Urban Law Annual ; Journal of Urban and Contemporary Law

Volume 35 *Voting Rights Symposium | New Jersey's Environmental Cleanup Recovery Act (ECRA) Symposium*

January 1989

Whose Vote Counts? Minority Vote Dilution and Election Rights

Ross J. Adams

WHOSE VOTE COUNTS? MINORITY VOTE DILUTION AND ELECTION RIGHTS

What is the value of one man's vote? While the obvious answer is "one man, one vote," some votes are worth less. Over the last one-hundred years, minorities have battled to receive equal rights and opportunities. A primary struggle for minorities has been the fight for equal access to political representation. Only through representation will problems like educational inequality and housing discrimination be eliminated.[1] Only since Congress enacted the Voting Rights Act[2] (the Act) in 1965 have minorities[3] had a fair opportunity[4] to become involved in the political process.[5] Discrimination did not simply disappear, however, when Congress enacted the Act. Voting discrimination

1. Boyd & Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1348-52 (1982).

2. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. §§ 1971 (1982)).

3. In addition to blacks, persons of Spanish heritage, Alaskan natives, American Indians and Asian-Americans are the minorities specifically designated for coverage. S. REP. No. 295, 94th Cong., 1st Sess. 11, 31-32 (1975), *reprinted in* 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 797-98.

4. President Lyndon Johnson hailed the enactment of the Voting Rights Act as a "triumph for freedom as huge as any ever won on any battlefield." S. REP. No. 417, 97th Cong., 2d Sess. § 1, 4-5, *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 177 (hereinafter SENATE REPORT).

5. The Senate Judiciary Committee wrote:

> As a result of the Voting Rights Act of 1965, hundreds of thousands of Americans can now vote and, equally important, have their vote count as fully as do the votes of their fellow citizens. Men and women from racial and ethnic minorities now hold public office in places where that was once impossible.

Id. at 181.

persists in a variety of political bodies, including school boards,[6] state senates,[7] park districts,[8] and congressional districts.[9] Since 1965, one of the most pervasive types of political discrimination has been vote dilution.[10] The Supreme Court has found that vote dilution can be as detrimental to a person's political rights as an absolute ban on voting.[11]

Minority voters have adopted two major strategies to combat political discrimination. The first is an equal protection claim[12] based on the fourteenth and fifteenth amendments.[13] Under this approach the minority voter must show that he has been denied equal access to the political process.[14] Originally, the voter only had to demonstrate a discriminatory result such as minority underrepresentation,[15] but after *Mobile v. Bolden*,[16] plaintiffs were required to show a discriminatory purpose. The second method uses the Voting Rights Act of 1965[17]

6. Potter v. Washington County, Florida, 563 F. Supp. 121 (N.D. Fla. 1986) (defendant County admitted that school board at-large election scheme was discriminatory).

7. Thornburg v. Gingles, 478 U.S. 30 (1986) (North Carolina legislature multimember election scheme held discriminatory); *see infra* notes 108-123 and accompanying text for discussion of *Gingles*.

8. McNeil v. Springfield Park Dist., 666 F. Supp. 1208 (C.D. Ill. 1987) (defendant park district admitted that its at-large election scheme was discriminatory).

9. Kirkpatrick v. Preisler, 394 U.S. 526, 527-28 (1969) (Court held that "as nearly as practicable, one man's vote in a congressional election is to be worth as much as another's").

10. Vote dilution diminishes a minority group's political power by weakening the effectiveness of its vote. In addition to at-large and multimember district schemes, other methods of vote dilution are gerrymandering and annexation.

11. Reynolds v. Sims, 377 U.S. 533 (1964). Writing for the Court, Chief Justice Warren stated:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. The right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id.

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

13. Reynolds v. Sims, 377 U.S. 533 (1964).

14. *See infra* notes 20-23 and accompanying text for discussion of the equal access argument.

15. *See infra* notes 43-49 and accompanying text for discussion of the results test.

16. 446 U.S. 55 (1980). *See infra* notes 51-58 and accompanying text for discussion of *Mobile*.

17. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965) (codified as amended at 42 U.S.C. § 1971 (1982)).

generally, and in particular section 2 of the Act as amended in 1982.[18] After this amendment, the Voting Rights Act specifically requires only a showing of a discriminatory result, not intent, after consideration of all the circumstances.[19]

A common method of vote dilution in city and county government has been the use of at-large elections rather than district or ward elections. For example, a city of 100,000 people[20] may have a five-person city commission. If the city uses an at-large election scheme, all the city's residents could vote for all five commission seats. A district system would divide the city into five districts with approximately equal populations.[21] Then, each district composed of 20,000 people would elect one commissioner. In essence, an at-large voting system permits the political majority to dominate the election by minimizing the voting strength of minorities,[22] especially where there is racially polarized

18. Section 2 of the Voting Rights Act provides in pertinent part:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973(f)(2), as provided in subsection (b) of this section.

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

42 U.S.C. § 1973(a) (1982).

19. Thornburg v. Gingles, 478 U.S. 30 (1986); Jones v. Lubbock, 727 F.2d 364 (5th Cir. 1984).

20. For example, assume that the 100,000 people are all of voting age. The district court in McNeil v. Springfield, 666 F. Supp. 1208, 1213 (C.D. Ill. 1987), held that only people of voting age should be counted to determine the existence of vote dilution. Plaintiffs unsuccessfully argued in *McNeil* and other cases that the Senate intended to count all residents, not just those of voting age. *See, e.g.*, Potter v. Washington County, 653 F. Supp. 121 (N.D. Fla. 1986).

21. Some courts have permitted deviation from exact equality if the state can justify it. In Abate v. Mundt, 403 U.S. 182, 187 (1971), the Supreme Court found justification for an 11.9% deviation from population equality within a county commission district. *See infra* notes 37-39 and accompanying text for discussion of deviation from population equality.

22. Rogers v. Lodge, 458 U.S. 613, 616 (1982).

voting.[23]

At-large elections are not unconstitutional or discriminatory per se,[24] but they do raise the spectre of discrimination.[25] The first[26] Supreme Court decision to address vote dilution was *Reynolds v. Sims*.[27] In *Reynolds*, Chief Justice Warren wrote that the equal protection clause protects the right to vote by requiring substantially equal legislative representation apportioned on the basis of population.[28] In 1964 the Alabama legislative districts were still apportioned as they had been in 1900[29] even though there had been tremendous movement from rural to urban areas.[30] Because of this shift in population, people in cities were underrepresented, whereas those in rural areas were overrepresented.[31] Reapportionment was delayed in some areas for many years. While this delay was not illegal,[32] it left many urban dwellers underrepresented[33]and politically overshadowed by rural residents.[34]

---

23. Racially polarized voting occurs when people in racial or ethnic groups vote only for candidates of the same ethnic group. For example, if a city is 60% white and 40% black, in all elections the white candidate would receive 60% of the vote and the black only 40%. *See* Engstrom & McDonald, *Quantitative Evidence in Vote Dilution Litigation: Political Participation and Polarized Voting*, 17 URB. LAW. 369 (1985).

24. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973). The Fifth Circuit concluded that at-large and multimember districting schemes are similar. Therefore, at-large arrangements, like multimember districts, are not unconstitutional per se. *Id.* at 1304; *see also* White v. Regester, 412 U.S. 755, 765 (1973).

25. At-large election systems give courts a sufficient basis to hear cases involving vote discrimination. *See, e.g.*, Whitcomb v. Chavis, 403 U.S. 124, 142-44 (1971).

26. Vote dilution was the issue in Baker v. Carr, 398 U.S. 186 (1962), but the Supreme Court did not reach the merits of the case. The Court ruled that federal courts did have jurisdiction in state vote dilution cases and remanded for a determination on the merits. *Id.* at 198-204, 237.

27. 377 U.S. 533 (1964).

28. *Id.* at 568.

29. *Id.* at 540.

30. Between 1900 and 1960, Lowndes County's population dropped from 35,651 to 15,417. The population of Bullock County declined from 31,944 to 13,462. During the same period, Mobile County grew from 62,739 to 314,301 and Jefferson County expanded from 140,420 to 634,864. Sims v. Frink, 208 F. Supp. 431, 447-48 (M.D. Ala. 1962).

31. Bullock County, with a population of 13,462, and Hendry County, consisting of only 15,286, each had two representatives in the Alabama House of Representatives. Mobile County, population 314,301, had only three representatives, and Jefferson County, with 639,869, had only seven representatives. 377 U.S. at 545-46.

32. A reapportionment based on the decennial federal census is adequate to comply with the equal protection clause. 377 U.S. at 583-84.

33. The Court wrote, "We do not mean to intimate that more frequent reapportion-

The Court ordered the state to reapportion its legislative districts[35] in order to guarantee the principle of "one man, one vote."[36]

After *Reynolds*, the Supreme Court determined what constitutes a prima facie case of unconstitutional disparities in voting district populations.[37] In *White v. Regester*, the court found that a population variation between districts of 9.9 percent was not a prima facie violation of the equal protection clause. The Court also held that a state must justify any larger disparity in district population.[38] The Court reversed the district court's decision[39] that population variance and multimember[40] districts were per se unconstitutional. However, the Supreme Court affirmed the district court's decision that the election scheme was improper based on the facts of this case.[41] The Supreme Court declared that the plaintiff's burden is to produce evidence that the minority had less opportunity to participate in the political process than did other residents.[42]

---

ment [than decennial] would not be constitutionally permissible or practicably desirable. But if reapportionment were accomplished with less frequency, it would assuredly be constitutionally suspect." *Id.* at 584.

34. 377 U.S. at 568-71.

35. In addition to there being fewer representatives from the urban areas than rural areas, it would be much more difficult for urban representatives to be responsive to their constituents.

36. Baker v. Carr, 369 U.S. 186 (1962).

37. White v. Regester, 412 U.S. 755 (1972). The *Reynolds* court declared that, while representation should be apportioned as equitably as possible, mechanical exactness is not required. 377 U.S. at 577.

38. The court said that it would use the *Reynolds* guidelines if a larger variance existed. A larger difference between districts would have to be justified "on legitimate considerations incident to the effectuation of a rational state policy. . . ." *Reynolds*, 377 U.S. at 579.

39. Graves v. Barnes, 343 F. Supp. 704 (W.D. Tex. 1972).

40. Multimember voting schemes are most prevalent in state legislature elections. If a legislature is apportioned on a county line basis, some counties would only have one representative, whereas other, more populous counties would have several representatives. Those representatives would be chosen by the whole county in an at-large election.

41. The Supreme Court upheld the district court's findings that the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that controlled the Democratic Party in Dallas County, had not "exhibit[ed] good faith concern for the political and other needs and aspirations of the Negro community." 412 U.S. at 767. The district court also found that "the black community ha[d] been effectively excluded from participation in the Democratic primary process." *Id.* (quoting *Graves*, 343 F. Supp. at 726).

42. The *White* Court held:

In *Zimmer v. McKeithen*,[43] the Fifth Circuit Court of Appeals listed several factors which would establish impermissible vote dilution.[44] The plaintiff in *Zimmer* charged that at-large elections for police jurors and school board members in their Louisiana parish impermissibly diluted the political strength of black residents.[45] The court ruled that the current apportionment scheme was discriminatory even though there was a black population majority in the parish.[46] The court held that a plaintiff can show dilution exists by presenting a combination of factors, such as a lack of access to the political process, unresponsive legislators, a history of past discrimination, and an at-large voting scheme.[47] The court created what could best be described as a results test: Minorities are not required to prove discriminatory intent so long as the totality of the circumstances point to voting discrimination.[48] Courts used this standard to attack the constitutionality of at-large elections[49] until the Supreme Court decided *Mobile v. Bolden*[50] in

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.

412 U.S. at 766.

43. 485 F.2d 1297 (5th Cir. 1973).

44. *Id.* at 1305; *see generally* O'Rourke, *Constitutional and Statutory Challenges to Local At-Large Elections*, 17 U. RICH. L. REV. 39 (1982).

45. 485 F.2d at 1306.

46. Blacks were, however, the minority racial group among people registered to vote. *Zimmer*, 485 F.2d at 1302.

47. *Id.* at 1305.

48. The court said that dilution could be found

> where the state policy favoring multi-member or at-large districting schemes is rooted in racial discrimination. [Additionally], where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provisions for at-large candidates running from particular geographical subdistricts

Zimmer, 485 F.2d at 1305.

49. For example, the Fifth Circuit struck down an at-large election scheme for city commissioners in Albany, Georgia. The court stated that *Zimmer* set the standards for vote dilution cases. Paige v. Gray, 538 F.2d 1108 (5th Cir. 1976).

50. *See* Blacksher, *Drawing Single-Member Districts to Comply with the Voting Rights Amendments of 1983*, 17 URB. LAW. 347 (1985).

1980.

In *Mobile v. Bolden*[51] the Supreme Court effectively ended the constitutional attack on at-large elections.[52] *Bolden* involved a challenge to Mobile's at-large city commission election system. Mobile's black residents argued that the at-large system denied them equal protection under the fourteenth and fifteenth amendments. In a plurality opinion, Justice Stewart[53] held that plaintiffs must prove a discriminatory intent in order to establish a constitutional violation.[54] In essence, the *Bolden* decision requires courts to examine the motives of legislators to determine whether the election system was devised or maintained for a discriminatory purpose.[55] The decision requires plaintiffs to show a "smoking gun" pointing directly to intentional discrimination before the court will overturn an at-large election scheme.[56] The *Bolden* court also held that Congress designed section 2 of the Voting Rights Act to track the fifteenth amendment. Therefore, the *Bolden* decision crippled vote dilution litigation[57] by requiring plaintiffs to prove discriminatory intent before a court could conclude an election system violated section 2.[58]

The Senate Judiciary Committee rejected the Supreme Court's decision in *Mobile v. Bolden*. The Committee's report accompanying its proposed amendment to the Voting Rights Act intended to restore the

---

51. 446 U.S. 55 (1980).

52. The Senate Judiciary Committee reported that:

> The impact of *Bolden* upon voting dilution litigation became apparent almost immediately after the Court's decision was handed down on April 22, 1980. As the Subcommittee heard throughout its hearings, after *Bolden*, litigators virtually stopped filing new voting dilution cases. Moreover, the decision had a direct impact on voting dilution cases that were making their way through the federal judicial system.

SENATE REPORT, *supra* note 4, at 26.

53. Justice Stewart was joined by Chief Justice Burger, Justice Rehnquist, and Justice Powell. Justices Blackmun and Stevens concurred separately in the plurality's result. Justices Brennan, Marshall, and White dissented.

54. Prior to *Bolden*, the Supreme Court decided Washington v. Davis, 426 U.S. 229 (1976), and Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). The *Washington* court held that a plaintiff must prove discriminatory intent to allege employment discrimination under the fourteenth and fifteenth amendments. The *Arlington Heights* decision required similar proof in the housing discrimination context.

55. SENATE REPORT, *supra* note 4, at 26-27.

56. *Id.*

57. *Id.*

58. *Bolden*, 446 U.S. at 62.

pre-*Bolden* legal standards[59] for challenging a potentially discriminatory voting scheme. The committee sought[60] to restore the "results test" developed in *White v. Regester*[61] and *Zimmer v. McKeithen*.[62] The report states that "the specific intent of this amendment [to section 2] is that plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose."[63] The Committee rejected the strict standard of discriminatory intent required by the *Bolden* court.[64]

Senators opposing the section 2 amendment were concerned that the results test as written was so ambiguous that it provided no clear justiciable standard, and that it might be construed to create a right to proportional representation.[65] In order to expedite passage of the amendment in the Senate, Senator Dole of Kansas introduced a substitute bill.[66] The "Dole Compromise" retained most of the results-test

59. The Committee wrote:

> The amendment to the language of section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system or practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

SENATE REPORT, *supra* note 4, at 27, 28.

60. Boyd & Markman, *supra* note 1, at 1382-89.

61. *See supra* notes 37-42 and accompanying text for discussion of *White*.

62. *See supra* notes 43-50 and accompanying text for discussion of *Zimmer*.

63. SENATE REPORT, *supra* note 4, at 27-28.

64. *Id.*

65. *Hearings on the Voting Rights Act before the Senate Subcomm. on the Constitution of the Comm. on the Judiciary*, 97 Cong., 2d Sess., vol. II, 82-84 (1982) [hereinafter *Hearings*].

66. Senator Dole said:

> With regard to the compromise itself, we are all aware that the most controversial aspect of the committee's consideration of S. 1992 relates to section 2 of the Voting Rights Act. Section 2 lies at the heart of the act insofar as it contains the basic guarantee that the voting rights of our citizens should not be denied or abridged on account of race, color, or membership in a language minority. In the 1980 case of Mobile v. Bolden, the Supreme Court interpreted section 2 as prohibiting only intentional discrimination.
>
> . . . .
>
> Proponents of the results standard . . . persuasively argue that intentional discrimination is too difficult to prove to make enforcement of the law effective. Perhaps more importantly, they have asked, if the right to exercise a franchise has been denied or abridged, why should plaintiffs have to prove that the deprivation of this fundamental right was intentional. On the other hand, many on the committee

language developed in *White*[67] and *Zimmer*[68] but added a specific disclaimer against proportional representation.[69] After much discussion, the compromise was adopted as the best way to ensure that the amendment would not be misconstrued.[70]

The Committee report established a number of factors which, considered in concert, could establish a violation of the Voting Rights Act. These factors include the degree of racial polarization, past discrimination, the effect of historical discrimination on life in the political entity, and past minority political success.[71] To prove a violation, plaintiffs

---

have expressed legitimate concerns that a results standard could be interpreted by the courts to mandate proportional representation.

. . . .

The supporters of this compromise believe that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists a discriminatory purpose or intent. For this reason, the compromise retains the results standards . . . . However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2, which codified language from the 1973 Supreme Court decision of White v. Regester.

. . . .

The new subsection clarifies as did *White* and previous cases, that the issue to be decided is whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process; not whether they have achieved proportional election results. The new subsection also provides, as did this *White* line of cases, that the extent to which minorities have been elected to office is one circumstance which may be considered. But it explicitly states — let me make that very clear — in the compromise that nothing in this section establishes a right to proportional representation.

Id.

67. *See supra* notes 37-42 and accompanying text for discussion of *White*.

68. *See supra* notes 43-50 and accompanying text for discussion of *Zimmer*.

69. *See supra* note 18 for text of amended act.

70. Senator Helms proposed an amendment which specifically would have allowed proportional representation. The Senator stated that although he would oppose the amendment, he wanted a vote on the record to show the Senate's intent that the amendment not be construed to force proportional representation. 128 CONG. REC. 14,141 (1982) (statement of Sen. Helms).

71. The Senate Judiciary Committee listed the following factors in their report that accompanied the bill in the Senate:

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

could show a variety of factors depending on the rule, practice, or procedure at issue.[72] The Committee pointed out that the factors are not to be used as a "mechanical point counting device,"[73] but that courts should base their decisions on the totality of the circumstances, using those factors that are relevant in each particular case.[74]

The impact of the 1982 amendments was immediate. In *Rogers v. Lodge*,[75] the Supreme Court rejected an at-large election system in Georgia because it was discriminatory under the fourteenth amendment.[76] Although the Court acknowledged that plaintiffs must prove intent in order to meet the *Bolden* standards,[77] the recently amended Voting Rights Act influenced the court's decision. In dissent, Justice Powell revealed this influence by admitting that the majority opinion in

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

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

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

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

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

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

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

Whether the policy underlying the state or political subdivision's use of such voting qualifications, prerequisite to voting, or standard, practices or procedure is tenuous.

SENATE REPORT, *supra* note 4, at 28-29.

72. *Id.*

73. *Id.* at 29-30 n.118.

74. *Id.* The Committee noted that no one factor or combination of factors was an automatic indicator of discrimination, but that the court should make that decision based on the facts of each case.

75. 458 U.S. 613 (1982) (Supreme Court struck down the Burke County, Georgia County Commission election scheme because it was maintained for invidious purposes in violation of the fourteenth amendment).

76. *Id.*

77. *Id.* at 617-18.

Rogers could not be reconciled with the *Bolden* decision.[78]

Justice Stevens, in his dissent, stated that the majority's decision was not sanctioned by precedent.[79] Justice Stevens noted that Congress had extensive discretion to legislate restrictions on discrimination. The court erred, Stevens argued, by failing to identify acceptable standard with which to decide these cases.[80]

Very likely, the majority realized in *Rogers* that Courts would abandon the *Bolden*[81] intent test following the amendment to section 2. Therefore, in order to avoid ignoring a very recent decision, the Court attempted to reconcile *Bolden* with the new section 2 results test. The Court held that the district court's application of the *Zimmer*[82] "totality of the circumstances" analysis established intentional, racially motivated discrimination in the case at bar.[83] Consequently, the Court held the at-large election scheme unconstitutional.[84]

One of the first cases to consider the amended section 2 was *United States v. Marengo County Commission*.[85] The Marengo County Commission and the Board of Education each had five members elected at-large.[86] While many blacks had run for office between 1966 and 1978,[87] only one was elected during that period.[88] A group of blacks

78. *Id.* at 629.

79. Justice Stevens wrote:

> In my opinion, there [could be no] doubt about the constitutionality of an amendment to the Voting Rights Act that would require Burke County and other covered jurisdictions to abandon specific kinds of at-large voting schemes that perpetuate the effects of past discrimination. As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting. . . .The Court's decision today, however, is not based on either its own conception of sound policy or any statutory command.

Rogers, 458 U.S. at 632 (Stevens, J., dissenting) (quoting South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966)).

80. *Id.* at 633.

81. Mobile v. Bolden, 446 U.S. 55 (1980).

82. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).

83. 458 U.S. at 621-22.

84. *Id.* at 628.

85. 731 F.2d 1546 (11th Cir. 1984).

86. Prior to 1955, each body had a president elected at large and four members who were elected from districts. In 1955, the state legislature enacted legislation which called for all members of both bodies to be elected at large, as long as one person was elected from each district. *Id.* at 1551-52.

87. There were 73 county-wide elections in which blacks ran against whites. *Id.*

88. One district elected a black county coroner over a white candidate in 1978. He won the Democratic primary by a margin of 3,719 to 3,617. Additionally, the district

filed a class action alleging that the Marengo County system unlawfully diluted black votes.[89]

The Eleventh Circuit held that the system was discriminatory under the amended section 2.[90] First, the court held the amendment constitutional. Next, the court applied the amendment's results test, noting that it was "clearly an appropriate means for carrying out the goals of the Civil War Amendments."[91] While the court suggested that the Act unconstitutionally restricts state rights, the court held that section 2 did not violate state's rights by limiting state powers to control elections.[92]

The *Marengo* court explained how the lower court should apply the section 2 results test on remand.[93] The court declared that minority plaintiffs need not prove discriminatory intent to establish a violation; however, the court also held that at-large elections are not prohibited per se.[94] Furthermore, the court held that a lack of proportional representation does not necessarily imply discrimination.[95] The court stated that the focus should be on the future opportunities the minority group will have to participate in the political process, not whether they cur-

---

appointed another black to the school board. Both were reelected without opposition after the case was tried. *Id.* at 1552.

89. *Id.* at 1552.

90. The Court stated, "Section 2 leaves state and local governments free to choose the election system best suited to their needs, as long as that system provides equal opportunities for effective participation by racial and language minorities." *Id.* at 1560.

91. *Id.* at 1560.

92. *Id.* The court declared that the thirteenth, fourteenth, and fifteenth amendments explicitly granted to all blacks national citizenship and the associated right of access to the voting process. Therefore, the amendments empower the federal government to intervene in state and local affairs to protect the rights of minorities. The court also stated:

> The states have an important interest in determining their election practices. But Congress could reasonably conclude that practices with discriminatory results had to be prohibited to reduce the risk of constitutional violations and the perpetuation of past violations. Today it is a small thing and not a great intrusion into state autonomy to require the states to live up to their obligation to avoid discriminatory practices in the election process.

Id. at 1561.

93. *Id.* at 1565 (citing SENATE REPORT, *supra* note 4, at 36). *See supra* note 71 for a list of factors.

94. *Marengo*, 731 F.2d at 1565.

95. *Id.* at 1566.

rently receive inadequate public services.[96]

While acknowledging that a dilution claim should be based on a "totality of the circumstances" and that no factor is indispensible,[97] the *Marengo* court indicated that racially polarized voting would ordinarily be the keystone of a dilution case.[98] Absent this voting pattern, black candidates would not be denied office simply because they were black.[99] The Senate emphasized that Congress intended section 2 to remedy existing race-conscious politics, not to create it.[100] In the *Marengo* case, plaintiffs were able to prove a race-conscious voting pattern through direct statistical analysis of vote returns.[101]

The court also considered past discrimination and its lingering effects[102] and improper election practices.[103] The court observed that past discrimination can severely impair current minority participation in the political process. Even if all discrimination were eliminated, the lingering effects of past discrimination cause some present socio-economic disadvantages.[104] Additionally, the low number of black poll officials[105] and the failure of the election registrar to obey the registra-

96. *Id.* (citing Nevett v. Sides, 571 F.2d 209, 223 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980)).

97. *Marengo*, 731 F.2d at 1567.

98. *Id.* at 1567 n.34.

99. *Id.*

100. SENATE REPORT, *supra* note 4, at 32.

101. *Marengo*, 731 F.2d at 1569-70.

102. At the time the decision was released, the county school system was under judicial supervision. In 1978, when the *Marengo* case was originally tried, the district court called the Board of Education "obdurately obstinate in its opposition to desegregation. The judicial opinions recording the efforts of the United States and private plaintiffs to desegregate the public schools of this small, rural county would fill a small volume." *Id.* at 1568 (citations omitted).

103. *Id.* In addition to official discriminatory acts, the political organizations acted in a discriminatory fashion. "[I]n 1978, only 7 of the 34 members of the Marengo County Democratic Executive Committee were black." *Id.* at 1569.

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

SENATE REPORT, *supra* note 4, at 29 n.114. *See also* Major v. Treen 574 F. Supp. 325, 351 n.31 (E.D. La. 1983) (inequality of political assess can be inferred from economic inequalities).

105. The court found that black poll watchers should be present to instill confidence in the electoral system. 731 F.2d at 1569-70.

tion laws[106] contributed to a finding of vote dilution.[107]

The Supreme Court upheld section 2 of the Voting Rights Act in *Thornburg v. Gingles*.[108] *Gingles* involved a redistricting plan for North Carolina which included several multimember[109] districts.[110] The Court ruled that, based on the "totality of the circumstances"[111] test and the Court's new threshold test,[112] the North Carolina reapportionment plan was unlawful.[113]

The Court established a three-part test to analyze a vote dilution case.[114] First, the minority group challengers must demonstrate that they are sufficiently large and geographically compact to constitute a majority in a single member district.[115] Second, the minority group must show that it is politically cohesive.[116] Third, the minority must demonstrate that the majority group votes as a bloc to defeat the minority's preferred candidate.[117] Plaintiffs must show that votes are cast along racial lines before the court will consider a claim.[118] If these

106. Citizens could only register to vote in Linden, the county seat. The county board and registrars would not visit outlying areas to register rural voters who were predominantly black. These factors tended to affect blacks more than whites; therefore they indicated dilution because they impaired minority access to the political system. *Id.* at 1570.

107. The court also considered the lack of political success of minority candidates and the majority's unresponsiveness to the needs of the minority. *Id.* at 1570-73.

108. 478 U.S. 30 (1986).

109. *See supra* note 40 for discussion of multimember districts.

110. 478 U.S. at 42.

111. *See supra* note 59-74 and accompanying text for discussion of "totality of circumstances" test.

112. *See infra* notes 114-119 and accompanying text for discussion of the threshold test.

113. 478 U.S. at 80.

114. *Id.* at 46-47.

115. If the minority could not be a majority in a single member integrated district, then the "multimember form of the district cannot be responsible for the minority voters' inability to elect its candidates." The minority voters must at least possess the potential to elect a representative if the challenged voting structure were not in place. *Id.*

116. If the minority is not cohesive, it is unlikely that there would be a distinctive minority group interest that one candidate could espouse. *Id.* at 51.

117. *Id.*

118. The court wrote:

> In sum, we would hold that the legal concept of racially polarized voting, as it relates to claims of vote dilution, refers only to the existence of a correlation between the race of voters and the selection of certain candidates. Plaintiffs need not

three factors are not met, no charge of race dilution could stand.[119]

The Court also established the supporting factors which lower courts may consider in a vote dilution claim. One factor is the degree of election success of protected class members. [120] It is also imperative to consider the circumstances surrounding recent black electoral success.[121] Additionally, past discrimination and appeals to racial bias in political campaigns "are supportive of, but not essential to, a minority voter's claim."[122]

The *Gingles* Court thus clarified the important factors to consider in vote dilution cases. The judiciary may interfere with a state's autonomy if the state does not equitably consider these factors. Although the court must allow the state some leeway in choosing its form of government,[123] if election systems with a less discriminatory impact exist, then states may be required to implement them.

In *Dillard v. Crenshaw County, Alabama*,[124] the Eleventh Circuit implied that as long as fair options exist,[125] the court may reject systems which merely hint at discrimination. Crenshaw county has an overall black population of 17.6 percent and a black voting population of 15.9 percent. Both parties stipulated that the present three-member county commission elected at-large was discriminatory.[126] The county recommended the establishment of a five-member commission elected by districts and a commission chair elected at large.[127] This scheme would

---

prove causation or intent in order to prove a prima facie case of racial bloc voting and defendants may not rebut that case with evidence of causation or intent. *Id.* at 61.

119. *Id.* at 45.

120. *Id.* at 75 (citing SENATE REPORT, *supra* note 4, at 29). The court should consider whether a minority candidate has ever been elected. *Id.*

121. The court noted that majority members could manipulate the statistics by electing a "safe minority candidate," one whom the majority put up for election and could control. *Id.* at 62.

122. *Id.* at 48 n.15.

123. *See supra* note 90 for consideration of state's rights.

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

125. If alternative electoral schemes are available that would be racially fair and also serve the interests of the community, the district should choose the best of those options.

126. Dillard v. Crenshaw County, 649 F. Supp. 289 (M.D. Ala. 1986).

127. The county proposed that the chair preside at commission meetings and only vote in case of a tie. However, there were very few concrete plans for the position. The county declared that the position would involve executive and administrative, but not legislative duties. The court feared the position would become legislative, which would

have provided for a district with a sixty-five percent black population, which would probably result in black representation on the commission.[128] The district court rejected this plan because it would have unlawfully diluted the vote for commission chair.[129] The court recommended that the county rotate the commission chair among the five district commissioners.[130]

The *Dillard* decision indicates that courts must always be cognizant of discriminatory maneuvers. Although a chair elected at large would not be inherently unfair, a rotating chair is also equitable. While an at large election is not discriminatory per se, if another fair method exists that is not potentially discriminatory, the alternative is preferable. If several fair methods exist, the district should choose the one with the least discriminatory potential.

The *Gingles* Court established a fair, sensible threshold test for determining vote dilution. If the minority group could not elect the candidate of its choice because, notwithstanding the district boundaries, it is too small or divisive, there would be no inquiry into the electoral procedures. If, however, the minority group had the voting power to put its candidate into office, it will be given the opportunity. At its most basic, the *Gingles* test should clear the way for electing representatives who better reflect their constituency.

Ideally, there would be no need for the *Gingles* test. For a race dilution charge to stand, voters must cast their ballots along racial lines. So long as this unfortunate voting behavior persists, the *Gingles* test is a necessary instrument in the effort to dismantle racial barriers.

It is imperative that minority vote dilution be eliminated in the United States. The courts and Congress must stand by the Supreme Court's interpretation of the Voting Rights Act in *Gingles*. Allowance of any retreat in the drive for voting equality may reverse all that has been achieved. As Justice Douglas wrote:

> The Constitution and Bill of Rights [guarantee to personal and spiritual self-fulfillment] is not self-executing. As nightfall does not come at once, neither does oppression. In both instances, there is a twilight when everything remains seemingly unchanged.

---

make the chair simply a sixth commissioner. Therefore the court indicated the chair should not be elected at large. *Id.*

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

129. 649 F. Supp. at 297. The court held that under this system, the commission would be completely beyond the reach of blacks. *Id.*

130. *Id.* at 296.

And it is in such twilight that we all must be most aware of change in the air — however slight — lest we become unwitting victims of the darkness.[131]

*Ross J. Adams**

131. W. DOUGLAS, THE DOUGLAS LETTERS (M. Urofsky ed. 1987) (from a 1976 letter to the Young Lawyer's Section of the Washington State Bar Association).

* J.D. 1988, Washington University