–08 (1987) (describing Court's decision in *Williams v. Mississippi*, 170 U.S. 213 (1898), as setting precedent for requirement of facial discrimination to establish constitutional violation under Fourteenth or Fifteenth Amendments); R. Tim Hay, Comment, *Blind Salamanders, Minority Representation, and the Edwards Aquifer: Reconciling Use-Based Management of Natural Resources with the Voting Rights Act of 1965*, 25 ST. MARY'S L.J. 1449, 1470 (1994) (noting Supreme Court's refusal to invalidate voting practices absent facial discrimination).

25. *See, e.g.*, McCain v. Lybrand, 465 U.S. 236, 243–44 (1984) (observing that successful lawsuits finding violations of Fifteenth Amendment only resulted in new forms of discrimination); *Katzenbach*, 383 U.S. at 310–12 (characterizing literacy tests, designed to prevent African-Americans from voting, as primary vote-discrimination method). *Katzenbach* outlined various methods commonly employed to prevent African-Americans from registering and voting: grandfather clauses, procedural hurdles, white primaries, racial gerrymandering, and application of voting tests. *Katzenbach*, 383 U.S. at 311. In a report to the Senate during the hearings leading up to the passage of the Voting Rights Act of 1965, Attorney General Robert F. Kennedy related several examples of racially discriminatory

from the Fifteenth Amendment, plaintiffs also sought relief under the Equal Protection Clause of the Fourteenth Amendment.[26] Neither amendment proved effective, however, and minorities made little progress against the indirect methods used in the South to prevent access to the ballot box during the first half of the twentieth century.[27]

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voting techniques. *Literacy Tests and Voter Requirements in Federal and State Elections, 1962: Hearings on S. 480, S. 2750, and S. 2979 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. (1962) (statement of Att'y Gen. Kennedy). One African-American was denied registration on four different occasions because he was unable to interpret a city's debt liquidation clause. *Id.* African-Americans were denied registration for inserting their names in only four of five blanks on a voter registration form. *Id.* Additionally, applicants were denied registration for writing "all my life" in a blank asking for length of residence in the county where the applicants had stated their exact ages elsewhere on the application. *Id.* A schoolteacher was denied registration for mispronouncing the word "equity" when reading a passage aloud. *Id. See generally* Morton Stavis, *A Century of Struggle for Black Enfranchisement in Mississippi: From the Civil War to the Congressional Challenge of 1965—And Beyond*, 57 MISS. L.J. 591, 625–27 (1987) (outlining report of Civil Rights Commission describing subtle discriminatory voting techniques including poll taxes, delayed processing, and literacy tests).

26. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 663 (1966) (holding that imposition of poll tax violated Fourteenth Amendment); Nixon v. Condon, 286 U.S. 73, 88–89 (1932) (invalidating Texas procedure of legislatively empowering political parties' state executive committees to establish voting qualifications for party members on equal protection grounds); Nixon v. Herndon, 273 U.S. 536, 541 (1927) (finding law banning "Negroes" from democratic primaries facially discriminatory in violation of Fourteenth Amendment); ANDREW R. CECIL, EQUALITY, TOLERANCE, AND LOYALTY 90 (1990) (noting that Supreme Court decisions affording remedy under Equal Protection Clause, prior to passage of Act, brought political balance to urban and rural areas); Daniel A. Klein, Annotation, *Racial Discrimination in Voting, and Validity and Construction of Remedial Legislation—Supreme Court Cases*, 92 L. Ed. 2d 809, 811–12, 817–29 (1986) (discussing similar application of both Fourteenth and Fifteenth Amendments to voting rights claims during the late 19th and early 20th centuries).

27. *See Presley*, 112 S. Ct. at 834–35 (summarizing history of Southern resistance lasting for nearly century and culminating in Act's passage); *Katzenbach*, 383 U.S. at 309 (1966) (identifying congressional purpose in passing Act to provide sterner measures to prevent vote discrimination in light of Fifteenth Amendment's limited effectiveness); *Nevett*, 571 F.2d at 218-20 (blaming intent requirement for ineffectiveness of both Fourteenth and Fifteenth Amendments in addressing voting discrimination); *see also* Don Edwards, *The Voting Rights Act of 1965, As Amended* (detailing chronology of federal government's effort to enforce voting rights and explaining resistance of Southern state legislatures), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 4 (Lorn S. Foster ed., 1985); Literacy Tests and Voter Requirements in Federal and State Elections, 1962: *Hearings on S. 480, S. 2750, and S. 2979 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 87th Cong., 2d Sess. 261 (1962) (statement of Att'y Gen. Kennedy) (summarizing lack of African-American voter progress from 1870 through 1960s notwithstanding provisions of Fifteenth Amendment). Progress in the area of voting rights ended along with Reconstruction after the "Compromise of 1877," which removed all remaining federal troops from the South. Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*,

Two landmark United States Supreme Court cases, *Smith v. Allwright*[28] and *Brown v. Board of Education*,[29] marked a change in Court policy, laying the groundwork for accelerated progress toward racial equality.[30] *Smith* reversed the Court's policy of non-interference with private political organizations, enjoining the Democratic Party from limiting participation in primary elections to Caucasians,[31] while *Brown* expressed the Court's commitment to educational equality by prohibiting racially segregated schools.[32]

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42 LA. L. REV. 851, 856 (1982). During the 80 years that followed, Caucasian Southerners methodically excluded African-Americans from meaningful participation in the political process. *Id.*

28. 321 U.S. 649 (1944).

29. 347 U.S. 483 (1954).

30. *See* CHARLES V. HAMILTON, THE BENCH AND THE BALLOT 27 (1973) (citing *United States v. Classic*, in conjunction with *Smith*, as controlling factors in nullifying white primaries); R. Tim Hay, Comment, *Blind Salamanders, Minority Representation, and the Edwards Aquifer: Reconciling Use-Based Management of Natural Resources with the Voting Rights Act of 1965*, 25 ST. MARY'S L.J. 1449, 1471 (1994) (characterizing *Smith* and *Brown* as first major civil rights victories since end of civil rights reform of Reconstruction). Following the decisions of *Smith* and *Brown*, the Supreme Court decided numerous cases in favor of minority advancement against racial discrimination. *See, e.g.*, Johnson v. Virginia, 373 U.S. 61, 62 (1963) (reversing conviction of African-American petitioner, finding that state may not constitutionally segregate seating in courtrooms); Burton v. Wilmington Parking Auth., 365 U.S. 715, 726 (1961) (banning racially segregated seating in public buildings); Shelley v. Kraemer, 334 U.S. 1, 20 (1948) (prohibiting judicial enforcement of private, racially discriminatory covenant). Record numbers of African-American voters participated in Georgia's 1946 Democratic gubernatorial primary after the Supreme Court refused to hear a lower court decision invalidating Georgia's white primary system. Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 96 (1994).

31. *See Smith*, 321 U.S. at 664–66 (characterizing Texas's Democratic white primaries as state action in violation of Fifteenth Amendment); ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 235 (1990) (describing *Smith* as change in Court's policy of non-intervention in operation of private political parties). *Smith* effectively overturned the Court's ruling in *Grovey v. Townsend*, which had declined to characterize Democratic policies as state action. *Id.* Following *Smith*, policies adopted by major political parties were subject to the constraints of the Fourteenth and Fifteenth Amendments as state action. *See Terry*, 345 U.S. at 470 (deeming Jaybird-Democratic general election procedure as state action in violation of Fifteenth Amendment based on racial discrimination); Bode v. National Democratic Party, 452 F.2d 1302, 1304–05 (D.C. Cir. 1971) (extending constitutional constraints, previously limited to state-sponsored organizations, to Democratic Party's delegate-selection process), *cert. denied*, 404 U.S. 1019 (1972). *But see* Irish v. Democratic-Farmer-Labor Party of Minn., 399 F.2d 119, 120 (8th Cir. 1968) (referring to general reluctance of Court involvement in workings of political parties); Lynch v. Torquato, 343 F.2d 370, 373 (3d Cir. 1965) (declining to characterize system of electing chairman of Democratic Party as state action).

32. *See Brown*, 347 U.S. at 493 (holding racially segregated schools unconstitutional); Robert A. Burt, Brown's *Reflection*, 103 YALE L.J. 1483, 1485 (1994) (characterizing

Taking advantage of the combined momentum generated by these decisions and the Civil Rights Acts of 1957, 1960, and 1964, Congress enacted the Voting Rights Act of 1965.[33] The Act consists of two primary components, Sections 2 and 5, which are designed to eliminate and prevent subtle voting practices and procedures utilized to obstruct minority voter participation.[34] Section 5 requires states with a history of discriminatory voting practices to obtain federal preclearance prior to changing a voting standard, practice, or procedure.[35] Section 2 addresses existing methods

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Court's new resolve as culmination of over decade of struggle and debate); Michael J. Klarman, Brown, *Racial Change, and the Civil Rights Movement*, 80 VA. L. REV. 7, 71 (1994) (identifying African-American progress in educational equality both before and after *Brown*). *Brown* followed several United States Supreme Court decisions holding segregated educational systems unconstitutional. *See, e.g.*, McLaurin v. Oklahoma State Regents, 339 U.S. 637, 642 (1950) (requiring identical treatment of graduate students regardless of race); Sweatt v. Painter, 339 U.S. 629, 635 (1950) (declaring racially separate state law schools inherently unequal); Sipuel v. Board of Regents, 332 U.S. 631, 632–33 (1948) (requiring state institution to admit African-American students for purposes of legal education).

33. *See Katzenbach*, 383 U.S. at 313 (explaining scope and purpose of Civil Rights Acts). Congress designed the Civil Rights Acts to empower the Attorney General to seek injunctions against interference with the right to vote, to join states as parties, and to gain access to local voting records. *Id.* Although the Civil Rights Acts were largely unsuccessful, they did help to illustrate the need for stronger legislation. *See* Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 858–59 (1982) (discussing Civil Rights Acts as helpful step toward passage of 1965 Act despite their overall failure). The Voting Rights Act was enacted based on the Fifteenth Amendment's provision authorizing Congress to pass legislation ensuring that the right to vote would not be denied or abridged on account of race. ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 237 (1990). Although states initially claimed that the Act violated their right to legislate voting requirements, the Supreme Court has consistently sustained its validity. *Id.*

34. *See Presley*, 112 S. Ct. at 835 (suggesting that Act represented necessary extension of Fifteenth Amendment); *see also* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1251 (1989) (clarifying stringent new measures needed to ensure enforcement of Fifteenth Amendment guarantees). *Compare* Oregon v. Mitchell, 400 U.S. 112, 117 (1970) (noting that Congress fashioned Act to enforce Fourteenth and Fifteenth Amendments) *with* Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969) (observing that Congress designed Act to eliminate subtle, as well as obvious, discriminatory voting practices). The Act was initially addressed to Southern states, including Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and parts of North Carolina. HOWARD BALL ET AL., COMPROMISED COMPLIANCE 16 (1982). As a result of a 1975 expansion of the Act, Texas, along with selected counties in 14 states, was brought under the Act's umbrella. *Id. See generally* Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What Is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1209 (1985) (outlining basic functions of Act).

35. *See, e.g.*, *Allen*, 393 U.S. at 569 (explaining that § 5 preclearance requirement applies to changes that dilute minority votes); Johnson v. Miller, 864 F. Supp. 1354, 1359–60

utilized to deny or abridge a citizen's right to vote.[36] Though Sections 2 and 5 were largely successful in eliminating blatant and subtle forms of discriminatory techniques preventing ballot access, the South developed new methods of discrimination aimed at reducing or diluting the effectiveness of African-American voters.[37]

Prior to the enactment of the Voting Rights Act, the Supreme Court emphasized that equal voter participation was not solely limited to the privilege of entering a voting booth to pull a lever, but also entailed the right to cast a meaningful, effective vote.[38] Multimember districts and

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(S.D. Ga. 1994) (analyzing application of § 5 preclearance requirement to limited number of states with history of discriminatory voting practices); Burton *ex rel.* Republican Party v. Sheheen, 793 F. Supp. 1329, 1351 (D.S.C. 1992) (concluding that Congress designed § 5 to prevent retrogression), *vacated*, 113 S. Ct. 2954 (1993); Don Edwards, *The Voting Rights Act of 1965, As Amended* (recounting need for effective review process to prevent creation of new discriminatory voting methods), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 3, 5 (Lorn S. Foster ed., 1985); Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What Is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1210 (1985) (explaining § 5 preclearance requirement as means of ensuring that new discriminatory voting devices would not replace old ones).

36. *See, e.g.*, *Jones*, 727 F.2d at 373 (stating that § 2 is remedial provision addressing existing electoral schemes that might debase guarantee of Fifteenth Amendment); *Burton*, 793 F. Supp. at 1351 (stating that § 2 creates private cause of action based on existing electoral systems); Nixon v. Kent County, 790 F. Supp. 738, 743 (W.D. Mich. 1992) (noting limit of § 2's protection as applicable to groups of minorities that experience "a common disability of chronic bigotry"), *aff'd*, 34 F.3d 369 (6th Cir. 1994); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 451 (1988) (commenting that § 2 has potential to reach existing, entrenched discrimination).

37. *See, e.g.*, *Gingles*, 478 U.S. at 44–45 (concluding that multimember districts are often utilized and maintained to diminish effectiveness of minority voters); *Rogers*, 458 U.S. at 615–16 (noting inadequacy of equal ballot access to address problem of multimember districts and other techniques employed to offset effect of African-American voters); *Katzenbach*, 383 U.S. at 330–31 (emphasizing that some states enacted slightly different voting requirements to circumvent literal requirements of Act); Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 851–52 (1982) (noting disappearance of poll taxes, grandfather clauses, and other forms of blatant discrimination, but explaining that ballot access must also involve right to have impact in election contests); Christopher Sullivan, *Great Expectations Face Growing Ranks of Elected Blacks*, PHILA. INQUIRER, Oct. 18, 1992, at 9 (describing new battle over gerrymandering, or vote dilution, replacing battle over ballot access).

38. *See, e.g.*, Lucas v. Forty-Fourth Gen. Assembly, 377 U.S. 713, 737 (1964) (finding that Colorado's districting plan was contrived to dilute effectiveness of minority voters); Reynolds v. Sims, 377 U.S. 533, 555 (1964) (emphasizing that right to vote encompasses claims of vote dilution as well as right to cast vote); Baker v. Carr, 369 U.S. 186, 187 (1962) (commenting on debasement of minority votes resulting from legislative apportionment systems); Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Propor-*

redistricting represent two major methods utilized to diminish the effectiveness of minority votes.[39] In a multimember, or at-large district, the entire voting population elects multiple candidates to a legislative body, thereby reducing a minority group's ability to elect a representative.[40] Redistricting, or gerrymandering, involves the creation or adjustment of legislative district boundaries in a manner calculated to reduce the effectiveness of the minority vote by concentrating or dispersing the minority voting population over various districts.[41]

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tional Representation: What Is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?, 32 UCLA L. REV. 1203, 1222 (1985) (accrediting *Reynolds v. Sims* with creating and defining concept of vote dilution). *See generally* Frank R. Parker, *Racial Gerrymandering and Legislative Apportionment* (reviewing Supreme Court decisions, dating prior to enactment of Act, as establishing causes of action for claims of vote dilution), *in* MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1984).

39. *See, e.g.*, Davis v. Bandemer, 478 U.S. 109, 119 (1986) (describing multiparty systems and redistricting as two main vote-dilution methods previously considered by Court); Rogers v. Lodge, 458 U.S. 613, 616–17 (1982) (reviewing past decisions pertaining to multimember systems and districting as two major methods of vote dilution); Zimmer v. McKeithen, 485 F.2d 1297, 1304 (5th Cir. 1973) (addressing gerrymandering as popular technique used to dilute minority voter strength), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976). *See generally* Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court* (describing use of at-large elections and racial gerrymandering to reduce minority voting power), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 14 (Lorn S. Foster ed., 1985). In addition to multimember districts and gerrymandering, other subtle forms of racial vote dilution include numbered posts, staggered terms, the abolition of elected or appointed offices, majority vote requirements, and discriminatory annexations. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1256–57 (1989).

40. *See, e.g.*, *Bandemer*, 478 U.S. at 119–20 (confirming that multidistrict plans, calculated to reduce effectiveness of minority group vote, are constitutionally justiciable); *Rogers*, 458 U.S. at 616 (stating that at-large voting schemes or multimember districts tend to minimize voting strength by enabling political majority to elect all representatives of district); White v. Regester, 412 U.S. 755, 765–66 (1973) (referring to history of decisions recognizing multimember districts as dilutive of minority voter strength); McGhee v. Granville County, 860 F.2d 110, 116 (4th Cir. 1988) (describing how multimember districting plans can dilute effectiveness of minority voters by submerging them into majority). *See generally* ALEXANDER J. BOTT, HANDBOOK OF UNITED STATES ELECTION LAWS AND PRACTICES 204 (1990) (outlining characteristics of multimember districts); Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence* (tracing use of multimember systems to diminish minority voting strength), *in* MINORITY VOTE DILUTION 65 (Chandler Davidson ed., 1984).

41. *See* Gaffney v. Cummings, 412 U.S. 735, 748–49 (1973) (emphasizing that fair and effective representation may be destroyed by gross population variations among districts resulting from gerrymandering); Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (finding that peculiar 28-sided district had been created to concentrate majority votes, while simultaneously diluting minority votes); *see also* Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment* (defining gerrymandering to encompass any redistricting

Prior to 1980, several courts found violations of Section 2, without finding racially discriminatory intent, when the minority group demonstrated an inability to elect a representative of its choice.[42] In two of the leading cases, *White v. Regester*[43] and *Zimmer v. McKeithen*,[44] the Supreme Court and the Fifth Circuit Court of Appeals developed a "results" test based on a "totality of circumstances" to determine a Section 2 violation; factors considered under this test include the history of vote-related discrimination, the extent of polarized voting, the presence of districts that tend to encourage voting discrimination, and the extent to which minority group members bear the effects of past discrimination.[45] In 1980, however, the

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practice that maximizes votes of one group while minimizing political advantage of another), *in* MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1984). The term "gerrymander" is said to have been named after Elbridge Gerry, governor of Massachusetts in 1812, after his approval of a districting plan shaped somewhat like a salamander. *Id.* Political or partisan minority groups may also be the object of gerrymandering. *See* Bernard Grofman, *Unresolved Issues in Partisan Gerrymandering Litigation* (discussing dispute over justiciability of political or partisan gerrymandering), *in* POLITICAL GERRYMANDERING AND THE COURTS 3 (Bernard Grofman ed., 1990). *Compare* Karcher v. Daggett, 462 U.S. 725, 741–42 (1983) (determining that districting scheme impermissibly diluted vote of racial minorities) *with Bandemer*, 478 U.S. at 109 (extending scope of vote-dilution justiciability to instances of partisan or political gerrymandering). Though historically used to create a voting advantage for majority voters, gerrymandering may also be used to benefit minority voters by concentrating them into a minority-majority district, thereby increasing the minority group's ability to elect a representative. *See* Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1590 (1993) (describing "earmuff" district in Chicago area carving out two Chicago neighborhoods to maximize Latino votes).

42. *See White*, 412 U.S. at 769 (affirming district court's evaluation based on historical discrimination, exclusive of intent); Burns v. Richardson, 384 U.S. 73, 88 (1966) (noting that proof of intentional discrimination is helpful, but unnecessary to determine violation of Act); Fortson v. Dorsey, 379 U.S. 433, 439 (1965) (emphasizing that, "designedly or otherwise," multimember scheme might operate to dilute minority voting strength); *Zimmer*, 485 F.2d at 1305 (requiring only that minority demonstrate inability to elect preferred candidate); *see also* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982* (comparing cases requiring no intent with cases holding that showing of intent was necessary), *in* MINORITY VOTE DILUTION 148 (Chandler Davidson ed., 1984). According to one commentator, the Supreme Court interpreted the provisions of § 2 to be merely superfluous to the Fourteenth and Fifteenth Amendments. *See* Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What Is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1222 (1985) (noting similarities in Court's reasoning in claims based on Act and those based on Fourteenth and Fifteenth Amendments). Constitutional case law pertaining to vote dilution cases at that time did not require a showing of intent. *Id.*

43. 412 U.S. 755 (1973).

44. 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

45. *See White*, 412 U.S. at 769 (considering totality of circumstances in determining that multimember district effectively removed Mexican-Americans from political process);

Supreme Court effectively nullified the use of the "results" test in the controversial decision of *Mobile v. Bolden*,[46] requiring a showing of intentional discrimination to sustain a claim of vote dilution.[47] The evidentiary hurdle involved in proving intent prompted Congress to again take action to protect the right of minorities to vote, this time in the 1982 amendment to the Act.[48]

Zimmer, 485 F.2d at 1304 (listing considerations, aggregate of which may establish violation absent showing of intent); *see also* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1261 (1989) (summarizing Court's consideration of numerous instances of historical discrimination). In articulating the "totality of the circumstances" test as defined in *White*, *Zimmer* outlined several factors to consider: (1) lack of access to the process of slating candidates; (2) the unresponsiveness of legislators to particularized interests; (3) a questionable state preference for multimember districts; (4) existence of past discrimination in general; (5) existence of large districts; (6) majority vote requirements; (7) anti-single shot rules; (8) and lack of provision for at-large candidates running from particular geographical subdistricts. *Zimmer*, 485 F.2d at 1304–05. *See generally* Frank R. Parker, *Protest, Politics, and Litigation: Political and Social Change in Mississippi, 1965 to Present*, 57 MISS. L.J. 677, 687 (1987) (explaining development of results test and its importance to minority voting rights).

46. 446 U.S. 55 (1980).

47. *See Bolden*, 446 U.S. at 60–63 (requiring showing of intentional discrimination to sustain violation of Fifteenth Amendment or Act); *see also* Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ., 4 F.3d 1103, 1114 (3d Cir. 1993) (describing *Bolden* as departure from previous cases establishing results test); Kirksey v. City of Jackson, 625 F.2d 21, 21 (5th Cir. 1980) (noting questionable validity of *Zimmer* in light of "intent" holding of *Bolden*). Another court, in anticipation of the *Bolden* decision, held that plaintiffs must show evidence of racially motivated discrimination to prevail in a vote dilution case. Nevett v. Sides, 571 F.2d 209, 217 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980). One commentator concluded that *Bolden* gravely damaged Section 2 of the Act, making it almost impossible to prevail on a claim of vote dilution. Don Edwards, *The Voting Rights Act of 1965, As Amended*, *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 6 (Lorn S. Foster ed., 1985).

48. As outlined in the legislative history to the 1982 amendment, Congress criticized the intent test the Court applied in *Bolden* on three grounds. S. REP. NO. 417, 97th Cong., 2d Sess. 36-37 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214-215. First, the motives prompting officials to adopt a particular electoral system more than 100 years ago were largely irrelevant if the current system did not give minorities a fair chance to participate. *Id.* Second, the intent test was needlessly divisive, involving charges of racism against the community and allegedly responsible officials. *Id.* Finally, the test placed an extremely difficult evidentiary burden on plaintiffs, who would often be unable to obtain the testimonial evidence and records necessary to prove intent. *Id.*; *see also Gingles*, 478 U.S. at 71–72 (describing intent requirement established in *Bolden* as unnecessarily divisive and difficult to prove); Wise v. Lipscomb, 437 U.S. 535, 550 (1978) (Rehnquist, J., concurring) (describing standard established in *Bolden* as indecisive and amorphous); Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2038 (1993) (analogizing finding of intent to search for Holy Grail). The Court's decision in *Bolden* acted as a catalyst for the passage of the 1982 amendment, clarifying the need for further reform. *See* Mack H. Jones, *The Voting Rights Act as an Intervention Strategy for Social Change: Symbolism or Substance?*

Explaining that Section 2 of the Act was never intended to require a showing of intentional discrimination, Congress amended Section 2 to expressly forbid the use of any "voting qualification, or prerequisite to voting or standard, practice, or procedure . . . which *results* in the denial or abridgment of the right . . . to vote on account of race."[49] Congress also incorporated into the amendment several of the factors previously developed by the Court in *White* and *Zimmer* to establish a Section 2 violation, including whether the district had a history of discrimination and the extent of racially polarized voting.[50] Finally, to satisfy opponents of the results standard, Congress added a provision which clarified that the amendment does not operate to guarantee racial minorities the right to proportionate representation.[51]

(asserting that *Bolden* clarified issues necessary for passage of 1982 amendment), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 66, 87 (Lorn S. Foster ed., 1985).

49. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437-39 (codified as amended at 42 U.S.C. § 1973 (1988)) (emphasis added).

50. *See, e.g.*, Jones v. City of Lubbock, 727 F.2d 364, 378–79 (5th Cir. 1984) (explaining that Congress utilized *Zimmer* factors to lend objectivity to claims of vote dilution); NAACP v. City of Columbia, 850 F. Supp. 404, 409 (D.S.C. 1993) (reporting that 1982 amendment contained nine factors derived from *White* and other pre-*Bolden* cases); Jeffers v. Clinton, 730 F. Supp. 196, 203 (E.D. Ark. 1989) (outlining "Senate" factors that may be used to establish whether electoral system has discriminatory effect), *aff'd*, 498 U.S. 1019 (1991); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 458–59 (1988) (characterizing Senate factors as giving courts power to address broad conception of political processes); Bobby Ruparts, Comment, *The Crown Jewel of American Liberty: The Right to Vote; What Does It Mean Under the Amended Section 2 of the Voting Rights Act?*, 37 BAYLOR L. REV. 1015, 1029 (1985) (interpreting vote dilution factors incorporated into 1982 amendment to be proof of intentional discrimination). One commentator noted that "[i]n detailing the factors showing vote dilution, Congress acted partly in response to criticism that the results test was amorphous, or had no 'core,' and partly to restore the analytical framework in *White* as articulated in *Zimmer*." Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1265–66 (1989).

51. Commonly referred to as the "Dole Compromise," named for its primary sponsor, Kansas Senator Robert Dole, the provision states "[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2, 96 Stat. 131, 134 (codified as amended at 42 U.S.C. § 1973 (1988)). *See, e.g.*, LULAC v. Clements, 999 F.2d 831, 896 (5th Cir. 1993) (commenting on tension between results test and prohibition against proportionate representation), *cert. denied*, 114 S. Ct. 878 (1994); *McGhee*, 860 F.2d at 117 (noting that concerns of opponents to amendment ultimately led to addition of Dole Compromise, which expressly denies that amendment created right to proportionate representation); Clark v. Roemer, 777 F. Supp. 445, 463 (M.D. La. 1990) (emphasizing that § 2 has no specific guaranteed proportionate representation), *vacated*, 501 U.S. 1246 (1991). The 1982 amendment plan prompted fear that it would encourage polarized voting and further divide the African-American and Caucasian communities. *See* Mack H. Jones, *Political Symbols and the Enactment of the 1982 Voting Rights Act*

Following the 1982 amendment, minority groups inundated the courts with claims alleging vote dilution.[52] In applying the new results standard of Section 2, the courts faced two problems: (1) determining the appropriate evidentiary burden to establish a violation; and (2) fashioning an appropriate remedy.[53] The Court addressed the first problem in *Thornburg v. Gingles*,[54] establishing an objective test which requires that a minority group bringing a vote dilution challenge under Section 2 prove that (1) it is sufficiently large to constitute a majority in a single-member district, (2) the majority group votes as a bloc to defeat the minority group's preferred candidate, and (3) the minority group is politically cohesive.[55]

(summarizing opposition's assertions that amendment would confer special privileges on minority groups), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 85, 86 (Lorn S. Foster ed., 1985). During the 1981 congressional reapportionment in Georgia, for example, a general assembly member criticized a plan introduced by Senator Julian Bond creating minority-majority districts, claiming that it would disrupt currently harmonious relationships and lead to "white flight." Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1274 (1989). Proponents of the plan alternatively asserted that any criticism was misplaced and was akin to "saying that it is the doctor's thermometer which causes high fever." *Id.*

52. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707 (1993) (commenting on thousands of vote dilution claims that followed 1982 amendment); Frank R. Parker, *Protest, Politics, and Litigation: Political and Social Change in Mississippi, 1965 to Present*, 57 MISS. L.J. 677, 687 (1987) (noting phenomenal success of 1982 amendment that prompted more than 1,300 jurisdictions, in response to litigation or threat thereof, to change methods of electing officials through 1987). Before the adoption of the 1982 amendment, which incorporated the results standard, federal cases were filed at a rate of 150 per year. Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1280 (1989). The amendment has increased the predictability of dilution challenges, thereby increasing the number of cases filed to about 225 per year. *Id.*

53. *See* Seastrunk v. Burns, 772 F.2d 143, 149–50 (5th Cir. 1985) (pondering several possible factors in determining violation, settling on totality of circumstances test derived from *Zimmer*); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 451 (1988) (describing difficult task courts faced in determining scope of § 2's command). *Compare* Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002, 1004–05 (1984) (Stevens, J., concurring) (concluding that evidence of past discrimination and racial bloc voting combined to substantiate § 2 violation) *with* Butts v. City of New York, 779 F.2d 141, 145 (2d Cir. 1985) (determining that election system, meeting six of nine factors listed in 1982 amendment, did not constitute § 2 violation), *cert. denied*, 478 U.S. 1021 (1986).

54. 478 U.S. 30 (1986).

55. *See Gingles*, 478 U.S. at 50–51 (enumerating tripartite test); *see also* Growe v. Emison, 113 S. Ct. 1075, 1084–85 (1993) (reversing lower court's decision for failing to evaluate claim of vote dilution based on objective test established in *Gingles*); *McGhee*, 860 F.2d at 117 (describing *Gingles* analysis as establishing test for vote dilution under § 2). The *Gingles* test for vote dilution under § 2 not only simplified a finding of a § 2 violation, but also added predictability for plaintiffs considering legal action. *See* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1269 (1989)

When a minority group satisfies these three preconditions, the court then must address the second problem of constructing an appropriate remedy.[56]

Notwithstanding the provision of Section 2 that expressly denies the right of minority groups to proportionate representation, courts have found the task of constructing any other workable remedy elusive and have usually applied remedies reasonably calculated to ensure minorities the opportunity to elect the number of representatives roughly equal to the percentage of the minority voting population.[57] Although courts

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(commenting on added predictability created by *Gingles* test). One commentator has noted that, although the Court's application of the standards developed in *Gingles* provides relief to some minority groups who can satisfy the requirement of geographical compactness, "groups that are too small or too diffuse to control a single-member district, but whose ability to influence elections has nevertheless been impaired in contravention of Section 2, have no remedy under *Gingles*." Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2050 (1993).

56. *See Growe*, 113 S. Ct. at 1084 (emphasizing that proof of violation is precursor to determining remedy); *see also* Voinovich v. Quilter, 113 S. Ct. 1149, 1156 (1993) (rejecting district court's holding that § 2 of Act prohibits creation of majority-minority districts unless necessary to remedy statutory violation). The *Gingles* three-prong test cannot be applied "mechanically and without regard to the nature of the claim." *Id.* at 1157; *see McGhee*, 860 F.2d at 117–18 (explaining creation of remedy as necessarily following finding of § 2 violation); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1730–32 (1993) (describing availability of favorable remedies and complicating factor added by § 2); *see also* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 464–65 (1988) (alluding that scope of available relief is uncertain under *Gingles*). The *Gingles* standard may make it more difficult to raise an "ability to influence" claim in the future. *Id.* at 465. Courts will usually give the state legislature an opportunity to submit a proposal to remedy a § 2 violation. *See generally* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 13–14 (1991) (explaining courts' reluctance to intervene with solution unless necessary).

57. *See, e.g.*, *McGhee*, 860 F.2d at 118–19 (acknowledging § 2 provision denying application to assure proportionate representation, yet finding that single-member district correlated to percentage of minority population represented only appropriate remedy); Potter v. Washington County, 653 F. Supp. 121, 124–25 (N.D. Fla. 1986) (speculating that creation of five single-member districts would be appropriate remedy when minority voting population composed 12% of total voting population in five-member district); Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1593 (1993) (acknowledging that judicial remedies have resulted in special representative relationship for minority voters); Mary A. Inman, Comment, *C.P.R. (Change Through Proportional Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2051 (1993) (concluding that proportionate representation is core of *Gingles* preconditions). *But see Bandemer*, 478 U.S. at 132 (finding districting plan constitutional despite fact that it would not establish proportionate representation). Dividing multimember districts into single-member districts is the most common, and arguably most logical, technique of enabling minority voters to elect preferred representatives. *See*

have established that the size of a government body is subject to Section 5 preclearance, they have limited the application of Section 2 to vote dilution analysis of cases involving the type or size of the actual electoral system.[58]

In *Holder v. Hall*, the United States Supreme Court addressed, for the first time, whether the size of a government body may be challenged as dilutive under Section 2 of the Voting Rights Act of 1965.[59] Justice Kennedy, writing for the plurality, stated that in addition to meeting the *Thornburg v. Gingles* preconditions, a court must find a reasonable alternative benchmark, or measure of undiluted voting strength, when a minority asserts a vote dilution claim.[60] The Court acknowledged and distinguished prior holdings that deemed changes in the size of a govern-

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Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1257 (1989) (requiring federal courts to use single districts as remedy absent unusual circumstances). The Supreme Court recently held that a districting plan tailored specifically for the purpose of enabling an African-American minority to elect a representative, absent a showing of prior discrimination, may have violated the voting rights of the Caucasian majority. Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993).

58. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 7 (1991) (explaining that courts have primarily focused attention in § 2 cases on widespread use of multimember and at-large systems); *cf.* Nevett v. Sides, 571 F.2d 209, 219 (5th Cir. 1978) (finding no realistic difference between multimember districts and gerrymandering claims), *cert. denied*, 446 U.S. 951 (1980). *Compare Growe*, 113 S. Ct. at 1084 (exploring prior decisions pertaining to § 2 violations relating to use of multimember districts to dilute minority votes) *and Gingles*, 478 U.S. at 48–49 (explaining use of multimember districts to diminish minority group's ability to effectively participate in political process) *with* Robinson v. Commissioners Court, 505 F.2d 674, 679 (5th Cir. 1974) (concluding apportionment plan unconstitutionally gerrymandered to diminish African-American voting strength) *and* Magnolia Bar Ass'n v. Lee, 793 F. Supp. 1386, 1396 (S.D. Miss. 1992) (analyzing claim brought by African-American minority groups alleging diluted vote caused by discriminatory redrawing of district boundaries), *aff'd*, 994 F.2d 1143 (5th Cir.), *cert. denied*, 114 S. Ct. 555 (1993).

59. Holder v. Hall, ___ U.S.___, ___, 114 S. Ct. 2581, 2583, 129 L. Ed. 2d 687, 692 (1994).

60. In the context of vote dilution analysis, the term "benchmark" refers to a voting practice which represents the norm, or measure of what minority voting strength should be, absent racial discrimination. *See* Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002, 1012 (1984) (Rehnquist, J., dissenting) (stressing phrases such as "vote dilution" suggest norm against which voting practice can be measured). As Justice O'Connor explained in *Gingles*, "in order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system." *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring); *see also Holder*, ___ U.S. at ___, 114 S. Ct. at 2585, 129 L. Ed. 2d at 694–95. As an alternative benchmark, respondents submitted a five-member board, arguing that (1) it was the most common size for a governing body in Georgia, (2) the Georgia Legislature had already authorized Bleckley County to form a five-member commission, and (3) Bleckley County had already changed from a single superintendent to a five-member school board. *Id.* at ___, 114 S. Ct.

ment body to be subject to preclearance under Section 5 of the Act.[61] The Court reasoned that Section 5, which Congress designed as a retrogression provision, contains a built-in benchmark,[62] whereas Section 2 does not.[63] Thus, the majority concluded that when a court is unable to ascertain a reasonable benchmark, a racial minority cannot maintain a vote dilution challenge under Section 2.[64]

Justice O'Connor filed a concurring opinion, finding that the size of a government body is a "standard, practice or procedure" under both Sections 2 and 5, and therefore is subject to the provisions of the Act.[65] Relying on precedent and legislative history supporting claims of vote dilution under the Act, Justice O'Connor strongly disagreed with Justice Thomas's concurrence, which interpreted the Act as solely addressing ballot access.[66] Even so, Justice O'Connor agreed that the plaintiffs had

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at 2586, 129 L. Ed. 2d at 695. According to Justice Kennedy, the factors submitted by respondents did not reasonably bear on the issue of vote dilution. *Id.*

61. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2587, 129 L. Ed. 2d at 696–97. In arguing that the Court should interpret the scope of § 2 in a manner similar to that of § 5, the respondents cited *Lockhart v. United States*, 460 U.S. 125 (1983), which concluded that a change in the size of a government body necessitated § 5 preclearance. Respondents' Brief at 29, Holder v. Hall, ___ U.S. ___, 114 S. Ct. 2581, 129 L. Ed. 2d 687 (1994) (91-2012). Justice Kennedy stated that, although the Court previously presumed the respective coverage of § 2 and § 5 to be the same, it did not conclusively adopt that rule. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2587, 129 L. Ed. 2d at 696.

62. *Id.* at ___, 114 S. Ct. at 2587, 129 L. Ed. 2d at 697. Section 5 forbids changes in existing voting practices that would result in a reduction, or "retrogression," in minority voting strength. Beer v. United States, 425 U.S. 130, 141 (1976).

63. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2587, 129 L. Ed. 2d at 697.

64. *Id.*

65. *Id.* at ___, 114 S. Ct. at 2588, 129 L. Ed. 2d at 698 (O'Connor, J., concurring).

66. *Id.* Justice O'Connor defended continued application of the Act to claims of vote dilution on two grounds: (1) stare decisis; and (2) legislative intent of Congress. *Id.* The Court has long recognized vote dilution as justiciable under both §§ 2 and 5 of the Act. *See* Thornburg v. Gingles, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring) (interpreting Congress's intent to apply Act to vote dilution under § 2); *see also* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 828 (1992) (noting that change in size of government body is subject to § 5 preclearance since it reduces number of candidates for whom minorities can vote). According to Justice O'Connor, Justice Thomas's suggested overhaul of § 2 interpretation is impermissible in light of precedent. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2588, 129 L. Ed. 2d at 698 (O'Connor, J., concurring). Justice O'Connor further argued that Congress clearly intended to extend application of the Act to claims of vote dilution. *Id.* (citing *Gingles*, 478 U.S. at 84 (O'Connor, J., concurring)). In her concurring opinion in *Gingles*, Justice O'Connor explained that Congress, in drafting the 1982 amendment to the Act, codified the results test developed in two vote dilution cases, *Whitcomb v. Chavis*, 403 U.S. 124 (1971) and *White v. Regester*, 412 U.S. 755 (1973). *Gingles*, 478 U.S. at 83–84.

presented no reasonable method for ascertaining an alternative benchmark.[67]

In a concurring opinion joined by Justice Scalia, Justice Thomas agreed with the judgment, but used a completely different line of reasoning.[68] Justice Thomas would not only disallow claims of vote dilution challenging the size of a government body, but would also reject any vote dilution claim, thereby limiting the scope of the Act to questions of ballot access.[69] Justice Thomas argued that the type or size of a district is not a "standard, practice or procedure" as originally contemplated by the Act.[70] According to Justice Thomas, Congress originally enacted the Act to eliminate discriminatory practices implemented by the South to prevent or restrict ballot access based on race.[71] Subsequent decisions have enlarged the scope of the Act to encompass claims of vote dilution, disregarding the rules of statutory interpretation.[72] Justice Thomas further asserted that, in fashioning various remedies for claims of vote dilution, the Court has exceeded its authority in choosing one theory of political representation over another.[73] Thus, Justice Thomas asserted that the Court should overrule all prior decisions extending the scope of the Act to claims of vote dilution, including *Gingles*. In Justice Thomas's opinion, the continued application of the Act to claims of vote dilution will only

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67. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2590–91, 129 L. Ed. 2d at 701 (O'Connor, J., concurring).

68. *Id.* at ___, 114 S. Ct. at 2591, 129 L. Ed. 2d at 702 (Thomas, J., concurring).

69. *Id.* at ___, 114 S. Ct. at 2592, 129 L. Ed. 2d at 702–03.

70. *Id.*

71. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2592, 129 L. Ed. 2d at 703 (Thomas, J., concurring).

72. *Id.* at ___, 114 S. Ct. at 2614, 129 L. Ed. 2d at 729. According to Justice Thomas, the Court's decision in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), marked a fundamental change in the emphasis of the Act, shifting its focus from ballot access to claims of vote dilution. *See Holder*, ___ U.S. at ___, 114 S. Ct. at 2593, 129 L. Ed. at 704 (Thomas, J., concurring) (explaining that *Allen* extended scope of Act to address wide variety of electoral practices). Justice Thomas asserted that *Allen* and subsequent cases broadened the original language of the Act. *Id.* The terms "standard, practice and procedure," according to Justice Thomas, focus on the voter's ability to register and cast a vote, not on the indirect effects of different electoral systems. *Id.* at ___, 114 S. Ct. at 2611, 129 L. Ed. 2d at 725–26.

73. *Id.* at ___, 114 S. Ct. at 2594, 129 L. Ed. 2d at 705. Justice Thomas cited two different theories of political representation implicated in the Act's interpretation: (1) a system in which minorities have some influence in the election of all officials, such as a multimember district; and (2) a system in which minorities have more influence in the election of fewer candidates, such as single-member districts. *Id.* The Court's preferred remedy of creating single-member districts enforces the second theory of representation. *Id.* Justice Thomas explained that no constitutional provision exists endorsing one theory of political representation over another. *Id.* at ___, 114 S. Ct. at 2594, 129 L. Ed. 2d at 705–06 (Thomas, J., concurring).

serve to further distance the interests of racial minorities from majorities.[74]

Justice Blackmun, joined by Justices Stevens, Souter, and Ginsburg, filed a dissenting opinion.[75] Justice Blackmun reasoned that the size of a government body, as in any vote dilution challenge, impacts a minority group's ability to elect the candidate of its choice.[76] Justice Blackmun further asserted that the five-member commission, authorized by the Georgia Legislature prior to its rejection by voters, provided a perfectly reasonable alternative benchmark in the instant case.[77]

In *Holder v. Hall*, a three-member plurality relied on a seemingly forgotten, and much ignored, element of vote dilution—establishment of a reasonable alternative benchmark representing undiluted voting strength—to summarily conclude that the size of a government body is immune to claims of vote dilution.[78] Prior decisions addressing such

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74. *Id.* at ___, 114 S. Ct. at 2598, 129 L. Ed. 2d at 709. Justice Thomas cited *Shaw v. Reno*, 113 S. Ct. 2816 (1993), in which the Court conceded that it has indirectly assisted in separating voters into racially segregated districts, a result known as the racial balkanization of a nation. *Id.* at ___, 114 S. Ct. at 2598, 129 L. Ed. 2d at 709.

75. *Holder*, ___ U.S. at ___, 114 S. Ct. at 2619, 129 L. Ed. 2d at 736 (Blackmun, J., dissenting).

76. *Id.* at ___, 114 S. Ct. at 2620, 129 L. Ed. 2d at 737. In reaching this conclusion, Justice Blackmun reviewed the Court's prior decisions construing § 5 of the Act as applicable to claims challenging the size of a government body and argued for a similar application of § 2. *See id.* at ___, 114 S. Ct. at 2620–21, 129 L. Ed. 2d at 737 (reviewing decisions of *City of Rome v. United States, Lockhart v. United States*, and *Presley v. Etowah County Comm'n*, all confirming that size of government body is subject to § 5 preclearance requirement).

77. *Id.* at ___, 114 S. Ct. at 2622, 129 L. Ed. 2d at 739. Justice Blackmun explained that a reasonable alternative benchmark must be evaluated based on the specific facts in a given case. *Id.* The five-member commission is reasonable in this case, Justice Blackmum argued, based on the three reasons presented by the respondents: (1) the Georgia Legislature expressly authorized a five-member commission; (2) a five-member commission is the most common size of governing body in the state of Georgia; and (3) Bleckley County had previously changed the size of the school board from one to five members. *Id.*

78. *See* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1714 (1993) (describing issue of baseline as problem that has bedeviled Court for generation); *see also* Mary A. Inman, Comment, *C.P.R. (Change Through Proportionate Representation): Resuscitating a Federal Electoral System*, 141 U. PA. L. REV. 1991, 2041–42 (1991) (criticizing requirement for measurement of undiluted voting strength, arguing that proper remedy in vote dilution claim is actual ability to elect representative). Recent vote dilution cases decided by the Supreme Court have not even utilized the term "benchmark" or addressed the measure of undiluted voting strength as a significant factor. *See, e.g.*, Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993) (defining § 2 violation to include any electoral practice that has effect of diminishing minority group's ability to elect candidate of its choice on account of race); Growe v. Emison, 113 S. Ct. 1075, 1084 (1993) (explaining concept of vote dilution as submergence of minority voting strength into majority, thereby diminishing effectiveness of minority vote); Chisom v. Roe-

claims have not relied on the need to establish a clearly defined benchmark, but instead have emphasized minority and majority voting tendencies and the resulting effect on a minority group's opportunity to elect a representative responsive to its interests.[79] Courts have presumed that, when a minority group establishes racially polarized voting tendencies, the measure of undiluted voting strength is represented in a real or proposed system designed to make the election of a preferred candidate possible.[80] The underlying objective, consistent with the remedial goals of the Act, has been to empower minority groups with the ability to exercise

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mer, 501 U.S. 380, 395 (1991) (concluding that judicial elections fell within scope of § 2 because they affected minority group's ability to participate in electoral process).

79. *See, e.g., Chisom*, 501 U.S. at 396-97 (concentrating on effect of election structure on minority group's ability to effectively participate in political process); Thornburg v. Gingles, 478 U.S. 30, 44 (1986) (explaining that correct question in evaluating claim of vote dilution is whether challenged structure affords racial minorities equal opportunity to participate and elect candidate of their choice); Nevett v. Sides, 571 F.2d 209, 216 (5th Cir. 1978) (emphasizing that plaintiff in vote dilution case has burden to establish unequal access to political process and inability to elect minority representative), *cert. denied*, 446 U.S. 951 (1980); Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1272 (1989) (discussing court decisions holding that proper vote dilution remedy when racially polarized voting is established is method enabling minorities to elect preferred candidate); Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 142 (1984) (stressing that initial and continuing goal of Congress in passing Act is to provide racial minorities with equal opportunity to participate in electoral process and to elect representative of their choice). A violation is established under § 2 if it is proved that political processes are not equally open to minority members in that (1) they have a diminished chance to participate in the political process, and (2) they are unable, because of the violation, to elect representatives of their choice. *Chisom*, 501 U.S. at 407–08 (Scalia, J., dissenting). The second consideration, concerning the minority group's ability to elect a preferred candidate, is a major focus in claims of vote dilution. *See Gingles*, 478 U.S. at 35 (explaining respondent's allegation that political system results in inability of minority group to elect representative of its choice).

80. *See, e.g.*, Chisom, 501 U.S. at 403 (determining that proper remedy, when racially polarized voting tendencies were evident, would be system that enables minorities to participate in political process and elect preferred candidate); Ketchum v. Byrne, 740 F.2d 1398, 1413 (7th Cir. 1984) (emphasizing futility of fashioning remedy unless it provides realistic opportunity to elect preferred representative), *cert. denied*, 471 U.S. 1135 (1985); Dillard v. Crenshaw County, 649 F. Supp. 289, 295 (M.D. Ala. 1986) (concluding that creating single-member commission unfairly diluted minority political participation in light of race-based voting tendencies), *aff'd in part and rev'd in part*, 831 F.2d 246, 252–53 (11th Cir. 1987); Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1245–46 (1993) (noting remedies for construction of single-member districts when minority groups are found submerged in multimember districts, thus creating districts that allow minority group an opportunity to elect candidate of choice); Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1812–13 (1992) (describing judicial reapportionment based on proportionate representation standard as remedy to § 2 violation).

the right to vote in a manner reasonably calculated to ensure representation of their interests, which were previously underrepresented because of racial discrimination.[81] Notwithstanding the objective of minority electoral empowerment developed in prior cases, the Court, wary of the potential for unrestrained expansion of Section 2, has adopted a much more literal, mechanical approach to vote dilution analysis.[82]

Justice Thomas's concurring opinion denotes a further departure from precedent and has evoked immediate criticism from voting rights advocates, particularly from the African-American community.[83] Although

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81. *See, e.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144, 170 (1977) (Brennan, J., concurring) (explaining that Court's preferential treatment of previously disadvantaged racial groups is justifiable to vest in minorities power to effectively participate in political process); *Ketchum*, 740 F.2d at 1413 (justifying use of remedy that would provide realistic opportunity for minority groups to elect candidate perceived to represent their interests); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1712 (1993) (describing claims of vote dilution as effort by minority groups to achieve representation of interests unfairly ignored); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 23 (1991) (concluding that equal opportunity for representation of minority interests does not exist within single-member office). Courts have uniformly approved the use of remedial solutions to address violations of the Act. *See, e.g.*, *Chisom*, 501 U.S. at 403 (describing remedial purpose of Act to eliminate racial discrimination in voting practices); Local 28 of Sheet Metal Workers' Int'l Ass'n v. EEOC, 478 U.S. 421, 449 (1986) (illustrating need for remedial, race-conscious remedies to address effects of past discrimination); Fullilove v. Klutznick, 448 U.S. 448, 477 (1980) (distinguishing remedial objectives of Act from antidiscrimination purpose of Public Works Employment Act of 1977).

82. *See* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 19 (1991) (explaining Court's reluctance to apply § 2 to claims challenging size of government body because Court is simply accustomed to idea that certain government bodies have traditionally consisted of one member). At least two courts have held that the size of a government body is a justiciable form of vote dilution because it reduces a minority group's ability to effectively participate in the political process. *See* NAACP v. Stallings, 829 F.2d 1547, 1560 (11th Cir. 1987) (declaring that minority group could maintain claim of vote dilution to challenge single-commissioner form of government), *cert. denied*, 485 U.S. 936 (1988); *Dillard*, 649 F. Supp. at 294 (rejecting district court's proposed vote-dilution remedy consisting of single county commissioner, concluding it would unfairly dilute minority voting strength). In a comparable situation, the Court has justified extension of § 2 to claims involving election of judges based on prior decisions pertaining to § 5. *See Chisom*, 501 U.S. at 401–02 (explaining contradiction of allowing existing structure to exist under § 2 while prohibiting creation of identical structure under § 5). The benchmark used in § 5 cases is similarly insupportable, providing for approval of an electoral system that is discriminatory, as long as it is no worse than the system it replaces. *See* Mark E. Haddad, Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139, 143 (1984) (criticizing § 5 retrogression standard as incomplete remedy).

83. *See, e.g.*, Kenneth J. Cooper & Joan Biskupic, *Thomas's Unwelcome Opinion—Justice Stokes Fires of Foes with Arguments in Voting Rights Case*, WASH. POST, July 22, 1994, at A3 (summarizing statements made by Democratic senator, Cleo Fields, alleging

Justice Thomas correctly characterized the original goal of the Act—equalizing ballot access—he failed to consider the ramifications of removing the remedial scope of the Act that has evolved in response to the renewed efforts of majority groups to dilute minority voting strength.[84] Although limiting the scope of Section 2 to claims of ballot access may effectively equalize voter participation, history has shown that additional legislative and judicial intervention is necessary to address the past effects and lingering problem of racial discrimination.[85]

Holder v. Hall illustrates an enduring dilemma the Court has encountered in interpreting the scope and purpose of the Act as applied to claims of vote dilution: justifying the formulation and application of proactive, race-conscious remedies under the authority of a color-blind Constitution.[86] Equalizing ballot access has proven insufficient to ensure

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that Justice Thomas has "disassociated" himself from civil rights community); Colman McCarthy, *When a "Brother" Strays*, WASH. POST, July 16, 1994, at A19 (discussing prayer urged at NAACP convention by ordained minister describing Justice Thomas as "brother" who has strayed from orthodoxy). *But see* Edwin M. Yoder, Jr., *Ask Why His Black Critics Are Angry at Justice Thomas*, WASH. POST, Aug. 12, 1994, at A27 (challenging critics to examine Justice Thomas's valid concerns pertaining to furtherance of racial division and improper judicial involvement in electoral methods).

84. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613, 637 (1982) (Stevens, J., dissenting) (concluding that multimember system, though technically in conformity with letter of Act, had effect of diluting minority voting strength); Allen v. State Bd. of Elections, 393 U.S. 544, 565 (1969) (discussing need to apply Act to subtle forms of discrimination employed to circumvent literal provisions); Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1821 (1992) (explaining that courts have uniformly adjusted original purpose of Act—elimination of physical barriers to ballot access—to address claims of vote dilution).

85. *See* Shaw v. Reno, 113 S. Ct. 2816, 2824 (1993) (approving use of race-conscious remedies in context of racially discriminatory practices and results); *United Jewish Orgs.*, 430 U.S. at 174 (Brennan, J., concurring) (characterizing enactment of Act to secure promise of Fourteenth and Fifteenth Amendments and justify use of remedial measures); Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 469 (1988) (describing Congress's intent in drafting § 2 to address accumulation of discrimination, creating advantageous voting arrangements). *But see* Presley v. Etowah County Comm'n, 112 S. Ct. 820, 832 (1992) (declaring that Act is not "all-purpose anti-discrimination statute"). *See generally* Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court* (discussing Act's history and necessity of subsequent amendments to ensure effective minority electoral participation), *in* THE VOTING RIGHTS ACT—CONSEQUENCES AND IMPLICATIONS 13-35 (Lorn S. Foster ed., 1985).

86. *See, e.g.*, *United Jewish Orgs.*, 430 U.S. at 170–71 (Brennan, J., concurring) (explaining that race-conscious remedies are constitutional, but only when related to past or current discrimination); Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1247 (1993) (acknowledging that Act has diverted focus away from "color-blind" notion of equality); Alexander A. Yanos, Note, *Reconciling the Right to*

racial minorities equal access to effective political participation;[87] however, manipulating electoral systems in a manner reasonably certain to yield predictable results strikes at the very heart of democratic government.[88]

Vote with the Voting Rights Act, 92 COLUM. L. REV. 1810, 1816 (1992) (describing conflict between Court's use of safe districting under Act and Court's traditional enforcement of Equal Protection Clause as guarantor of individual, equal voting rights). Justice Harlan coined the concept of a "color-blind" Constitution in *Plessy v. Ferguson*, when he stated that "[o]ur Constitution is color-blind, and neither knows nor tolerates classes among citizens." Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954). The Court faced this problem in great detail in school desegregation cases. *See* Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424, 434 (1976) (noting difficulty of determining extent of allowable judicial interference in appropriating race-conscious remedies). The Court's dilemma in school segregation, similar to that of voting rights jurisprudence, was in determining the extent to which race-conscious remedies could be enforced when some segregation of schools was the natural result of population shifts and was unrelated to present or past discrimination. *Id.* Race-conscious remedies were only proper when racial discrimination caused a disproportionate result in the number of minority students. *Id.*

87. *See, e.g.*, *Gingles*, 478 U.S. at 44 (noting Act's purpose of addressing accumulation of discrimination, not just right to register); *Rogers*, 458 U.S. at 616 (commenting on use of multimember district to diminish effect of minority voter participation despite equal access to ballot); South Carolina v. Katzenbach, 383 U.S. 301, 310 (1966) (emphasizing slightly different voting requirements enacted by some states to circumvent literal requirements of Act); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1862-63 (1992) (noting need for judicial intervention to protect racial minorities from electoral perils of majority factionalism); Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1819 (1992) (explaining Court's extension of Act to claims of vote dilution as necessary despite removal of barriers to ballot access).

88. *See, e.g.*, Colegrove v. Green, 328 U.S. 549, 553–54 (1946) (warning of danger inherent in judicial intervention in democratic system); LULAC v. Clements, 914 F.2d 620, 622 (5th Cir. 1990) (commenting on undesirable, intrusive nature of judicial intervention in state operation of elections), *rev'd*, 501 U.S. 419 (1991), *and cert. denied*, 114 S. Ct. 878 (1994); NAACP v. Leon County, 827 F.2d 1436, 1438 (11th Cir. 1987) (considering demands of federalism in deferring to state legislative proposals for electoral methods), *cert. denied*, 488 U.S. 960 (1988); Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing?"*, 14 CARDOZO L. REV. 1237, 1247 (1993) (noting criticism describing race-conscious remedies as antithetical to fundamental American political process); Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1857 (1992) (noting issue of fundamental concern with judicial oversight of political process). *But see* Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 13–14 (1991) (explaining that judicial intervention is permissible since it reflects legislative policy passed with majority support). The Court has established that a claim challenging an electoral system which allegedly deprives a minority group of fair participation in the political process does not present a "political question" and is therefore justiciable. *See, e.g.*, Lockport v. Citizens for Community Action at Local Level, Inc., 430 U.S. 259, 264 (1977) (explaining

In *Holder*, the Court chose perhaps the only plausible solution to a potentially explosive situation.[89] By declining to extend Section 2 to vote dilution claims challenging the size of a government body, the Court indirectly justified the continued employment of the Act as a vote dilution remedy, yet maintained the overall integrity of the Act itself.[90]

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that impact of electoral system on voters is justiciable); Reynolds v. Sims, 377 U.S. 533, 566 (1964) (designating claim, which asserted that legislative reapportionment scheme diluted minority votes, as justiciable under Equal Protection Clause); Baker v. Carr, 369 U.S. 186, 209 (1962) (concluding that plaintiff's claim challenging Tennessee's apportionment scheme was justiciable and did not present political question). The issue the Court must address in claims challenging a voting standard, practice, or procedure is not whether apportionment schemes or electoral methods are, in general, justiciable, but whether relief for the right allegedly violated may be judicially molded and enforced. *See Gingles*, 478 U.S. at 88 (O'Connor, J., concurring) (explaining that in claim of vote dilution, Court must be able to determine proper measure of undiluted voting strength prior to formulating appropriate remedy); Davis v. Bandemer, 478 U.S. 109, 121 (1986) (noting lack of judicially manageable standard in resolving claim, which challenged electoral system, as important consideration).

89. *See* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1247 (1993) (commenting on volatile situation prompted by growing public and scholarly opposition to race-conscious application of Act); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1725 (1993) (noting Court's reluctance to enter "political thicket" unless absolutely necessary). Some courts have become increasingly dissatisfied with the trend toward proportionate representation, finding districts created solely on the basis of race incompatible with the provisions of the Act. *See Shaw*, 113 S. Ct. at 2824 (finding North Carolina's redistricting plan, allegedly fashioned to maximize African-American vote, was subject to Equal Protection challenge by Caucasian majority); Johnson v. Miller, 864 F. Supp. 1354, 1392–93 (S.D. Ga. 1994) (concluding that Georgia's redistricting plan, termed "max-black" for its objective of maximizing African-American voting strength, was unconstitutional attempt to force proportionate representation). In *Presley v. Etowah County Commission*, for example, the Court declined to extend the scope of § 5 to changes in an elected official's responsibilities partly to avoid opening the door to an infinite number of suits whenever an elected official's responsibilities changed. *See Presley*, 112 S. Ct. at 831 (commenting on potential for infinite number of claims related to change in responsibility of elected official).

90. *See Chisom*, 501 U.S. at 405 (Scalia, J., dissenting) (intimating that legislative integrity of Act is weakened when extended beyond its intended scope); *Johnson*, 864 F. Supp. at 1380 (acknowledging place for remedial remedy in claim of vote dilution, but cautioning against employing remedies beyond intended scope of Act). Most commentators agree that the Act, as currently applied, is both useful and necessary in the continued enforcement of minority voting rights. *See* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1261 (1993) (acknowledging usefulness and continued necessity of enforcement of Act); Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1709 (1993) (describing benefits of Act in furthering minority voting leverage). Unbridled use of § 2 to address claims of vote dilution, however, may serve to cast doubt on the validity of the Voting Rights Act as effective voting legislation, and not merely as guarantor of proportionate representation.

In recent years, commentators have argued with increasing frequency that the manner in which the Court has applied Section 2 to claims of vote dilution has corrupted the electoral process by virtually guaranteeing proportionate representation whenever a minority group establishes that voting patterns are racially correlated.[91] Although race-based voting tendencies may provide evidence of discrimination in the voting process,[92] racially polarized voting does not necessarily prove that an electoral practice is discriminatory, nor does it establish that a particular electoral system operates to unconstitutionally deny a minority group the opportunity to pursue representation of its interests.[93] Neither the Constitution nor

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See Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What Is the Appropriate Remedy for a Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1248 (1985) (describing application of Act to produce proportionate representation as artificial democracy). Consequently, the Court has been careful not to give the impression that any vote dilution challenge will be sustained. *See Presley*, 112 S. Ct. at 831 (explaining that deference given to Attorney General's interpretation is not same as acquiescence and is not without limits).

91. *See* Potter v. Washington County, 653 F. Supp. 121, 128 (N.D. Fla. 1986) (criticizing plan introduced by minority plaintiffs to create single-member district as incompatible with § 2); Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1813 (1992) (recognizing growing number of scholars objecting to manner of Act's enforcement). Single-member districts are still the presumed remedy in cases of vote dilution arising out of multimember districts. *See* Connor v. Finch, 431 U.S. 407, 415 (1977) (holding that, absent unique factors, multimember districts should be replaced with single-member districts in state reapportionment schemes); Chapman v. Meier, 420 U.S. 1, 26–27 (1975) (concluding that proper reapportionment remedy in claim of vote dilution is to avoid use of multimember districts). Although critics have characterized the application of the Act to claims of vote dilution as a form of affirmative action, the comparison is arguably unfair. *See* Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1247 (1993) (distinguishing Act from previously defined forms of affirmative action). The comparison is inaccurate since claims of minorities are given no more weight than those of identically situated Caucasians. *Id.*

92. *See, e.g., Voinovich*, 113 S. Ct. at 1157 (explaining that racially polarized voting must be shown by plaintiff); *Growe*, 113 S. Ct. at 1084 (requiring plaintiff to establish race-based voting tendencies); *Gingles*, 478 U.S. at 51 (requiring showing of racially polarized voting to establish unrepresentation of minority interests); *see also* Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 VAND. L. REV. 1249, 1268 (1989) (indicating that plaintiffs must show that minority groups exhibit race-based voting tendencies for reasons of race, and not because of another variable); *cf.* Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1713 (1993) (explaining that claims of vote dilution may be brought by both racial groups and politically aligned parties).

93. *See Gingles*, 478 U.S. at 99 (O'Connor, J., concurring) (arguing for admissibility of evidence offered by majority showing other, nondiscriminatory reasons for racially corrolated voting); *Nevett*, 571 F.2d at 223 (explaining that racial bloc voting, although in itself constitutionally unobjectionable, may be corroborative of discrimination). *Compare* McMillan v. Escambia County, 748 F.2d 1037, 1044 (5th Cir. 1984) (claiming discrimination

the Act should be used to afford special protection to minority voters pertaining to the representation of culturally unique interests unless the interests themselves, or the methods by which minority groups pursue representation of these interests, are linked to racial discrimination.[94] The difficulty the Court now faces lies in determining how to utilize the remedial aspects of the Act in a manner that appropriately recognizes the distinction between culturally benign interests and those interests produced by, or related to, racial discrimination—interests often inseparably intertwined.[95]

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outside electoral system should not be ignored when assessing system, thus defendant has burden of showing reduced participation is because of something other than disadvantages resulting from past discrimination) *with* Whitcomb v. Chavis, 403 U.S. 124, 155 (1971) (finding absence of constitutional violation even if plaintiffs established racial bloc voting as long as electoral scheme was not invidiously discriminatory). *But see* LULAC v. Clements, 986 F.2d 728, 748 & n.7 (5th Cir. 1993) (deeming cause of race-based voting irrelevant and focusing instead on result); Frederick G. Slabach, *Equal Justice: Applying the Voting Rights Act to Judicial Elections*, 62 U. CIN. L. REV. 823, 853–54 (1994) (declaring that following 1982 amendment, eight Justices in *Gingles* agreed that state may not introduce evidence of other, nondiscriminatory reasons for racially polarized voting to defeat claim). *See generally* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1876 (1992) (describing basis of racially polarized voting and subsequent effect on voting tendencies).

94. *See, e.g.*, *Bandemer*, 478 U.S. at 151 (O'Connor, J., concurring) (clarifying that group rights, outside context of racial discrimination, are not constitutionally recognized by Court's decisions applying Fourteenth and Fifteenth Amendments to voting rights); *Gingles*, 478 U.S. at 47 (explaining applicability of § 2 when discriminatory historical and social conditions have interacted to produce inequality in voting opportunities between racial minorities and majorities); Mobile v. Bolden, 446 U.S. 55, 76-77 (1980) (refuting argument that Constitution affords protection to advancement of political interests of minority voters absent racial discrimination); Whitcomb v. Chavis, 403 U.S. 124, 149 (1971) (explaining that Fourteenth Amendment is not implicated in voting rights claim absent racial discrimination).

95. *See* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1890 (1992) (explaining that racial bloc voting is result of combination of numerous factors including, but not limited to, race and partisan considerations); Alexander A. Yanos, Note, *Reconciling the Right to Vote with the Voting Rights Act*, 92 COLUM. L. REV. 1810, 1834 (1992) (describing justifiable distrust between Caucasian and minority voters caused by racial prejudice and divergent interests); *see also Gingles*, 478 U.S. at 70–73 (refuting argument that racially polarized voting tendencies are solely the result of racial prejudice, but may be attributable to other factors); United States v. Dallas County Comm'n, 739 F.2d 1529, 1536–39 (11th Cir. 1984) (remanding case after finding that race-based voting may be attributable to racial discrimination and prejudice). Untangling discriminatory factors from nonracial differences poses a difficult challenge for courts, especially in the area of voting rights jurisprudence. *See Johnson*, 864 F. Supp. at 1369 (expounding that difficulty in establishing discriminatory intent gave rise to *Zimmer* factors). The 1982 amendment to § 2, codifying the results standard, acknowledged this difficulty by removing the intent requirement established in *Bolden*. *Id.*

A decision further broadening the scope of Section 2 in *Holder* would have supported the position that the Act has become nothing more than an elaborate quota system, a result that would warrant limitation of the Act's application to claims of vote dilution.[96] However, by emphasizing the need for an objective benchmark in vote dilution analysis, the Court rebutted the proposition that the Act has degenerated into a standardless guarantor of minority electoral results, giving further credibility and justification to its current application to claims of vote dilution.[97] Furthermore, because the Court previously determined that a change in the size

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96. *See, e.g., Shaw*, 113 S. Ct. at 2832 (describing racial gerrymandering solutions to vote dilution as moving further from goal of impartial political system, resulting in balkanization of competing racial factions); *Gingles*, 478 U.S. at 91 (O'Connor, J., concurring) (warning that rigid application of tripartite test would inevitably lead to undesirable result of producing proportionate representation); *United Jewish Orgs.*, 430 U.S. at 172 (Brennan, J., concurring) (explaining that minority "safe districts," supposedly created to ensure proportionate representation, may be created for purposes of segregation rather than minority enfranchisement); Bernard Grofman, *Would Vince Lombardi Have Been Right if He Had Said: "When It Comes to Redistricting, Race Isn't Everything, It's the Only Thing"?*, 14 CARDOZO L. REV. 1237, 1248 (1993) (referring to characterization of vote dilution remedies as minority quota system). *See generally* ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 233-44 (1987) (characterizing enforcement of Act as improper form of affirmative action).

97. *See* Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1412–13 (1993) (describing Court's decision in *Presley* as retreat from "slippery slope" that "unconstrained expansion" of § 5 to claims challenging changes in government responsibilities would have created). The Supreme Court has previously cautioned against the application of the Act to situations lacking a workable standard preventing the infinite and unmanageable extension of its provisions. *See Presley*, 112 S. Ct. at 829 (declining to apply § 5 to changes in elected official's function without objective standard for "distinguishing between changes in rules governing voting" from routine government functions); *Bandemer*, 478 U.S. at 148 (O'Connor, J., concurring) (arguing against application of Fourteenth Amendment to appellant's political gerrymandering claim because of lack of judicially manageable standard). *But see* Kathryn Abrams, *"Raising Politics Up": Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 504 (1988) (arguing for further broadening of Act to include not only right to vote, but also predicate activities that precede and follow vote). To establish some semblance of predictability and order, the Court has outlined four factual contexts into which § 5 cases fall: (1) manner of holding elections; (2) candidacy requirements; (3) composition of the electorate; and (4) creation or abolition of an elected office. *See Presley*, 112 S. Ct. at 828 (delineating applicable factors for § 5 analysis). Application of the Act to claims of vote dilution must consider the effect of the decision on future voting law, balanced with the need to implement remedies sensitive to historical evidence of racial inequities. *See United Jewish Orgs.*, 430 U.S. at 175 (Brennan, J., concurring) (explaining importance of cautious application of Act, tempered with sensitivity to racial concerns). The Court has also emphasized that the prospect of future litigation, although a legitimate concern, is not sufficient to justify limiting the scope of the Act. *See Chisom*, 501 U.S. at 403 (explaining that difficulty in applying "totality of circumstances" test is not justification for limiting scope of statute enacted by Congress).

of a governing body is subject to the nonretrogression, preclearance requirements of Section 5, the *Holder* decision does not afford majority groups an opportunity to perpetuate future voter discrimination by changing from multimember to single-member forms of government.[98]

Properly applied, the Voting Rights Act has proven to be an effective tool in the enhancement and enforcement of minority suffrage. Courts have successfully utilized the Act to address not only flagrant forms of vote discrimination, but subtle ones as well. As successful as the Act has been, however, the Court should extend the scope of its protection only when necessary to ensure that minority political participation is not diminished by racial discrimination.

The Voting Rights Act intrudes into the very nature and intricate workings of our democratic system of government. Unrestrained, standardless application of the Act could ultimately result in a mechanically contrived system of government whose representative members merely reflect the racial composition of the voting population, a result inimical to the ideal of representative democracy. By declining to extend Section 2 to vote dilution claims challenging the size of a government body, the Supreme Court has maintained a delicate balance between ensuring the continued protection of minority voting rights and avoiding unnecessary intrusion into fundamental aspects of democratic government.

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98. *See, e.g., Presley*, 112 S. Ct. at 828 (explaining that size of electoral body is subject to § 5 preclearance requirement because it increases or diminishes number of officials for whom electorate may vote); Lockhart v. United States, 460 U.S. 125, 131–32 (1983) (concluding that change in size of commission from three to five members was subject to § 5 preclearance); City of Rome v. United States, 446 U.S. 156, 160–61 (1980) (intimating that change in elected school board from five to six members was subject to § 5 preclearance); Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1413 (1993) (noting prior Court decisions deeming changes in size of government body subject to § 5 preclearance); Sharon N. Humble, Note, 24 ST. MARY'S L.J. 569, 579–81 (1993) (describing four categories held to be subject to § 5 preclearance, including changes in nature of elective office).