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The Quiet Revolution in Minority Voting Rights

Laughlin McDonald

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The Quiet Revolution in Minority Voting Rights

Laughlin McDonald*

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* Director, Southern Regional Office, American Civil Liberties Union Foundation, Inc.; B.A., Columbia University; LL.B., University of Virginia.

I. INTRODUCTION

The modern voting rights movement began with passage of the Voting Rights Act of 1965¹ and was essentially black and southern. Today that movement, propelled by a series of congressional amendments to the Act, favorable court decisions, and the concerted efforts of minority and civil rights communities, is multiracial and national in character. It is also having an increasingly profound impact on American politics.

Although the 1965 Act had provisions that applied nationwide,² Congress intentionally targeted seven states of the old Confederacy—Alabama, Georgia, Louisiana, Mississippi, South Carolina, Virginia, and portions of North Carolina—for the application of unique and stringent measures described by the Supreme Court as the “heart of the Act.”³ The new measures suspended discriminatory literacy and other tests which had been used to deny blacks the vote. The Act also prohibited the affected jurisdictions from enacting any new discriminatory laws by requiring them for a period of five years to preclear all changes in their election practices with federal officials.⁴

1. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)) [hereinafter 1965 Act]. The Civil Rights Acts of 1957, 1960, and 1964 also contained provisions prohibiting discrimination in voting. See Civil Rights Act of 1957, Pub. L. No. 85-315, § 131, 71 Stat. 634, 637-38 (codified as amended at 42 U.S.C. § 1971 (1982)); Civil Rights Act of 1960, Pub. L. No. 86-449, § 601, 74 Stat. 86, 90-93 (codified as amended at 42 U.S.C. §§ 1971, 1974 to 1974e (1982)); Civil Rights Act of 1964, Pub. L. No. 88-352, § 101, 78 Stat. 241, 241-42 (codified as amended at 42 U.S.C. § 1971 (1982)). They depended primarily upon time consuming litigation for enforcement, and consequently failed to achieve any significant minority voter registration or office holding. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313-15 (1966). For a discussion of the shortcomings of these earlier acts, see: Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 544-48 (1973); Van Alstyne, *The Administration's Anti-Literacy Test Bill: Wholly Constitutional but Wholly Inadequate*, 61 MICH. L. REV. 805 (1963); and Note, *Federal Protection of Negro Voting Rights*, 51 VA. L. REV. 1051, 1100-95 (1965).

2. E.g., 1965 Act, Pub. L. No. 89-110, § 2, 79 Stat. at 437 (codified at 42 U.S.C. § 1973 (1982)) (a general prohibition on discrimination in voting); *id.* § 10(a)-(c), 42 U.S.C. § 1973h(a)-(c) (facilitating constitutional challenges to the use of poll taxes in state and local elections); *id.* §§ 11, 12(a)-(d), 42 U.S.C. §§ 1973i-1973j (establishing criminal and civil sanctions for interference with rights protected by the Act).

3. *Katzenbach*, 383 U.S. at 315.

4. 1965 Act, Pub. L. No. 89-110, §§ 4(a), 5, 79 Stat. at 438-39 (codified at 42 U.S.C. §§ 1973b(a), 1973c (1982)). Preclearance could be obtained administratively by submitting a proposed change to the Attorney General or by bringing a declaratory judgment action in the United States District Court for the District of Columbia. In either case the submitting jurisdiction had the burden of proving that the proposed change would not have the purpose or effect of denying or abridging the right to vote on account of race or color. *City of Rome v. United States*, 446 U.S. 156, 172, 185 (1980); *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969). Underscoring the controversial nature of the new measures, in *Katzenbach* Justice Black charged that the Act was a “radical degradation of state power” and created the impression that the affected southern states “are little more than conquered provinces.” *Katzenbach*, 383 U.S. at 360 (Black, J., dissenting). Repeating these charges in his dissenting opinion in *Allen*, Justice Black said that the preclearance require-

Congress acted in this unprecedented manner because the targeted states since the days of Reconstruction had systematically discriminated against blacks in voter registration, voting, and by adopting official policies of racial segregation in other areas of public and private life.⁵ Congress concluded that the prior method of redressing discrimination in voting through litigation on a case-by-case basis had failed and that stringent new measures were needed to enforce the guarantees of the fifteenth amendment.⁶

From this narrow, specialized, regional and racial focus of the Voting Rights Act of 1965, the campaign for equal voting rights has spread. Blacks, joined by Hispanics and Native Americans, have intensified the fight for increased political participation and have taken voting rights challenges to the cities of the North, the West, and the Southwest.⁷ As

ment was "reminiscent of old Reconstruction days when soldiers controlled the South and when those States were compelled to make reports to military commanders of what they did." *Allen*, 393 U.S. at 595; see MacCoon, *The Enforcement of the Preclearance Requirement of Section 5 of the Voting Rights Act of 1965*, 29 CATH. U.L. REV. 107 (1979); McDonald, *The 1982 Extension of Section 5 of the Voting Rights Act of 1965: The Continued Need for Preclearance*, 51 TENN. L. REV. 1, 30-62 (1983); Motomura, *Preclearance Under Section Five of the Voting Rights Act*, 61 N.C.L. REV. 189 (1983).

The Act also authorized the appointment of federal examiners to register qualified voters in the covered jurisdictions and the appointment of federal poll watchers. 1965 Act, Pub. L. No. 89-110, §§ 6(b)-9, 79 Stat. at 439-42 (codified at 42 U.S.C. §§ 1973d-1973f (1982)). Section 3(c), the so-called "pocket trigger," was aimed at pockets of discrimination not otherwise covered by § 5 and allowed a district court to require preclearance of voting changes in any jurisdiction to remedy a violation of the fifteenth amendment. *Id.* § 3(c), 79 Stat. at 437-38 (codified at 42 U.S.C. § 1973a(c) (1982)).

5. This history has been recorded in numerous places. See, e.g., J. FRANKLIN, *FROM SLAVERY TO FREEDOM* (1967); V. KEY, *SOUTHERN POLITICS IN STATE AND NATION* (1949); P. LEWINSON, *RACE, CLASS AND PARTY: A HISTORY OF NEGRO SUFFRAGE AND WHITE POLITICS IN THE SOUTH* (1965); V. WOODWARD, *THE STRANGE CAREER OF JIM CROW* (1966).

6. *Katzenbach*, 383 U.S. at 308-09, 328 (holding the special provisions constitutional). The coverage of the special provisions was tied to a jurisdiction's use of a discriminatory "test or device" for voting (for example, a literacy, education, or good character test), and low voter registration or turnout (defined as less than half of age eligible residents actually registered or voting in the preceding presidential election). 1965 Act, Pub. L. No. 89-110, § 4(b), 79 Stat. at 438 (codified at 42 U.S.C. § 1973(b) (1982)); see H.R. REP. No. 439, 89th Cong., 1st Sess. 13-14, reprinted in 1965 U.S. CODE CONG. & ADMIN. NEWS 2437, 2445 [hereinafter 1965 U.S. CODE]; S. REP. No. 162, 89th Cong., 1st Sess. 13-14, reprinted in 1965 U.S. CODE, *supra*, at 2508, 2552.

In addition to the southern states, coverage was extended to Alaska, three counties in Arizona, one county in Idaho, and one county in Hawaii. 30 Fed. Reg. 9897, 14,505 (1965). All these jurisdictions, except Hawaii, immediately petitioned for, and were granted, "bailout" from coverage pursuant to § 4(a) of the 1965 Act, 42 U.S.C. § 1973b(a), by filing suits in the United States District Court for the District of Columbia and proving that they had not used a test or device within the preceding five years with the purpose or effect of discriminating. See *Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966); *Elmore County v. United States*, No. 320-66 (D.D.C. Sept. 22, 1966); *Alaska v. United States*, No. 101-66 (D.D.C. Aug. 17, 1966); see also S. REP. No. 295, 94th Cong., 1st Sess. 12 n.4, reprinted in 1975 U.S. CODE CONG. & ADMIN. NEWS 774, 778 [hereinafter 1975 U.S. CODE].

7. See, e.g., *Gomez v. City of Watsonville*, 852 F.2d 1186 (9th Cir. 1988) (suit by Hispanics

a result, more minorities are going to the polls, holding office, and helping to shape national policy. Since 1965, what has been unfolding is nothing less than a quiet revolution in voting.

II. INCREASED MINORITY VOTING AND OFFICE HOLDING

Prior to 1965 there were fewer than one hundred black elected officials in the southern states originally targeted by the Voting Rights Act, and fewer than two hundred nationwide.⁸ As of January 1987 the number had grown to 2908 in the target states and 6892 nationwide.⁹ Non-black minorities have posted similar gains. Although statistics from pre-Voting Rights Act years are not generally available, today there are an estimated 3360 elected officials of Latin American descent¹⁰ and approximately 852 who are Native American (in nontribal offices).¹¹

Accurate registration figures are difficult to obtain,¹² but there is no

challenging at-large elections in Watsonville, Cal.); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988) (suit by Mexican-Americans against method of electing city council); *Buckanaga v. Sisseton Indep. School Dist.*, 804 F.2d 469 (8th Cir. 1986) (law suit by Sisseton-Wahpeton Sioux involving at-large elections for South Dakota school district); *Buchanan v. City of Jackson*, 683 F. Supp. 1515 (W.D. Tenn. 1988) (suit against at-large voting for city board of commissioners); *McNeil v. City of Springfield*, 658 F. Supp. 1015 (C.D. Ill. 1987) (challenging method of elections for city commission); *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986) (challenge by Crow and Northern Cheyenne to discriminatory at-large elections in Big Horn County, Mont.); *Campaign for a Progressive Bronx v. Black*, 631 F. Supp. 975 (S.D.N.Y. 1986) (suit on behalf of Hispanic voters challenging registration procedures in Bronx County); *Ketchum v. City Council*, 630 F. Supp. 551 (N.D. Ill. 1985) (implementing a remedy for vote dilution in a suit by blacks and Hispanics against the Chicago City Council).

8. See U.S. COMM'N ON CIVIL RIGHTS, *POLITICAL PARTICIPATION* 15 (1968) [hereinafter *POLITICAL PARTICIPATION*]; see also Hamilton, *Political Access, Minority Participation, and the New Normalcy*, in *MINORITY REPORT* 12 (L. Dunbar ed. 1984).

9. JOINT CENTER FOR POLITICAL STUDIES, *BLACK ELECTED OFFICIALS: A NATIONAL ROSTER* (1988) [hereinafter *NAT'L ROSTER 1988*]. More than 80% of black elected officials hold municipal or county offices; 23 serve in the Congress. *Id.*

10. NALEO EDUCATION FUND, *1988 NATIONAL ROSTER OF HISPANIC ELECTED OFFICIALS* [hereinafter *NALEO REPORT*]. According to the *NALEO Report*, 69.4% of Hispanic elected officials serve on school boards or hold municipal office; 120 serve in state legislatures and 11 in Congress. *Id.*

11. NATIONAL INDIAN YOUTH COUNCIL, *INDIAN ELECTED OFFICIALS DIRECTORY* (Nov. 1986). Of Indian officeholders, more than 90% serve on school boards whose members generally are elected by residents of the areas served by the schools or by parents of children in the schools; 49 Indians serve in state level positions and one, Ben "Nighthorse" Campbell (D. Colo.), in Congress. *Id.*

12. Standard sources of voter registration data include the reports of the various secretaries of state, the National Election Study (NES), prepared by the University of Michigan's Survey Research Center after Presidential elections, and the Census Bureau's Current Population Survey (Census Bureau/CPS), compiled from surveys following Presidential and midterm elections. All these sources significantly inflate registration rates. The reports of the secretaries of state fail to compensate for "deadwood"—registrants who have died or moved but who are still carried on the rolls. One study estimates that the average deadwood registration for the country is between 15% and 20%. See F. PIVEN & R. CLOWARD, *WHY AMERICANS DON'T VOTE* 266 (1988). The same study estimates that the NES is similarly inflated by 10% to 20%. *Id.* at 257. The Census Bureau/CPS is unreliable because those surveyed (58,000 households in 1984 and 54,500 in 1986), particularly

doubt that minority registration has increased substantially. The Census Bureau's Current Population Survey gives a rough indication of the levels of increase in minority registration. According to the 1986 survey, there were approximately 3,590,000 black registered voters in the seven states originally targeted by the Voting Rights Act, about a quarter of all registered voters.¹³ Even adjusting these figures for error, there has been a dramatic increase since 1965, when the number of black registered voters stood at only 994,000.¹⁴

Similar increases in Hispanic and Native American registration have been recorded in other parts of the country. The Southwest Voter Research Institute reports that more than three million Hispanics are registered in California, Texas, Arizona, New Mexico, and Colorado, and an additional two million are registered in other parts of the country.¹⁵ Aggregate registration data for American Indians are not generally available because the racial identification of voters often is not required by states, while survey research is difficult to conduct because of language and cultural barriers and the remoteness of areas in which Indians live. Nonetheless, surveys that have been conducted show substantial increases in registration among Indian tribes. According to the *Navajo Times*, there was an increase in Navajo registration in New Mexico and Utah from 11,500 in 1974 to 38,000 in 1976.¹⁶ In Big Horn

blacks and probably southerners, generally overreport their registration and voting. *Id.* at 257-59; see also Abramson & Claggett, *Race-Related Differences in Self-Reported and Validated Turnout*, 46 J. POL. 719, 722-23 (1984); Katosb & Traugott, *The Consequences of Validated and Self-Reported Voting Measures*, 45 PUB. OPINION Q. 519, 525 (1981).

The extent of the inflation of state and Census Bureau/CPS registration estimates was demonstrated during a challenge to Mississippi's restrictive registration laws. Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245 (N.D. Miss. 1987). The state's figures indicated that in 1984, 92.2% of the voting age population was registered, making Mississippi's registration rate the highest in the Nation. *Id.* at 1264. The Census Bureau/CPS reported that 85.6% of the state's black and 81.4% of its white voting age population was registered to vote. *Id.* at 1253. The court concluded, however, on the basis of more reliable registration data developed by the plaintiffs from returned jury questionnaires/summons for the United States District Court for the Northern District of Mississippi that only 54% of the state's black and 79% of its white age eligible population were actually on the voter rolls. *Id.* at 1255.

13. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1986, at 25-28 (1987). The secretaries of state reported an even higher number of black registered voters, 3,620,100. JOINT CENTER FOR POLITICAL STUDIES, BLACK ELECTED OFFICIALS: A NATIONAL ROSTER (1986) [hereinafter NAT'L ROSTER 1986].

14. POLITICAL PARTICIPATION, *supra* note 8, at 12-13. In Mississippi, which traditionally had the lowest rate of black voter registration in the southern states, less than 7% of age-eligible blacks were on the voter rolls in 1965. *Id.* at 13. Today the figure stands at about 54%, or approximately 356,000 voters. Operation PUSH, 674 F. Supp. at 1255.

15. Interview with Robert Brischetto, Director, Southwest Voter Research Institute, in San Antonio, Texas (Nov. 14, 1988).

16. Navajo Times, Nov. 13, 1980, cited in McCool, *Indian Voting*, in AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY 105, 124 (V. DeLoria ed. 1985) [hereinafter AMERICAN INDIAN POLICY].

County, Montana, where Crow and Northern Cheyenne comprise forty-one percent of the voting age population and where discrimination against Indians in the political process has been severe, Indians and whites now register at about the same rates.¹⁷

III. AMENDMENTS TO THE VOTING RIGHTS ACT OF 1965

The convergence of a number of factors has contributed to the growth in minority political participation. Most obvious among these is the 1965 Voting Rights Act. Amendments to the Act in 1970 extended (for five additional years) and nationalized the suspension of literacy and other tests for voting. The amendments also increased the number of jurisdictions subject to the preclearance requirement by including the 1968 Presidential election in the coverage formula.¹⁸ In 1975, Congress made the suspension of literacy and other tests permanent.¹⁹ It also extended preclearance for an additional seven years, enlarged coverage of the Act by including the 1972 Presidential election in the coverage formula and extended protection for the first time to "language minorities," defined as American Indians, Asian Americans, Alaskan Natives and Hispanics.²⁰

17. *Windy Boy*, 647 F. Supp. at 1004, 1017. Increased Indian registration also may be inferred from increased rates of voter turnout. For seven tribes in Arizona—Papago, Navajo, Hualapi, Hopi, Havasupai, Colorado, and Apache—voter turnout at reservation precincts rose from 11,789 in 1972 to 15,982 in 1980. McCool, *supra* note 16, in *AMERICAN INDIAN POLICY*, *supra* note 16, at 119-20.

18. Pub. L. No. 91-285, 84 Stat. 314 (codified as amended at 42 U.S.C. § 1973b(b) (1982)). The added jurisdictions were: Kings and Bronx Counties in New York; Elmore County, Idaho; election districts in Alaska; counties in Arizona, California, and Wyoming; and towns in Connecticut, New Hampshire, Maine, and Massachusetts. S. REP. NO. 295, *supra* note 6, at 13, *reprinted in* 1975 U.S. CODE, *supra* note 6, at 774, 777-78.

19. Pub. L. No. 94-73, 89 Stat. 402 (codified as amended at 42 U.S.C. § 1973(a) (1982)). The original suspension of literacy tests and the subsequent nationwide ban were held constitutional in *South Carolina v. Katzenbach*, 383 U.S. 301, 334 (1966), and *Oregon v. Mitchell*, 400 U.S. 112, 132 (1970).

20. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, sec. 207, § 14(c)(3), 89 Stat. 401, 402 (codified at 42 U.S.C. § 1973l(c)(3) (1982)) [hereinafter 1976 Act]. The term "test or device" for purposes of § 5 coverage was amended to include English-only registration procedures and elections where a single linguistic minority comprises more than 5% of the voting age population in the jurisdiction. *Id.* sec. 203, § 4(f)(3), 89 Stat. at 401-02 (codified at 42 U.S.C. § 1973b(f)(3)). Jurisdictions added to § 5 coverage include Alaska (which was "recaptured" after its successful bailout from original coverage), Arizona, and various counties in California, Florida, Michigan, South Dakota, Texas, North Carolina, Colorado, Idaho, and Hawaii. *See* 28 C.F.R. § 51 app. (1988). The 1975 amendments also provided that a jurisdiction must conduct bilingual elections and registration campaigns if a single language minority comprises greater than 5% of the eligible voters, and the illiteracy rate within the language minority is higher than the national average. 1975 Act, Pub. L. No. 94-73, sec. 203(b)-(c), 89 Stat. at 402-03 (codified at 42 U.S.C. § 1973aa-la (b), (c) (1982)); *see City of Rome v. United States*, 446 U.S. 156, 182 (1980) (holding the 1975 extension of § 5 constitutional and stating that "Congress' considered determination that at least another 7 years of statutory remedies were necessary to counter the perpetuation of 95 years

The history of discrimination in voting against language minorities was described by Congress as "pervasive and national in scope."²¹ Based upon testimony presented at hearings in 1975,²² it concluded that language minorities had "been denied equal educational opportunities by state and local governments" causing them to have "severe disabilities and continuing illiteracy" in English. These language barriers, coupled with English-only registration and voting procedures, as well as "acts of physical, economic, and political intimidation," excluded language minorities from effective political participation and were the rationale for passage of the special minority language provisions of the 1975 Act.²³

Congress strengthened the protections of the Act again in 1982 by extending preclearance until the year 2007²⁴ and by amending section 2 to provide that any voting practice which "results" in discrimination on the basis of race, color or membership in a language minority is unlawful.²⁵ The Act's condemnation of vote denial and the preclearance re-

of pervasive voting discrimination is both unsurprising and unassailable").

21. 1975 Act, Pub. L. No. 94-73, sec. 203, § 4(f)(1), 89 Stat. at 401 (codified at 42 U.S.C. § 1973b(f)(1) (1982)).

22. See *Extension of the Voting Rights Act of 1965: Hearings on S. 407, S. 903, S. 1297, S. 1409 and S. 1443, Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary*, 94th Cong., 1st Sess. 214-29, 255-68, 738-56, 756-89 (1975).

23. 1975 Act, Pub. L. No. 94-73, sec. 203, § 4(f)(1), 89 Stat. at 401 (codified at 42 U.S.C. § 1973b(f)(1) (1982)); see also S. REP. NO. 295, *supra* note 6, at 24-30, reprinted in 1975 U.S. CODE, *supra* note 6, at 790-97 (discussing various forms of discrimination against Hispanics, Asian Americans, Alaskan Natives, and American Indians); F. COHEN, HANDBOOK OF FEDERAL INDIAN LAW 157-62 (1971) (describing state restrictions on Indian voting and office holding); U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 76-78 (1981) [hereinafter UNFULFILLED GOALS]. See generally McCool, *supra* note 16, in AMERICAN INDIAN POLICY, *supra* note 16.

24. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, sec. 2, 96 Stat. 131, 131-32 (codified at 42 U.S.C. § 1973b(a)(8) (1982 & Supp. IV 1986)) [hereinafter 1982 Act]. At the present time, Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and portions of California, Florida, Michigan, New Hampshire, New York, North Carolina, and South Dakota are covered by § 5. See 28 C.F.R. § 51 app. (1988). Section 4(a) of the 1965 Act established a new scheme for bailout from § 5 coverage designed to encourage jurisdictions to change their voting practices and thereby eliminate barriers to minority political participation. See H.R. REP. NO. 227, 97th Cong., 1st Sess. 37 (1981) [hereinafter H.R. REP. NO. 227]; S. REP. NO. 417, 97th Cong., 2d Sess. 44 [hereinafter S. REP. NO. 417], reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177 [hereinafter 1982 U.S. CODE]. Five suits seeking bailout have been filed since passage of the 1982 amendments. See G. HEBERT, VOTING CASES AT THE DISTRICT COURT LEVEL IN WHICH UNITED STATES BEGAN AFTER JANUARY 20, 1981 (Dep't of Justice July 1, 1988) (citing *Alaska v. United States*, (D.D.C. 1984); *Waihee (Hawaii) v. United States*, (D.D.C. 1984); *Connecticut v. United States*, (D.D.C. 1983); *Massachusetts v. United States*, (D.D.C. 1983); *Board of Comm'rs v. United States*, (D.D.C. 1982). For a discussion of the operation of § 4(a), see Hancock & Tredway, *The Bailout Standard of the Voting Rights Act: An Incentive to End Discrimination*, 17 URB. LAW. 379 (1985).

25. See 1982 Act, Pub. L. No. 97-205, sec. 2, 96 Stat. at 131-32 (codified at 42 U.S.C. § 1973(a) (1982)). Amended § 2 provides:

No voting qualification or prerequisite to voting or standard, practice, or procedure shall be

quirement were crucial to the advances in minority political participation. Equally crucial was the prior and parallel development of the prohibition on vote dilution which the 1982 amendments embodied in the results standard of section 2. It allowed minorities, even when they had free access to registration and voting, to successfully challenge practices that submerged their voting strength or denied them equal and effective participation in the political process.

A. *The Development of the Prohibition on Vote Dilution*

1. Origins of the Prohibition

Vote dilution has been described as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group."²⁶ Vote dilution can take many forms, including reapportionment plans that unnecessarily fragment or concentrate black population,²⁷ numbered posts,²⁸ staggered terms,²⁹ majority

imposed or applied by any state or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

Id. The 1982 amendments also provide that any voter who requires assistance because of a disability or an inability to read or write is entitled to assistance by a person of the voter's choice, except for an employer or agent of the employer, or officer or agent of the voter's union. *Id.* sec. 5, § 208, 96 Stat. at 135 (codified at 42 U.S.C. § 1973aa-6 (1982)).

26. MINORITY VOTE DILUTION 4 (C. Davidson ed. 1984) [hereinafter VOTE DILUTION]. The prohibition on vote dilution was explained and defended by the Supreme Court as follows:

There is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted. . . . It also includes the right to have the vote counted at full value without dilution or discount. . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength. . . . [and] [t]he groups not in favor have their votes discounted.

Reynolds v. Sims, 377 U.S. 533, 555 n.29 (1964) (quoting *South v. Peters*, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)); see also *Allen v. Board of Elections*, 393 U.S. 544, 569 (1969) (stating that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot").

27. See, e.g., *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982) (invalidating the reapportionment of Georgia's fourth and fifth congressional districts because it fragmented the minority population in the metropolitan Atlanta area), *aff'd*, 459 U.S. 1166 (1983).

28. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (stating that "the requirement that candidates run for specific seats . . . enhances appellee's lack of access because it prevents a cohesive political group from concentrating on a single candidate"); *Dunston v. Scott*, 336 F. Supp. 206 (E.D.N.C. 1972) (finding North Carolina's anti-single shot and numbered seat laws unconstitutional).

29. See, e.g., *City of Rome*, 446 U.S. at 183-85 (stating that "staggered terms . . . have the effect of forcing head-to-head contests between Negroes and whites and depriving Negroes of the opportunity to elect a candidate by single-shot voting").

vote requirements,³⁰ discriminatory annexations,³¹ and the abolition of elected or appointed offices.³² Perhaps the preeminent form of vote dilution today is at-large voting, or multimember districting. Under an at-large scheme all the residents of a town, county, or other jurisdiction vote for all the members of a city council, county commission, or other governmental body. The majority, if it votes as a bloc, can choose all the officeholders, thereby denying a discrete minority an effective opportunity to elect any representatives of its choice.³³ Whatever their name or description, the effect—and frequently the purpose—of practices that dilute minority voting strength is to wipe out the gains made in minority voter registration since passage of the Voting Rights Act.³⁴

The use of single member districts, in which members of the minority group constitute a majority, usually can remedy dilution from at-large voting. For this reason, among others, federal courts are required, absent unusual circumstances, to utilize all single member districts in court ordered reapportionment.³⁵ Although under increasing attack, at-large voting remains common at the municipal, county, and state levels throughout the United States.³⁶

30. See, e.g., *City of Port Arthur v. United States*, 459 U.S. 159, 167 (1982) (stating that “[i]n the context of racial bloc voting . . . the [majority vote] rule would permanently foreclose a black candidate from being elected to an at-large seat”); *White v. Regester*, 412 U.S. 755, 766 (1973) (finding that a majority vote requirement “enhance[s] the opportunity for racial discrimination”).

31. See, e.g., *City of Port Arthur*, 459 U.S. at 166-67.

32. See, e.g., *McCain v. Lybrand*, 465 U.S. 236 (1984).

33. At-large elections, although not unconstitutional per se, have been criticized frequently for their “winner take all” character and their tendency to disadvantage minorities. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 47-48 (1986); *Rogers*, 458 U.S. at 616-17; *Chapman v. Meier*, 420 U.S. 1, 16 (1975). One commentator has described the discriminatory effect of at-large elections as “one of the best-substantiated propositions in political science.” Grofman, “One Person, One Vote”: The Legacy of *Baker v. Carr*, Paper for a Twentieth Century Fund Conference 9 (Jan. 6-7, 1989) (source on file with Author). Justice Stevens has written that at-large elections are sufficiently suspect to justify a congressional ban on their use in jurisdictions covered by § 5. *Rogers*, 458 U.S. at 632 (Stevens, J., dissenting); see also Davidson & Korbel, *At-Large Elections and Minority-Group Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. Pol. 982 (1981).

34. For a discussion of vote dilution practices, particularly those adopted to counter increased minority registration after passage of the Voting Rights Act in 1965, see: H.R. REP. NO. 227, *supra* note 24; S. REP. NO. 417, *supra* note 24, at 6, 10-14, reprinted in 1982 U.S. CODE, *supra* note 24, at 187-91; A. DERFNER, L. McDONALD & C. McTEER, *LITIGATION UNDER THE VOTING RIGHTS ACT OF 1965*, at 11-3 (1986); UNFULFILLED GOALS, *supra* note 23; UNITED STATES COMM’N ON CIVIL RIGHTS, *THE VOTING RIGHTS ACT: TEN YEARS AFTER* (1975); McDonald, *supra* note 4, at 68-80; and Rios & Alonzo, *A Survey of Chicano Representation in 361 Texas Public School Boards 1979/80* (1981).

35. *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 639 (1976); *Wallace v. House*, 515 F.2d 619 (1975), *cert. granted, vacated and remanded*, 425 U.S. 947 (1976).

36. As of November 1970, 46% of the upper houses and 62% of the lower houses in the states contained some multimember, at-large elected, districts. See *Whitcomb v. Chavis*, 403 U.S. 124, 157 n.37 (1971). In 1980 more than 60% of cities elected some, or all, of their council members at-large. See Grofman, *Alternatives to Single-Member Plurality Districts: Legal and Empirical Is-*

The prohibition on vote dilution, which continues to generate substantial controversy, has its roots in *Baker v. Carr*³⁷ and later cases which establish that voting power must be apportioned equally among the electorate on the basis of population. *Baker* in turn had its roots in the race discrimination jurisprudence of the Court. For example, the *Baker* Court cited *Gomillion v. Lightfoot*³⁸ for the proposition that legislative apportionment was justiciable. *Gomillion* held unconstitutional the redrawing of the boundaries of Tuskegee, Alabama by the state legislature to exclude blacks from the city limits and thus to deny them the right to vote.

After *Baker*, the Court in *Gray v. Sanders*³⁹ invalidated Georgia's "county unit system" used in primaries for statewide office because the system gave counties having a third of the state's population a majority of the voting power. According to the Court, "The conception of political equality . . . can mean only one thing—one person, one vote."⁴⁰ The following year, in *Wesberry v. Sanders*,⁴¹ the Court struck down Georgia's congressional apportionment on the grounds that some districts had twice the population of others. The Court held that "the command of Art. 1, § 2 [of the Constitution] . . . means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."⁴²

The Court followed *Gray* and *Wesberry* in *Reynolds v. Sims*.⁴³ In *Reynolds*, the Court found Alabama's legislative apportionment to be unconstitutional under the equal protection clause of the fourteenth amendment because senate and house districts were of unequal size and resulted in "[d]iluting the weight of votes" of residents of the more populous districts.⁴⁴ *Fortson v. Dorsey*,⁴⁵ decided after *Reynolds* but

sues, 9 POL'Y STUD. J. 875-89 (1980-1981).

37. 369 U.S. 186 (1962). The controversy has concerned the justiciability of vote dilution, the standards for measuring dilution, the individuals or groups entitled to press claims of dilution, and the appropriate remedies. The literature of vote dilution is extensive. See, e.g., B. CAIN, THE REAPPORTIONMENT PUZZLE (1984); VOTE DILUTION, *supra* note 26; Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1 (1982); Symposium, *Gerrymandering and the Courts*, 33 UCLA L. REV. 1 (1985).

38. 369 U.S. at 229-30 (citing *Gomillion v. Lightfoot*, 364 U.S. 339 (1960)).

39. 372 U.S. 368 (1963).

40. *Id.* at 381.

41. 376 U.S. 1 (1964).

42. *Id.* at 7-8.

43. 377 U.S. 533 (1964).

44. *Id.* at 566. It would be more accurate to say that the Court found the state's refusal to reapportion unconstitutional. The state had last reapportioned in 1901 and population-variance ratios in 1964 were as high as 41-to-1 in the Senate and 16-to-1 in the House. *Id.* at 545. In striking down this submergence of voting power, the Court indicated that the right of voters "to have their votes counted," the basis of the one person-one vote rule, was grounded in its prior decisions re-

several months before passage of the Voting Rights Act, explicitly held that voting strength could be diluted on the basis of race as well as population inequality. The Court rejected a facial challenge to county-wide voting for members of the state senate in several multidistrict counties in Georgia. However, at-large elections, or multimember districts, while not unconstitutional per se, would be unlawful if they "designedly or otherwise . . . operate to minimize or cancel out the voting strength of racial or political elements of the voting population."⁴⁶

Sims v. Baggett,⁴⁷ the district court's decision on remand from *Reynolds v. Sims*, was one of the first cases relying on the authority of *Fortson v. Dorsey* to invalidate a districting plan on the ground that it diluted minority voting strength. After *Reynolds* the all white Alabama legislature reapportioned itself in the following manner. The plan for the house treated counties as the basic voting unit except in the case of majority black counties. These were aggregated with predominantly white counties into multiseat districts with overall white majorities. The district court described this procedure as "turning Negro majorities into minorities."⁴⁸ Rather than "prove that justice is both blind and deaf,"⁴⁹ the court struck down the house plan because it had the purpose and effect of discriminating against blacks by diluting their voting strength. According to the district court, the "dilution of Negro voting power by racial gerrymandering is just as discriminatory as complete disfranchisement or total segregation."⁵⁰

In the Supreme Court's first decision construing the scope of the preclearance requirement of section 5, *Allen v. State Board of Elec-*

garding discrimination against black voters. *Id.* at 554-55 (citing *United States v. Mosley*, 238 U.S. 383 (1915) (holding that all voters have a right to have their votes counted)); *see also* *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Terry v. Adams*, 345 U.S. 461 (1953); *United States v. Saylor*, 322 U.S. 385 (1944) (holding that a vote may not be diluted by ballot box stuffing); *Smith v. Allwright*, 321 U.S. 649 (1944) (finding the exclusion of blacks from party primary unconstitutional); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927); *Guinn v. United States*, 238 U.S. 347 (1915) (invalidating a grandfather clause discriminating against blacks); *Ex parte Siebold*, 100 U.S. 371 (1879).

45. 379 U.S. 433 (1965).

46. *Id.* at 439.

47. 247 F. Supp. 96 (M.D. Ala. 1965).

48. *Id.* at 109.

49. *Id.*

50. *Id.* at 109. The theme of the unfairness of at-large or multiseat districts was repeated in subsequent vote dilution cases. *See* *Smith v. Paris*, 257 F. Supp. 901, 904 (M.D. Ala. 1966) (citing *Sims v. Baggett*). In *Wallace v. House*, 515 F.2d 619 (5th Cir. 1975), the court found:

The particular vice of multi-member districts . . . is their tendency to minimize minority representation even at the lowest political levels in a way that could not occur if single-member districts existed in their stead. Multi-member districts thus pose a problem of degree of fair representation—"fair" not in the sense either of "considerable" or of "proportionate," but rather in a general sense of equity.

Id. at 629; *see also* *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

tions,⁵¹ a majority of the Court concluded on the basis of the legislative history that Congress intended the Act to have "the broadest possible scope" and to prohibit the more subtle forms of vote dilution, as well as the obvious forms of vote denial.⁵² Citing *Reynolds v. Sims*, the Court held that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot," and that section 5 preclearance applied to such changes as the adoption of at-large voting.⁵³ This broad standard for preclearance, which acknowledged the applicability of concepts of vote dilution to the Voting Rights Act, was approved expressly by Congress in the 1970, 1975, and 1982 amendments and has been consistently applied by the courts and the Attorney General.⁵⁴

2. The Search for Standards in Racial Vote Dilution Cases

The "minimize or cancel out" language of *Fortson v. Dorsey*⁵⁵ was echoed in later cases,⁵⁶ but was not applied by the Supreme Court until the decision in *Whitcomb v. Chavis*⁵⁷ in 1971. *Whitcomb* concerned a challenge to at-large elections in Marion County, Indiana. The district court invalidated a multimember legislative district for the county because few blacks had been elected to office.⁵⁸ The Supreme Court reversed, reasoning that "[t]he voting power of ghetto residents may have been 'cancelled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls."⁵⁹ The Court indicated, however, that the result would have been different had plaintiffs pro-

51. 393 U.S. 544 (1969).

52. *Id.* at 566-67. The Court relied on the Attorney General's statements throughout the legislative hearings that § 5 was to have "a broad scope and [on] Congress' refusal to engraft even minor exceptions" on the preclearance requirement. *Id.* at 568.

53. *Id.* at 569. Other voting practices at issue in *Allen* and found to be subject to the preclearance requirement because of the risk of vote dilution included new procedures for casting write-in votes, a change from elected to appointed county officials, and changes in the requirements for independent candidates running in general elections. Justice Harlan, who dissented on similar grounds in *Reynolds*, 377 U.S. at 621, argued that there were no clear standards for determining vote dilution because "it is not clear . . . how a court would go about deciding whether an at-large system is to be preferred over a district system." *Allen*, 393 U.S. at 586 (Harlan, J., dissenting). Justice Harlan believed that § 5 applied to all the voting changes before the Court, with the exception of the change from district to at-large voting. *Id.* at 591-93 (Harlan, J., dissenting).

54. See, e.g., *City of Pleasant Grove v. United States*, 479 U.S. 462, 467-68 (1987); *NAACP v. Hampton County Election Comm'n*, 470 U.S. 166, 175-76 (1985); *Dougherty County v. White*, 439 U.S. 32, 37-39 (1978); H.R. REP. No. 227, *supra* note 24, at 34-35; S. REP. No. 417, *supra* note 24, at 6-7 & n.8, reprinted in 1982 U.S. CODE, *supra* note 24, at 182-84 & n.8; 28 C.F.R. § 51.12 (1988).

55. See *supra* notes 45, 46 and accompanying text.

56. See *Burns v. Richardson*, 384 U.S. 73, 88 (1966); see also *Abate v. Mundt*, 403 U.S. 182, 184 n.2 (1971).

57. 403 U.S. 124 (1971).

58. *Id.* at 148-49, 164.

59. *Id.* at 153.

duced evidence that minorities had less opportunity than other residents in the district to participate in the political process and to elect legislators of their choice.⁶⁰

Two years later, in another racial vote dilution case, *White v. Regester*,⁶¹ the Court found a denial of equal voting opportunity on facts absent in *Whitcomb*. In a unanimous opinion by Justice White, who had written for the majority in *Whitcomb*, the Court invalidated multi-seat legislative districts in Dallas and Bexar Counties, Texas, because they diluted black (Dallas) and Mexican-American (Bexar) voting strength. The plaintiffs did not rely solely on the lack of proportional representation of minorities as proof of dilution, as had been done in *Whitcomb*.⁶² Instead, they based their case on a broad range of factors affecting minority political participation. They showed: (1) a history of official discrimination against blacks in Dallas and Mexican-Americans in Bexar; (2) the existence of a white slating group and racial campaign tactics in Dallas; (3) cultural and language barriers and depressed voter registration in Bexar; (4) a lack of responsiveness by elected officials to the needs of the minority community in Bexar; and (5) numbered post and majority vote requirements in both jurisdictions. Based on the "totality of the circumstances," and mindful of the "cultural and economic realities" characteristic of at-large voting,⁶³ the Court concluded that blacks and Mexican-Americans "had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."⁶⁴ The Court affirmed as well the district court's finding that single member districts for Dallas and Bexar were required as a remedy "to bring the [minority] community into the full stream of political life of the county and State by encouraging their further registration, voting, and other political activity."⁶⁵

White v. Regester was applied and elaborated on by the lower federal courts, principally those in the Fifth Circuit which handled the greatest number of voting rights cases during the 1970s.⁶⁶ The most an-

60. *Id.* at 149-50.

61. 412 U.S. 755 (1973).

62. According to the majority in *Whitcomb*, there was no "evidence [or] findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." *Whitcomb*, 403 U.S. at 149. The issue in *Whitcomb* was whether blacks were discriminated against merely because their candidates "los[t] too many elections." *Id.* at 153.

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

64. *Id.* at 766.

65. *Id.* at 769.

66. Twenty-three minority vote dilution cases were decided by federal circuit courts prior to 1978. Of those, 19 were decided by the old Fifth Circuit comprising Texas, Louisiana, Mississippi, Alabama, Georgia, and Florida. One case was decided by each of the First, Fourth, Seventh, and Eighth Circuits. See *Voting Rights Act: Hearings Before the Subcomm. on the Constitution of the*

alytically rigorous and influential of these cases was the en banc decision in *Zimmer v. McKeithen*.⁶⁷ *Zimmer* identified four primary and four enhancing factors (known as the *Zimmer* factors or criteria) derived from *White v. Regester* and adopted them as the test for resolving claims of vote dilution.⁶⁸ The primary factors were: (1) a lack of access to the process of slating candidates; (2) the unresponsiveness of legislators to the particularized interests of the minority community; (3) a tenuous state policy underlying the preference for multimember or at-large districting; and (4) the existence of past discrimination in general that precluded effective minority participation in the election system. The enhancing factors included the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidates running from particular geographical subdistricts.⁶⁹ Dilution could be shown by proof of "an aggregate of these factors," and no particular factor or number of factors had to be proved to obtain relief.⁷⁰

After the decision in *Washington v. Davis*,⁷¹ the Fifth Circuit, anticipating the holding in *City of Mobile v. Bolden*,⁷² held in *Nevett v. Sides*⁷³ that plaintiffs in vote dilution cases must show that the challenged practice was racially motivated. *Nevett* did not change the plaintiff's burden of proof, however, since the court held that "a finding of racially discriminatory dilution under the *Zimmer* criteria raises an inference of intent and, therefore, that a finding under the criteria satisfies the intent requirement of *Washington v. Davis*."⁷⁴

Senate Comm. on the Judiciary, 97th Cong., 2d Sess. 1205-07, 1216-26 (1982) [hereinafter *Voting Rights Act Hearings*] (statement of Frank R. Parker, Lawyers Comm. for Civil Rights Under Law). See generally Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353 (1976).

67. 485 F.2d 1297 (5th Cir. 1973).

68. *Zimmer* was apparently an attempt by the Fifth Circuit to establish more precise evidentiary standards for dilution cases than had been articulated in *White v. Regester*.

69. See *supra* notes 21-23 and accompanying text.

70. *Zimmer*, 485 F.2d at 1305. For decisions applying the *Zimmer* factors, see: *Hendrix v. Joseph*, 559 F.2d 1265 (5th Cir. 1977); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 143 (5th Cir. 1977) (en banc); and *Wallace v. House*, 515 F.2d 619, 630 (5th Cir. 1975). See also *supra* note 66.

71. 426 U.S. 229 (1976) (holding that proof of racial purpose was a necessary element of a fourteenth amendment employment discrimination claim).

72. 446 U.S. 55 (1980). For a discussion of *City of Mobile v. Bolden*, see *infra* notes 75-91 and accompanying text.

73. 571 F.2d 209 (5th Cir. 1978).

74. *Id.* at 217.

3. *City of Mobile v. Bolden* and Subjective Racial Intent

Zimmer was the reigning standard for vote dilution cases for seven years until the Supreme Court toppled it in *City of Mobile v. Bolden*.⁷⁵ The Court had affirmed *Zimmer* on the basis that a court ordered plan ordinarily must use single member districts, but "without approval of the constitutional views expressed by the Court of Appeals."⁷⁶ The Court's dissatisfaction with the *Zimmer* standards was signaled more directly in *Wise v. Lipscomb*,⁷⁷ in which four of the Justices described *Zimmer* as a "highly amorphous theory" and suggested that it should not apply to municipal governments.⁷⁸ Then, in 1980, a sharply divided Court in *City of Mobile v. Bolden* established a subjective intent standard for vote dilution claims under the Constitution and section 2 of the Voting Rights Act and repudiated the *Zimmer* criteria.⁷⁹ The plurality held that a plaintiff had to produce evidence that a challenged practice was racially motivated and that proof of the *Zimmer* factors was "most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case."⁸⁰

There was no majority opinion on the standards to be used in determining racial purpose in vote dilution cases. The plurality opinion of Justice Stewart, joined by Chief Justice Burger and Justices Powell and Rehnquist, held that proof of racial purpose was required.⁸¹ Justices Marshall and Brennan argued in dissent that racial purpose should not be an element of a dilution claim.⁸² The remaining opinions of Justices Stevens, Blackmun, and White did not address the intent issue.

Although the totality of facts in *Bolden*, according to Justice White in dissent, was "even more compelling than that present in *White v. Regester*,"⁸³ and even though *White* granted relief on evidence of the effect of at-large voting without even discussing any requirement of proving discriminatory purpose, the plurality insisted that the two cases were wholly consistent.⁸⁴ Because there was no majority opinion describing the legal standards for proving intent, and given the plural-

75. 446 U.S. 55 (1980).

76. *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 638 (1976).

77. 437 U.S. 535 (1978).

78. *Id.* at 550.

79. Chief Justice Burger, Justice Stevens, Justice Stewart, Justice Powell, and Justice Rehnquist rejected *Zimmer*, 446 U.S. 55. In all, there were six separate opinions in *Bolden*.

80. *Id.* at 73. Justice Marshall dissented on the ground that § 2 and the fifteenth amendment prohibited voting practices that had an adverse racial effect as well as those that were purposefully discriminatory. *Id.* at 104-05 (Marshall, J., dissenting).

81. *Id.* at 72-74.

82. *Id.* at 94 (Brennan, J., dissenting).

83. *Id.* at 103 (White, J., dissenting).

84. *Id.* at 69.

ity's rejection of circumstantial evidence to show racial purpose, Justice White warned that *Bolden* "leaves the courts below adrift on uncharted seas with respect to how to proceed on remand."⁸⁵ Justice White proved to be correct.

The lower courts disagreed on the meaning and application of the *Bolden* intent standard. In *McMillan v. Escambia County*,⁸⁶ for example, one panel of the Fifth Circuit held that reliance on the *Zimmer* factors "would be erroneous,"⁸⁷ and that the responsiveness of elected officials to the needs of the black community was "not relevant."⁸⁸ In another voting case decided the following month, *Lodge v. Buxton*,⁸⁹ a different panel wrote that the Supreme Court was actually directing lower courts to apply the *Zimmer* criteria "to the extent that they are relevant to the factual context at hand,"⁹⁰ and that unresponsiveness was an "essential element" of a vote dilution claim.⁹¹

Judge Goldberg of the Fifth Circuit criticized strongly the subjective intent standard of *Bolden* and, borrowing a phrase from Justice Rehnquist's concurring opinion in *Wise*,⁹² called it an "indecisive" and "amorphous holding."⁹³ Often it would be impossible in voting cases, he said, "to conduct the postmortem psychoanalysis of all of the legislators or councilmen responsible for the institution of the plan in order to meet the 'subjective intent' standard."⁹⁴ He also defended the *Zimmer* criteria as "a jurisprudence produced by ten years of struggle and compromise between judges of varying political and jurisprudential backgrounds . . . [which] relied on legal principles whose merit had been tested and affirmed by the trial of reality and experience."⁹⁵ In rejecting *Zimmer*, he lamented, the Court was "casting aside the ten years of thought, experience and struggle embodied within it."⁹⁶

85. *Id.* at 103 (White, J., dissenting).

86. 638 F.2d 1239 (5th Cir. 1981).

87. *Id.* at 1247 n.16.

88. *Id.* at 1248 n.18.

89. 639 F.2d 1358 (5th Cir. Unit B Mar. 1981).

90. *Id.* at 1373.

91. *Id.* at 1375.

92. 437 U.S. at 550 (Rehnquist, J., concurring).

93. *Jones v. City of Lubbock*, 640 F.2d 777, 779 (5th Cir. Unit A Mar. 1981).

94. *Id.* at 779 n.6.

95. *Id.* at 777; see Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 725 (1983) (describing the *White-Zimmer* approach as "flexible, fact-specific, precise, and workable"); cf. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77, 144 (1985).

96. *Jones*, 640 F.2d at 777.

4. The Results Standard of the 1982 Amendments

Congress adopted the results standard in 1982 in response to *City of Mobile v. Bolden*. Unhappy with the subjective intent standard of *Bolden*, Congress amended the Voting Rights Act in order "to reinstate Congress' earlier intent that violations of the Voting Rights Act, including Section 2, could be established by showing the discriminatory effect of the challenged practices."⁹⁷ Congress repudiated the intent standard for three basic reasons: it was "unnecessarily divisive" because it required plaintiffs to prove that local officials were racists, the burden of proof was "inordinately difficult," and it "ask[ed] the wrong question."⁹⁸

One of the most dramatic examples of the inadequacy of the *City of Mobile v. Bolden* standard cited in the legislative history was *McCain v. Lybrand*.⁹⁹ Five days before the decision in *Bolden* the district court, in a detailed and exhaustive opinion, invalidated at-large elections in Edgefield County, South Carolina, concluding that black political participation "has been merely tokenism and even that has been on a very small scale."¹⁰⁰ After the *Bolden* decision, however, the court withdrew its opinion on the grounds that plaintiffs had not proven that the voting system was intentionally discriminatory.¹⁰¹ In addressing the inappropriate result in *McCain v. Lybrand*, Congress concluded that the "right" question was not the subjective intent of legislators but whether minorities have "a fair opportunity to participate" in the political process.¹⁰²

The legislative history of the 1982 amendments sets out certain readily verifiable factors derived from *White*, *Zimmer*, and other voting cases, which courts ordinarily should consider in dilution cases. These factors included bloc voting, a history of discrimination, depressed levels of minority employment and income, and few minorities elected to office. Congress also described subjective factors courts should avoid considering, including responsiveness to minority communities and racial motive.¹⁰³ In detailing the factors showing vote dilution, Congress

97. H.R. REP. NO. 227, *supra* note 24, at 29; S. REP. NO. 417, *supra* note 24, at 17-19, reprinted in 1982 U.S. CODE, *supra* note 24, at 194-97; see also *Thornburg v. Gingles*, 478 U.S. 30 (1986).

98. S. REP. NO. 417, *supra* note 24, at 36-37, reprinted in 1982 U.S. CODE, *supra* note 24, at 214-15.

99. Civ. No. 74-281 (D.S.C. Apr. 17, 1980); see S. REP. NO. 417, *supra* note 24, at 26, reprinted in 1982 U.S. CODE, *supra* note 24, at 203-04.

100. *McCain*, Civ. No. 74-281, slip op. at 18.

101. *Id.* (order of Aug. 11, 1980).

102. S. REP. NO. 417, *supra* note 24, at 36, reprinted in 1982 U.S. CODE, *supra* note 24, at 214; see *Gingles*, 478 U.S. 30.

103. A complete list of "typical factors" showing vote dilution was identified in the Senate

acted partly in response to criticism that the results test was amorphous, or had no "core,"¹⁰⁴ and partly to restore the analytical framework in *White* as articulated in *Zimmer*. The factors were illustrative, not exhaustive, and no particular number of them had to be proved. As under *White* and *Zimmer*, the ultimate question was whether the challenged practice denied the minority an equal opportunity to participate and to elect candidates of its choice, a question that could be answered only by "a searching practical evaluation of the 'past and present reality.'" ¹⁰⁵

5. Judicial Response to the 1982 Amendments

Two days after Congress amended section 2, the Supreme Court decided *Rogers v. Lodge*,¹⁰⁶ another vote dilution case involving a challenge to at-large elections for the county council in Burke County,

report: A history of discrimination, the existence of polarized voting, the use of enhancing devices (such as majority vote requirements), the presence of slating groups, the continuing effects of past discrimination, the existence of racial campaign appeals, and the extent of minority office holding. S. REP. NO. 417, *supra* note 24, at 28-30, reprinted in 1982 U.S. CODE, *supra* note 24, at 205-08. Other factors having possible probative value were a lack of responsiveness and a tenuous policy underlying the use of the challenged practice. The House report is generally to the same effect. H.R. REP. NO. 227, *supra* note 24, at 30. Both reports indicate, however, that an inquiry into responsiveness ordinarily should be avoided. According to the House report, responsiveness was a "highly subjective" factor and its use had created "inconsistencies among court decisions on the same or similar facts and confusion about the law." *Id.* In *Cross v. Baxter*, 604 F.2d 875, 883 (5th Cir. 1979), for example, the court set aside the trial court's dismissal of the plaintiffs' challenge to at-large elections in Moultrie, Georgia in part because the trial court erred in finding that plaintiffs had failed to prove unresponsiveness. On remand, the trial court again found no unresponsiveness and again dismissed the complaint. Although the evidence of unresponsiveness was essentially the same on the second appeal, a different panel affirmed, ruling that "the finding, that plaintiff had failed to prove unresponsiveness . . . is amply supported and not clearly erroneous." *Cross v. Baxter*, 639 F.2d 1383, 1384 (5th Cir. Unit B Mar. 1981). The plaintiffs' petition for a writ of certiorari was granted and the Court remanded for further consideration in light of the amendment to § 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982). *Cross v. Baxter*, 460 U.S. 1065 (1983). On the second remand the trial court entered a consent order establishing district elections for the Moultrie city council. *Cross v. Baxter*, Civ. No. 76-20-THOM (M.D. Ga. July 24, 1984).

104. Senator Orrin Hatch (R.-Utah), one of the most vocal of the critics, charged that the results standard had no "core value . . . other than election results" and that the mere absence of proportional minority representation would be enough to invalidate a challenged voting system. S. REP. NO. 417, *supra* note 24, at 96, reprinted in 1982 U.S. CODE, *supra* note 24, at 269. The Administration also opposed the amendment of § 2. Attorney General William French Smith testified before the Senate subcommittee that the bill to amend § 2 would change the law radically and was "bad legislation." *Voting Rights Act Hearings*, *supra* note 66, at 78. Assistant Attorney General William Bradford Reynolds testified that the results test of § 2 "threatens to undermine a basic principle of our democratic system of Government." *Id.* at 1662. The Act, however, was passed by overwhelming majorities in both houses. 127 CONG. REC. H7011 (daily ed. Sept. 15, 1982) (passed 389-24); 128 CONG. REC. S7139 (daily ed. June 18, 1982) (passed 95-9); 128 CONG. REC. H3840 (daily ed. June 23, 1982) (motion to concur in Senate amendments passed unanimously).

105. S. REP. NO. 417, *supra* note 24, at 30, reprinted in 1982 U.S. CODE, *supra* note 24, at 207-08.

106. 458 U.S. 613 (1982).

Georgia. The facts in *Rogers* were very similar to those in *City of Mobile v. Bolden*. In both cases the lower courts found dilution using a *White-Zimmer* analysis without direct evidence of racial purpose. In *Rogers*, the Court affirmed and effectively restored the *White* totality-of-facts analysis for voting challenges based on the Constitution. The Court affirmed its ruling in *City of Mobile v. Bolden* that proof of racial purpose was required, but explained that it had never intended to imply that racial purpose could not be inferred from the totality of relevant facts. According to the Court, "discriminatory intent need not be proved by direct evidence. 'Necessarily, an invidious discriminatory purpose may often be inferred from the totality of the relevant facts.'"¹⁰⁷

City of Mobile v. Bolden and *Rogers v. Lodge* probably cannot be distinguished on their facts but can be best understood as a reflection of changes in the membership of the Court and the position of the Chief Justice. Justice O'Connor had replaced Justice Stewart, who wrote the plurality opinion in *City of Mobile v. Bolden*, and she voted to sustain the finding of dilution in *Rogers v. Lodge*. Chief Justice Burger, confronted with the outrageous facts in *Rogers*, and, according to one observer, "stung by nationwide criticism of the *Bolden* decision,"¹⁰⁸ changed sides and voted with the Burke County plaintiffs.

The Supreme Court first construed amended section 2 in *Thornburg v. Gingles*,¹⁰⁹ a challenge to six multimember districts in North Carolina's 1982 legislative reapportionment. A majority of the Court (Justices Brennan, Marshall, Blackmun, Stevens, and White) established a three part test for determining when multimember districting violated the results standard of the statute. First, the minority must be able to show that it is sufficiently large and geographically compact to constitute a majority in one or more single member districts. Second, it must be able to show that it is politically cohesive, or tends to vote as a bloc. Third, it must show that the majority votes sufficiently as a bloc "usually to defeat the minority's preferred candidate."¹¹⁰

107. *Id.* at 618 (quoting *Washington v. Davis*, 426 U.S. 229, 242 (1976)). The Court also resolved the disagreement among panels of the Fifth Circuit over the relevance of evidence of unresponsiveness in constitutional challenges. See *supra* notes 66-96 and accompanying text. According to the Court, evidence of unresponsiveness was not an essential element of a claim of vote dilution "but only one of a number of circumstances a court should consider in determining whether discriminatory purpose may be inferred." *Rogers*, 458 U.S. at 625 n.9.

108. VOTE DILUTION, *supra* note 26, at 161. For examples of criticism of *Bolden* from the legal community, see: Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383 (1981); *The Supreme Court, 1979 Term*, 94 HARV. L. REV. 75, 138 (1980); Note, *Vote Dilution Claims Confined*, 10 STETSON L. REV. 363 (1981).

109. 478 U.S. 30 (1986).

110. *Id.* at 51 (Brennan, J., Marshall, J., Blackmun, J., and Stevens, J.); *id.* at 82-83 (White, J., concurring). This analysis is essentially the one rejected by the Court earlier in *Whitcomb*, 403

The Court adopted, in its words, a "functional" view of the political process and isolated "the most important Senate Report factors bearing on § 2 challenges to multimember districts,"¹¹¹ which, if proved, compel a finding of a statutory violation. The other factors discussed in the legislative history, such as the lingering effects of discrimination, racial campaign appeals, and the use of enhancing devices, were deemed supportive of, but not essential to, a vote dilution claim.¹¹²

Four other Justices (Burger, O'Connor, Powell, and Rehnquist) concurred in the judgment. The majority affirmed that the reapportionment plan of four multimember districts in which minorities had had only minimal electoral success violated section 2. The Court reversed as to a fifth, House District 23, on the grounds that the lower court had ignored "the significance of the *sustained* success black voters have experienced."¹¹³ The Court explicitly rejected the argument for reversal pressed by the State of North Carolina and the Solicitor General, who filed an amicus brief and participated in oral argument, that token or minimal minority electoral success foreclosed as a matter of law a section 2 claim in any of the challenged districts.¹¹⁴ According to the Court, "[w]here multimember districting generally works to dilute the minority vote, it cannot be defended on the ground that it sporadically and serendipitously benefits minority voters."¹¹⁵

The Court also simplified proof of racial bloc voting. North Carolina argued, relying on the language of several lower court decisions, that plaintiffs had to show not simply a correlation between race of voters and race of candidates, but that voters were voting for reasons of race, and not based on some other variable, such as religion, party affiliation, age, campaign expenditures, or name identification.¹¹⁶ *Gingles* re-

U.S. 124, *rev'g* Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969), a fact noted by Justice O'Connor in her concurring opinion in *Gingles*, 478 U.S. at 99. According to the Court in *Whitcomb*, one flaw in the district court's opinion was the expression as a general proposition that reapportionment was unconstitutional if a minority "is numerous enough to command at least an area sufficiently compact to constitute a single-member district . . . but who in one year or another, or year after year, are submerged in a one-sided multi-member district vote." *Whitcomb*, 403 U.S. at 156.

111. *Gingles*, 478 U.S. at 48-49 n.15.

112. *Id.*

113. *Id.* at 77 (emphasis in original). Black voters in District 23 (Durham County) had enjoyed proportional representation in their legislative delegation since 1973. Justices Stevens, Marshall and Blackmun dissented from the finding that the reapportionment for House District 23 did not violate § 2. *Id.* at 106.

114. *Id.* at 74-78. The adoption of this argument, which was consistent with the Administration's announced opposition to the results standard, would have greatly diminished the effectiveness of the amended statute.

115. *Id.* at 76.

116. See *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1482 (5th Cir. 1984); *Jones v. City of Lubbock*, 730 F.2d 233, 234 (5th Cir. 1984) (Higginbotham, J., concurring)

jected this attempted backdoor reintroduction of an intent requirement in vote dilution cases. According to the Court, “[a]ll that matters under § 2 and under a functional theory of vote dilution is voter behavior, not its explanations.”¹¹⁷ Bloc voting could be shown “where there is ‘a consistent relationship between [the] race of the voter and the way in which the voter votes,’ . . . or to put it differently, where ‘black voters and white voters vote differently.’”¹¹⁸ While no simple doctrinal test is applicable in all cases, legally significant racial bloc voting exists in general where “a white bloc vote . . . normally will defeat the combined strength of minority support plus white ‘crossover votes.’”¹¹⁹

The Court thus simplified and added predictability to the application of the standard for determining vote dilution in cases challenging discriminatory districting. By focusing almost exclusively on demographics and racial patterns in elections the Court attempted to place claims of vote dilution based on race on the same evidentiary footing as claims of vote dilution based on population disparities. The *Gingles* inquiry avoids unnecessary investigation into historical, social, and economic dynamics and intent, and attempts to measure dilution in the same objective way as the one person, one vote rule. That does not mean, however, that the *White-Zimmer* analysis has been completely superseded. As the legislative history and *Gingles* indicate, the *White-Zimmer* factors are still relevant in supporting claims of vote dilution

(the Solicitor General supported the state in this argument).

117. *Gingles*, 478 U.S. at 73. Four of the Justices (Burger, O'Connor, Powell, and Rehnquist) agreed that, while causation was not relevant to establish (or to rebut a showing) that “the minority group is politically cohesive and to assess its prospects for electoral success,” it might be evidence that could “affect the overall vote dilution inquiry” by showing, for example, that minorities “might be able to attract greater white support in future elections.” *Id.* at 100.

118. *Id.* at 53 n.21. The Brennan plurality felt that while black and white voters may frequently prefer candidates of their own race, it is “the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important.” *Id.* at 68 (emphasis in original). Justice White and the O'Connor group believed that the race of the candidate was critical to distinguish racial voting from voting along party or interest-group lines. *Id.* at 84, 101. This disagreement, academic in most voting cases, would be relevant in determining the existence of polarized voting *vel non* in cases where the minority favored a white candidate identified with minority interests who was defeated by members of the candidate's own race voting as a group.

119. *Id.* at 56. On the same day that it decided *Gingles*, the Court expanded the scope of vote dilution by holding for the first time that political gerrymandering was justiciable. *Davis v. Bandemer*, 478 U.S. 109 (1986). According to a plurality (Justices White, Brennan, Marshall, and Blackmun), “unconstitutional discrimination occurs only when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole.” *Id.* at 132. The impact of *Bandemer* on minority political participation as a competing claim in the construction of reapportionment plans is impossible to predict, although the Court indicated that this admittedly laconic standard was not “intended in any way to suggest an alteration of the standards developed in those cases for evaluating . . . claims [of racial vote dilution].” *Id.* at 132 n.13.

and it is unlikely that ordinary prudent counsel in contested cases would fail to present, or the court to consider, such evidence if it existed.¹²⁰ The *White-Zimmer* analysis would also be relevant in cases that did not involve districting or the use of multimember districts.¹²¹

B. Rejection of the Proportional Representation Argument in the 1982 Amendments

1. The Proportional Representation Issue

Amended section 2 and *Gingles* put to rest an objection frequently raised by defendants, and sometimes accepted by the courts, that the creation of majority black districts to remedy vote dilution was unlawful proportional representation. In *Marshall v. Edwards*,¹²² decided prior to the amendment of section 2, the Fifth Circuit ruled that equitable standards did not permit it to approve a county reapportionment plan based on racially proportional representation.¹²³ According to the court, “[a]lthough some democracies provide for proportional representation of parties and ethnic groups, it has never been an American tradition.”¹²⁴ The rejected plan had been devised by the defendants to

120. *Campos v. City of Baytown*, 840 F.2d 1240, 1249-50 (5th Cir. 1988); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 498 (5th Cir. 1987); see also *Gomez v. City of Watsonville*, 863 F.2d 1407, 1413 (9th Cir. 1988) (noting that the Supreme Court put “substantially greater emphasis on some of the Senate factors than on others”); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1555 (11th Cir. 1987) (describing *Gingles* as “essentially a ‘gloss’ on the Senate factors and a limitation on the interpretation of those factors in proving a vote dilution claim”).

121. The limits of exclusive reliance on the *Gingles* analysis are also apparent in cases where minorities, even though they are politically cohesive and the candidates of their choice are usually defeated by whites voting as a bloc, are so dispersed that it is not possible to draw a majority minority district. One court has held that under such circumstances plaintiffs failed to state a cause of action under § 2. *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988) (holding that “[i]n fashioning a clear regime for a prima facie section 2 case, *Gingles* precludes some small and unconcentrated minority groups from attempting to rectify vote dilution even though they have ‘less opportunity than other members in the electorate to participate in the political process and to elect representatives of their choice’”). But is it arbitrary and contrary to the spirit of the *White-Zimmer* analysis adopted by Congress in the 1982 amendment to conclude that minorities are not entitled to any remedy at all for the admitted dilution of their voting strength merely because a districting remedy is unavailable? That is elevating an accident of demography over claims of racial equality, an ironic and intolerable result under the Voting Rights Act. A more appropriate test for cases in which the strict *Gingles* analysis is not applicable would be whether vote dilution is shown by an aggregate of the Senate factors and, if so, whether the dilution is corrigible—if not by single member districts then by some other electoral arrangement, such as limited or cumulative voting. See *infra* text accompanying notes 190-98; cf. *Gomez*, 863 F.2d at 1414 (reversing the district court for arbitrarily dismissing a § 2 complaint because the minority community was not geographically compact, that is, a majority of the minority community lived outside of two proposed minority districts).

122. 582 F.2d 927 (5th Cir. 1978).

123. *Id.* at 934-36.

124. *Id.* at 934-35; see Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won't It Go Away?*, 33 UCLA L. REV. 257 (1985).

remedy the dilution effect of at-large elections. It created nine single member districts, five of which were majority black and four of which contained a majority of black registered voters. In reversing, the court of appeals directed the district court on remand to formulate a new plan giving more weight to "neutral values of rational boundaries, and to districts of equal voting population, and less weight to the political objective of proportional racial representation."¹²⁵

While a few other cases cited *Marshall v. Edwards*,¹²⁶ the great majority either required or approved the use of effective majority black voting districts.¹²⁷ No one formulation fits all cases, but the courts frequently defined an effective minority district as one in which minorities comprised approximately sixty-five percent of the total population. This figure takes into account that the minority population may be younger than the majority population and may have lower levels of registration and turnout due to the effects of past and continuing discrimination. The figure also has been used by the Department of Justice and reapportionment experts in measuring the degree of minority population needed to provide minorities a meaningful opportunity to elect a candidate of their choice.¹²⁸

The difficulty with relying on "neutral values" in reapportionment is that they may provide no remedy at all for racial discrimination. In majority white jurisdictions where voting is along racial lines, "racially neutral" districts that contain all white majorities simply insure the continued exclusion of minorities from effective political participation. Common sense and fairness reject such "remedies" for discriminatory vote dilution. As the court in *Ketchum v. Byrne*¹²⁹ concluded, "[t]here is simply no point in providing minorities with a 'remedy' for the illegal deprivation of their representational rights in a form which will not in

125. *Marshall*, 582 F.2d at 938.

126. See, e.g., *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1163 (5th Cir. 1981) (holding that a trial court "must avoid a strict proportionality" based on race and "fix boundaries that are compact, contiguous and that preserve natural, political and traditional representation").

127. See, e.g., *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1255 (5th Cir. 1981) (holding that "[a]s drawn the plan will permit blacks to elect a proportionate number of council members [and since] [t]hat conforms to the ideal [it] will not be disturbed by this court"); *Calderon v. McGee*, 584 F.2d 66, 69 (5th Cir. 1978) (finding that "[e]lection of two minorities to a board consisting of seven members would result in 28% minority representation and would reflect the approximate 28% minority population"); *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977); *Mississippi v. United States*, 490 F. Supp. 569, 575, 582 (D.D.C. 1979).

128. E.g., *Ketchum v. Byrne*, 740 F.2d 1398, 1413 (7th Cir. 1984); *Smith v. Clinton*, 687 F. Supp. 1361, 1363 (E.D. Ark. 1988), *aff'd mem.* 109 S. Ct. 548 (1988); *Rybicki v. State Bd. of Elections*, 574 F. Supp. 1082, 1113 n.87 (N.D. Ill. 1982); see also *Brace, Grofman, Handley & Niemi, Minority Voting Equality: The 65 Percent Rule in Theory and Practice*, 10 LAW & POL'Y 43 (1988).

129. 740 F.2d 1398 (7th Cir. 1984).

fact provide them with a realistic opportunity to elect a representative of their choice."¹³⁰

2. The "Complete Remedy" Standard

Congress resolved the matter of the propriety of creating majority black districts as a remedy for vote dilution when it amended section 2 in 1982. According to the Senate report, "[t]he court should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice."¹³¹ Voting cases cited in the report as exemplifying this "complete remedy and full opportunity" standard were *Kirksey v. Board of Supervisors*,¹³² and *In re Illinois Congressional Districts Reapportionment Cases*.¹³³ *Kirksey* concerned the sufficiency of a 1973 reapportionment plan for the Board of Supervisors of Hinds County, Mississippi, which was adopted after the prior plan had been invalidated on one person, one vote grounds. Although the county was thirty-nine percent black, the new plan fragmented the geographically concentrated minority community in the City of Jackson so that none of the five supervisory districts contained a majority of voting age blacks. The Fifth Circuit concluded that in the context of polarized voting in Hinds County the plan failed to provide minorities with a realistic opportunity to elect candidates of their choice, and that the district court "as a matter of its remedy-fashioning power . . . could not approve a plan which tended to carry forward into the future the long-lived denial of black access to the political process."¹³⁴ The court also confronted, and rejected, the argument that majority black districts would constitute an unlawful racial gerrymander.¹³⁵ In reaching this conclusion the court relied on *United Jewish Organizations of Williamsburg, Inc. v. Carey*,¹³⁶ in which the Supreme Court held that a state may properly take race into account in reapportionment to create majority nonwhite districts as long as it does not stigmatize or fence out a racial minority or dilute its voting strength. *In re Illinois Congressional Districts Reapportionment Cases* similarly approved the use of sixty-five percent minority voting districts for congressional reappor-

130. *Id.* at 1413.

131. S. REP. No. 417, *supra* note 24, at 31, reprinted in 1982 U.S. CODE, *supra* note 24, at 208-09.

132. 554 F.2d 139 (5th Cir. 1977).

133. No. 81-C-3915 (N.D. Ill. 1981), *aff'd sub nom.* Ryan v. Otto, 454 U.S. 1130 (1982).

134. *Kirksey*, 554 F.2d at 152.

135. *Id.*

136. 430 U.S. 144 (1977); *see id.* at 165.

tionment in Illinois.

That adoption of the "complete remedy and full opportunity" standard for section 2 violations validated the use of effective minority districts is apparent from subsequent decisions applying the statute. In *Gingles v. Edmisten*,¹³⁷ citing both *Kirksey v. Board of Supervisors* and *In re Illinois Congressional Districts Reapportionment Cases*, a district court concluded that Congress in amending section 2 "necessarily took into account and rejected as unfounded, or assumed as outweighed, the risk that creating 'safe' black-majority single member districts would perpetuate . . . racial polarization in voting behavior."¹³⁸ Similarly, in *United States v. Marengo County Commission*,¹³⁹ Judge Wisdom noted that in light of amended section 2, states were now obligated to provide "opportunities for effective participation by racial and language minorities," and suggested that such opportunities might be provided voluntarily through limited, cumulative or transferable preferential voting.¹⁴⁰ *Thornburg v. Gingles* removed any lingering doubt about the propriety of majority nonwhite districts. The Supreme Court held that such districts are legally required when they can provide a remedy for the dilution effect of multimember districting.¹⁴¹

Included in the final version of amended section 2 was the so-called "Dole compromise," a proportional representation disclaimer authored by Senator Robert Dole of Kansas, which stated that nothing in section 2 established "a right to have members of a protected class elected in numbers equal to their proportion in the population."¹⁴² According to the Senate report, the purpose of the disclaimer was to make clear that at-large elections were not unlawful per se, that minorities could not establish a violation of section 2 merely by showing that they had not been elected to office in proportion to their numbers in the population, and that minorities were not entitled to racial quotas for office holding.¹⁴³ Congress reinforced the intentment of section 2 by adopting si-

137. 590 F. Supp. 345 (E.D.N.C. 1984).

138. *Id.* at 356-57 (noting that Congress considered the risk that the "recognition of group voting rights was alien to the American political tradition").

139. 731 F.2d 1546 (11th Cir. 1984).

140. *Id.* at 1560 & n.24.

141. *Gingles*, 478 U.S. at 50-51 n.17.

142. 42 U.S.C. § 1973(b) (1982); S. REP. NO. 417, *supra* note 24, at 193-95, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 363-66; *see also* H.R. REP. NO. 227, *supra* note 24, at 30 (providing that the proposed results standard "does not create a right of proportional representation").

143. S. REP. NO. 417, *supra* note 24, at 23-24, 27, 31, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 200-01, 204-05, 208-09 (stating that the disclaimer "puts to rest any concerns that have been voiced about racial quotas"); *id.* at 16, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 193 (explaining that the purpose of the disclaimer was to articulate the consensus of Congress "that the test for Section 2 claims should not be whether members of a protected class have achieved proportional representation") (additional views of Senator Robert Dole).

multaneously the multistep *White-Zimmer* analysis for claims of vote dilution, and the requirement that remedies for section 2 violations be complete and provide minorities full access to the political process.

The Supreme Court confirmed this interpretation of the proportional representation disclaimer in *Thornburg v. Gingles*. It noted that the Senate report limited the circumstances under which a section 2 violation could be found in three ways: at-large elections are not considered per se unlawful, "the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation," and the existence of polarized voting may not be assumed by a court.¹⁴⁴ This construction has been applied consistently by the lower federal courts in other section 2 cases.¹⁴⁵

Majority nonwhite districts do not guarantee, or set quotas for, minority office holding and thus do not provide proportional representation as the phrase was used in the disclaimer and the legislative history. They merely afford minorities a proportional *opportunity* to elect candidates of their choice—of whatever race. Proportional, or equal, opportunity is not only consistent with, but is required by, section 2, the Constitution, and American democratic traditions.

C. *The Red Herring of Resegregation*

Opponents of majority nonwhite districts have claimed that, proportional representation aside, the districts are undesirable for various reasons of policy. During the 1981 congressional reapportionment in Georgia, for example, a member of the general assembly criticized a plan introduced by Senator Julian Bond creating a sixty-nine percent black fifth congressional district because "[i]t brings out resegregation in a fine county like Fulton and resegregation in a fine city like Atlanta."¹⁴⁶ The plan, he said, would disrupt the "'harmonious working relationship between the races'" and would cause polarization and "'white flight.'"¹⁴⁷ Other members said that a majority black congressional district would be merely a black ghetto.¹⁴⁸ One of the black mem-

144. *Gingles*, 478 U.S. at 46.

145. See *Gingles v. Edmisten*, 590 F. Supp. 345, 355 & n.13 (E.D.N.C. 1984) (stating that the "limit of the intended meaning of the disclaimer in amended Section 2" is that "the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population" does not alone establish vote dilution); see also *Buchanan v. City of Jackson*, 683 F. Supp. 1515, 1521 (W.D. Tenn. 1988); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1018 (C.D. Ill. 1987).

146. *Busbee v. Smith*, 549 F. Supp. 494, 507 (D.D.C. 1982).

147. *Id.*

148. *Id.*; see Fund, *Voting Law Hurts Blacks, Helps GOP*, Wall St. J., Dec. 21, 1987, at 18, col. 4 (commenting that majority black districts bear "resemblance to the justly criticized example of black Zimbabwe, which until this year was required to have 20 of its 100 seats in parliament

bers of the general assembly, suggesting that the opposition was racially biased, defended the Bond plan and charged that no one seemed concerned about "working relations" in the other nine majority white congressional districts. Opponents expressed racial concerns only about the single district in which whites would constitute the minority.¹⁴⁹

The general assembly rejected the Bond proposal and instead adopted a plan that divided the black population in the metropolitan Atlanta area among several congressional districts and thus minimized the percentage of minorities in the fifth district. The state sought section 5 preclearance of the plan but preclearance was denied. The District of Columbia court characterized opposition to the Bond plan as "based solely on race"¹⁵⁰ and concluded that the adopted plan "has a discriminatory purpose in violation of Section 5."¹⁵¹ As the battle over congressional reapportionment in Georgia demonstrates, much of the stated hostility to effective minority voting districts is a rationalization for maintaining the status quo or simply a mask for racist opposition to minority political participation. That is evident in other cases in which courts have invalidated at-large systems on the grounds of purposeful discrimination.¹⁵²

Congress, moreover, considered similar arguments that the amendment of section 2 and the implementation of districting remedies in vote dilution cases would be against public policy.¹⁵³ Congress weighed

reserved for whites"); Schuck, *What Went Wrong With the Voting Rights Act*, WASH. MONTHLY, Nov. 1987, at 51 (noting that majority nonwhite districts are "a paternalistic policy of electoral apartheid"); see also A. THERNSTROM, *WHOSE VOTES COUNT?: AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* 242-44 (1987).

149. *Busbee*, 549 F. Supp. at 507.

150. *Id.*

151. *Id.* at 517.

152. See, e.g., *Rogers v. Lodge*, 458 U.S. 613 (1982); *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1077 (S.D. Ala. 1982).

153. See, e.g., *Voting Rights Act Hearings*, *supra* note 66, at 511 (statement of Dr. Edward J. Erlor) (warning that a results standard "may allow the racial minority to become isolated"); *id.* at 662 (statement of John H. Bunzel) (stating that a results standard would "deepen the tensions, fragmentation and outright resentment among racial groups"); *id.* at 745 (statement of Michael Levin) (warning that a results standard would "pit race against race"); *id.* at 1115 (statement of Robert M. Brinson) (arguing that a results standard would "tend strongly to stigmatize minorities, to compartmentalize the electorate, to reinforce any arguable voting syndrome, and to prevent minority members from exercising influence on the political system beyond the bounds of their quota"); *id.* at 1250 (statement of Prof. Henry Abraham) (contending that a results standard "would enhance, that this would exacerbate, race consciousness"); *id.* at 1328 (statement of Donald L. Horowitz) (stating that a results standard "may well foster polarization"); *id.* at 1335 (statement of Prof. James F. Blumstein) (contending that a results standard "reduces the incentives for inter-racial coalition formation"); *id.* at 1449 (letter from Prof. William Van Alstyne) (warning that a results standard would "compel the worst tendencies toward race-based allegiances and divisions").

Members of the Senate subcommittee similarly argued that adoption of a results standard for § 2 would lead to the creation of "political ghettos for minorities" and that "minority influence

these arguments, assessed the risks involved, and judged that the amendments were justified and necessary to combat continuing racial discrimination and polarization in the electorate.¹⁵⁴ According to the Senate report, the testimony, and other evidence presented to the subcommittee belied the predictions and speculations that the amendment of section 2 would be a divisive factor that would polarize communities on the basis of race.¹⁵⁵ Numerous courts had applied the results test prior to 1980 and the decision in *Bolden*, and none of the dire consequences predicted by the opponents of the 1982 amendment had occurred. "There is, in short, an extensive, reliable and reassuring track record of court decisions using the very standard which the Committee bill would codify. The witnesses who attacked the 'result standard' virtually ignored those decisions in their analysis and, in most cases, admitted unfamiliarity with them, as well."¹⁵⁶ The subcommittee concluded that criticism of the application of the results standard in racially polarized jurisdictions was "like saying that it is the doctor's thermometer which causes high fever."¹⁵⁷ Because Congress rejected these arguments and speculations when it enacted the amendments to the Act in 1982, they are no longer factors to consider in vote dilution cases under section 2.¹⁵⁸

The available evidence, while not extensive, supports the conclusion that effective minority voting districts do not create racial isolation

would suffer enormously." S. REP. NO. 417, *supra* note 24, at 103, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 276 (emphasis in original) (additional views of Sen. Orrin G. Hatch of Utah).

154. Unlike the 1965 Act, there was no broad or regionally based opposition to the 1982 amendments. To the extent that there was opposition, it primarily came from the Administration, a few members of Congress, and a coterie of academicians. Foster, *Political Symbols and the Enactment of the 1982 Voting Rights Act*, in *THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 85, 102 (L. Foster ed. 1985) [hereinafter *CONSEQUENCES AND IMPLICATIONS*].

155. S. REP. NO. 417, *supra* note 24, at 31-32, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 208-10.

156. *Id.* at 32, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 209-10.

157. *Id.* at 34, *reprinted in* 1982 U.S. CODE, *supra* note 24, at 212.

158. The district court in *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984), took special note of the action taken by Congress and rejected for the same reasons similar objections raised to invalidating North Carolina's legislative reapportionment. The court stated:

Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that opponents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; the risk that creating "safe" black-majority single member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; and the fundamental risk that the recognition of "group voting rights" and the imposing of affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.

Id. at 356-57 (footnotes omitted).

or disserve the interests of racial minorities. Existing social science data confirm what common sense and the anecdotal evidence indicate—that the increased minority office holding associated with single member districts has also been associated with a substantial shift in responsiveness to minority interests and the inclusion of minorities in decisionmaking.¹⁵⁹ A recent study of ten cities in California found that minority political participation, facilitated by single member districts, was “associated with important changes in urban policy—the creation of police review boards, the appointment[] of more minorities to commissions, the increasing use of minority contractors, and a general increase in the number of programs oriented to minorities.”¹⁶⁰ The report also found that the mere presence of black and Hispanic council members tended to break down polarization and racial stereotyping and “has increased minority access to councils and changed decision-making processes.”¹⁶¹

A 1979 study in Alabama likewise found “a causal relationship between growth and black political participation and policy change: the greater the change in political participation, the greater the change in social welfare policy.”¹⁶² A study of Newark concluded that under a black mayor “[m]ore blacks were appointed to higher offices as well as employed throughout the city government,” and that there was a strengthening of the city human rights commission and the implementation of affirmative action policies.¹⁶³

Black officials generally confirm the findings in these reports. Tom McCain, the first black county administrator in the history of Edgefield County, South Carolina, gave the following example of the significance of increased black political participation and office holding at the most basic level of county services. “Before blacks held elected office, the

159. Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in *THE RIGHT TO VOTE* 164, 180 (Rockefeller Found. 1981) [hereinafter Morris]. And responsiveness aside, increased minority office holding enhances ethnic pride and dignity, underscores the legitimacy of elected government, and is a visible sign that public office is not reserved for whites only. A. THERNSTROM, *supra* note 148, at 239-40.

160. R. BROWNING, D. MARSHALL & D. TABB, *PROTEST IS NOT ENOUGH* 168 (1984).

161. *Id.* at 141, 168.

162. Hamilton, *supra* note 8, in *MINORITY REPORT*, *supra* note 8, at 14-15 (quoting Sanders, *New Voters and New Policy Priorities in the Deep South: A Decade of Political Change in Alabama*, Paper presented at the annual meeting of the American Political Science Association, Washington, D.C. (August 1979)).

163. Yatrakis, *Electoral Demands and Political Benefits: Minority as Majority, A Case Study of Two Newark Elections 1970, 1974* (Ph.D. diss. Columbia Univ., 1981) (source on file at Columbia Univ.). Other studies reach similar conclusions. See, e.g., H. GOSNELL, *NEGRO POLITICIANS: THE RISE OF NEGRO POLITICS IN CHICAGO* 367-68 (1935); W. KEECH, *THE IMPACT OF NEGRO VOTING: THE ROLE OF THE VOTE IN THE QUEST FOR EQUALITY* 93-94 (1968) (asserting that black electoral participation brought changes in the outcome of elections and the distribution of services in Tuskegee, Alabama and Durham, North Carolina), cited in Morris, *supra* note 159 (citing Eisinger, *Black Employment in Municipal Jobs: The Impact of Black Political Power*, 26-27).

county always picked up white folk's garbage and sometimes it picked up black folk's garbage. Now, we just pick up the garbage."¹⁶⁴ Carl Eggleston, the first black elected to the Farmville, Virginia city council says that "[o]ne of the main benefits of black office holding is that it allows us to be a part of what is taking place and to know what is going on. Before, we didn't."¹⁶⁵ Eggleston was a leader in a successful attempt to block a proposed city tax on food which would have had a disproportionate impact on black and poor residents.¹⁶⁶

Aside from local politics, the impact of increased minority political participation nationally often has been dramatic. In 1975, for the first time since Reconstruction, a majority of the white members of Congress from the South supported, on final passage, a major civil rights bill—the 1975 amendments to the Voting Rights Act. This watershed political event can be traced directly to the increased participation of blacks in the region's electoral process.¹⁶⁷ The same can be said of southern congressional support for the 1982 amendments of the Voting Rights Act, as well as support for the Civil Rights Restoration Act of 1987 and the Fair Housing Amendments Act of 1988.¹⁶⁸ The members of Congress from Alabama, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, and Texas cast 158 votes (seventy-nine percent) for, and only 41 votes against, the two 1988 civil rights bills.¹⁶⁹

164. Interview with Tom McCain in Edgefield, South Carolina (July 8, 1988).

165. McDonald, *Votes of Confidence*, FOUND. NEWS, Sept.-Oct. 1988, at 27, 31.

166. *Id.* There is even evidence, although tentative and anecdotal, that increased minority political participation is breaking down patterns of racial polarization and bloc voting. In 1986, as the result of reapportionment and the creation of a majority black district in the Delta area of the state, Mike Espy became the first black elected to Congress from Mississippi since Reconstruction. He received just 10% of the white vote and 52% of the vote overall. In 1988 he won re-election with 40% of the white vote and 66% of the vote overall, a remarkable and encouraging showing in a state which traditionally has taken the lead in discrimination against blacks. *Republicans Push "Hot Button" Issues*, 16 S. EXPOSURE, Winter 1988, at 5, 7.

167. Black, *Racial Composition of Congressional Districts and Support for Federal Voting Rights Legislation in the American South*, 59 SOC. SCI. Q. 435, 448-49 (1978); Stern, *Legislative Responsiveness and the New Southern Politics*, in CONSEQUENCES AND IMPLICATIONS, *supra* note 154, at 105, 114, 117-18 (stating that "[t]he shift in southern congressional voting on black rights issues is a manifestation of the black suffrage extension in recent years").

168. The Civil Rights Restoration Act, Pub. L. No. 100-259, 102 Stat. 28 (1988), which passed the House by a vote of 315 to 98 and the Senate by a vote of 75 to 14, was enacted in response to *Grove City College v. Bell*, 465 U.S. 555 (1984). The Act provided that civil rights laws protecting minorities, the aged and the disabled apply to an entire institution—not just to the program or activity receiving federal funds. The Fair Housing Act, Pub. L. No. 100-430, 102 Stat. 1619 (1988), which strengthened enforcement of fair housing laws and extended coverage to the disabled and families with children, passed the House by a vote of 376 to 23 and the Senate by a vote of 94 to 3. See *Special Report, Congressional Voting Records*, CIV. LIBERTIES ALERT, Nov. 1988, at 4-9, 12-18.

169. See *supra* note 168.

Another important example of the increasing influence of black political participation upon national decisionmaking was the 1987 rejection by the Senate of the Supreme Court nomination of Robert Bork, who was regarded by minorities as being soft on civil rights.¹⁷⁰ Judge Bork needed the votes of such southern senators as Howell Heflin and Richard Shelby of Alabama, John Breaux of Louisiana, and Sam Nunn of Georgia. He did not get them, perhaps because those Senators, although generally regarded as conservative, owed their elections in large part to black voters who would have been alienated by support of Judge Bork's confirmation. Those "no" votes from the South would have been unthinkable twenty years ago.¹⁷¹

D. The Quickened Pace and Expanded Scope of Litigation After 1982

The amendment of section 2 and the decision in *Rogers v. Lodge* in 1982, together with the *Gingles* decision in 1986, represented a strong congressional and judicial commitment to equality in voting and the support of vote dilution claims. They also accelerated the pace of voting rights litigation. This was a secondary, but critical, benefit to the voting rights revolution.

In the past, vote dilution cases often were endlessly litigated, with numerous appeals and remands for further consideration of the various *White-Zimmer* factors. Judges frequently viewed the same, or nearly the same, evidence and reached opposite conclusions.¹⁷² In addition, proving dilution was expensive and time consuming. This severely limited the number of discriminatory practices the minority and civil rights community could challenge.¹⁷³ As a practical matter, a plaintiff's

170. *Disputed Court Nominee Promises No Surprises*, N.Y. Times, Feb. 26, 1988, at B8, col. 1.

171. Neuborne, *Disfranchising the Poor*, Civ. LIBERTIES, Spring-Summer 1988, at 10 (reviewing F. PIVEN, *WHY AMERICANS DON'T VOTE* (1988)). Bork got the vote of just one of the 17 white Democratic senators from the states of the old Confederacy, Senator Hollings of South Carolina. Hollings, in what appeared to be an act of penitence over his support of Bork, later endorsed the Rev. Jesse Jackson as the Democratic Party's nominee for President. He was the only one of the southern Democratic senators to do so.

172. See, e.g., *Cross v. Baxter*, 604 F.2d 875 (5th Cir. 1979), *aff'd*, 639 F.2d 1383 (5th Cir. Unit B Mar. 1981), *modified*, 688 F.2d 279 (5th Cir. 1982), *vacated and remanded*, 460 U.S. 1065 (1983); *Nevett v. Sides*, 533 F.2d 1361 (5th Cir. 1976), *aff'd after remand*, 571 F.2d 209 (5th Cir. 1978).

173. *City of Mobile v. Bolden*, 446 U.S. 55 (1980), for example, took eight years to litigate and the plaintiffs' lawyers spent 5525 hours and approximately \$96,000 in out-of-pocket costs to prosecute the case. *Bolden v. City of Mobile*, Civ. No. 75-297-P (S.D. Ala. Dec. 12, 1983) (order on attorneys' fees and expenses). *McCain v. Lybrand*, 465 U.S. 236 (1984), a challenge to at-large elections in Edgefield County, South Carolina, took more than 10 years to litigate. The plaintiffs' lawyers spent in excess of 1651 hours on the case and had \$14,928 in direct expenses. *McCain v. Lybrand*, Civ. No. 74-281 (D.S.C. Apr. 13, 1987) (order on fees and costs). In a similar suit against

burden in a dilution case was to demonstrate the importance of race in every aspect of the public and private life of the challenged jurisdiction. Hundreds of hours were required to make a record of historical and continuing discrimination or polarization in voting, employment, public accommodations, appointments to boards and commissions, provision of services, police practices, jury selection, housing, social and business organizations, churches, and political associations. Historians, demographers, statisticians, political scientists and engineers, among others, had to be consulted in gathering and analyzing the relevant evidence and were regularly used as expert witnesses.¹⁷⁴

Prior to the adoption of the results standard in 1982, voting cases were brought in federal court at the rate of about 150 a year. Since then, with the streamlining and greater predictability of dilution challenges, the number has jumped to about 225 a year.¹⁷⁵ As a result of the increase in litigation, and the threat of litigation, more jurisdictions have abandoned their at-large elections and adopted district voting. According to the Department of Justice, in the three years prior to 1982, fewer than six hundred jurisdictions in the covered states changed their method of election. In the three years following the amendment of section 2 the number rose to 1354.¹⁷⁶

As these figures suggest, voting cases are being settled at a much greater rate than in the past. Edgefield County, South Carolina is illustrative. The first vote dilution challenge was filed against the county council in 1974 and was litigated for more than ten years, including an

the board of education, *Jackson v. Edgefield County School District*, 650 F. Supp. 1176 (D.S.C. 1986), plaintiffs' lawyers spent 806 hours in the district court on trial and pretrial proceedings and had \$35,795 in expenses. *Jackson v. Edgefield County School Dist.*, Civ. No. 9:85-709-3 (D.S.C. July 27, 1987) (order on fees and costs). In *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002 (D. Mont. 1986), a challenge to at-large elections in Big Horn County, Montana brought by members of the Crow and Northern Cheyenne Tribes, the plaintiffs' lawyers spent 767 hours in the district court and had expenses in the amount of \$17,641. *Windy Boy v. County of Big Horn*, No. CV 83-225-BLG-ER (D. Mont. Jan. 28, 1987). In *NAACP v. City of Dover*, Civ. No. 85-230-JLL (D. Del. Oct. 28, 1988), even though the case was settled well in advance of trial, the plaintiffs' lawyers still spent 335 hours in preparation and had approximately \$28,000 in expenses.

174. In recognition of the complexity of voting rights litigation, a 1980 survey of federal district court judges gave voting cases a weight of 2.8420. An average case was weighted 1.000 on a scale that measured the complexity and amount of judicial resources different categories of cases needed. Only 10 of the 55 categories listed in the survey exceeded voting cases in complexity. DIRECTOR OF ADMIN., OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT A-161 table X-2 (1980) [hereinafter 1980 ANNUAL COURT REPORT]; see also *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966) (noting that voting cases "are unusually onerous to prepare").

175. DIRECTOR OF ADMIN., OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT table C-2 (1979-1988) [hereinafter 1979-1988 ANNUAL COURT REPORT].

176. CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, ENFORCING THE LAW, VOTING 2 (Jan. 20, 1981-Jan. 31, 1987) [hereinafter VOTING]. In addition to litigation, state laws requiring district elections have also contributed to the changes in the form of local governments. See, e.g., 1978 Tenn. Pub. Acts ch. 934, § 8 (requiring district elections for county legislative bodies).

appeal to the Supreme Court.¹⁷⁷ A similar suit was filed against the county school board in 1985. Following the decision in *Gingles*, and a trial court decision for the plaintiffs, the defendants decided not to appeal.¹⁷⁸ Vote dilution suits were then filed against the two largest towns in the county, Johnston and Edgefield, and both municipalities settled without going to trial.¹⁷⁹

Dillard v. Crenshaw County,¹⁸⁰ a challenge by blacks to at-large elections in the nine counties in Alabama that used such procedures and were not already subject to federal lawsuits, also illustrates the quickened pace of voting rights litigation and the increased willingness of defendants to settle. Three of the nine counties reached full agreement with the plaintiffs shortly after the litigation was begun.¹⁸¹ Following the issuance of a preliminary injunction by the district court, three additional counties reached a full settlement and the remaining three reached partial settlements.¹⁸² In granting injunctive relief the court concluded that the adoption of the at-large systems by the state legislature was "racially inspired" and that a state-wide numbered place law enacted in 1961 was for the purpose of reshaping the at-large systems into "more secure mechanisms for discrimination."¹⁸³

The prior finding by the district court of intentional discrimination at the state level, which had been affirmed on appeal, clearly placed in doubt the continued legality of at-large elections anywhere in the state. The plaintiffs in *Dillard* accordingly amended their complaint to add 183 cities, counties, and county school boards that used at-large elections, alleging that they too were tainted by the racially inspired enactments of the Alabama legislature. All but seven of the jurisdictions

177. *McCain*, 465 U.S. 236; see also *supra* note 173 (documenting plaintiffs' lawyers' hours and expenses).

178. *Jackson*, 650 F. Supp. 1176.

179. *Jackson v. Johnston*, Civ. No. 9:87-955-3 (D.S.C. Sept. 30, 1987); *Thomas v. Mayor of Edgefield*, Civ. No. 9:86-2901-16 (D.S.C. May 27, 1987).

180. 649 F. Supp. 289 (M.D. Ala. 1986), *aff'd in part, remanded in part*, 831 F.2d 246 (11th Cir. 1987).

181. *Dillard*, 649 F. Supp. at 291.

182. The counties reaching partial settlement admitted liability under § 2 but argued that their retention of an at-large elected commission chair was permitted under the statute. The district court disagreed and enjoined the use of any at-large elected positions. *Id.* at 292, 298-99. Only one of the three counties appealed, and on appeal the district court was affirmed. *Dillard*, 831 F.2d at 252-53. The county argued that the chairperson was a single-member office such as a sheriff or a tax collector and thus not subject to proportional representation. The court of appeals, however, concluded that the chairperson was more directly tied to the work of the county commission and could not be treated as a single-office position. Under those circumstances the retention of at-large voting would not "with certitude completely remedy the Section 2 violation." *Id.* at 252 (emphasis in original). On remand the county adopted a system of rotating the chair among the five associate commissioners. *Dillard*, 679 F. Supp. at 1547.

183. *Dillard*, 640 F. Supp. at 1361, 1357; see also *supra* notes 26-32.

entered into an interim consent decree agreeing to a resolution of the plaintiffs' claims in the district court.¹⁸⁴

In addition to the increase in the number of voting rights cases being brought and the jurisdictions affected, the scope of the litigation has been broadened. Section 2's prohibition of vote dilution has been expressly held to cover the election of judges. It seems equally clear that the statute applies to the election of any public official in which the vote dilution is corrigible.

Defendant jurisdictions have argued that section 2, like the one person, one vote rule, applies only to the election of legislators and that judicial officials do not "serve" a constituency in the same way that representatives do.¹⁸⁵ These arguments have been rejected by the appellate courts considering them. In *Chisom v. Edwards*,¹⁸⁶ for example, the court held that the "plain language" of the Act provided that section 2 was to apply to the election of any candidate for public office, including judges. The court found further support for its position in the "absence of any legislative history" of the 1982 amendments warranting a contrary conclusion, and in the holding of the courts and the Attorney General that section 5 of the Act applies to voting changes affecting the election of judges.¹⁸⁷ Similarly, in *Dillard v. Crenshaw County*,¹⁸⁸ the court of appeals rejected the suggestion that elected administrative positions are excluded from section 2 coverage. According to the court, "[n]owhere in the language of Section 2 nor in the legislative history does Congress condition the applicability of Section 2 on the function performed by an elected official."¹⁸⁹

E. Strategies for a Complete Remedy

The recent increases in minority office holding can be traced, not simply to formal access to the ballot, but directly to the creation of

184. *Dillard v. Baldwin County Bd. of Ed.*, 686 F. Supp. 1459, 1461 (M.D. Ala. 1988). The parties later agreed that the court should treat 165 of the jurisdictions as individual lawsuits with separate files and civil action numbers. *Id.*

185. In *Wells v. Edwards*, 347 F. Supp. 453, 455 (M.D. La. 1972) (citing *Buchanan v. Rhodes*, 249 F. Supp. 860 (N.D. Ohio 1960)), *aff'd*, 409 U.S. 1095 (1973), the district court held that judges do not represent people but serve them. As a consequence the rationale that one person, one vote preserves a representative form of government did not apply to the judiciary. *Id.*; accord *Voter Information Project, Inc. v. City of Baton Rouge*, 612 F.2d 208 (5th Cir. 1980).

186. 839 F.2d 1056, 1060 (5th Cir.), *cert. denied sub nom. Roemer v. Chisom*, 109 S. Ct. 390 (1988).

187. *Id.* at 1061-64 (emphasis in original) (citing *Haith v. Martin*, 618 F. Supp. 410, 413 (E.D.N.C. 1985), *aff'd*, 477 U.S. 901 (1986), and *Kirksey v. Allain*, 635 F. Supp. 347, 349 (S.D. Miss. 1986)); accord *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988); *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987).

188. 831 F.2d 246 (11th Cir. 1987).

189. *Id.* at 251.

effective minority electoral districts.¹⁹⁰ Single member districts, however, do not always provide an equal opportunity for racial minorities to elect representatives of their choice, as where the minority population is geographically dispersed.¹⁹¹ In some cases, therefore, it may be desirable or necessary to adopt measures that do not rely exclusively on single member districts, such as limited or cumulative voting, in order to provide the complete and full remedy for vote dilution mandated by Congress.¹⁹² In a limited voting system, the voter votes for fewer than the number of seats to be filled. In a cumulative system, the voter may cast a multiple vote for less than a full slate of candidates.¹⁹³ Both systems, known as semi-proportional systems, enhance the opportunity for minority office holding where the minority population is too dispersed to allow for the creation of a fair number of single member districts.¹⁹⁴

190. NAT'L ROSTER 1986, *supra* note 13, at 1, 5. In Mississippi and Alabama, for example, every black in the state legislature was elected from a majority black district. McDonald, *Votes of Confidence*, 29 FOUND. NEWS, Sept.-Oct. 1988, at 26, 31. In Big Horn County, Montana, the only Indian who has served on the county commission was elected from a majority-Indian district. *Id.* In Georgia, of the six black state senators and 22 representatives, only one, Michael Thurmond (D.-Athens), was elected from a majority white district. *Blacks Fighting To Gain Six Seats*, Atlanta Const., July 3, 1988, at 1B, col. 6, at 4B, col. 4. In those cities and counties in Texas that have adopted single member districts or redrawn district lines "[t]he results have in all cases been favorable to ethnic minorities: registration, voter turnout, and minority representation have increased." D. MONTEJANO, *ANGLOS AND MEXICANS IN THE MAKING OF TEXAS, 1836-1986*, at 293 (1987).

191. See B. CAIN, *supra* note 37, at 36-37; Grofman, *supra* note 95, at 160; Still, *Alternatives to Single Member Districts*, in VOTE DILUTION, *supra* note 26, at 249.

192. See S. REP. NO. 417, *supra* note 24, at 31, reprinted in 1982 U.S. CODE, *supra* note 24, at 208-09 (stating that the court should exercise its traditional equitable powers to remedy completely the prior dilution of minority voting strength).

193. See R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* 523-25 (1968); E. LAKEMAN, *HOW DEMOCRACIES VOTE: A STUDY OF MAJORITY AND PROPORTIONAL ELECTORAL SYSTEMS* 85-88 (1970); Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 223-36 (1989); Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 YALE L.J. 144, 148-49, 153-54 (1982).

194. One court has ruled that these remedies are required when a districting remedy is incomplete, but the decision was overturned on appeal. In *McGhee v. Granville County*, 860 F.2d 110, 115 (4th Cir. 1988), the court of appeals reversed a district court order requiring the use of limited voting when all single member districts, because of the dispersion of the minority population, did not completely remedy the existing vote dilution. The appellate court reasoned that since the plaintiffs challenged an existing geographical districting system, their remedy was limited to a new geographical districting system. See *id.* at 118. When the use of a geographical districting system itself was alleged and found to cause vote dilution, however, *McGhee*, at least on its face, would not appear to be an obstacle to the use of limited or cumulative voting. The fortuity of population dispersion logically should not be a basis for curbing the broad equitable powers of the courts to fashion effective remedies for voting rights violation. See *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547 (11th Cir. 1987), *cert. denied sub nom. Duncan v. Carrollton*, 108 S. Ct. 1111 (1988) (reversing a district court's holding against plaintiffs who challenged a single county commissioner form of government, and remanding the case for proper application of *Gingles* standards); cf. *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 946 (7th Cir. 1988) (requiring the minor-

Limited and cumulative voting, despite claims that they are exotic procedures antithetical to American traditions, often have been used in the United States¹⁹⁵ and have consistently withstood constitutional challenges.¹⁹⁶ They also have been adopted in a number of recent consent decrees in section 2 cases challenging at-large elections and have been precleared by the Attorney General.¹⁹⁷ Where limited and cumulative voting have been implemented they have been shown to be an effective remedy for section 2 violations, and there is no evidence that they have had an adverse effect on local politics or undermined American democratic traditions.¹⁹⁸

IV. VOTING RIGHTS ENFORCEMENT

A. *The Department of Justice*

The Department of Justice has broad powers and duties under the Voting Rights Act, including reviewing submissions of voting changes under section 5, assigning federal examiners and observers of elections and conducting various litigation activities.¹⁹⁹ As part of its litigation program the Department may bring affirmative suits to enforce the voting laws and by statute must defend section 5 preclearance and bail-out suits brought in the District Court for the District of Columbia. The Department also must defend challenges to the constitutionality of acts of Congress, including the Voting Rights Act.²⁰⁰

ity group to constitute a majority in a single-member district and denying plaintiffs' requests for the addition of seats to the park and school boards).

195. As noted in Grofman, *supra* note 95, at 163-64, New York, Boston, and Indianapolis occasionally have used limited voting since 1870. Pennsylvania and Connecticut use it extensively for county and school board elections. Conecuh County, Alabama adopted limited voting in 1982. Cumulative voting was used in several jurisdictions in Illinois until 1980.

196. See *Cintron-Garcia v. Romero-Barcelo*, 671 F.2d 1, 6-7 (1st Cir. 1982); *Orloski v. Davis*, 564 F. Supp. 526, 529-30 (M.D. Pa. 1983); *LoFrisco v. Schafer*, 341 F. Supp. 743, 749 (D. Conn.), *aff'd*, 409 U.S. 972 (1972).

197. See, e.g., *Harry v. Bladen County*, Civ. No. 87-72-CIV-7 (E.D.N.C. April 21, 1988); *United States v. City of Augusta*, Civ. No. CV 187-004 (S.D. Ga. July 22, 1988).

198. See Affidavit of Jerome A. Gray, Field Director of the Alabama Democratic Conference (Sept. 22, 1988) (source on file with Author) (reporting that either limited or cumulative voting was adopted by consent in 27 jurisdictions in *Dillard v. Crenshaw County*, and 17 black candidates were elected in the 16 jurisdictions where blacks qualified to run for city council seats). Gray concluded that

the tremendous success rate in which black candidates were elected under these new systems attests that they are yet another effective way to remedy Section 2 violations of at-large elections, especially in localities where it is impractical to draw districts or where the black population may be too dispersed, but where there is still a definite minority community of interest.

Id.

199. VOTING, *supra* note 176, at 1.

200. 42 U.S.C. §§ 1973a-1973c (1982 & Supp. IV 1986); 28 U.S.C. § 2403 (1982).

1. Section 5

The record of the Reagan Administration in reviewing section 5 submissions has been erratic at best.²⁰¹ Although the Department has objected to many potentially discriminatory voting changes, its overall objection rate is lower than previous administrations'. During the second term of the Nixon Administration and the Ford and Carter Administrations (1971-1980), the average rate of section 5 objections was 3.87 percent per year. During the first seven years of the Reagan Administration, the average rate dropped to 1.02 percent.²⁰² This decline no doubt reflects to some extent the deterrent effect of section 5, but the record also shows that a number of submissions precleared by the Department were later invalidated by the courts. In 1982, for example, the Attorney General precleared North Carolina's legislative reapportionment, Louisiana's congressional reapportionment, and Montgomery, Alabama's council apportionment, concluding that they had no adverse racial purpose or effect. The federal courts later set aside major portions of all three plans on the grounds that they diluted minority voting strength in violation of section 2 of the Act.²⁰³

The problem with section 5 enforcement has not been with the professional or career staff but with the Administration's political appointees. The Assistant Attorney General for Civil Rights frequently has overruled his staff and made section 5 decisions for political reasons. At the confirmation hearings on his appointment to be Associate Attorney

201. The administration of § 5 historically was problematic for a number of reasons. During the early years under the Johnson Administration (1965-1968), the Department of Justice placed very little emphasis on § 5, and the covered jurisdictions complied only minimally. Under President Nixon, the Attorney General advocated repeal of § 5 and in practice excluded annexations and redistricting from coverage. Systematic compliance with the preclearance requirement only began after the Supreme Court authoritatively construed the scope of § 5 and the allocation of the burden of proof in *Allen v. State Bd. of Elections*, 393 U.S. 544 (1969), and *Perkins v. Matthews*, 400 U.S. 379 (1971), and after the Attorney General issued guidelines for the administration of § 5. *Procedures for the Administration of the Voting Rights Act of 1965*, 30 Fed. Reg. 18,186 (1971) (codified at 28 C.F.R. § 51.1 (1988)). Even then, many jurisdictions continued to flout the statute. For a discussion of past and continuing problems in § 5 enforcement, see H. BALL, D. KRANE & T. LAUTH, *COMPROMISED COMPLIANCE: IMPLEMENTATION OF THE 1965 VOTING RIGHTS ACT* (1982); *COMPTROLLER GENERAL OF THE UNITED STATES, VOTING RIGHTS ACT—ENFORCEMENT NEEDS STRENGTHENING* (1978); Days & Guinier, *Enforcement of Section 5 of the Voting Rights Act*, in *VOTE DILUTION*, *supra* note 26, at 167; McDonald, *supra* note 4, at 62-80.

202. F. PARKER, *VOTING RIGHTS ENFORCEMENT IN THE REAGAN ADMINISTRATION* 26 (1989).

203. See *Gingles v. Edmisten*, 590 F. Supp. 345, 351 (E.D.N.C. 1984), *aff'd in part, rev'd in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); *Major v. Treen*, 574 F. Supp. 325, 328 (E.D. La. 1983); *Buskey v. Oliver*, 565 F. Supp. 1473, 1484-85 (M.D. Ala. 1983); see also *Nisby v. Commissioners Court*, Civ. No. B-83-342-CA (E.D. Tex. Aug. 14, 1984) (setting aside a redistricting plan under § 2 that was precleared by the Department of Justice). For a discussion of the role and commitment of Department of Justice staff attorneys in enforcement of civil rights, see Selig, *The Reagan Justice Department and Civil Rights: What Went Wrong*, 1985 U. ILL. L. REV. 185, 188.

General, Assistant Attorney General William Bradford Reynolds testified that from 1981 to 1985 he overruled staff recommendations for section 5 objections at least thirty times.²⁰⁴ One case in which he overruled his staff arose in Edgefield County, South Carolina. In that case, Reynolds denied the staff permission to file a district court brief (which previously had been prepared and approved) supporting the minority plaintiffs in a section 5 enforcement action after he received complaints from Senator Strom Thurmond of South Carolina, who began his political career in Edgefield.²⁰⁵ The Department similarly withdrew an objection to a municipal annexation in Jackson, Mississippi after receiving complaints from Senator Thad Cochran of Mississippi and Representative Trent Lott of Mississippi.²⁰⁶ Based on these and other examples of political interference with section 5 enforcement, the Leadership Conference on Civil Rights issued a report in 1982 concluding that "the Reagan Administration's Justice Department has permitted political considerations to corrupt fair administration of the law."²⁰⁷

In other section 5 cases the Attorney General has either failed to support minority plaintiffs who had meritorious claims or, as in *Thornburg v. Gingles*, actively opposed them. For example, in *Blanding v. Dubose*,²⁰⁸ black residents of Sumter County, South Carolina brought suit to enjoin at-large elections for the county council. The residents alleged that the county failed to comply with a section 5 objection by the Attorney General. Shortly after the suit was filed, the United States filed a similar action and the two cases were consolidated. The issue in the case was whether a letter from the county was a request for reconsideration or a new preclearance submission. The letter informed the Attorney General that a subsequent referendum had been held approving at-large council elections. If the letter was a new submission, as the county argued, the failure of the Attorney General to interpose a new objection within sixty days would result in preclearance of the voting change. The three judge court agreed with the county and granted it summary judgment. The district court's opinion allowed a jurisdiction to circumvent section 5 by readopting a contested voting practice and

204. *Nomination of William Bradford Reynolds to be Associate Attorney General of the United States: Hearings Before the Senate Comm. on the Judiciary*, 99th Cong., 1st Sess. 448 (1985).

205. *Justice Department Withdraws Support in Edgefield Case*, *The State* (Columbia, S.C.), Sept. 14, 1981, at 1B, col. 4.

206. *Cochran-Lott, One-two Punch Attack Stirs Controversy in Federal Agencies*, *Clarion-Ledger* (Jackson, Miss.), July 22, 1981, at A1, col. 3.

207. LEADERSHIP CONFERENCE ON CIVIL RIGHTS, *WITHOUT JUSTICE: A REPORT ON THE CONDUCT OF THE JUSTICE DEPARTMENT IN CIVIL RIGHTS IN 1981-82*, at 65 (1982). F. PARKER, *supra* note 202, at 14-15.

208. 509 F. Supp. 1334, 1335-37 (D.S.C. 1981), *rev'd*, 454 U.S. 393 (1982).

merely advising the Department of Justice of its action, but without specifically requesting preclearance. The Attorney General refused to appeal, acquiescing in this restrictive interpretation of section 5. The minority plaintiffs did appeal, however, and the Supreme Court reversed in a unanimous per curiam opinion.²⁰⁹

In a case from predominantly black Greene County, Alabama, *Hardy v. Wallace*,²¹⁰ the Attorney General similarly retreated from section 5 enforcement. The Department originally objected to a statute providing for the appointment by the governor, rather than by the county's legislative delegation, of members of the county racing commission. The change was triggered by the likely election, under a new apportionment, of blacks to Greene County's house and senate districts. The Attorney General, following a request for reconsideration, withdrew the objection and ruled that the change was not within the scope of section 5. Minority plaintiffs challenged the new statute and a three-judge court enjoined its use, holding that it was subject to section 5 review.

2. Proposed Revision of the Section 5 Guidelines

The Department of Justice not only opposed the twenty-five year extension of preclearance in 1982,²¹¹ but also published a proposed revision of procedures for the administration of section 5²¹² that would have watered down section 5 enforcement. The revisions, which were strongly criticized by the civil rights community,²¹³ reflected a narrow or erroneous reading of intervening court decisions and congressional intent in extending and amending the Act in 1982, and failed to incorporate decisions that had strengthened the Act. More particularly, the revisions

209. *Blanding v. Dubose*, 454 U.S. 393 (1982) (holding that the county's letter was a request for reconsideration, not a preclearance submission).

210. 603 F. Supp. 174, 177, 181-82 (N.D. Ala. 1985) (the Assistant Attorney General denied § 5 coverage and jurisdiction via letter to Alabama's Attorney General).

211. *Voting Rights Act Hearings*, *supra* note 66, at 67-68. The Administration endorsed only a 10 year extension of preclearance conditional on a liberalized bailout, which would have allowed many discriminatory jurisdictions to escape § 5 review. *Id.* at 70.

212. 50 Fed. Reg. 19,122 (1985) (codified at 28 C.F.R. §§ 51.1 to 51.67 (1988)). The regulations, first published in 1971, 36 Fed. Reg. 18,186 (1971), were revised on January 5, 1981, 46 Fed. Reg. 870 (1981); 46 Fed. Reg. 9570 (1981). Further revision was necessary, according to the Attorney General, to conform the procedures to recent interpretations of § 5 contained in judicial decisions and the 1982 Voting Rights Act amendments. 28 C.F.R. § 51 (1988).

213. See *Proposed Changes to Regulations Governing Section 5 of the Voting Rights Act: Oversight Hearings Before the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary House of Representatives*, 99th Cong., 1st Sess. 2, 43, 84, 166 (1985) [hereinafter *Oversight Hearings*] (testimony on behalf of American Civil Liberties Union, Joint Center for Political Studies, League of Women Voters, Mexican American Legal Defense and Educational Fund, and Texas Rural Legal Services).

narrowed the scope of section 5 review of reapportionment plans developed as the result of litigation, allowed the implementation of unprecleared voting practices on the basis of "exigent circumstances," granted preclearance of discriminatory changes when the section 5 violation was "unavoidable," and suggested that a reapportionment plan or an annexation would be objectionable only if the reduction of minority voting strength was "significant."²¹⁴

The House held oversight hearings on the revisions on November 13 and 20, 1985, and issued a report strongly critical of the proposed changes. According to the House report, "the proposed regulations would undermine the effective enforcement of the Voting Rights Act. The proposed regulations abandon proven methods of success and adopt new methods not sanctioned by the 1982 Amendments or by case law."²¹⁵ As a result of the criticisms that emerged during the House hearings and the receipt of comments from other interested parties, the Attorney General removed most of the objectionable features from the final version of the regulations issued on January 6, 1987.²¹⁶

The most controversial of the proposals was section 51.56(c)(1), which authorized an objection to a section 5 submission based on a violation of the results standard of section 2 only "if there is clear and convincing evidence of such a violation" presented by "the party or parties alleging violations of the Section." Congress indicated in the legislative history that section 2 applied to section 5 preclearance in order to correct *Beer v. United States*,²¹⁷ which defined the "effect" language of section 5 to mean only retrogression. According to the majority in *Beer*, section 5 was designed to freeze voting practices and maintain the status quo. Thus, voting procedures free of racial purpose which did not cause further harm to minorities were not objectionable under the effect test of section 5, no matter how unfair in their application. The Senate report that accompanied the amendment, as well as its key sponsors, made it clear that section 2 was to apply to section 5. Moreover, preclearance should be denied to a voting practice, even if not retrogressive, if it had a discriminatory result or diluted minority voting strength.²¹⁸ This interpretation is consistent with the Attorney Gen-

214. For a more complete discussion of the legal basis for these criticisms, see *Oversight Hearings*, *supra* note 213, at 2, 43, 84, 166 (prepared statements of Dorothy S. Ridings, Cynthia Hill, Laughlin McDonald, Judith Sanders-Castro, Dianne Ross, and Frank R. Parker).

215. H.R. REP. SER. No. 9, 99th Cong., 2d Sess. 11 (1986).

216. 28 C.F.R. § 51 (1988).

217. 425 U.S. 130, 141 (1976).

218. See S. REP. No. 417, *supra* note 24, at 12 n.31, reprinted in 1982 U.S. CODE, *supra* note 24, at 189 n.31; 128 CONG. REC. S57,095 (daily ed. June 18, 1982) (remarks of Sen. Kennedy); 128 CONG. REC. H3841 (daily ed. June 23, 1982) (remarks of Rep. Sensenbrenner, agreed to by Rep. Edwards). Section 2 would have its greatest potential application to submissions that did not show

eral's established practice, known to Congress at the time of enactment of the 1982 amendments, of denying preclearance changes which violated other provisions of the Act. The Attorney General, for example, in the past had denied section 5 preclearance to changes which violated section 2 as well as section 4(f)(4) of the Act, a provision requiring certain covered jurisdictions to implement bilingual voting procedures.²¹⁹

These are the only direct references in the legislative history. Nevertheless, opponents have argued that brief colloquies during the debate in the House indicate that section 2 was not to apply to preclearance.²²⁰ As the House oversight committee concluded, however, these colloquies did not address the question of whether section 2 applied to section 5, but only to the more general issue of whether the preclearance requirement had been changed. The Edwards colloquies, therefore, confirm that section 5 was not changed on its face, but do not address whether section 2 standards apply to preclearance.²²¹

At the time of the colloquies the fourth and fifth congressional districts in the Atlanta area, represented by Representatives Elliot Levitas and Wyche Fowler, were involved in section 5 litigation in the District Court for the District of Columbia.²²² The case, *Busbee v. Smith*,²²³ concerned whether the general assembly had fragmented the concentration of minority population in the metropolitan area to limit the number of blacks in the fifth district—or, in the words of the chairman of the house reapportionment committee, to keep from drawing “a nigger district.”²²⁴ Given the options for reapportionment, a “blacker” fifth district (an obvious concern to Fowler, a white Democrat) would mean a “whiter,” and more Republican, fourth district (an obvious concern to Levitas, also a white Democrat).²²⁵ The state argued, among other things, that the reapportionment could not violate the effect, or retrogression, standard of section 5 since the proposed fifth district had a

retrogression either because it was absent or because it was difficult to measure, for example, when a jurisdiction changed from direct appointments to elections at-large. See *County Council of Sumter County v. United States*, 596 F. Supp. 35, 38 (D.D.C. 1984).

219. H.R. REP. SER. No. 9, *supra* note 215, at 4; see *Voting Rights Act Hearings, supra* note 66, at 1659 (statement of William Bradford Reynolds, Assistant Attorney General, Civil Rights Div.); see also 28 C.F.R. § 55.2(e) (1988). This interpretation also is consistent with the broad construction of § 5 mandated by Congress and the courts and with the general remedial purposes of the Act.

220. See *Oversight Hearings, supra* note 213, at 71 (prepared statement of Katharine I. Butler) (citing 128 CONG. REC. H3844-45 (daily ed. June 23, 1982) (remarks of Representatives Levitas, Fowler, and Edwards)).

221. H.R. REP. SER. No. 9, *supra* note 215, at 4.

222. *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

223. 549 F. Supp. 494 (D.D.C. 1982), *aff'd*, 459 U.S. 1166 (1983).

224. *Id.* at 501, 515.

225. *Id.* at 507.

higher black population percentage (fifty-seven percent) than under the existing plan (fifty percent).²²⁶ As both Levitas and Fowler knew, the adoption of a section 2 results standard for section 5 would have made this argument academic. The court denied preclearance, reasoning that, while the plan "technically . . . does not have a discriminatory effect," the state had failed to satisfy its burden that the plan was "nondiscriminatory in purpose."²²⁷ Although the case was decided shortly after the 1982 amendments to the Act, the court did not discuss the application of section 2 to preclearance.²²⁸

In light of *Busbee*, the cryptic Levitas-Fowler colloquies can be best understood as reflecting the private concerns of two members of Congress. They hardly represent the general understanding of the House as a whole, much less that of the Senate. In any event, to the extent that there is a conflict between the Senate report and the statements of key sponsors of the bill (Senator Edward Kennedy and Representative James Sensenbrenner) on the one hand, and Representatives Fowler and Levitas on the other, normal rules of legislative construction indicate that the former take precedence over the latter.²²⁹

The Attorney General, who had opposed the amendment of section 2, vacillated on whether, and how, to apply section 2 to preclearance.²³⁰ In a section 5 case from Sumter County, South Carolina, concerning a change from appointed county officials to officials elected at-large, the Department took three different positions in three successive briefs. It argued initially that to obtain preclearance a jurisdiction must establish that a voting change does not violate section 2.²³¹ Nine days later the Department filed a substitute brief that deleted the section 2 argument entirely.²³² Before the litigation was over the Department filed a third brief arguing that section 2 applied to section 5, but that those oppos-

226. *Id.* at 498, 516.

227. *Id.* at 516, 518.

228. The state developed a second plan for a fifth district with a black population exceeding 65%. That plan was approved by the court. *Id.* at 520.

229. See *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 526-27 (1982) (stating that the comments of legislation sponsors "are an authoritative guide to the statute's construction"); *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 548, 564 (1976); *Zuber v. Allen*, 396 U.S. 168, 186 (1969) (stating that reports of standing committees represent "the considered and collective understanding" of the drafters and are an acknowledged source for determining legislative intent); *NLRB v. Fruit Packers*, 377 U.S. 58, 66 (1964); *American Jewish Congress v. Kreps*, 574 F.2d 624, 629 n.36 (D.C. Cir. 1978); *American Airlines, v. Civil Aeronautics Bd.*, 365 F.2d 939, 948-49 (D.C. Cir. 1966) (stating that "reports by the legislative committees responsible for formulating the legislation must take precedence in event of conflict over statements in the legislative debates on the floors of the houses of Congress").

230. See *supra* note 104.

231. U.S. Attorney General's Memorandum, Oct. 18, 1982, at 17-19, *County Council of Sumter County v. United States*, 596 F. Supp. 35 (D.D.C. 1984).

232. U.S. Attorney General's Memorandum, Oct. 27, 1982, *Sumter County*, 596 F. Supp. 35.

ing preclearance (the United States or minority intervenors) had the burden of establishing a prima facie violation of the statute.²³³ The district court did not reach the section 2 issue but denied preclearance on the grounds that Sumter County had not shown that the submission was free of racial purpose or effect.²³⁴

The third position taken in the Sumter County case was essentially the one adopted by the Attorney General in the final version of the section 5 guidelines issued in January 1987.²³⁵ The difficulties with the Attorney General's position are that it shifts the burden of proof in section 5 submissions and lowers the standard for preclearance. The law of section 5 prior to 1987 was that submitting jurisdictions had the burden of proof.²³⁶ Under the new guidelines, those opposing preclearance on section 2 grounds have the burden of proof. In addition, prior to 1987, if the evidence of discriminatory purpose or effect was ambiguous, preclearance would be denied. Under the new guidelines, if the evidence of discriminatory results is ambiguous preclearance will be granted. The guidelines thus lower the standard for preclearance and, contrary to the intent of Congress, once again give state officials some of the advantage of inertia and delay in enacting new voting practices.²³⁷

B. *Affirmative Litigation: The Civil Rights Community Carries the Load*

The Department has been most neglectful in enforcing the Voting Rights Act in the area of affirmative litigation, where it must exercise initiative in instituting challenges to discriminatory practices. Between 1978 and 1988, a total of 2236 voting rights lawsuits were filed in the

233. U.S. Attorney General's Pre-Trial Brief, Jan. 24, 1983, at 74, *Sumter County*, 596 F. Supp. 35. The Department later took yet another position—that § 2 did not apply to § 5 at all. At a meeting of political scientists in Washington, D.C. in August 1986, the Assistant Attorney General announced that the Department no longer would object to submitted voting changes on the basis of § 2 because "it would be too burdensome to consider discriminatory results in each preclearance review." Kurtz, *Justice Dept. Won't Assess Possible Bias in Election Plans*, Wash. Post, Aug. 30, 1986, at A1, col. 5, at A9, col. 1.

234. *Sumter County*, 596 F. Supp. at 39. The defendant-intervenors preclearance also raised the application of § 2 to § 5 in *Busbee v. Smith*, 549 F. Supp. 494 (D.D.C. 1982), but the court again did not reach the issue.

235. The final version, 28 C.F.R. § 51.55(b)(2) (1988), provides that the Attorney General will object to a submission under § 5 "to prevent a clear violation of amended Section 2." The regulations and the testimony of the Assistant Attorney General at the House oversight hearings provide that those opposing preclearance on § 2 grounds have the burden of showing a violation of the statute. See 28 C.F.R. § 51 (1988); *Oversight Hearings*, *supra* note 213, at 151.

236. *McCain v. Lybrand*, 465 U.S. 236, 256 (1984) (stating that the adoption of a new election practice by a covered jurisdiction "raises, in effect, a statutory inference that the practice may have been adopted for a discriminatory purpose or may have a discriminatory effect"); *City of Rome v. United States*, 446 U.S. 156, 183 & n.18 (1980).

237. *South Carolina v. Katzenbach*, 383 U.S. 301, 328 (1966).

federal district courts.²³⁸ The United States was named as a defendant in seventy-nine of these suits involving section 5 preclearance and bail out, and the Attorney General thus was required to defend them. Of the remaining 2157 the United States was a plaintiff in only 105 (4.9 percent), including cases filed initially by private parties and in which the United States was a plaintiff-intervenor.²³⁹ Private parties brought the rest of the 2052 cases (95.1 percent).²⁴⁰ As is apparent, the civil rights community, frequently opposed by the Department of Justice on such critical issues as extension and amendment of the Act and the construction of the results standard, has borne the burden of modern voting rights enforcement.²⁴¹

C. *Incomplete Progress and the Need for Reform in Registration*

Despite the undeniable progress, minorities clearly have not yet achieved equality of political participation. In Alabama, for example, blacks are 22.9 percent of the voting age population, but only about ten percent of elected officials. In Mississippi, which has the largest black voting age population (thirty-one percent) and the largest number of black elected officials (578) of any state, blacks are only ten percent of the total number of elected officeholders.²⁴² Nationally, blacks comprise eleven percent of the population but hold fewer than 1.5 percent of elected offices.²⁴³ Hispanics are seven percent of the population but less than one percent of office holders, while the population-percent ratio of

238. 1979-1988 ANNUAL COURT REPORT, *supra* note 175, table C-2.

239. The United States was a plaintiff-intervenor in six cases begun after January 20, 1981. DEPARTMENT OF JUSTICE, VOTING CASES AT DISTRICT COURT LEVEL IN WHICH THE UNITED STATES' PARTICIPATION BEGAN AFTER JANUARY 20, 1981.

240. *Id.*

241. Most of the private litigation has been initiated, or supported, by such civil rights organizations as the American Civil Liberties Union, Lawyers Committee for Civil Rights Under Law, Legal Defense Fund, Mexican American Legal Defense and Educational Fund, and Southwest Voter Registration Education Project. Other groups active in voting rights enforcement include the Center for Constitutional Rights, League of Women Voters, Legal Services Corporation, NAACP, National Indian Youth Council, Native American Rights Fund, Puerto Rican Legal Defense Fund, Southern Poverty Law Center, Southern Regional Council and Voter Education Project. Despite the considerably greater resources of the Department of Justice (the Civil Rights Division alone has 400 employees), many of the individual civil rights organizations have brought more voting rights lawsuits than the federal government. During the period from 1982 to 1988, for example, the southern regional office of the ACLU, with three or four lawyers and a limited budget, filed more than 80 voting cases in federal district court, compared with 67 filed by the Department of Justice. ACLU SOUTHERN REGIONAL OFFICE, ANNUAL DOCKETS (1982-1988). The Southwest Voter Registration Education Project, another comparatively small civil rights organization in San Antonio, brought the same number of voting rights cases as the Department of Justice in 1981 (eight) and more cases than the Department in 1982 (six as opposed to four) and in 1983 (eight as opposed to one). SOUTHWEST VOTER REGISTRATION EDUCATION PROJECT, DOCKET.

242. 17 NAT'L ROSTER, *supra* note 9.

243. 15 *id.* at 1.

Indians to Indian office holders is similarly low.²⁴⁴

Registration and turnout statistics, which are depressed for all voters, also show racial disparities. According to the Census Bureau/CPS estimates, 69.6 percent of whites, 66.3 percent of blacks, and 40.1 percent of Hispanics of voting age were registered to vote in 1984. On the day of the 1984 Presidential election, an estimated 61.4 percent of whites, 55.8 of blacks, and 32.6 percent of Hispanics of voting age cast ballots.²⁴⁵ The estimates for 1986 showed the rates of registration remaining fairly constant, but an even lower turnout rate—for whites forty-seven percent, for blacks forty-three percent, and for Hispanics only twenty-four percent.²⁴⁶ The turnout for the 1988 Presidential election was also low, lower than at any time since 1942, and the third lowest in our history. According to CBS News estimates, only 49.1 percent of voting age Americans voted in the last Presidential election.²⁴⁷

Numerous studies have concluded that these low levels of voter participation, which are at the bottom in comparison with the world's other major democratic nations,²⁴⁸ are the result, in part, of the country's needlessly complex, state-by-state system which places the burden of registration on the voter.²⁴⁹ The studies also conclude that burden-

244. NALEO REPORT, *supra* note 10.

245. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1984, at 7 (1985).

246. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, VOTING AND REGISTRATION IN THE ELECTION OF NOVEMBER 1986, at 25 (1987).

247. *CBS News Poll*, N.Y. Times, Nov. 10, 1988, at B6, col. 1; see *Republicans Push "Hot Button" Issues*, 16 S. EXPOSURE, Winter 1988, at 5, 7; see also COMMITTEE FOR THE STUDY OF THE AMERICAN ELECTORATE, CREATING THE OPPORTUNITY 3 (1988) [hereinafter CREATING THE OPPORTUNITY]; F. PIVEN & R. CLOWARD, *supra* note 12, at 161.

248. Harvard/ABC Symposium (1984:7), in F. PIVEN & R. CLOWARD, *supra* note 12, at 19. On a list of 24 of these nations, the United States ranks next-to-last in voter turnout, only slightly ahead of Switzerland.

249. CITIZENS COMM'N ON CIVIL RIGHTS, BARRIERS TO REGISTRATION AND VOTING 8-11, 53-115; NATIONAL ASSOCIATION OF SECRETARIES OF STATE, REPORT OF THE TASK FORCE ON BARRIERS TO VOTING, at iii (1987); F. PETERS & R. JACKS, STATES ADVANCE VOTER REGISTRATION REFORMS, at i, 44 (Nat'l Center for Pol'y Alternatives 1987); F. PIVEN & R. CLOWARD, *supra* note 12, at 17-18, 25, 209, 244-47; Boyd, *Decline in U.S. Voter Turnout: Structural Explanations*, 16 AM. POL. Q., April 1988, at 9; Burnham, *The Appearance and Disappearance of the American Voter*, in THE DISAPPEARANCE OF THE AMERICAN VOTER (1979). The United States is virtually alone among democracies in requiring a two-step process in which voters must register, usually at specially designated sites, prior to casting a ballot. In other countries, the state generally prepares the voter list and all the citizen needs to do is vote. Crewe, *Electoral Participation*, in DEMOCRACY AT THE POLLS (D. Butler, H. Penniman & A. Ranney eds. 1981). There are other reasons unrelated to registration laws why voter participation in the United States is lower than other democracies. The introduction of 18-20 year olds (who are notoriously sluggish voter participants) to the pool of eligible voters, disenchantment with government, weakened party structures, and alienation are other possible causes of low voting in the United States. Stronger or more homogeneous political parties, fewer elections, and less complex systems of government are causes of higher voting in other countries. Boyd, *supra*, at 143, 153-54.

some registration procedures have a disproportionate impact on minorities and the poor.²⁵⁰

As the post-Reconstruction experience in the South so vividly demonstrates, and as the Democratic "redeemers" so clearly understood, there is a strong correlation between complex registration procedures and low minority voter participation. In Mississippi in 1867, seventy percent of the state's black population was registered to vote. By 1899, after the state's adoption of a literacy test, a poll tax and a residency requirement for voting, all but nine percent of blacks were removed from the electorate.²⁵¹ Other southern states adopted similar restrictive registration laws and in all of them voter registration and participation by minorities declined dramatically.²⁵² Conversely, as the experience of abolition of literacy tests in 1965 demonstrates, the easing of restrictions on voter registration enhances both registration and voting.

One study has estimated that voter participation in the United States would increase by 9.1 percent if all barriers to registration were removed and all the voter had to do was vote.²⁵³ Other studies have set the increase at a lower level, but all agree that easing restrictions on registration would have a positive impact on the level of voter participation, even during a period of high voter disaffection from the political process.²⁵⁴

The conclusions reached by these studies of registration procedures are supported by the findings of the district court in *Mississippi State Chapter, Operation PUSH v. Allain*.²⁵⁵ *Operation PUSH* invalidated two provisions of state law. The first modified, but failed to eliminate, the state's "dual registration" requirement; the second prohibited county registrars from removing the voter registration books from the county courthouse to register voters without the permission of the county board of supervisors. The court found that black registration was approximately twenty-five percentage points below that of white, that the challenged practices were enacted for a discriminatory purpose, and that the practices "have a discriminatory result and deny black

250. Boyd, *supra* note 249, at 143, 153-54; see also Stone, *Voter Registration Context and Results*, 17 *URB. LAW.* 519, 522-23 (1985).

251. *United States v. Mississippi*, 380 U.S. 128, 132 (1965).

252. *POLITICAL PARTICIPATION*, *supra* note 8, at 8; see also sources cited *supra* note 5.

253. Rosenstone & Wolfinger, *The Effects of Registration Laws on Voter Turnout*, 72 *AM. POL. SCI. REV.* 22, 41 (1978).

254. See *CREATING THE OPPORTUNITY*, *supra* note 247, at 6 (estimating that if election day registration were adopted voter turnout might increase in the United States by more than six million voters in four years). Other measures which could increase voter registration and turnout include increasing the number of deputy registrars, allowing registration at government agencies, door-to-door and mail-in registration, and decreasing the frequency of purges for nonvoting.

255. 674 F. Supp. 1245 (N.D. Miss. 1987).

voters equal access to the political process."²⁵⁶ The court expressly found that barriers to voter registration were the main reason for low turnout rates in the state.²⁵⁷ The opinion outlined the kind of relief that would cure the violations but allowed the state time to propose a remedial plan.

Decisions like *Operation PUSH*,²⁵⁸ and declining, racially disparate voter participation rates, underscore the need for reform of the Nation's voter registration system, including the establishment of federal standards for mail-in, agency based, volunteer, and election day registration.²⁵⁹ Not surprisingly, the states with the most liberal registration laws and which permit election day registration were among those with the highest turnout rates in the 1988 Presidential election. Minnesota was first with 65.4 percent of the voting age population going to the polls, Wisconsin was second with 61.9 percent and Maine was fourth with 61 percent. North Dakota was sixth with a rate of 59.6 percent.²⁶⁰

Bills incorporating many of the reforms discussed above have been introduced in Congress at various times but have not been enacted into law.²⁶¹ Universal voter registration, however, is an idea whose time has

256. *Id.* at 1252.

257. *Id.* at 1256 (stating that "[d]ifficulty in registration is the main reason for not voting").

258. Numerous other cases illustrate how needlessly restrictive and discriminatory in effect are the registration procedures used in many states. *See, e.g.*, *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding unconstitutional one year durational residency requirement); *Beare v. Briscoe*, 498 F.2d 244 (5th Cir. 1974) (invalidating a Texas statute requiring annual voter registration during a restrictive four month period); *Project VOTE! v. Ledbetter*, Civ. No. C86-1946A (N.D. Ga. Sept. 12, 1986) (consent decree striking down a state's refusal to allow registration at food stamp distribution centers); *Windy Boy v. County of Big Horn*, 647 F. Supp. 1002, 1008 (D. Mont. 1986) (describing the arbitrary use of registration procedures by local officials to discourage or prevent Indians from voting); *Connecticut Citizens Action Group v. Pugliese*, Civ. No. N84-431, slip op. (D. Conn. Aug. 19, 1985) (invalidating a registrar's refusal to deputize volunteers); *Spalding County VEP v. Cowart*, Civ. No. 3-84-CV-79 (N.D. Ga. June 3, 1985) (consent decree allowing registration at sites in the black community); *Project VOTE! v. Ohio Bureau of Employment Serv.*, 578 F. Supp. 7 (S.D. Ohio 1982) (enjoining state from refusing to allow voter registration activity at employment office); *NAACP, DeKalb County v. Georgia*, 494 F. Supp. 668 (N.D. Ga. 1980) (enjoining under § 5 the disallowance by local officials of neighborhood voter registration drives). *See also Williams, Current Litigation Challenging Voter Registration Procedures*, in T. PIVEN & R. CLOWARD, *supra* note 12, at 272-90 app. D.

259. None of these proposals is radical or untested. Twenty-four states and the District of Columbia currently provide for registration by mail. Sixteen states allow government and private agencies to register voters. Three states, Maine, Minnesota, and Wisconsin, permit election day registration, and one state, North Dakota, has no voter registration at all. These states, moreover, have not reported any increase or additional problems in fraudulent registration or voting.

260. *CBS News Poll*, N.Y. Times, Nov. 10, 1988, at B6, col. 1.

261. An election day registration bill was introduced in Congress in 1977 during the Carter Administration. According to the former President, the bill was defeated because "[i]ncumbent members of the Congress don't want to see additional unpredictable voters registered . . . [T]his is the single most important obstacle to increasing participation on election day." Harvard/ABC News Symposium (1984:18), *quoted in* F. PIVEN & R. CLOWARD, *supra* note 12, at 215. More recently Senator Alan Cranston (D.-Calif.) introduced a bill in the Senate requiring the states to

come and will continue to be a civil rights priority. It may not ensure one hundred percent voter turnout, but it will certainly help stop the decline in voter participation and remove unnecessary and unjustifiable barriers to registration and voting.

V. CONCLUSION

The Voting Rights Act continues to demonstrate its great value in guiding us toward the pluralism and political equality envisioned by the post-Civil War constitutional amendments. But we are still far from being a truly integrated society or one in which race is no longer a dominant factor. That is apparent from the chronic levels of bloc voting that are still documented in modern voting cases and the fact that minorities have gained election principally in districts where members of their own race were in the majority. If racial bloc voting remains a constant, and if single member districts remain the only alternative to at-large voting, the number of available minority districts will represent the practical upper limit on the ability of minorities to elect representatives of their choice. Continued progress, therefore, will depend on the development of additional, more effective remedies for vote dilution. It also will depend on the ability of minority candidates to establish coalitions with white voters and on the elimination of racial fear and polarization in the electorate.

provide for registration by mail, at government agencies that serve the public directly, at private agencies that volunteer to register voters and at polling places on the day of election. S. 2061, 100th Cong., 2d Sess. (1988). A similar bill was introduced in the House by Representative John Conyers (D.-Mich.). H.R. 3950, 100th Cong., 2d Sess. (1988).

APPENDIX

Voting Cases Filed in U.S. District Court, 1978 - 1988*

<u>Year</u>	<u>Total</u>	<u>U.S. Pl.</u>	<u>U.S. Def.</u>	<u>Private Pl.</u>
1978	139	11	5	123
1979	145	13	7	125
1980	160	6	7	147
1981	152	8	9	135
1982	170	4	11	155
1983	175	1	6	240
1984	259	10	9	240
1985	281	17	5	259
1986	194	12	4	178
1987	214	12	7	195
1988	347	11	9	327
Totals:	2,236	105	79	2,052

* Source: Annual Reports of the Director of the Administrative Office of the United States Courts, Table C 2, U.S. District Courts, Civil Cases Commenced, by Basis of Jurisdiction and Nature of Suit, June 30, 1978 - June 30, 1988.

