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Martin Patrick Averill

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Holder v. Hall: Sizing Up Vote Dilution in the '90s

If liberty and equality, as is thought by some, are chiefly to be found in democracy, they will best be attained when all persons alike share in the government to the utmost.¹

Though written over 2,000 years ago, Aristotle's profound words ring true to this day and find their embodiment in the most basic of our American entitlements: the right to vote. Unfortunately, his noble vision of equal participation has not been fully realized in our modern republic, all too often drowned in waves of factious domination and public complacency. In the generations since our nation's birth, courts and legislative bodies have labored to define the right to vote and divine what that right requires in the treatment of the individual citizen. During that struggle to wade through the "political thicket"² of representational ideology, the right has at different times been denied, abridged, ignored, and sullied. In recent years, the suffrage debate has focused on a particular problem—vote dilution.³

The Supreme Court recently confronted for the first time a vote dilution challenge to the size of a governing body under section 2 of the Voting Rights Act of 1965.⁴ In *Holder v. Hall*,⁵ a group of

1. ARISTOTLE, *POLITICS*, c.322 B.C., *quoted in* THE QUOTABLE LAWYER 84 (David E. Shrager & Elizabeth Frost eds., 1986).

2. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

3. Minority (whether political, ethnic or racial) vote dilution has been defined as "a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable majority group to diminish or cancel the voting strength of at least one minority group." *CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE* 24 (Bernard Grofman & Chandler Davidson eds., 1992) [hereinafter *CONTROVERSIES*].

4. 42 U.S.C. § 1973 (1982). What was formerly § 2 now provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) [42 U.S.C.S. § 1973(f)(2)], as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which

minority black voters challenged their county's single-commissioner system of government, claiming that it diluted their vote in violation of section 2.⁶ Five members of the Court rejected the challenge on the ground that no "objective alternative benchmark" existed by which to measure the dilutive effects of a governing authority's size.⁷ However, a different combination of five Justices found that governmental size was subject to at least threshold coverage under section 2 of the Voting Rights Act.⁸ The case resulted in a judicial constriction of the Act, as the Court denied voting minorities the right to challenge a governing body's size under a dilution theory absent proof of intentional discrimination.⁹

This Note first provides a brief description of the case's factual and legal background.¹⁰ It then describes the evolution of voting rights jurisprudence, focusing primarily on developments since passage of the Voting Rights Act in 1965.¹¹ The Note next examines the decision in detail, analyzes its various lines of argument,¹² and suggests some alternative solutions to the problem of securing effective political participation for all citizens.¹³ The Note concludes that *Holder* is emblematic of the Rehnquist Court's increasingly conservative view of the Voting Rights Act and provides little guidance to the lower federal courts concerning the core issues of voting rights jurisprudence.¹⁴

Bleckley County is a rural county in central Georgia.¹⁵ Since its establishment in 1912, the county has been governed by a single

members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, [t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (1982).

5. 114 S. Ct. 2581 (1994) (plurality opinion).

6. *Id.* at 2584.

7. *Id.* at 2588, 2591; see *infra* notes 137-50 and accompanying text.

8. *Holder*, 114 S. Ct. at 2619; see *infra* notes 101-36 and accompanying text.

9. See *id.* at 2588.

10. See *infra* notes 15-41 and accompanying text.

11. See *infra* notes 42-99 and accompanying text.

12. See *infra* notes 100-67 and accompanying text.

13. See *infra* notes 171-89 and accompanying text.

14. See *infra* notes 190-201 and accompanying text. On the same day it decided *Holder*, the Court handed down its decision in *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), a Florida reapportionment case. *De Grandy* and *Holder* both evidence the Court's increasing unwillingness to broaden the vote dilution inquiry. See *infra* note 199 and accompanying text for a brief discussion of *De Grandy*.

15. *Holder v. Hall*, 114 S. Ct. 2581, 2584 (1994).

county commissioner,¹⁶ as authorized by Georgia law.¹⁷ Under this system, the Bleckley County Commissioner performs all of the executive and legislative functions of the county government, including levying general and special taxes, directing and controlling all county property, and settling all claims.¹⁸ According to the 1990 census, Bleckley County's population numbers 10,430, over twenty-two percent of which is black.¹⁹ The voting-age population for Bleckley County is 19% black and 80% white, and the voter registration level for both groups is approximately 70%.²⁰

In 1985, the Georgia legislature authorized Bleckley County to adopt a multi-member county commission, consisting of five commissioners elected from single-member districts and a single chairman elected at large.²¹ The county's voters rejected this proposition in a 1986 referendum, by a vote of 1156 to 887.²² In 1985, six registered black voters from Bleckley County and the Cochran/Bleckley County Chapter of the National Association for the Advancement of Colored People (NAACP) challenged the single-commissioner system in a suit filed against petitioners Jackie Holder, the incumbent county commissioner,²³ and Probate Judge Robert Johnson, the superinten-

16. Bleckley County also has one sheriff, probate judge, clerk of superior court, tax commissioner, coroner, school superintendent, county surveyor, and magistrate, each of whom is elected by a majority of all the voters in Bleckley County. Brief for the Petitioners at 4 n.1, *Holder*, 114 S. Ct. 2581 (1994) (No. 91-2012).

17. See GA. CODE ANN. § 1-3-3(7) (Supp. 1994). In addition to Bleckley County, about 10 of Georgia's other 159 counties use the single-commissioner system; the rest maintain multi-member commissions. *Holder*, 114 S. Ct. at 2584.

18. GA. CODE ANN. § 36-5-22.1 (1993).

19. Brief for the Petitioners at 4 n.2, *Holder* (No. 91-2012).

20. *Id.* at 6.

21. 1985 GA. LAWS 4406. The five-member commission is a popular form of governing authority in Georgia. See *infra* note 145.

22. Brief for the Petitioners at 6, *Holder* (No. 91-2012). At trial, Dr. Bernadette Loftin, an historian and resident of Bleckley County, testified to the effect that the referendum was not introduced to combat any perceived discriminatory motive behind the commissioner scheme. *Id.* at 7. Rather, it was recommended by the Bleckley County grand jury because of voter dissatisfaction with a tax increase (taxation was controlled by the County Commissioner). *Id.* Moreover, the black community showed very little interest in the referendum, as attested at trial by City Councilman Willie Basby, a black councilman elected from the county seat's majority black council district. *Id.* at 6 n.3.

23. Mr. Holder has been the county commissioner since 1976, and is one of only seven county commissioners in Bleckley County's history. Brief for the Petitioners at 4, *Holder* (No. 91-2012). No minority has ever run for or been elected to the office, and the district judge stated that, having run for public office himself, he "wouldn't run if [he] were black in Bleckley County." *Holder v. Hall*, 955 F.2d 1563, 1571 (11th Cir. 1992), *rev'd*, 114 S. Ct. 2581 (1994).

dent of elections.²⁴ The complaint raised both a constitutional and a statutory claim.²⁵

In their constitutional claim, the "respondents alleged that the county's single-member commission was enacted or maintained with an intent to exclude or limit the political influence of the county's black community in violation of the Fourteenth and Fifteenth Amendments."²⁶ The district court rejected that claim, holding that the respondents had "failed to provide any evidence that Bleckley County's single member county commission [was] the product of original or continued racial animus or discriminatory intent."²⁷

The statutory claim asserted that the county's single-member commission diluted minority voting strength,²⁸ violating section 2 of the Voting Rights Act of 1965.²⁹ According to the respondents, the Act required Bleckley County to have a county commission of sufficient size that the county's black citizens would constitute a majority in a single-member election district.³⁰ The district court rejected this claim as well, finding that the respondents had failed to satisfy two of three of the preconditions to a section 2 claim.³¹ The

24. *Holder*, 114 S. Ct. at 2584.

25. *Id.*

26. *Id.*; see *Holder v. Hall*, 757 F. Supp. 1560, 1569 (M.D. Ga. 1991), *rev'd*, 955 F.2d 1563 (11th Cir. 1992), *rev'd*, 114 S. Ct. 2581 (1994). The plaintiff must show intent to discriminate to establish a Fourteenth or Fifteenth Amendment claim. See, e.g., *Washington v. Davis*, 426 U.S. 229, 240 (1976) ("[T]he invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose."). See generally JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW 816-46 (4th ed. 1991) (providing an overview of voting rights under the Fourteenth and Fifteenth Amendments, the development of voting rights jurisprudence, and factors to be considered in assessing a discrimination claim under the Constitution).

27. *Holder*, 757 F. Supp. at 1571. The district court also found that the system was not maintained for "tenuous reasons" and that the commissioner himself was not unresponsive to the "particularized needs" of the black community. *Id.* at 1564. There was no "slating process" to stand as a barrier to black candidates, and there was testimony from respondents that they were unaware of any racial appeals in recent elections. *Id.* at 1562 n.2; see *infra* note 77 (listing the factors a district court should consider in assessing a dilution claim).

28. *Holder*, 114 S. Ct. at 2584.

29. 42 U.S.C. § 1973 (1988).

30. *Holder*, 114 S. Ct. at 2584-85.

31. *Holder*, 757 F. Supp. at 1582. The three necessary preconditions, as set out by the Court in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986), are geographical compactness of the minority group, minority political cohesion, and the existence of racial bloc voting on the majority's part. See *id.*; *infra* note 89 and accompanying text. While finding the first precondition satisfied, the court held that respondents failed to prove the existence of racially polarized voting, embodied in the other two preconditions, which had been recognized as the "keystone" of a vote dilution case. See *infra* notes 83-84, 93 and accompanying text.

Court of Appeals for the Eleventh Circuit reversed on the statutory claim, holding that all of the preconditions were met, and that the "totality of the circumstances" supported a finding of liability under section 2.³² The court of appeals then remanded for formulation of a remedy for the violation³³ and suggested that it "could well be modeled" after the five-member system used to elect the Bleckley County school board.³⁴

The Supreme Court granted certiorari to review the statutory holding of the court of appeals.³⁵ Justice Kennedy announced the judgment of the Court and delivered a plurality opinion.³⁶ Narrowly holding that no objective alternative benchmark existed by which to measure the dilutive effects of Bleckley County's single-member commission system on the minority vote, a five-member group of Justices³⁷ reversed the court of appeals and remanded for consideration of the respondents' constitutional claim of intentional discrimination under the Fourteenth and Fifteenth Amendments.³⁸ A different five-member group,³⁹ however, found that section 2 of the Voting Rights Act was meant to provide at least threshold coverage⁴⁰ of dilution claims against a governing authority's size.⁴¹

32. *Holder v. Hall*, 955 F.2d 1563, 1573-74 (11th Cir. 1992), *rev'd*, 114 S. Ct. 2581 (1994). The court of appeals did not consider the district court's ruling on the respondents' constitutional claim due to its statutory ruling and reversal. *Holder*, 114 S. Ct. at 2585.

33. *Id.* at 1574.

34. *Id.* at 1574 n.20. In a referendum similar to the one rejected in 1986, Bleckley County voters approved a five-member district plan for the election of the county school board. *Holder*, 114 S. Ct. at 2585.

35. *Holder v. Hall*, 113 S. Ct. 1382 (1993). The Court did not consider the constitutional claim because the Eleventh Circuit had reversed solely on statutory grounds. *Holder*, 114 S. Ct. at 2585.

36. *Holder*, 114 S. Ct. at 2583.

37. Chief Justice Rehnquist joined the opinion of Justice Kennedy. *Id.* Justice O'Connor filed an opinion concurring in part and concurring in the judgment. *Id.* at 2588 (O'Connor, J., concurring in part and concurring in the judgment). Justice Thomas, joined by Justice Scalia, filed an opinion concurring in the judgment. *Id.* at 2591 (Thomas, J., concurring in the judgment).

38. *Id.* at 2588.

39. Justice Blackmun filed a dissenting opinion, in which Justices Stevens, Souter, and Ginsburg joined. *Id.* at 2619 (Blackmun, J., dissenting). Justice Ginsburg also filed a dissenting opinion. *Id.* at 2624 (Ginsburg, J., dissenting). Justice Stevens filed a separate opinion in which Justices Blackmun, Souter, and Ginsburg joined. *Id.* at 2625 (Stevens, J.). Justice O'Connor agreed with the part of that opinion which found that § 2 covers a governing body's size. *Id.* at 2588 (O'Connor, J., concurring in part and concurring in the judgment).

40. The phrase "threshold coverage" as used in this Note means only that the Act's scope, both in letter and spirit, was intended to regulate the situation in question. The

The evolution of American voting rights jurisprudence has been anything but smooth, and the minority citizen has often suffered as a result.⁴² That evolution did occur, however, grudgingly and sometimes violently. African-Americans first were enfranchised during Reconstruction, a right that became constitutionally protected upon the passage of the Fifteenth Amendment in 1870.⁴³ Shortly thereafter, partly as a result of a rise in Southern white supremacist movements, African-Americans were almost totally disenfranchised once more.⁴⁴ Gradual reenfranchisement through Supreme Court

coverage is only "threshold" coverage due to the infeasibility of applying the Act to size challenges. Justice O'Connor's concurring opinion discusses this dichotomy, demonstrating how a challenge may be "covered" by the threshold scope of § 2, yet not fit within the established standards for demonstrating the existence of vote dilution. *Holder*, 114 S. Ct. at 2589-91 (O'Connor, J., concurring in part and concurring in the judgment).

41. Justice O'Connor provided the fifth vote for each group, finding that challenges to size were covered under § 2, but that no objective, alternative benchmark could ever exist for the dilution comparison. *Id.* Consequently, although Justice O'Connor would allow the federal courts threshold coverage of a dilution challenge to size under § 2, that coverage is for all intents and purposes rendered inoperative by her belief that no benchmark could ever be found for measurement. *See infra* note 104 and accompanying text.

42. *See* Robert S. McKay, *Racial Discrimination in the Electoral Process*, in 6 RACE, LAW AND AMERICAN HISTORY 1700-1990: AFRICAN AMERICANS AND THE RIGHT TO VOTE 342, 342-58 (Paul Finkelman ed., 1992) (examining that evolution up to 1973 and asserting that "a measure of our [America's] own imperfection is the fact that it should have taken so long in the United States to bring practice into line with aspiration, a task still not completely accomplished").

43. *See* 6 RACE, LAW, AND AMERICAN HISTORY, *supra* note 42, at viii (introduction) (providing a brief description of the plight of African-Americans in their quest for enfranchisement). After the Compromise of 1877 officially ended Reconstruction, the newly acquired voting rights of blacks were squelched by whatever means available, including violence, intimidation, and fraud. *Id.* at viii-ix ("As one Mississippi Democratic politician asserted in 1875, 'Carry the election peaceably if we can, forcibly if we must.'").

Ultimately the disenfranchisement was accomplished not by physical violence and intimidation, but by law, in the form of amendments to state constitutions, poll taxes, literacy tests, grandfather clauses, property requirements, and other mechanisms that prevented blacks from exercising their right to vote. *Id.* at ix. Since these laws never mentioned race, the Supreme Court of the period was unwilling to strike them down as violations of the Fifteenth Amendment. *Id.*

44. *Id.* at viii-ix.

decisions beginning in 1915,⁴⁵ however, made the African-American citizen's right to vote a practical reality by the 1960s.⁴⁶

Even though the Court invalidated all-white primaries and other facially discriminatory tactics throughout the first half of this century, and expanded its reading of the Fifteenth Amendment to invalidate racial gerrymandering schemes in 1960,⁴⁷ the voting rights of minority citizens continued to be denied in many states. Legislation did little to stem the tide of discrimination, and case-by-case litigation efforts proved cumbersome and ineffective.⁴⁸ The report of the House Judiciary Committee considering the then Voting Rights Bill of 1965 noted that "[t]he historic struggle for the realization of this

45. See *Guinn v. United States*, 238 U.S. 347 (1915). In *Guinn*, the Court struck down Oklahoma's "grandfather clause," which allowed poor and illiterate whites to vote because their grandfathers had been voters before 1866, but did not grant the same privilege to blacks. *Id.* at 352-53; see also *Terry v. Adams*, 345 U.S. 461, 469-70 (1953) (holding that privately run all-white primaries which prohibited African-Americans from voting constituted state action and violated the Fifteenth Amendment); *Smith v. Allwright*, 321 U.S. 649, 663-66 (1944) (invalidating the whites-only Democratic primary in Alabama).

46. See 6 RACE, LAW, AND AMERICAN HISTORY, *supra* note 42, at ix. During this evolution, the Supreme Court proceeded slowly in invalidating discriminatory legislation. See Emma C. Jordan, *The Future of the Fifteenth Amendment*, 28 HOW. L.J. 541, 555 (1985) (arguing that the Court acquiesced in all but the most "obvious and crude acts of discrimination," such as statutes which facially prevented blacks from voting). The origins of this acquiescence can be traced back to *United States v. Reese*, 92 U.S. 214, 217 (1875), where the Court stated that "[t]he Fifteenth Amendment does not confer the right of suffrage upon any one."

47. *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960). In *Gomillion*, the Court held that a local act altering the shape of Tuskegee, Alabama, from a square to an "uncouth" 28-sided figure, which effectively removed all but four or five of its 400 African-American voters while leaving the white constituency intact, constituted sufficient evidence to state a valid voting rights discrimination claim. *Id.* at 341, 347. See generally MARK E. RUSH, DOES REDISTRICTING MAKE A DIFFERENCE? PARTISAN REPRESENTATION AND ELECTORAL BEHAVIOR (1993) (examining the gerrymander in great depth); Ripley Eagles Rand, Note, *The Fancied Line: Shaw v. Reno and the Chimerical Racial Gerrymander*, 72 N.C. L. REV. 725 (1994) (discussing the history behind, and current status of, the racial gerrymander in light of the Supreme Court's decision in *Shaw v. Reno*, 113 S. Ct. 2816 (1993)).

48. See *South Carolina v. Katzenbach*, 383 U.S. 301, 313-14 (1966) (finding that voting rights suits were arduous to prepare, lent themselves to official delays, and were usually ineffective even when successful, as some states simply switched to other devices not specifically covered by federal decrees or enacted difficult new tests to prolong voting disparity). See generally 2 STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 935-38 (Bernard Schwartz ed., 1970) (editorial commentary) (discussing the legislative history of the 1960 Civil Rights Act that made the Act ineffective and "primarily symbolic").

[Fifteenth Amendment] guarantee indicates clearly that our national achievements in this area have fallen far short of our aspirations."⁴⁹

In response to this national crisis, Congress enacted the Voting Rights Act of 1965⁵⁰ to "banish the blight of racial discrimination in voting."⁵¹ Hailed by President Lyndon B. Johnson as a "triumph for freedom as huge as any ever won on any battlefield,"⁵² the Act was directed at the methods and tactics used to disqualify blacks from registering and voting in federal and state elections, emphasizing equal electoral access by facilitating registration and securing the ballot.⁵³ The Act was designed to work on two levels. First, in section 2, it flatly prohibited discriminatory practices and procedures.⁵⁴ Next, it subjected certain "covered" states—states that had a history of past discrimination in voting⁵⁵—to a "preclearance" requirement, which mandated that any change in voting policy, practice, or procedure be pre-approved by either the Attorney General or the federal district court for the District of Columbia.⁵⁶ The Act was to last for only five years, as a "quick-fix" remedy.⁵⁷ However, it was reenacted in both 1970 and 1975 due to its inability

49. H.R. DOC. NO. 439, 89th Cong., 1st Sess. (1965), *reprinted in* 1965 U.S.C.C.A.N. 2437, 2439.

50. Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1988)).

51. *Katzenbach*, 383 U.S. at 308.

52. S. REP. NO. 417, 97th Cong., 2d sess. 4 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 181 (1982).

53. *Id.* at 118, *reprinted in* 1982 U.S.C.C.A.N. at 290.

54. Voting Rights Act of 1965 § 2 (codified as amended at 42 U.S.C. § 1973(a) (1988)). To enforce this prohibition, the Attorney General was authorized to send in federal examiners either to register voters or to monitor the conduct of elections. *Id.* § 6 (codified as amended at 42 U.S.C. § 1973(d) (1988)); S. REP. NO. 417, *supra* note 52, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 182.

55. "Covered" jurisdictions were those that had a literacy test or similar device to screen votes as of November 1, 1964, 1968, or 1972, and low voter registration turnout of fewer than 50% of eligible citizens registered as of the same dates. S. REP. NO. 417, *supra* note 52, at 5, *reprinted in* 1982 U.S.C.C.A.N. at 182; *see also* Robert Barnes, Comment, *Vote Dilution, Discriminatory Results, and Proportional Representation: What Is The Appropriate Remedy For A Violation of Section 2 of the Voting Rights Act?*, 32 UCLA L. REV. 1203, 1210-11 n.26 (1985) (discussing the coverage "triggering formula").

56. Voting Rights Act of 1965 § 5 (codified as amended at 42 U.S.C. § 1973c (1988)). The preclearance requirement was meant to ensure that the old devices would not simply be replaced with newer, more subtle practices. S. REP. NO. 417, *supra* note 52, at 6, *reprinted in* 1982 U.S.C.C.A.N. at 182. It was also meant to provide an expeditious and effective review to ensure that devices other than those directly addressed in the Act, e.g., literacy tests and poll taxes, would not be used to "thwart the will" of Congress to secure the franchise for blacks. *Id.*

57. *Cf.* S. REP. NO. 417, *supra* note 52, at 5-8, *reprinted in* 1982 U.S.C.C.A.N. at 181-84.

to cure the problem immediately, and amended in 1982 to incorporate a discriminatory results test for electoral practices.⁵⁸

Following the dramatic rise in minority voter registration after passage of the Act, a broad array of subtler dilution schemes replaced the outlawed blatant practices and acted to cancel the impact of the new minority vote.⁵⁹ Consequently, from 1965 until the 1982 amendments, section 5 was the focal point of statutory vote dilution, because it required federal pre-approval of new practices;⁶⁰ however, section 5 applies only when a covered jurisdiction proposes a *change* in voting procedure.⁶¹ Existing discriminatory voting systems were attacked solely on constitutional grounds, as violations of the Fourteenth and Fifteenth Amendments.⁶² The early development of *constitutional* vote dilution jurisprudence focused on mathematical population differences between legislative districts.⁶³ Later cases

58. See *id.* at 7-12, 27-30, reprinted in 1982 U.S.C.C.A.N. at 184-89, 204-08. The results test differentiated the Act from the Fourteenth and Fifteenth Amendments, which require a showing of discriminatory intent for a violation. See *infra* notes 65-81 and accompanying text.

59. See S. REP. NO. 417, *supra* note 52, at 6, reprinted in 1982 U.S.C.C.A.N. at 183. The schemes included, *inter alia*, switching from elective to appointive governmental offices; gerrymandering election boundaries; instituting majority runoff requirements to prevent victories in prior plurality systems; and substituting at-large elections for election by single-member districts. *Id.* In the words of the Senate Judiciary Committee: "The ingenuity of such schemes seems endless. Their common purpose and effect has been to offset the gains made at the ballot box under the Act." *Id.*

60. Cf. Chandler Davidson, *The Voting Rights Act: A Brief History in CONTROVERSIES*, *supra* note 3, at 7, 17-37 (focusing on § 5 as the primary statutory protection of voting rights before the 1982 amendment of § 2).

61. *Holder*, 114 S. Ct. at 2587 ("Section 5 applies only in certain jurisdictions specified by Congress and 'only to proposed changes in voting procedures.'") (quoting *Beer v. United States*, 425 U.S. 130, 138 (1976)).

62. Before *City of Mobile v. Bolden*, 446 U.S. 55 (1980), and the subsequent amendment of the Act, courts assumed that § 2 was "essentially . . . synonymous with the fourteenth and fifteenth amendments." Barnes, *supra* note 55, at 1221. Consequently, vote dilution claims to existing systems were not brought under the Act, but under the established constitutional line of cases. *Id.*; see also Davidson, *supra* note 60, at 38 ("Section 2 . . . had served as little more than a symbolic preamble to the operative sections [of the Act], in effect restating the Fifteenth Amendment.").

63. See *Reynolds v. Sims*, 377 U.S. 533, 562, 568 (1964) (raising the concept of "one-man, one-vote" to the level of a fundamental right, and holding that significant mathematical disparities among districts can unconstitutionally abridge the right to vote); *Baker v. Carr*, 369 U.S. 186, 208-37 (1962) (using the Equal Protection Clause to provide a standard for fashioning judicial relief, thereby making reapportionment cases justiciable); *Lathrop v. Donohue*, 367 U.S. 820, 856 (1961) (Harlan, J., concurring in the judgment) (establishing the "one-man-one-vote" concept). These early cases, which focused on "quantitative" vote dilution, were termed "first generation" voting rights cases by one renowned commentator—Lani Guinier. See LANI GUINIER, *THE TYRANNY OF THE MAJORITY* 7 (1994).

expanded the concept to address the potential dilutive effects of electoral schemes such as multi-member districts and at-large elections.⁶⁴

When Congress amended the Act in 1982,⁶⁵ it incorporated a group of factors set forth in two 1973 vote dilution decisions, one by the Supreme Court and the other by the Fifth Circuit.⁶⁶ The two decisions outlined the evidentiary standards to be met in establishing a constitutional dilution claim. In *White v. Regester*, the Supreme Court invalidated multi-member districts in two Texas counties because in their operation they diluted the voting strength of racial and ethnic minorities.⁶⁷ Making clear that such schemes were not *per se* unconstitutional, the Court asserted that the focus should be on the actual result of the legislation "[b]ased on the totality of the circumstances."⁶⁸ *Zimmer v. McKeithen*⁶⁹ involved a challenge by black residents of East Carroll Parish, Louisiana to a proposed at-large scheme⁷⁰ for election of the school board and police juries.

64. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 157-60 (1971) (recognizing that multi-member districts can operate to minimize or cancel the impact of minority votes, and requiring an evidentiary showing that the electoral system denied equal access to the political process); *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (stating that a constitutional violation could be shown by proof of an "invidious effect" or an "invidious result"); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965) ("It might well be, that designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."). Professor Guinier dubbed this type of case "second generation" voting rights activism, which focused on "qualitative" vote dilution. GUINIER, *supra* note 63, at 7.

65. See *infra* note 76 and accompanying text.

66. See *infra* note 77 for a list of the incorporated factors.

67. 412 U.S. 755 (1973). In *White*, African- and Mexican-American residents of Dallas and Bexar Counties, Texas challenged parts of a legislative reapportionment plan adopted by the State of Texas. Plaintiffs alleged that the multimember districts for the two counties in which they resided minimized the effect of their votes in violation of the Fourteenth Amendment. *Id.* at 759. The Court specifically relied upon evidence of a long history of official discrimination against minorities, indifference to their concerns on the part of white elected officials, exclusion from the Democratic Party's slate, and cultural and language barriers for the Mexican-American plaintiffs which made "participation in [the] community processes extremely difficult." *Id.* at 766-68.

68. *Id.* at 768.

69. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* *East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

70. Under an at-large system, voters cast ballots for all contested seats in the governing authority, rather than for a single district representative. Consequently, the voting power of any particular area is submerged in the voting power of the entire area, increasing the likelihood that the majority will prevail. This is especially true where racially polarized voting is prevalent. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) ("At-large voting schemes and multi-member districts tend to minimize the voting strength

The parish argued that, because blacks constituted a majority of the parish's total population, no dilution claim could lie.⁷¹ The Fifth Circuit rejected this argument, stating that "although population is the proper measure of equality in apportionment, . . . access to the political process and not population [is] the barometer of dilution of minority voting strength."⁷²

In 1980, the Supreme Court abandoned the results-oriented approach of *White* and *Zimmer* in its controversial *City of Mobile v. Bolden*⁷³ decision. In *Bolden*, a plurality of the Court held that proof of a discriminatory purpose was necessary to establish a constitutional vote dilution claim against "racially neutral" state action.⁷⁴ When the seven-year extension of the Voting Rights Act expired in 1982, Congress was presented with the ideal opportunity to reverse *Bolden*, which had been roundly condemned in the academic press.⁷⁵ Congress amended section 2 of the Act to incorporate the pre-*Bolden* "results" language of *White* and *Zimmer*.⁷⁶ In its 1982 report, the Senate Judiciary Committee listed what it considered the

of minority groups by permitting the political majority to elect *all* representatives of the district."); *Whitcomb v. Chavis*, 403 U.S. 124, 158-59 (1971) (noting "winner-take-all" aspects of multi-member districts and a tendency to submerge minorities and overrepresent the winning party); see also GUINIER, *supra* note 63, at 3-7 (arguing that "winner-take-all" majority at-large elections allow as little as 51% of the population to decide 100% of the elections).

71. *Zimmer*, 485 F.2d at 1303.

72. *Id.* (emphasis added).

73. 446 U.S. 55 (1980) (plurality opinion).

74. *Id.* at 62. Due to its assumed synonymity with the Fourteenth and Fifteenth Amendments, § 2 provided no relief here either. See *supra* note 62.

75. See, e.g., Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851, 853 (1982) (arguing that *Bolden* did not give "proper consideration to the role the right to vote plays in a democratic society," and therefore reached the wrong result); Aviam Soifer, *Complacency and Constitutional Law*, 42 OHIO ST. L.J. 383, 409 (1981) ("To settle for the constitutionalization of the status quo is to bequeath a petrified forest. It is to fail to do justice in the constitutional quest."); Terry Gorman, Note, *City of Mobile v. Bolden: Voter Dilution and New Intent Requirements Under the Fifteenth and Fourteenth Amendments*, 18 HOUS. L. REV. 611, 611 (1981) ("By limiting fifteenth amendment protection in racial voting matters and requiring extremely stringent evidentiary standards for equal protection challenges, the *Bolden* Court may have ended successful challenges to unconstitutional vote dilution.").

76. The Senate Judiciary Committee stated,

Section 2, as amended, adopts the functional view of 'political process' used in *White* rather than the formalistic view espoused by the plurality in *Mobile*. . . . [T]his section without question is aimed at discrimination which takes the form of dilution, as well as outright denial of the right to register or to vote.

S. REP. NO. 417, *supra* note 52, at 30 n.120, reprinted in 1982 U.S.C.C.A.N. at 208.

most relevant of the "*White-Zimmer*" factors.⁷⁷ The factors are to be employed by a court in applying *White*'s "totality of the circumstances" test,⁷⁸ and clearly indicate that a discriminatory legislative purpose is not necessary to establish a vote dilution claim—only the effects of the contested scheme or mechanism need be dilutive. Congress also added section 2(b), which codified the results test⁷⁹

77. The list includes:

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

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

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

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

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

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

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

S. REP. NO. 417, *supra* note 52, at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07 (footnotes omitted). The Committee also indicated two additional factors that in some cases may have probative value in establishing a violation: (1) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group," and (2) "whether the policy underlying the political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous." *Id.* at 219, reprinted in 1982 U.S.C.C.A.N. at 207 (footnotes omitted).

78. *Id.* at 21-23, reprinted in 1982 U.S.C.C.A.N. at 199-200. The Committee emphasized that there is no "scorekeeping" approach to the use of the factors—that is, no set number of them must be shown to establish a vote dilution claim. In its words, "[t]he cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or another." *Id.* at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07.

79. See *supra* note 4 for the text of amended § 2.

and included the so-called "Dole Compromise,"⁸⁰ an express disclaimer of any right to proportional representation.⁸¹

The conflict between the revamped results test and the Dole Compromise's rejection of proportional representation presented an "inherent tension,"⁸² as courts were asked to improve minority access to political participation while simultaneously avoiding proportionality. Hence, in the years following the amendment, courts had difficulty applying the new section to vote dilution claims. Much of the controversy centered around the importance of racially polarized voting to dilution claims,⁸³ and the statistical methods to be used to determine its existence.⁸⁴

In *Thornburg v. Gingles*,⁸⁵ the Supreme Court for the first time addressed the effect of the 1982 amendments on vote dilution claims, and attempted to provide a workable test for proving section 2

80. The new section was named for Sen. Robert Dole, a Republican from Kansas. The prohibition against guaranteed proportionality was apparently inserted to "mollify" conservatives who had taken seriously Justice Stewart's *Bolden* dictum concerning the dangers of allowing results to govern vote dilution claims. Jim R. Karpiak, *Voting Rights and the Role of the Federal Government: The Rehnquist Court's Mixed Messages In Minority Vote Dilution Cases*, 27 U.S.F. L. REV. 627, 636 n.65 (1993). Justice Stewart did not believe that political groups, as opposed to individuals, had an independent constitutional right to representation. See *City of Mobile v. Bolden*, 446 U.S. 55, 78-79 (1980); see also *infra* note 197. According to Justice Stewart, using results to measure discrimination would lead to proportional representation, which is not required by the Equal Protection Clause as an "imperative of political organization." *Bolden*, 446 U.S. at 75-76; see *infra* note 197.

81. The disclaimer states: "Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(b), 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973(b) (1988)).

82. See *Holder*, 114 S. Ct. at 2624 (Ginsburg, J., dissenting) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment)).

83. See, e.g., *Jones v. City of Lubbock*, 727 F.2d 364, 384-85 (5th Cir.) (indicating that no specific number of Senate factors must be proven to establish a § 2 violation, and stressing the importance of racially polarized voting), *reh'g denied*, 730 F.2d 233 (1984); *United States v. Marengo County Comm'n*, 731 F.2d 1546, 1566 (11th Cir.) (holding that racially polarized voting "will ordinarily be the keystone of a vote dilution case"), *cert. denied*, 469 U.S. 976 (1984).

84. See *Collins v. City of Norfolk*, 768 F.2d 572, 574-76 (4th Cir. 1985) (condoning the use of multi-variate statistical analysis), *cert. granted and vacated*, 478 U.S. 1016 (1986); *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473, 1482 (11th Cir. 1984) (remanding with instructions to the district court to use a multi-variate statistical analysis, which measures the relative effect of a number of factors in addition to the race of the voter on electoral outcomes, to determine the effects of racially polarized voting). See generally *Jones*, 730 F.2d at 233-35 (Higginbotham, J., specially concurring in denial of petition for rehearing) (discussing the statistical and evidentiary standards for racially polarized voting).

85. 478 U.S. 30 (1986).

violations. *Gingles* involved a challenge to a North Carolina legislative redistricting plan that created certain multi-member districts with significant, although not majority, African-American populations.⁸⁶ The plaintiffs proposed to establish smaller single-member districts, some of which would have majorities of African-American voters.⁸⁷ A fractured Court affirmed the district court's holding that the "totality of the circumstances" supported a finding that the current scheme was diluting the minority group's voting strength.⁸⁸ Led by Justice Brennan, the Court took a "functional view" of the political process and established three preconditions to a vote dilution claim: (1) the minority population must be "sufficiently large and geographically compact" to constitute a majority in a single-member district; (2) minority voters must be "politically cohesive"; and (3) the white majority must vote sufficiently as a bloc that it usually defeats minority-preferred candidates.⁸⁹ Before reaching the "totality of the circumstances" test, a court must first find that those preconditions are met.⁹⁰

The Court noted that the "right question" in voting rights cases is "whether, *as a result of the challenged practice or structure*, plaintiffs do not have an equal opportunity to participate in the

86. *Id.* at 35, 38.

87. *Id.* at 46 n.12.

88. *Id.* at 80. The district court found that racially polarized voting, a legacy of official discrimination in voting, education, housing, employment, and health services, and persistent racial appeals in campaigning joined with the multi-member districting scheme to hinder black voters' ability to participate equally in the electoral process. *Id.*

89. *Id.* at 50-51. The Court took these preconditions from S. REP. NO. 417, *supra* note 52, at 16-33, reprinted in 1982 U.S.C.C.A.N. at 193-211. The Report, while espousing a flexible, fact-intensive test for § 2 violations, limits § 2 claims in three ways. First, electoral devices such as at-large elections are not considered *per se* violations of § 2—plaintiffs must demonstrate, under the totality of the circumstances, that they result in unequal access to the political process. *Id.* at 16, reprinted in 1982 U.S.C.C.A.N. at 193. Also, the combination of an allegedly dilutive electoral mechanism and lack of proportional representation alone does not establish a violation. *Id.* Finally, the results test does not assume the existence of racial bloc voting—plaintiffs must prove it. *Id.* at 34, reprinted in 1982 U.S.C.C.A.N. at 212.

90. *Gingles*, 478 U.S. at 49-50. As later observed by the Seventh Circuit in *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 942 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989), these preconditions circumscribe the almost unbridled judicial discretion that otherwise might exist under the totality of the circumstances test, and limit the inquiry to those claims that meet the threshold requirements. It has been noted that the *Gingles* "electoral standard" (the first prong—geographic compactness) makes raising an "ability to influence" claim more difficult, and hence makes establishing a § 2 claim harder. Kathryn Abrams, *Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 465 (1988).

political processes and to elect candidates of their choice.' ⁹¹ The *Gingles* Court, therefore, required a plaintiff group to prove that the challenged election practice caused the alleged injury.⁹² It also synthesized the prior statistically involved methods of determining bloc voting into a "common sense" notion of racially polarized voting as merely reflecting differences in the voting behavior of groups.⁹³

Since *Gingles*, the federal courts have confronted a number of vote dilution claims encompassing a wide variety of factual patterns, but the standards for deciding them have remained unclear.⁹⁴ Until

91. *Gingles*, 478 U.S. at 44 (quoting S. REP. NO. 417, *supra* note 52, at 28, reprinted in 1982 U.S.C.C.A.N. at 206) (emphasis added).

92. One commentator noted that "[t]his insistence on establishing a causal relationship between the challenged election system or practice and the alleged vote dilution is a critical element of any reasoned analysis." C. Robert Heath, *Managing The Political Thicket: Developing Objective Standards In Voting Rights Litigation*, 21 STETSON L. REV. 819, 821 (1992).

93. Bernard Grofman, *The Use of Ecological Regression to Estimate Racial Bloc Voting*, 27 U.S.F. L. REV. 593, 597 (1993). The *Gingles* Court found that voting is racially polarized 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." *Gingles*, 478 U.S. at 53 n.21 (adopting Dr. Bernard Grofman's definition, as put forth at trial); see *League of United Latin Amer. Citizens Council No. 4434 v. Clements*, 986 F.2d 728, 748 (5th Cir. 1993) (holding that racially polarized voting is an objective factor which is established by evidence demonstrating that voters vote along racial lines), *on reh'g*, 999 F.2d 831, *cert. denied*, 114 S. Ct. 878 (1994); *Clark v. Calhoun County*, 813 F. Supp. 1189, 1198 (N.D. Miss. 1993) (using the *Gingles* conception of racially polarized voting); see also Evelyn Elayne Shockley, Note, *Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice*, 89 MICH. L. REV. 1038, 1045-53 (1991) (discussing three approaches taken by lower courts to the *Gingles* view of racial bloc voting: (1) cases finding the race of the candidate irrelevant, (2) cases implicitly treating the candidate's race as a relevant factor in evaluating the level of racial bloc voting; and (3) cases explicitly finding the candidate's race relevant).

94. See, e.g., *Shaw v. Reno*, 113 S. Ct. 2816, 2830-33 (1993) (using the aesthetically "irrational" appearance of a proposed North Carolina legislative district as the basis for an equal protection claim by white majority voters); *Grove v. Emison*, 113 S. Ct. 1075, 1083-85 (1993) (discussing voter fragmentation in single-member districts and concluding that the *Gingles* preconditions were "unattainable" under the case's facts); *Presley v. Etowah County Comm'n*, 502 U.S. 491, 506 (1992) (holding that shifts in the allocation of power in a government body were not subject to § 5 preclearance because they had "no direct relation to, or impact on, voting"); *Chisom v. Roemer*, 501 U.S. 380, 404 (1991) (finding judicial elections subject to § 2 dilution analysis); *Carrollton Branch of NAACP v. Stallings*, 829 F.2d 1547, 1563 (11th Cir. 1987) (reconsidering decision of district court in light of *Gingles*), *cert. denied*, 485 U.S. 936 (1988); *Cane v. Worcester County*, 840 F. Supp. 1081, 1091 (D. Md. 1994) (recommending that the county consider alternative solutions—solutions other than single-member districting—as the remedy for its dilution violation); Shockley, *supra* note 93, at 1067 ("Over four years after *Thornburg v. Gingles* was handed down, the case law under section 2 . . . is still in disarray. . . . [T]he Court . . . further confused lower courts by introducing controversy over the way to

Holder, the Supreme Court had never directly addressed a dilution challenge to a governing body's existing size under section 2.⁹⁵ However, previous lower court cases rejected the notion that a proposed system with an expanded size may serve as the benchmark by which to measure the dilutive effects of an existing electoral structure, such as a multi-member, at-large district.⁹⁶ In *McNeil v. Springfield Park District*, the Seventh Circuit refused to expand the size of a county commission from seven to the eight or nine necessary to permit the plaintiff's racial group to constitute a majority in a single-member district.⁹⁷ The court carefully distinguished between a court's broad *remedial* powers to order such relief, and the probative purpose of the *Gingles* threshold geographical compactness test, which is to determine whether there is a causal relationship between the use of an at-large system and the alleged dilution of minority voting strength.⁹⁸ In essence, the court decided that the

determine the existence of racially polarized voting.").

95. It is interesting to note that the Eleventh Circuit addressed this type of challenge in 1987, and decided that it was appropriate to consider demographic evidence relating to the geographic concentration of voters in hypothetical three- and five-member forms of commission government. *Carrollton*, 829 F. 2d at 1563. In other words, the *Carrollton* court would allow plaintiffs to use a hypothetical expanded commission size to determine the dilutive effects of a system in which a single commissioner is elected at-large. *Carrollton* differed slightly from *Holder* in that the commission size had *intentionally* been reduced in the past from 5 to 3 to 1 in order to limit black voting strength, but nevertheless is implicitly overruled by *Holder's* rationale.

96. *E.g.*, *Overton v. City of Austin*, 871 F.2d 529, 543 (5th Cir. 1989) ("Actionable vote dilution must be measured against the number of positions in the existing governmental body rather than some hypothetical model based on whatever size is necessary to accomplish proportional representation.") (Jones, J., concurring in the judgment); *cf.* *McNeil v. City of Springfield, Ill.*, 658 F. Supp. 1015, 1020 (C.D. Ill.) (memorandum opinion) (assuming an expanded council size for the dilution comparison, but only because a state law required cities with ward systems to have a council of either 10 or 20 members, and Springfield had a city commission of only five members), *appeal dismissed sub nom. In re City of Springfield, Ill.*, 818 F.2d 565 (7th Cir. 1987).

97. *McNeil*, 851 F.2d 937, 946 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

98. *Id.* The *McNeil* court noted, "Although courts have broad remedial powers, plaintiffs must first show injustice [before a remedy may be had]." *Id.*

Some lower courts, in line with *McNeil's* reasoning, have forced expansion of a governing body's size in the *remedy* stage of some dilution cases to permit the inclusion of minorities. *See, e.g.*, *Carrollton*, 829 F.2d at 1563 (holding that it is appropriate to consider geographical compactness of minority groups in expanded three- and five-member commission sizes in determining the remedy for alleged dilutive effects of at-large election of single commissioner); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 871-72 (M.D. Ala. 1988) (increasing the size of several municipal governing bodies to provide a realistic opportunity for cumulative voting remedy to result in minority inclusion), *aff'd*, 868 F.2d 1274 (11th Cir. 1989); *McNeil*, 658 F. Supp. at 1022 (assuming a 10-member council as the relevant measuring stick for determining a remedy).

purpose of the *Gingles* test is to help determine whether a violation exists, not to create one by increasing the size of the governing body being challenged.⁹⁹ In other words, according to the Seventh Circuit, dilution cannot be *proved* by comparing an existing structure to another with an expanded size, but may be *remedied* by expanding the structure's size once dilution has been proved by some other means.

In *Holder*, the Court faced once again the problem inherent in all section 2 vote dilution claims—how courts should identify vote dilution, measure its effects, and decide whether section 2 has been violated. While *Holder* appears on its face to address only the narrow issue of whether section 2 covers vote dilution claims based on a governing body's size, it essentially involves a continuation of the long-standing debate over quantifying the rights of minority voters. The Court's divergent lines of reasoning and lack of a strong consensus on the Act's requirements and on the proper role of the federal courts in this sensitive area reflect the simple fact that measuring the effectiveness of political participation is a difficult task.¹⁰⁰ While not establishing any new evidentiary standards for

99. *McNeil*, 851 F.2d at 946. The *McNeil* court noted, "Adding seats to the boards would create a voting rights violation where none presently exists by enabling appellants to meet the necessary precondition of their Section 2 claim. This is a sort of bootstrapping we cannot accept." *Id.*; see *Romero v. City of Pomona*, 883 F.2d 1418, 1425 n.10 (9th Cir. 1989) ("If proposed districting plans with additional district seats could be considered to prove a section 2 violation, there would be no case where geographical compactness could not be demonstrated by artful gerrymandering."), *aff'g* 665 F. Supp. 853 (C.D. Cal. 1987); see also *Heath*, *supra* note 92, at 827 (1992) ("While there may be legitimate and compelling reasons for expanding the size of a legislative body, once one departs from the current number of districts or other objective standard, the test loses its validity as a threshold standard."). Compare *Carrollton*, 829 F.2d at 1563 (holding that demographic evidence of voter concentration in proposed expanded commission sizes was "highly relevant" to a showing under *Gingles*), with *McNeil*, 851 F.2d at 946 (distinguishing *Carrollton* by the fact that it involved past *intentional* dilution of the minority community's vote).

100. A recap of the division among Justices is helpful here. Justice Kennedy, joined by Chief Justice Rehnquist, concluded both that no reasonable benchmark existed and that § 2 did not cover size challenges. See *supra* notes 36-38 and accompanying text. Justice O'Connor concurred in their judgment and in their benchmark reasoning, but found that § 2 did provide threshold coverage of size challenges. See *supra* notes 37, 39-41 and accompanying text. Justice Thomas, joined by Justice Scalia, concurred in their judgment also, but would further limit § 2 to disallow claims based on anything but denial of access to the ballot. See *supra* note 37. Those five constituted the plurality on the benchmark holding.

Justice O'Connor's interpretation of § 2 to cover size challenges allied her with the reasoning of the dissenters, Justices Blackmun, Ginsburg, Stevens, and Souter. See *supra* notes 39-41 and accompanying text. Hence, a separate five-member majority found that § 2 should be interpreted to cover vote dilution challenges to size.

vote dilution claims, or even directly addressing the theoretical bases of political participation, *Holder* does rein in vote dilution claims by precluding future inquiry into the dilutive effects of governmental size and limiting the role of the federal courts in policing state voting practices. *Holder* may be divided into two main segments for purposes of simplicity: (1) interpretation of section 2; and (2) the search for a benchmark by which to measure dilution in size challenges.

Before reaching the benchmark dilemma, the Court had to decide whether a governing body's size could be considered a "standard, practice, or procedure" under section 2. If not, no claim under the Act would lie. Since section 5 does encompass size claims,¹⁰¹ much of the case focused on the perceived similarity between sections 2 and 5. Statutory construction, historical precedent, and legislative history were used to stress either that the two sections were never meant to be the same¹⁰² or that both sections were meant to be read broadly to prohibit vote dilution of all kinds.¹⁰³ In the end, five justices found that dilution claims based on size were covered under section 2, due to its similarity in language and purpose to section 5. That finding did not expand minority voting rights at all, however, due to the equally binding holding that no reasonable benchmark can ever exist to measure dilution in a challenge to size. In essence, five members of the Court gave minority voters their cake, but a different five would not let them eat it. Justice O'Connor provided the swing vote for both sides, as she simultaneously handed minority voters the plate while binding their mouths.¹⁰⁴

Section 5 of the Act prohibits changes in voting policy by "covered" states with regard to "[a]ny voting qualification or

101. See *infra* note 107.

102. See *Holder*, 114 S. Ct. at 2586-88 (opinion of Kennedy, J.) (arguing that "[a] voting practice is not necessarily subject to a dilution challenge under § 2 even when a change in that voting practice would be subject to the preclearance requirements of § 5"); *id.* at 2591-619 (Thomas, J., concurring in the judgment) (stressing vehemently that § 2 was never meant to apply to vote dilution claims at all).

103. See *id.* at 2625-30 (opinion of Stevens, J.) (arguing that a distinction between § 2 and § 5 is difficult to square with the language of the statute); *id.* at 2619-24 (Blackmun, J., dissenting).

104. Justice O'Connor voiced concern over the far-reaching implications of the respondents' suggested rationale: "Once a court accepts respondents' reasoning, it will have to allow a plaintiff group insufficiently large or geographically compact to form a majority in one of five districts to argue that the jurisdiction's failure to establish a 10-, 15-, or 25-member commissioner structure is dilutive." *Holder*, 114 S. Ct. at 2590 (O'Connor, J., concurring in part and concurring in the judgment).

prerequisite to voting, or standard, practice, or procedure with respect to voting.” Section 2 prohibits any discriminatory “voting qualification or prerequisite to voting, or standard, practice or procedure.” The Court read section 5 broadly in *Allen v. State Board of Elections*,¹⁰⁵ attaching great significance to the fact that “Congress chose not to include even . . . *minor* exceptions in § 5, thus indicating an intention that *all* changes, no matter how small, be subject to § 5 scrutiny.”¹⁰⁶ Since *Allen*, section 5 has been extended to cover challenges to changes in governmental size,¹⁰⁷ annexations of land,¹⁰⁸ and switches from elective to appointive offices.¹⁰⁹ Unlike its counterpart, section 2 was hardly used until its amendment in 1982; prior to that it was considered co-extensive with the Fourteenth and Fifteenth Amendments.¹¹⁰ In the ensuing twelve years, however, section 2 took over the vote dilution spotlight, as litigants used its revamped results test to attack *existing* discriminatory electoral systems, structures, or practices.¹¹¹

On this issue, the *Holder* Court divided three ways: (1) those who found the two sections co-extensive, at least for threshold

105. 393 U.S. 544 (1969).

106. *Id.* at 568 (emphasis added).

107. *See, e.g.,* Presley v. Etowah County Comm’n, 502 U.S. 491, 503-04 (1992) (stating that a change in a governing authority’s size is a “standard, practice, or procedure with respect to voting” because the change “increase[s] or diminishes the number of officials for whom the electorate may vote,” thereby bearing “on the substance of voting power” and having “a direct relation to voting and the election process”); Lockhart v. United States, 460 U.S. 125, 131 (1983) (holding that a change from a three- to a five-member commission was subject to § 5 preclearance); City of Rome v. United States, 446 U.S. 156, 160-61 (noting that an expansion in the size of a board of education was clearly covered in § 5), *reh’g denied*, 447 U.S. 916 (1980).

108. *See, e.g.,* Pleasant Grove v. United States, 479 U.S. 462, 467 (1987) (holding that annexations of *both* inhabited and uninhabited land are subject to § 5 preclearance).

109. *See, e.g.,* McCain v. Lybrand, 465 U.S. 236, 250 n.17 (1984) (noting that a change from an appointed to an elected office affects a citizen’s voting power and is therefore subject to the § 5 preclearance requirement); Bunton v. Patterson, 393 U.S. 544, 569-70 (1969) (holding that a change from an elected to an appointed office was a “standard, practice, or procedure” with respect to voting).

110. *See supra* note 62.

111. Section 2 was even extended to cover judicial elections in *Chisom v. Roemer*, 501 U.S. 380, 395-96 (1991), which interpreted “representative” to mean the winner of a representative, popular election. *Id.* at 399. The *Chisom* Court reasoned that if Congress had intended to exclude judicial elections from coverage, it would have made that intent explicit in the statute or at least mentioned it somewhere in the legislative history of the 1982 amendments. *Id.* at 399-402; *see also* Houston Lawyer’s Ass’n v. Attorney Gen. of Texas, 501 U.S. 419, 425-26 (1991) (holding that judicial elections must be conducted in compliance with the Voting Rights Act, and stating that “the term ‘representatives’ is not a word of limitation”), *rev’g* 498 U.S. 1060 (1991).

coverage;¹¹² (2) those who found that section 2 does not cover size challenges and is not co-extensive with section 5;¹¹³ and (3) those who argued that section 2 was never meant to cover anything but ballot access.¹¹⁴

Although Justice Thomas strenuously urged a "systematic reassessment" of the Court's interpretation of section 2¹¹⁵—arguing at length that the Act's terms, when interpreted according to established canons of statutory construction, do not cover dilution cases at all¹¹⁶—it is clear that amended section 2 was meant to encompass more than mere access to the ballot. The statute itself refers to the openness of the "political process leading to nomination or election" and the equal opportunity to participate in that process, as well as the opportunity "to elect representatives of [one's] own choice."¹¹⁷ The legislative history is replete with references to "political process."¹¹⁸ The two cases upon which Congress relied most, *White v. Regester*¹¹⁹ and *Zimmer v. McKeithen*,¹²⁰ "were concerned with activities both prior and subsequent to the actual election."¹²¹ In fact, the first of the "*White-Zimmer*" factors¹²²

112. This group consisted of Justices O'Connor, *Holder*, 114 S. Ct. at 2588-89, Souter, Ginsburg, Stevens, and Blackmun, *id.* at 2619-21.

113. This view was espoused by Justice Kennedy, joined by Chief Justice Rehnquist. *Id.* at 2585-88.

114. Justice Thomas argued this view at length in his opinion concurring in the judgment, and was joined by Justice Scalia. *Id.* at 2591-619 (Thomas, J., concurring in the judgment). In *Chisom*, Justice Scalia dissented on the narrow ground that "[s]ection 2 extends to vote dilution claims for the elections of representatives only, and judges are not representatives." *Chisom*, 501 U.S. at 405 (Scalia, J., dissenting) (emphasis added). By joining Justice Thomas in *Holder*, Justice Scalia repudiated this position that § 2 covered at least some dilution claims and aligned himself with the extreme view that § 2 covers only ballot access. See *Holder*, 114 S. Ct. 2591-619 (Thomas, J., concurring in the judgment).

115. *Holder*, 114 S. Ct. at 2591 (Thomas, J., concurring in the judgment).

116. *Id.* at 2603-11. Justice Thomas claimed that the language of the Act dictates that the Court's "interpretation of § 5 should not be adopted wholesale to supply the meaning of the terms 'standard, practice, or procedure' under § 2." *Id.* at 2611 (Thomas, J., concurring in the judgment); see also *Chisom*, 501 U.S. at 404 (1991) (Scalia, J., dissenting) (similarly arguing the necessity of applying traditional statutory construction to section 2 interpretation).

117. See *supra* note 4 (providing the Act's full text).

118. The Senate Judiciary Committee stated, "The initial effort to implement the Voting Rights Act focused on registration . . . [b]ut registration is only the first hurdle to full effective participation in the political process." S. REP. NO. 417, *supra* note 52, at 6, reprinted in 1982 U.S.C.C.A.N. at 183.

119. 412 U.S. 755 (1973).

120. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

121. *Abrams*, *supra* note 90, at 459.

adopted by the Senate Judiciary Committee directs courts to look at "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or *otherwise to participate in the democratic process*."¹²³ The fifth looks at the extent to which discrimination against members of the minority group "hinder[s] their ability to *participate effectively in the political process*."¹²⁴ The very existence of the Dole Compromise indicates that the section covers more than mere access, since proportionality would not have been a concern unless the amendments were directed at potentially dilutive electoral schemes.¹²⁵ In other words, merely ensuring access to the ballot would not engender worry over guaranteeing minorities a proportional number of seats.¹²⁶

The Judiciary Committee relied upon *Reynolds v. Sims* as the patriarch of the dilution principle, and quoted the *Reynolds* Court for its description of the principle:

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.¹²⁷

The Committee continued in its own words:

As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, designedly or otherwise, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, *just as much as outright denial of access to the ballot box*. . . . [S]ection 2 remains the major statutory prohibition of *all* voting rights discrimination. . . . [T]he requirement that the

122. See *supra* note 77.

123. S. REP. NO. 417, *supra* note 52, at 28-29, reprinted in 1982 U.S.C.C.A.N. at 205-07 (emphasis added).

124. *Id.* (emphasis added).

125. See *supra* notes 80-81 and accompanying text.

126. Cf. S. REP. NO. 417, *supra* note 52, at 140-47, reprinted in 1982 U.S.C.C.A.N. at 313-20 (additional views of Senator Orrin G. Hatch of Utah) (objecting to the results test as inevitably leading to proportionality and claiming that the disclaimer against guaranteed proportionality will have no effect on the problem); see *infra* note 197.

127. S. REP. NO. 417, *supra* note 52, at 19, reprinted in 1982 U.S.C.C.A.N. at 196 (quoting *Reynolds*, 377 U.S. 533, 555 n.29 (1964)).

political processes leading to nomination and election be 'equally open to participation by the group in question' extends *beyond* formal or official bars to registering and voting, or to maintaining a candidacy.¹²⁸

It therefore appears that Justice Thomas's assertions about "established canons of statutory construction" and an access-only approach to the Act are not well founded. Short of amendment or repeal,¹²⁹ section 2 must be read to cover vote dilution claims. However, section 2's coverage of dilution claims in general does not necessarily translate into its coverage of dilution claims against size. Regardless of the similarity in language and purpose between sections 2 and 5, size challenges highlight a fundamental difference between the two. Section 5 asks whether the proposed electoral change would lead to "*retrogression* in the position of racial minorities with respect to their effective exercise of the electoral franchise",¹³⁰ in other words, the baseline for comparison under section 5 is the status quo.¹³¹ Section 2 provides no such "inherent" benchmark, and therefore does not easily lend itself to coverage of size challenges.¹³²

128. S. REP. NO. 417, *supra* note 52, at 28-30, *reprinted in* 1982 U.S.C.C.A.N. at 205-08 (emphasis added); *see supra* note 76 (noting the committee's adoption of a "functional view" of the political process). The Court itself has explained that "there is no question that the terms 'standard, practice, or procedure' are broad enough to encompass the use of multimember districts to minimize a racial minority's ability to influence the outcome of an election covered by section 2." *Chisom v. Roemer*, 501 U.S. 380, 390 (1991). Even the *Chisom* dissenters, while disagreeing that judges are representatives, agreed that § 2 extends to vote dilution claims. *See supra* note 114.

129. *Cf. Holder*, 114 S. Ct. at 2625 (opinion of Stevens, J.) ("To the extent that [Justice Thomas's] opinion advances policy arguments in favor of [an access-only] interpretation of the statute, it should be addressed to Congress, which has ample power to amend the statute.").

130. *Beer v. United States*, 425 U.S. 130, 141 (1976) (emphasis added); *see Holder*, 114 S. Ct. at 2587 (opinion of Kennedy, J.) (using the retrogression distinction to justify his refusal to recognize § 2's coverage of size dilution claims).

131. *See Holder*, 114 S. Ct. at 2587 (opinion of Kennedy, J.).

132. *Id.* This lack of standards for comparison may actually be a problem with all vote dilution claims under § 2, because divining the "correct" or optimal level of minority voting strength against which to measure the existing system is an inherently political matter. *See Thornburg v. Gingles*, 478 U.S. 30, 87-88 (1986) (O'Connor, J., concurring in the judgment) (listing some of the inherent difficulties with the very concept of vote "dilution"). Consequently, § 2 has been questioned as an unconstitutional delegation of power to the judiciary. Interview with Melissa Saunders, Associate Professor of Law, University of North Carolina School of Law, Chapel Hill, N.C. (Feb. 8, 1995). However, due to Congress's expansive Fifteenth Amendment powers, § 2's results test probably will not be overturned on constitutional grounds. *Id.*; S. REP. NO. 417, *supra* note 52, at 39, *reprinted in* 1982 U.S.C.C.A.N. at 217 ("By now the breadth of Congressional power to enforce these provisions is hornbook law."). The Senate Judiciary Committee relied on earlier Supreme Court precedent, noting that "Congress has full remedial powers to

Nevertheless, according to Justice O'Connor, it is "[im]possible to read the terms of § 2 more narrowly than the terms of § 5" as a textual matter, at least for threshold coverage.¹³³ Both sections have the broad remedial purpose of eliminating discrimination in the electoral process, and use nearly identical language to express that purpose.¹³⁴ The mere fact that one lends itself more easily to proof of discrimination in size challenges should not preclude the other from initial coverage of those challenges.¹³⁵ Consequently, section 2 must be read to encompass dilution challenges to existing governmental size, in line with the Act's "broad remedial purpose of 'rid[ding] the country of racial discrimination in voting.'" ¹³⁶

Section 2's threshold coverage of size challenges was a mere pyrrhic victory for the plaintiffs in this case, however, since five members of the Court found no "objective alternative benchmark" by which to measure the dilutive effects of governmental size.¹³⁷ To determine whether minority voters have the potential to elect representatives of their choice in the absence of a challenged electoral structure, the Supreme Court requires an "objectively reasonable alternative practice" against which to measure dilution.¹³⁸ In some

effectuate the constitutional prohibition against racial discrimination in voting." S. REP. NO. 417, *supra* note 52, at 39, reprinted in 1982 U.S.C.C.A.N. at 217 (citing *South Carolina v. Katzenbach*, 383 U.S. 301, 326 (1966)). The Committee stated, "[T]he Court has long held that Congress need not limit itself to legislation coextensive with the Fifteenth Amendment, if there is a basis for the congressional determination that the legislation furthers enforcement of the amendment." *Id.*

133. *Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

134. *Cf. id.* (O'Connor, J., concurring in part and concurring in the judgment) (finding that §§ 2 and 5 have parallel scope for purposes of determining threshold coverage).

135. *Id.* (O'Connor, J., concurring in part and concurring in the judgment).

136. *Id.* at 2619 (Blackmun, J., dissenting) (quoting *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (1966))). The *Chisom* Court stated: "Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview." *Chisom*, 501 U.S. at 392.

137. *See Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

138. *Id.* at 2589 (O'Connor, J., concurring in part and concurring in the judgment); *Thornburg v. Gingles*, 478 U.S. 30, 88 (O'Connor, J., concurring in the judgment) ("In order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system."); Pamela S. Karlan, *Maps & Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 176 (1989) ("Any theory of qualitative vote dilution necessarily requires some notion of what the 'undiluted' voting strength of the plaintiff class should be. In other words, courts must measure the observed

dilution contexts, this benchmark is "self-evident."¹³⁹ For example, a court may compare a challenged multi-member at-large election system to a system of multiple single-member districts.¹⁴⁰ In jurisdictions where majority vote requirements, numbered posts, staggered terms, residency requirements, or anti-single-shot rules are used,¹⁴¹ the benchmark for comparison is simply a system without the challenged practice.¹⁴² According to the majority, however, section 2 dilution challenges to size are different because there are simply too many choices to put any "objectively determinable constraints" on the dilution inquiry.¹⁴³

results against some baseline of expected outcomes.").

139. *Holder*, 114 S. Ct. at 2589 (O'Connor, J., concurring in part and concurring in the judgment).

140. *Id.* (O'Connor, J., concurring in part and concurring in the judgment). *But cf. id.* at 2594-97 (Thomas, J., concurring in the judgment) (arguing that the choice of single-member districts as the benchmark and the remedy in challenges to such schemes is only one political judgment among many different possibilities); GUINIER, *supra* note 63, at 119-56 (arguing that the current single-member districting remedy does not effectively provide representation of either groups or individuals). *See infra* notes 159-89 and accompanying text.

141. *See generally* *City of Rome v. United States*, 446 U.S. 156, 184 n.19 (1980) (explaining the mechanics of single-shot voting and providing a hypothetical example). Single-shot voting was often used by minority groups in multi-member districts where the top vote-getters filled the available positions, each voter had as many votes to cast as there were positions to be filled, and the candidates were all in competition with one another. *See id.*; CONTROVERSIES, *supra* note 3, at 25 n.63. Minority groups would decide in advance to support one candidate, and group members would cast only one of their available votes for that candidate. *Id.* By withholding their other votes from that candidate's competitors, minority groups could sometimes elect their chosen representative. *Id.* So-called "full slate" laws, which invalidated all ballots on which the voter had not cast all available votes, ended single-shot voting in the jurisdictions that employed them. *Id.* Numbered post systems, staggered terms, and majority vote requirements similarly eliminated the possibility of single-shooting to obtain representation. *Id.*

A majority requirement forces the two top vote-getters into a runoff election if neither commanded a majority of votes in the first election. *Id.* at 23 n.56. This often allows white majority voters, who have split their votes among several white candidates in the first election, to coalesce behind a single white candidate, providing the required majority. *Id.* In a numbered post system, candidates are required to run for designated places on the ballot, with the majority vote-getter winning the post. *Id.* at 25 n.63. This quite transparently leads to the exclusion of minority candidates in jurisdictions where racial bloc voting exists, i.e., where minority and majority voters consistently prefer different candidates. *Id.* Staggered terms are similar in their effect; each seat in the electorate expires and is voted for at a different time of the year. Since single-shooting requires a multi-member plurality election to work, staggered terms eliminate the possibility of its use. *See id.*

142. *Gingles*, 478 U.S. at 2590 (O'Connor, J., concurring in part and concurring in the judgment).

143. *Id.* (O'Connor, J., concurring in part and concurring in the judgment). Justice O'Connor argued that to accept the five-member commission here would lead to future

Justice Thomas characterized the benchmark supporters in *Holder* as focusing heavily on the "practical concern" that "there is no principled method for determining a benchmark against which the size of a governing body might be compared" to decide whether it dilutes a minority group's voting strength.¹⁴⁴ The respondents argued that a five-member commission should be used for the comparison for several reasons: it was a common form of governing authority in the state;¹⁴⁵ the state legislature had authorized the county to switch to a five-member commission elected from single-member districts with a chairman elected at-large;¹⁴⁶ and the county had moved from a single superintendent of education to a five-member school board elected from single-member districts.¹⁴⁷ To the five benchmark Justices, however, none of those considerations bore on dilution.¹⁴⁸ The Court held that the sole commissioner system has the same impact on the vote whether or not it is common among other counties, and a minority group's voting strength is not diluted any more or less by the fact that the county enlarged its school board or that the State authorized a change in size.¹⁴⁹ The choice of a "hypothetical" larger commission as the benchmark, and the likely remedy should dilution be found, was therefore "extremely problematic" to the benchmark justices.¹⁵⁰

claims from increasingly smaller minority groups arguing for larger commission sizes, so that they would be able to form a geographically compact majority in one of the single-member districts. *Id.* (O'Connor, J., concurring in part and concurring in the judgment); see *supra* note 104.

144. *Holder*, 114 S. Ct. at 2591 (Thomas, J., concurring in the judgment). Justice O'Connor agreed, stating that "[t]he wide range of possibilities makes the choice inherently standardless." *Id.* at 2590 (O'Connor, J., concurring in part and concurring in the judgment). This furthers the reasoning of lower court cases like *McNeil v. Springfield Park Dist.*, 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989). See *supra* notes 97-99 and accompanying text.

145. Of Georgia's 159 counties, 76 had five commissioners, including 25 counties smaller than Bleckley County. *Holder*, 114 S. Ct. at 2622 (Blackmun, J., dissenting) (citing GEORGIA DEPT. OF COMMUNITY AFFAIRS, COUNTY GOVERNMENT INFORMATION CATALOG (Table 1.A: Form of Government) (1989)).

146. *Id.* (citing 1985 GA. LAWS 4406).

147. *Id.* at 2586 (opinion of Kennedy, J.).

148. *Id.* (opinion of Kennedy, J.) (describing the issues as "irrelevant considerations in the dilution inquiry").

149. *Id.* (opinion of Kennedy, J.) ("It makes little sense to say . . . that the sole commissioner system should be subject to a dilution challenge if it is rare—but immune if it is common."). This reasoning appears sound; if commonality were a bar to vote dilution claims, multi-member, at-large electoral systems would never have been subject to challenge on a dilution theory due to their widespread use.

150. *Id.* at 2590 (O'Connor, J., concurring in part and concurring in the judgment).

The four dissenters on the benchmark reasoning did not see this as a problem and would have relied on the *Gingles* "totality of the circumstances" test to provide the limits on size claims that concerned the Kennedy supporters.¹⁵¹ By combining this "totality of the circumstances" test and the facts of each case with a "searching practical evaluation of 'past and present reality,'" ¹⁵² the dissenters believed courts may responsibly decide whether a reasonable alternative practice exists by which to determine dilution.¹⁵³ Such an evaluation did not present much difficulty in *Holder* because the five-member commission was well grounded in history, custom, and practice, and provided an immediately identifiable benchmark for the dilution comparison.¹⁵⁴

The Court has previously stated that there is no right to elect particular representatives outside of a possible symbiotic relationship with the right to equal participation in the political process, a deprivation of which must be proven under the totality of the circumstances to establish a section 2 violation.¹⁵⁵ In *Holder*, then, the fact that no "minority-preferred" representative had ever been elected to office in Bleckley County was not enough to establish a vote dilution claim.¹⁵⁶ The plaintiffs also had to prove that they had been denied equal participation in the political process, something they could not do absent the use of a hypothetical, expanded commission size for the dilution comparison.¹⁵⁷ Losing elections

151. *Id.* at 2622 (Blackmun, J., dissenting); see *supra* notes 88-89 and accompanying text (discussing the *Gingles* test).

152. S. REP. NO. 417, *supra* note 52, at 30, reprinted in 1982 U.S.C.C.A.N. at 208 (quoting *White v. Regester*, 412 U.S. 755, 769-70 (1973)).

153. *Id.* at 2622-24 (Blackmun, J., dissenting). According to Justice Blackmun, these combined limitations "protect against a proliferation of vote-dilution challenges premised on eccentric or impracticable alternative methods of redistricting." *Id.* at 2624 (Blackmun, J., dissenting).

154. *Id.*; see *supra* note 145 (noting the prevalence of 5-member county commissions). According to Justice Blackmun, this consideration would rule out size challenges to traditional single-member executive offices such as governor, sheriff, and mayor. *Holder*, 114 S. Ct. at 2622. Unlike those offices, a one-member legislature is an "anomaly." *Id.* at 2623. Note that single-member executive offices are not otherwise immune from § 2 coverage—Justice Blackmun addressed only size challenges in his opinion. *Id.* at 2623 n.5 (Blackmun, J., dissenting); cf. *Houston Lawyers' Ass'n v. Texas Attorney Gen.*, 501 U.S. 419, 427 (holding that judicial elections are not exempt from § 2 coverage under a "single-member office" exception), *rev'g* 498 U.S. 1060 (1991).

155. *Chisom v. Roemer*, 501 U.S. 380, 396-97 (1991) ("The statute does not create two separate and distinct rights.").

156. *Holder*, 114 S. Ct. at 2595-96.

157. With only one commissioner to be elected, these plaintiffs will naturally "lose" every election if they support a different candidate than does a white voting majority

does not constitute denial of participation, unless participation is defined solely as the ability to actually have preferred candidates elected, a proposition soundly rejected in past case law.¹⁵⁸

The measure of effective political participation and "correct" voting weight is unclear. Is it control of a select few seats¹⁵⁹ or influence over the electoral fortunes of all representatives in the governing body?¹⁶⁰ The *Holder* dissenters would apparently choose limited control over wider influence. Using a five-member commission as the remedy here, African-Americans in Bleckley County would be given the chance to control one seat if "packed"¹⁶¹ into

(assuming the existence of racial bloc voting) since they only constitute 20% of the county's population.

158. See, e.g., *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971) ("The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them."). The *Whitcomb* Court described the "cancellation" of minority voting power as a "mere euphemism for political defeat at the polls." *Id.* at 153; see also *League of United Latin Am. Citizens v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1507 (Higginbotham, J., dissenting) ("I had supposed that the essence of our republican arrangement is that voting minorities lose."), *vacated on reh'g*, 829 F.2d 546 (5th Cir. 1987) (en banc) (per curiam).

159. According to Justice Thomas, the Court's focus on control of seats is a direct result of the courts' desire for an objective standard to use in deciding questions of abstract political theory. *Holder*, 114 S. Ct. at 2595 n.6 (Thomas, J., concurring in the judgment). Justice Thomas continued, "If using control of seats as our standard does not reflect a very nuanced theory of political participation, it at least has the superficial advantage of appealing to the 'most easily measured indicia of political power.'" *Id.* (Thomas, J., concurring in the judgment) (quoting *Davis v. Bandemer*, 478 U.S. 109, 157 (1986) (O'Connor, J., concurring in the judgment)).

160. Justice Harlan presented that question in *Allen v. State Board of Elections* when he stated, "Under one system, Negroes have *some* influence in the election of *all* officers; under the other, minority groups have *more* influence in the selection of *fewer* officers. If courts cannot intelligently compare such alternatives, it should not be readily inferred that Congress has required them to undertake the task." 393 U.S. 544, 586 (1969) (Harlan, J., concurring in part and dissenting in part). Lani Guinier asked more directly, "Are blacks better off with one aggressive advocate or several mildly sympathetic listeners?" GUINIER, *supra* note 63, at 80.

161. See, e.g., Paulette Walker, *Foes Crack, Stack, Pack To Weaken Voting Power*, USA TODAY, Aug. 6, 1990, at 9A ("Packing is overconcentrating minorities in a district to deny them a chance to have influence in adjoining districts."). Ms. Walker and others have argued that providing minorities with their own "safe" districts may dilute votes just as much as submerging them in majority-white districts, since they will have virtually no influence on the election of any representatives save their own. See *id.*; John Leo, *The Progeny of Strange Bedfellows: New Racism*, S.F. CHRON., Oct. 4, 1992, at TW4 ("[P]ack[ing] minorities into electoral homelands, thus 'whitening' surrounding districts and increasing the likelihood that black and Hispanic gains will be more than offset by increased numbers of white Republicans in Congress . . . is ethnic cleansing American-style."); Renee Loth, *GOP Teaming Up With Minorities: They Hope to Deliver a One-Two Punch on Legislative, Congressional Redistricting*, BOSTON GLOBE, May 19, 1991, at A29

their own majority-minority district, since they comprise over twenty percent of the county's total voting age population.¹⁶² The Kennedy-O'Connor reasoning skirted this inherently political issue by narrowly focusing on the potentially limitless nature of size challenges and thereby avoided the swift undertow of theoretical confrontation over representational ideology.¹⁶³ Only Justice Thomas's lengthy concurrence addressed the theoretical underpinnings of dilution challenges.¹⁶⁴ Justice Thomas argued that the federal courts' choice of single-member districting as their preferred remedy has involved them in "an enterprise of segregating the races into political homelands that amounts, in truth, to nothing short of a system of 'political apartheid.'" ¹⁶⁵ Backhandedly endorsing alternative

("With gerrymandering, undesirable voting blocs are packed or stacked tightly together to have as narrow an influence as possible or cracked apart into several separate districts to dilute their power."); see also *Chisom v. Roemer* 501 U.S. 380, 397 n.24 (1991) (noting that participation in the political process is not denied solely by lack of ability to control seats, and stating that the argument "rests on the erroneous assumption that a small group of voters can never influence the outcome of an election") (emphasis added); *Puerto Rican Legal Defense & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694-95 (E.D.N.Y. 1992) (finding that prohibited dilution can occur either when large concentrations of minority voters are fragmented or disbursed into separate electoral districts or where minorities are concentrated into districts where they constitute an excessive majority); *Turner v. State of Arkansas*, 784 F. Supp. 553, 583-84 (E.D. Ark. 1991) (finding that the proposed remedy of packing black voters into single-member districts also fractured and reduced the number of blacks in adjacent districts), *aff'd* 112 S. Ct. 2296 (1992).

162. The petitioners claimed this line of reasoning wrongly focused not on denial of political participation, but on a lack of proportional minority representation. Reply Brief for the Petitioners at 10, *Holder v. Hall*, 114 S. Ct. 2581 (1994) (No. 91-2012). Since guaranteed proportionality is prohibited by the Act, absence of proportional representation is not a permissible argument in a dilution case. See *supra* notes 80-81.

163. See *supra* notes 143-44 and accompanying text (discussing the Court's view of the dangerous extensions possible should size challenges be allowed).

164. Because *Holder* could be dispensed with on relatively narrow grounds, it is not surprising that only Justice Thomas entered into a deeper discussion of ideology and principle. The Court was expected to discuss the tougher voting-rights issues involved in voting rights in *Holder's* companion case, *Johnson v. De Grandy*, 114 S. Ct. 2647 (1994), but it declined to do so there as well. See *infra* note 199. Justice Thomas dissented in *De Grandy* and adopted his *Holder* concurrence as his dissenting opinion. *De Grandy*, 114 S. Ct. at 2667 (Thomas, J., dissenting). He may have done so to lend more legitimacy to his narrow interpretation of the Voting Rights Act—expressed as a concurrence in *Holder*, it could more easily be seen as an extension of the majority reasoning, rather than as a radical departure from the mainstream interpretation of the Act in *De Grandy* if proposed in a dissenting opinion. Interview with Melissa Saunders, Associate Professor of Law, University of North Carolina School of Law, Chapel Hill, N.C. (Feb. 8, 1995).

165. *Holder*, 114 S. Ct. at 2598 (Thomas, J., concurring in the judgment) (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2827 (1993)).

methods such as cumulative voting and transferable votes,¹⁶⁶ Justice Thomas stressed that single-member districting is merely one "inherently . . . political" choice among many "competing theories of political philosophy" which seek to define the fully effective vote, that is, to define "effective participation in representative government."¹⁶⁷

Choosing the correct or fully effective level of political participation is the critical issue in a vote dilution case because without such a benchmark, measuring the dilutive effects of the system in question would be impossible.¹⁶⁸ In the search for some kind of objective standard in dilution cases, the federal courts have seized upon the single-member district as both yardstick and remedy.¹⁶⁹ Unfortunately, choosing control of seats as the preferred indicia of political effectiveness and single-member districting as the preferred remedy for a violation of section 2 has, according to some, deepened

166. *Id.* at 2599-600 (Thomas, J., concurring in the judgment). The endorsement was backhanded in its context. Justice Thomas argued that single-member districting is simply a "less precise expedient" to achieving proportional representation than requiring registration on racial rolls and dividing power purely on a population basis. *Id.* at 2599 (Thomas, J., concurring in the judgment). Consequently, his argument runs, if we are going to insist on proportional representation as the correct measure of political effectiveness, we might as well utilize other systems which can produce proportional results with less difficulty and more accuracy. *Id.* at 2600 (Thomas, J., concurring in the judgment). For a discussion of some alternative approaches to securing effective political participation, see *infra* notes 171-89 and accompanying text.

167. *Id.* at 2594 (Thomas, J., concurring in the judgment).

168. In Justice O'Connor's words:

The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained. . . . [I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system.

Thornburg v. Gingles, 478 U.S. 30, 88 (O'Connor, J., concurring in the judgment) (internal quotation marks omitted).

169. Cf. Karlan, *supra* note 138, at 174. Professor Karlan strongly objected to the federal courts' reliance on geography: "The courts often focus on geography as if it were more than a means of providing representation, and they ignore effective access to the political process." *Id.* She claimed that the *Gingles* "geographically insular" requirement was being misperceived by the lower courts, in that it cannot be seen as a threshold requirement for all § 2 challenges to at-large elections. *Id.* Rather, according to Professor Karlan, "intra-jurisdiction geography" is relevant only to the extent that it "illuminates the existence of exclusion from the political process or provides a tool for remedying that exclusion." *Id.* at 174-75; see *infra* notes 171, 188 (discussing Professor Karlan's alternative approach of "civic inclusion").

racial divisions, obviated the need for coalition-building, and resulted in " 'political apartheid' " in the nation.¹⁷⁰

So-called "alternative" solutions¹⁷¹ to the problem of securing equal political participation for all should not be dismissed out of hand. Their driving principle is the "threshold of exclusion," defined as the percentage of the vote that will guarantee winning a seat in even the most unfavorable circumstances.¹⁷² The threshold of exclusion in traditional at-large elections and in single-member districts is fifty percent, meaning that any cohesive larger group cannot be excluded from electing a representative, while any smaller group can, at least when the majority group votes strategically.¹⁷³ Consequently, such systems often deny a sizable portion of the electorate the opportunity to elect any representatives, resulting in what one renowned commentator aptly termed "the tyranny of the majority."¹⁷⁴

170. *Holder*, 114 S. Ct. at 2598 (Thomas, J., concurring in the judgment) (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2832 (1993)); *Leo*, *supra* note 161 ("The relentless search for mono-racial districts is a sorry business. It makes too much of tribal identity and may usher in an era in which people get elected primarily by making racial appeals. . . . [I]t will . . . isolate [minority candidates] in racial enclaves and further fragment our politics."); Stuart Taylor, Jr., *Electing by Race*, 13 THE AMERICAN LAWYER 50, 52 (1991) ("[W]e seem to be perpetuating racial divisions by carving a principle of racial separation into our electoral system."); *White Liberals Looking In From The Outside*, DETROIT FREE PRESS, Jan. 29, 1995, at 6J (" 'The black districts are blacker, and the white districts are whiter, radicalizing the electorate in both, which radicalizes the people they elect.' ") (quoting Ayers Haxton, a progressive white Mississippi legislator); Richard Wolf, *Political Lines Drawn & Redrawn Around Race*, USA TODAY, Feb. 5, 1992, at 5A (" 'It's almost like creating these independent townships in South Africa. The whole idea was to create a truly interracial society.' ") (quoting Rep. John Lewis of Georgia, a well-known civil rights leader).

171. Karlan, *supra* note 138, at 223. Professor Karlan identified two approaches to measuring the presence of vote dilution; one focuses on a "geographic baseline" (single-member districting), while the other is concerned with "civic inclusion." *Id.* at 175. According to Professor Karlan, a civic inclusion approach examines vote discrimination on a broader plane, and requires "an intensely local appraisal of political reality in the relevant jurisdiction." *Id.* at 180. In her view, geography is an imperfect and formalistic proxy for the distinctive interests of minority individuals, and may in fact "impair the development of representatives concerned with the welfare of the entire community." *Id.* at 181-82. She stated: "[R]acial vote dilution cannot be treated as simply a geographic phenomenon. . . . Unlike the white suburban plaintiffs in *Reynolds* [*v. Sims*], whose voting strength was diluted because of *where* they lived, the political power of black citizens is diluted because of *who* they are." *Id.* at 174 (citations omitted).

172. Arend Lijphart et al., *The Limited Vote and the Single Non-Transferable Vote: Lessons from the Japanese & Spanish Examples*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 154, 157 (Bernard Grofman & Arend Lijphart eds., 1986).

173. Karlan, *supra* note 138, at 222.

174. GUINIER, *supra* note 63, at 3.

The central feature of alternative, "semiproportional"¹⁷⁵ election systems is that they substantially lower the threshold of exclusion, thereby increasing the number of groups large enough to elect the representative of their choice.¹⁷⁶ For example, limited voting schemes, originally conceived to allow representation to minority political parties, limit voters to voting for less than a full slate of representatives.¹⁷⁷ In a limited voting scheme, the greater the difference between the number of seats to be filled and the number of votes allotted each voter, the lower the threshold of exclusion.¹⁷⁸

Cumulative voting, another alternative solution, is a more involved modification of traditional at-large elections: It not only enhances inclusion, but allows voters to express the *intensity* of their preference for a candidate(s).¹⁷⁹ In cumulative voting, voters are given the same number of votes as there are seats to be filled, but are allowed to cast more than one vote for a particular candidate.¹⁸⁰ The threshold of exclusion is substantially reduced in such a scheme—it is identical to that of a limited voting system where each voter is limited to one vote.¹⁸¹ Cumulative voting is more flexible

175. MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY 124 (Bernard Grofman et al. eds., 1992) [hereinafter MINORITY REPRESENTATION]. The systems are called "semiproportional" because they provide at least a minimal level of minority representation, but not proportionality per se, where voting is racially polarized. *Id.*

176. Karlan, *supra* note 138, at 223.

177. Limited voting has been used in over half a dozen cities in this country, and is still used in most Pennsylvania counties, where individuals may vote for only two candidates out of the three to be elected. MINORITY REPRESENTATION, *supra* note 175, at 125. Alabama and Georgia have also adopted some element of limited voting in the last 10 years. *Id.* at 125-26.

178. Karlan, *supra* note 138, at 224. The formula for limited voting's threshold of exclusion is: # votes allotted to each voter ÷ (# votes allotted to each voter + # of seats to be filled). *Id.* Thus, under a scheme where three school board members are to be elected and each voter gets two votes, the threshold of exclusion is 40% [$2 \div (3+2) = 2/5 = 40\%$]. *Id.* It follows that limited systems where voters have only one vote are the most inclusionary. *Id.* at 225. Inserting that number into the preceding example gives us a threshold of exclusion of 25% [$1 \div (1+3) = 1/4 = 25\%$]. In that system, a politically cohesive group constituting more than 25% of the electorate could not be denied representation if it voted strategically. *See id.*

179. *Id.* at 231; *see also* GUINIER, *supra* note 63, at 14-16 (discussing the benefits of cumulative voting). Cumulative voting is very common in the corporate setting, precisely because it increases minority inclusion in corporate decisionmaking. *See* Aminai Glazer et al., *Cumulative Voting in Corporate Elections: Introducing Strategy into the Equation*, 35 S.C. L. REV. 295, 295 (1984) (noting that roughly 20 states require cumulative voting for corporate elections and another 13 permit its use).

180. Karlan, *supra* note 138, at 231.

181. *Id.* at 232. The formula for cumulative voting's threshold of exclusion may be expressed: $1 \div (1 + \# \text{ of seats to be filled})$. *Id.* Thus, in elections for a seven-member

than limited voting—which necessarily restricts the number of candidates each voter can support to less than the number to be selected—because it allows voters to gauge for themselves whether their interests are better served by concentrating all of their support behind one candidate or by influencing the electoral prospects of several candidates.¹⁸²

These and other non-traditional voting systems are in many ways preferable to the current practice of single-member districting, which some believe already “creates what amounts to a right to usual, roughly proportional representation on the part of sizable, compact, cohesive minority groups.”¹⁸³ They allow the voters, not the district drawers, to determine with whom they will unite to elect representatives, solving the problem of optimizing minority influence.¹⁸⁴ These systems encourage candidates to be responsive to the needs of the entire community and appeal to all voters in the jurisdiction for support.¹⁸⁵ They also give much more influence to minority groups that are too small or geographically fragmented to meet the *Gingles* requirements of size and compactness,¹⁸⁶ because their votes could provide the potential swing necessary for any one candidate to win. In other words, they encourage coalition-building among the voters

body, the threshold of exclusion is extremely low at 12.5% [$1 \div (1+7) = 1/8 = 12.5\%$]. *Id.* 182. *Id.*

183. *Thornburg v. Gingles*, 478 U.S. 30, 91 (1986) (O'Connor, J., concurring in the judgment). Senator Orrin Hatch of Utah recognized the potential incompleteness of single-member districting as a remedy when he considered the 1982 amendments to the Act:

[T]he proposed amendments will . . . [move us] in the direction of providing compact and homogenous political ghettos for minorities and conceding them their “share” of officeholders, rather than undertaking the more difficult (but ultimately more fruitful) task of attempting to integrate them into the electoral mainstream in this country by requiring them to engage in negotiation and compromise, and to enter into electoral coalitions, in order to build their influence. Minority representation in the most primitive sense may be enhanced by the proposed amendments; minority influence will suffer enormously.

S. REP. NO. 417, *supra* note 52, at 103, reprinted in 1982 U.S.C.C.A.N. at 275-76.

184. “Optimizing” as used here refers only to the necessity of ensuring an *equal* opportunity to participate in the political process and to elect representatives of choice, as guaranteed by the Act. Note that these systems do not in any way mandate, contrary to Justice Thomas’s assertions, *Holder*, 114 S. Ct. at 2599-2600, proportionality—they simply allow the voters an opportunity to join together in support of a candidate or candidates and vote strategically. See *supra* note 166 (discussing Justice Thomas’s view).

185. See *Karlan*, *supra* note 138, at 226-27. There is some concern on this point about accountability in such a jurisdiction-wide arrangement, but many would say that accountability is not a particular strongpoint of the current system either.

186. See *supra* text accompanying notes 89-90.

and concern for all citizens among the legislators¹⁸⁷ while reducing the heavy load on the federal courts and state legislatures.¹⁸⁸ It is perplexing that our courts feel they must resort to cramming certain groups into legislative districts just to ensure their election of a representative. It is equally vexing that those representatives will be largely ignored upon reaching office, because they will still constitute a minority.¹⁸⁹

The desire for equal political participation must be tempered with rationality. To allow a minority group to challenge a single-commissioner scheme of government, which is in itself a single-member district, and suggest a hypothetical expanded commission size by which to measure dilution, would be to fabricate a voting rights violation.¹⁹⁰ Bleckley County, Georgia does not have a racially polarized voting environment in the modern day,¹⁹¹ and there was

187. The current favor for single-member districting may be accomplishing the exact opposite—as one commentator put it, “The cost of rigging the system to elect more minorities may . . . be a net loss in legislative support for inner-city schools, anti-poverty programs, and civil rights bills,” due to the reduction of overall influence, which “leav[es] many white officeholders with little incentive to court [minorities].” Taylor, *supra* note 170, at 52.

188. Cf. Karlan, *supra* note 138, at 179-82 (discussing her “civic inclusion” philosophy of representative democracy). Professor Karlan states that a civic inclusion approach “rests on a belief in the distinctive values that inclusion in governmental decisionmaking brings: a sense of connectedness to the community and of equal political dignity; greater readiness to acquiesce in governmental decisions and hence broader consent and legitimacy; and more informed, equitable, and intelligent governmental decisionmaking.” *Id.* at 180.

189. Solutions to this additional problem have also been proposed by many commentators. See, e.g., GUINIER, *supra* note 63, at 16-17 (exploring the use of super-majority voting); Karlan, *supra* note 138, at 236-48 (arguing for inclusionary approaches to the legislative process, including rotating power positions and super-majority voting rules); MINORITY REPRESENTATION, *supra* note 175, at 127-28 (discussing power sharing devices designed to improve the “proportionate influence” of elected representatives).

190. Cf. McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) (“It is not reasonable to add seats to the [bodies in question] essentially to create a section 2 violation.”), *cert. denied*, 490 U.S. 1031 (1989); see *supra* notes 97-99 and accompanying text.

191. Analysis of recent elections in the county showed little statistical evidence of racially polarized voting. Brief for the Petitioners at 10, Holder v. Hall, 114 S. Ct. 2581 (1994) (No. 91-2012). In fact, black candidate Robert Benham received over half of his votes in Bleckley County from white voters when he ran for the Georgia Court of Appeals. *Id.* Black candidate Willie Basby won three at-large city council elections for the City of Cochran, twice by receiving a majority of the votes cast. *Id.* Councilman Basby himself even testified that white voters would not discriminate against a qualified black candidate, and that personal voter contact, name recognition, and consensus building win elections in Bleckley County. *Id.* David Walker, president of the local NAACP chapter, also testified at trial that a qualified black candidate for county commissioner could win, even though no minority candidate has ever run for the office. *Id.* at 23 n.18.

evidence at trial of a lack of minority political cohesion and organization.¹⁹² In fact, there was an overall lack of evidence tending to show that the single-commissioner system is not the best way to run a small county like Bleckley for the benefit of all its citizens, regardless of their race or ethnicity.

In *Holder*, the Court was faced once again with the problem inherent in all section 2 vote dilution claims: How are the courts to identify vote dilution, measure its effects, and decide whether section 2 has been violated? The Court did not address that problem, choosing instead to decide the case on the readily available, narrow ground that size challenges are not feasible. Indeed, notwithstanding the availability of a "benchmark" by which to measure the dilutive effects of a single commissioner system in this case,¹⁹³ it is apparent that to allow dilution challenges to size would embroil lower courts in even more complicated, fact-intensive inquiries than those already required.¹⁹⁴ The use of a hypothetical, expanded government body size for purposes of the dilution comparison would presuppose a section 2 violation and bypass the geographical compactness requirement of *Gingles*.¹⁹⁵

Congress has given the judiciary a "difficult responsibility" in the area of voting rights,¹⁹⁶ requiring it to balance the competing

Even the respondents testified that they were unaware of any racial appeals in recent elections. *Holder*, 757 F. Supp. at 1562 n.2. The district court observed that Councilman Basby's testimony "serve[d] less as evidence of racially polarized voting and more as a lesson in the dynamics of grass roots political campaigning," and stated, "Nothing in the plaintiff's evidence . . . leads this court to a conclusion that voting on local levels is racially polarized." *Id.* at 1573-74.

192. Dr. Bernadette Loftin, town historian, researched the issue and determined that there was no evidence of political organization among black citizens in Bleckley County. Brief for the Petitioners at 36 n.29, *Holder* (No. 91-2012). NAACP chapter president Walker testified that there are differences of opinion in the Bleckley County black community on political matters, and that the black community as a whole does not vote the same way in each election. *Id.* City Councilman Basby testified that the black community showed very little interest in the 1986 referendum to change the form of county government, which was rejected by the county's voters. *Id.*; see *supra* note 22 and accompanying text.

193. See *supra* notes 145-47, 151-54 and accompanying text.

194. Cf. *Holder*, 114 S. Ct. at 2590 (O'Connor, J., concurring in part and concurring in the judgment) ("The wide range of possibilities makes the choice inherently standardless.").

195. See *supra* notes 89-90 and accompanying text; see also *supra* note 99.

196. See *Holder v. Hall*, 114 S. Ct. 2581, 2625 (1994) (Ginsburg, J., dissenting); cf. *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) ("Even if serious problems lie ahead in applying [totality of circumstances] inquiry under § 2(b) of the Voting Rights Act], that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute.").

congressional concerns of eliminating voting discrimination and avoiding a system of interest group representation.¹⁹⁷ The federal courts have tried valiantly to effectuate that dual purpose and are now firmly entrenched in the "political thicket" of reapportionment,¹⁹⁸ struggling with questions of how much is too much, how bizarre is too bizarre, and how few are too few. Taken together, *Holder* and its companion case *Johnson v. De Grandy*¹⁹⁹ evidence the Court's

197. *Holder*, 114 S. Ct. at 2624 (Ginsburg, J., dissenting) (" 'There is an inherent tension between what Congress wished to do and what it wished to avoid'—between Congress' [sic] 'intent[t] to allow vote dilution claims to be brought under § 2' and its intent to avoid 'creat[ing] a right to proportional representation for minority voters.' ") (quoting *Thornburg v. Gingles*, 478 U.S. 30, 84 (1986) (O'Connor, J., concurring in the judgment) (last alteration in original)). The former concern is self-evident—the whole purpose of the Act was to eliminate vote discrimination. See *supra* text accompanying note 51. The latter is evidenced in the "Dole Compromise," see *supra* notes 80-81 and accompanying text, and in the remarks of the Senate Subcommittee on the Constitution, which stated that "the framers of our Federal Government rejected official recognition of *interest groups* as a basis for representation [i.e. rejected proportionality] and instead chose the *individual* as the primary unit of government." S. REP. NO. 417, *supra* note 52, at 139, reprinted in 1982 U.S.C.C.A.N. at 311 (emphasis added). The Subcommittee expressed its concern with the new results test, stating, "Thus launched in search of a remedy involving results, the subcommittee believes that courts would have to solve the problem of measuring that remedy by distributional concepts of equity which are indistinguishable from the concept of proportionality." *Id.* at 140, reprinted in 1982 U.S.C.C.A.N. at 312.

The Senate Judiciary Committee recognized that the new results test was "not an easy test," but claimed that minority voters "emerge[d] from virtual exclusion from the electoral process" only after its adoption by some lower federal courts. *Id.* at 31, reprinted in 1982 U.S.C.C.A.N. at 209. The Committee addressed all of the arguments against the test, most of which focused on the dangers of proportionality and "racial quotas," and found the disclaimer against guaranteed proportionality sufficient to assuage those concerns. *Id.* at 30-35, reprinted in 1982 U.S.C.C.A.N. at 208-13.

198. *Colegrove v. Green*, 328 U.S. 549, 556 (1946).

199. 114 S. Ct. 2647 (1994). The legal community did not expect the Court to reach the deeper voting rights issues in *Holder*, but it very much expected the Court to do so in *De Grandy*. Interview with Melissa Saunders, Associate Professor of Law, University of North Carolina School of Law, Chapel Hill, N.C. (Feb. 8, 1995). *De Grandy*, a controversial reapportionment case, presented the Court with the ideal opportunity to address the core issues involved in the voting rights arena.

De Grandy involved the vote dilution claim of a consolidated group of minority voters against Florida's reapportionment plan for the state's single-member Senate and House districts. *De Grandy*, 114 S. Ct. at 2651-52. The voters claimed that the districts used since 1982 were malapportioned, failing to reflect changes in the State's population during the ensuing decade, even though they provided representation which was roughly proportional to the minority groups' share of the area's voting-age population. *Id.* at 2651. The district court found that more "majority-minority" districts could be drawn, and after reviewing the "totality of the circumstances," concluded that the state's reapportionment plan impermissibly diluted the voting strength of the plaintiff groups. *Id.* at 2652-53.

The Supreme Court ultimately held that the states have no obligation to "guarantee a political feast" to minority voters by maximizing the number of minority "influence districts," *id.* at 2660; see *Thornburg v. Gingles*, 478 U.S. 30, 94 (1986) (O'Connor, J.,

reluctance to revisit the basis of the vote dilution inquiry, as well as its increasingly conservative view of the Voting Rights Act.²⁰⁰ While *Holder* cut off one branch of the "political thicket," it did not aid the resolution of the basic dilemma of voting rights jurisprudence—determining "how hard it 'should' be"²⁰¹ for minority voters to elect representatives.

MARTIN PATRICK AVERILL

concurring in the judgment) ("There is substantial doubt that Congress intended 'undiluted minority voting strength' to mean 'maximum feasible minority voting strength.'"), but also held that rough proportionality in representation does not provide a "safe harbor" for apportionment plans. *De Grandy*, 114 S. Ct. at 2660. Instead, the Court found that proportionality is merely one important factor to consider in examining the totality of the circumstances to determine whether dilution exists. *Id.* at 2661; *see supra* notes 77-78, 88-90 and accompanying text (discussing the "totality of the circumstances" inquiry). The legal community's high expectations were doused, as the Court sidestepped the core issues once again. It refused to clarify the *Gingles* three-prong test (the plaintiff groups satisfied all three prongs yet still lost), refused to state exactly what effect rough proportionality has on the dilution inquiry (claiming that it was not dispositive, but relying heavily on it to find an absence of dilution), and relied solely on the ambiguous "totality of the circumstances" test to uphold Florida's proposed reapportionment plan.

200. *See High Court Continues to Narrow Its Reading of Voting Rights Act*, STAR TRIBUNE, July 1, 1994, at 13A ("Both of these cases are a continuation of the conservative trend in the Court's view of voting rights cases.") (quoting Neil Bradley, an American Civil Liberties Union lawyer involved in *Holder*); *id.* ("The Court's decisions . . . are a major disappointment. . . . [T]hey are a continuation of the rollback of civil rights we've seen under the Rehnquist Court.") (quoting Elliot Minberg of People for the American Way, a liberal lobbying group).

201. *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring in the judgment).