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NOTES

MAPPING THE MORASS: APPLICATION OF SECTION 2 OF THE VOTING RIGHTS ACT TO JUDICIAL ELECTIONS

In June, 1991, the United States Supreme Court decided two major Voting Rights Act¹ cases: *Chisom v. Roemer*,² a voting rights challenge to Louisiana's system for electing state supreme court justices, and *Houston Lawyers' Ass'n v. Attorney General*,³ a similar challenge to Texas' system for electing trial court judges. The issue presented to the Court in both cases was whether section 2 of the Voting Rights Act, which outlaws voter dilution, is applicable to judicial elections.⁴ The Supreme Court determined that section 2 applies to both types of judicial elections: elections of supreme court justices who decide cases as a panel⁵ and trial judges who act as sole decisionmakers.⁶ These decisions resolved a conflict between the Fifth and Sixth Circuits⁷ and laid to rest a statutory issue with which courts had wrestled for years.⁸

The finding that section 2 applies to judicial elections will greatly facilitate voter dilution claims. The nonapplicability of section 2 to judicial elections would have required minority plaintiffs challenging state judicial elections to meet the more burdensome intent standards of the Fourteenth⁹ and Fifteenth¹⁰

1. Voting Rights Act of 1965, Pub. L. No. 89-110, Title I, § 2, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1973-1973p (1988)).

2. 111 S. Ct. 2354 (1991).

3. 111 S. Ct. 2376 (1991).

4. *Chisom*, 111 S. Ct. at 2358; *Houston Lawyers' Ass'n*, 111 S. Ct. at 2378.

5. *Chisom*, 111 S. Ct. at 2358.

6. *Houston Lawyers' Ass'n*, 111 S. Ct. at 2380.

7. Compare *Mallory v. Eyrich*, 839 F.2d 275 (6th Cir. 1988) (finding that § 2 did cover state judicial elections) with *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc) (finding that § 2 did not cover state judicial elections), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

8. See, e.g., *Chisom v. Edwards*, 659 F. Supp. 183 (E.D. La. 1987), *rev'd and remanded*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. 955 (1988), *subsequent proceeding*, *Chisom v. Roemer*, No. 86-4057, 1989 U.S. Dist. LEXIS 10816 (E.D. La. Sept. 13, 1989), *aff'd and remanded*, 917 F.2d 187 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2354 (1991).

9. *City of Mobile v. Bolden*, 446 U.S. 55, 66-68 (1979).

10. *Id.* at 61-65; see *infra* note 39.

Amendments. Under these intent standards, plaintiffs would prevail only if they offered evidence sufficient to support a finding that judicial districts were either designed or maintained to discriminate against the racial minority.¹¹ Because the Court has now determined that section 2 applies to judicial elections, plaintiffs will be able to establish a violation by meeting the more liberal "results" test of section 2.¹² Under the results test, claimants can succeed by showing that based on the totality of the circumstances, a racial minority has not had the opportunity to elect representatives of its choice.¹³

Chisom and *Houston Lawyers' Ass'n* will have significant impact across the country. Most states elect judges at some level,¹⁴ and any electoral scheme that effectively dilutes minority votes may be subject to challenge. Thus far, minority plaintiffs have brought section 2 challenges to judicial election schemes in eleven states.¹⁵ One state, Mississippi, had redesigned judicial districts to remedy section 2 violations even before the recent Supreme Court determinations.¹⁶ Judicial districts in other challenged states, how-

11. *Rogers v. Lodge*, 458 U.S. 613, 626-27 (1982).

12. *Thornburg v. Gingles*, 478 U.S. 30, 83-84 (1986) (O'Connor, J., concurring); see generally Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What is the Intent of the Results Test?*, 36 EMORY L.J. 1, 3 (1987) (discussing impact of the adoption of the results test).

13. *Gingles*, 478 U.S. at 50-51. The *Gingles* opinion gives the following definition of racial bloc voting: "Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Id.* at 48-49.

14. Thirty-eight states elect either appellate or general jurisdiction trial court judges. Dixie K. Knoebel, *The Voting Rights Act: Are Its Provisions Applicable to the Judiciary?*, 13 STATE CT. J., Summer 1989, at 24, 26. The following states elect at least some of their judges in multijudge, at-large elections: Alabama, Alaska, Arizona, Arkansas, California, Colorado, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, West Virginia, Wisconsin, and Wyoming. *Id.* at 27; see also MARVIN COMISKY & PHILIP C. PATTERSON, *THE JUDICIARY—SELECTION, COMPENSATION, ETHICS, AND DISCIPLINE* 7-9 (1987) (distinguishing states that have partisan elections from those that have nonpartisan elections). Still more states elect justices of the peace and judges to courts of limited jurisdiction, such as family and probate courts. *Id.* at 8, 24 n.72.

15. These states include Alabama, Florida, Georgia, Illinois, Louisiana, Mississippi, North Carolina, and Texas. See ABA JUDICIAL ADMIN. DIV., STANDARDS RELATING TO COURT ORGANIZATION 54 n.5 (1990). Plaintiffs filed suit in California and New Mexico after the Supreme Court's determination in June, 1991, that § 2 applies to judicial elections. Scott Armstrong, *Minorities Seek More Clout on the Bench*, CHRISTIAN SCI. MONITOR, Oct. 1, 1991, at 1.

16. In *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), the district court found that eight of Mississippi's judicial districts violated § 2 of the Voting Rights Act. *Id.* at

ever, have remained in limbo, anticipating Supreme Court review.¹⁷

The event prompting Supreme Court review in 1991 was the Fifth Circuit's finding in September of 1990 that section 2 of the Voting Rights Act¹⁸ did not apply to the election of state judges. This en banc decision, in *League of United Latin American Citizens Council (LULAC) v. Clements*,¹⁹ reversed the direction courts had taken on the question of the applicability of section 2 to judicial elections.²⁰ The decision not only ran counter to precedent set in the Sixth Circuit²¹ but also overruled the Fifth Circuit's own decision only two years earlier in *Chisom v. Edwards*.²² As a result, *LULAC* was a controversial decision that presented a compelling issue for Supreme Court review. State defendants praised the decision as a triumph of local prerogatives.²³ Civil

1204. The state did not appeal. In *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988), the court ordered restructuring and special elections. As a result, more black trial judges were elected in Mississippi than ever before. See Robert McDuff, *The Voting Rights Act and Judicial Elections Litigation: The Plaintiffs' Perspective*, 73 JUDICATURE 82, 84 (1989).

17. In Louisiana, for example, the district court, bound by *League of United Latin American Citizens Council (LULAC) v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney General*, 111 S. Ct. 2376 (1991), vacated a prior injunction that prevented the state from holding judicial elections in districts found to be in violation of § 2. *Clark v. Roemer*, 751 F. Supp. 586 (M.D. La. 1990) (order vacating injunction), *rev'd*, 111 S. Ct. 2096 (1991). Two days later, the Supreme Court ordered a stay of elections until the Court determined the issue on appeal. *Clark v. Roemer*, 111 S. Ct. 376 (1990) (order granting, in part, application for injunction and stay of order).

18. Section 2 of the Voting Rights Act reads:

(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 1973b(f)(2) of this title, as provided in subsection (b) of this section.

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

42 U.S.C. § 1973 (1988) (codified as amended).

19. 914 F.2d 620.

20. *Id.* at 652 (Johnson, J., dissenting).

21. See *Mallory v. Eyrich*, 839 F.2d 275, 280 (6th Cir. 1988).

22. 839 F.2d 1056 (5th Cir.), *cert. denied*, 488 U.S. 955 (1988). In *Chisom*, the court found § 2 applicable to state supreme court elections. *Id.* at 1058.

23. Ronald Smothers, *Texas Way of Electing Judges Is Upheld*, N.Y. TIMES, Sept. 29,

rights groups, on the other hand, lambasted the decision as a major setback.²⁴ In scathing dissent, Judge Johnson described the *LULAC* opinion as a "burning scar on the flesh of the Voting Rights Act."²⁵ "[T]he majority opinion is not simply wrong," warned Judge Johnson, "it is dangerous."²⁶

With the Supreme Court's decision in June, 1991, any such dangers presented by *LULAC* have dissipated. Significant difficulties, however, still lie ahead in devising a standard and an appropriate remedy for Voting Rights Act violations in judicial elections. The dilemma that courts will continue to face is how to reconcile the goals of voting rights legislation with the special characteristics of the judicial function. The solution to this dilemma has eluded lower courts in the past.²⁷

Unfortunately, the Supreme Court's decisions in *Chisom* and *Houston Lawyers' Ass'n* give the lower courts little guidance as to the standard or the remedy in section 2 challenges to judicial districts. In both opinions, the Court decided only the threshold issue of statutory interpretation. The opinions do not address how courts should determine whether a judicial scheme violates section 2. In *Chisom*, Justice Stevens wrote: "[T]hat task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute"²⁸ In his *Chisom* dissent, Justice Scalia accused the Court of "lead[ing] us . . . with stubborn persistence—into this morass of unguided and perhaps unguidable judicial interference in democratic elections."²⁹

This Note supports the Supreme Court's determination that section 2 applies to judicial elections. It heeds the dissent's concern, however, that major incongruities exist in applying

1990, at 8. Renea Hicks, Texas' Deputy Attorney General, applauded the decision, stating, "You just can't have Federal courts intervening in the way states reconfigure their judicial systems." *Id.*

24. *Id.* Frank R. Parker of the Lawyers' Committee for Civil Rights Under Law explained the decision as the result of "Nixon-Reagan-Bush conservative appointments to the courts." *Id.*

25. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620, 652 (5th Cir. 1990) (Johnson, J., dissenting) (en banc), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

26. *Id.*

27. *See, e.g., Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 543-44 (M.D. Ala. 1989) (expressing "serious and deeply felt concerns about the difficulty in fashioning an equitable remedy" to a § 2 violation in judicial elections). The court wrote that "[a]ny remedy may only serve to further polarize the voting blocs which currently exist, and will almost certainly result in the removal from the bench of a number of decent, fair and competent state judges In remedying one injustice this court may, in effect, be creating others." *Id.*

28. *Chisom v. Roemer*, 111 S. Ct. 2354, 2368 (1991).

29. *Id.* at 2375 (Scalia, J., dissenting).

section 2 in the judicial context. The Note argues that these incongruities emerge not from the statute itself but from the Supreme Court's interpretation of the statute in the legislative context in *Thornburg v. Gingles*.³⁰ The Note contends that courts should limit the *Gingles* standard³¹ to elected representative bodies and should develop new criteria more appropriate to the judicial context. Courts should adopt a revised section 2 test that acknowledges the special characteristics of the judicial function.

In developing these arguments, the Note first traces the development of voting rights law, focusing on the legislative objectives of the 1982 amendment to section 2. Next, the Note addresses the interests of state defendants, focusing on the concepts of state autonomy and judicial independence and the extent to which these represent compelling state concerns. The Note then proposes a new threshold test that tailors the *Gingles* criteria to fit the judicial context. This revised threshold test, combined with a pure totality of the circumstances test, would serve the purposes of the Voting Rights Act without compromising the judicial function. Finally, the Note concludes that the historic deference to state judicial election schemes and sensitive policy issues justify applying a different and less intrusive voter dilution standard to judicial elections.

MINORITY VOTING RIGHTS AND THE PROTECTIONS OF SECTION 2

President Lyndon Johnson signed the original Voting Rights Act into law in 1965,³² acclaiming its enactment as a "triumph for freedom as huge as any victory that has ever been won on any battlefield."³³ Since its passage, the Voting Rights Act has been instrumental in curbing the most blatant forms of electoral discrimination. It has forced the removal of literacy tests and other formal barriers to voting³⁴ and has made orchestrated intimidation and harassment of minority voters the exception

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

31. For a discussion of the *Gingles* standard, see text accompanying notes 82-98, 278-316.

32. *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, PUB. PAPERS 840 (1965). Congress had passed other voting rights legislation prior to the 1965 Act. See 42 U.S.C. § 1971 (1964).

33. *Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act*, *supra* note 32, at 840.

34. U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 29 (1981).

rather than the norm.³⁵ Today, the central battle for minority voting rights is waged not over eliminating formal barriers to participation but over guaranteeing full and equal access to the electoral process. The wrong to be righted is that of voter dilution. Voter dilution exists when a minority group represents a sizable percentage of the population but is unable to elect its preferred candidates in multimember, at-large elections because the majority regularly votes along racial lines to defeat the racial minority.³⁶

Voter Dilution Before 1982

Today, section 2 of the Voting Rights Act provides the statutory basis for voter dilution claims. Before its amendment in 1982, however, section 2 was a noncontroversial³⁷ and largely superfluous provision.³⁸ Its text paralleled the language of the Fifteenth Amendment³⁹ and outlawed any "standard, practice, or procedure" applied "to deny or abridge the right of any citizen of the United States to vote on account of race or color."⁴⁰ Courts found section 2 protections to be coequal with Fifteenth Amend-

35. See Don Edwards, *The Voting Rights Act of 1965 as Amended, in THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS* 3, 3-5 (Lorn S. Foster ed., 1985). Abuses persist, however. In 1981, the U.S. Commission on Civil Rights reported incidents of harassment of minority voters, misuse of absentee ballots, and the strategic location of polls to discourage black voters. *Id.* at 29-37. For more recent charges of voter manipulation in North Carolina, see Michael Isikoff, *Justice Dept. Investigates GOP Mailing to Voters*, WASH. POST, Nov. 6, 1990, at A6.

36. *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986).

37. *City of Mobile v. Bolden*, 446 U.S. 55, 61 (1980).

38. Frank R. Parker, *The 'Results' Test of Section Two of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 727-28 (1983).

39. The Fifteenth Amendment reads as follows:

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

Section 2. The Congress shall have the power to enforce this article by appropriate legislation.

U.S. CONST. amend. XV.

40. 42 U.S.C. § 1973 (1975), amended by 42 U.S.C. § 1973 (1982) (current version at 42 U.S.C. § 1973 (1988)). Before its amendment in 1982, § 2 of the Voting Rights Act read:

No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title.

Id.; see *supra* note 18.

ment guarantees.⁴¹ Before the amendment of section 2 in 1982, minority plaintiffs generally brought voter dilution claims under the Equal Protection Clause of the Fourteenth Amendment.⁴²

Initially, however, plaintiffs had little success winning voter dilution claims at the Supreme Court level. The three voter dilution cases reaching the Supreme Court before 1973, *Fortson v. Dorsey*,⁴³ *Burns v. Richardson*,⁴⁴ and *Whitcomb v. Chavis*,⁴⁵ challenged at-large electoral districts, at least in part because they discriminated impermissibly against minority voters. The Court rejected each of these claims for failure to prove invidious discrimination.⁴⁶ To prove a constitutional violation, the Court required a showing that the electoral system was either "conceived or operated" with discriminatory intent.⁴⁷ Dicta in each of these cases, however, suggested that in a different factual situation the Court might accept a showing of discriminatory effects as evidence of a Fourteenth Amendment violation.⁴⁸

Not until 1973, however, did plaintiffs succeed in a racial voter dilution claim at the Supreme Court level.⁴⁹ In *White v. Regester*,⁵⁰ the Court found that multimember, at-large districts in two Texas counties impermissibly diluted the voting strength of blacks and Mexican-Americans. The Court held that the plaintiff's burden of proof in a racial voter dilution claim was

to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.⁵¹

The Court's opinion in *White* neither mentioned nor inquired into the subjective intent of Texas state officials. The holding rested

41. *E.g.*, *Bolden*, 446 U.S. at 60-61; see also *Parker*, *supra* note 38, at 727-28 (suggesting that lower courts deciding § 2 claims preferred to rely on constitutional standards because the constitutional case law was more developed and therefore provided more solid footing for their decisions).

42. See *Parker*, *supra* note 38, at 718.

43. 379 U.S. 433 (1965).

44. 384 U.S. 73 (1966).

45. 403 U.S. 124 (1971).

46. *Id.* at 149-50; *Burns*, 384 U.S. at 88-89; *Fortson*, 379 U.S. at 438-39.

47. *Whitcomb*, 403 U.S. at 149.

48. *Id.*; *Burns*, 384 U.S. at 88-89; *Fortson*, 379 U.S. at 439.

49. See *White v. Regester*, 412 U.S. 755, 765-67 (1973).

50. *Id.*

51. *Id.* at 766.

on a "totality of the circumstances"⁵² test; these circumstances included not only electoral impact but also "cultural and economic realities."⁵³ The Court upheld the district court finding of illegal voter dilution as "a blend of history and intensely local appraisal of the design and impact of the . . . multimember district."⁵⁴

City of Mobile v. Bolden: The Intent Standard

In 1980, the Supreme Court in *City of Mobile v. Bolden*⁵⁵ narrowed the *White v. Regester*⁵⁶ "totality of the circumstances" test.⁵⁷ In *Bolden*, the Court required evidence of discriminatory intent to establish an Equal Protection Clause violation in voting rights cases.⁵⁸ The Court held that the plaintiffs in *Bolden* lacked sufficient evidence to show Mobile's at-large system of electing three city commissioners had been purposefully designed or maintained to discriminate against black voters.⁵⁹ The facts of *Bolden* were compelling. African-American plaintiffs from Mobile, Alabama, charged that they did not have an opportunity to elect the candidates of their choice because at-large voting for a three-person city commission allowed the white majority to vote as a block to defeat black candidates.⁶⁰ Statistics supported the plaintiffs' claim: although blacks comprised thirty-five percent of Mobile's population, no black had ever been elected to the city commission.⁶¹ The Supreme Court, however, found that the plaintiffs' Fourteenth and Fifteenth Amendment claims failed because they had not proven discriminatory intent.⁶² One reason for the

52. *Id.* at 769.

53. *Id.*

54. *Id.* at 769-70.

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

56. 412 U.S. 755.

57. Although *Bolden* was predicated on the Fifteenth Amendment, it interpreted *White* as stating that "legislative apportionments could violate the Fourteenth Amendment if their purpose were invidiously to minimize or cancel out the voting potential of racial or ethnic minorities." *Bolden*, 446 U.S. at 66 (emphasis added).

58. *Id.* In 1976, the Court in *Washington v. Davis*, 426 U.S. 229 (1976), established that in order for a law to violate the Equal Protection Clause of the Fourteenth Amendment its "invidious quality . . . claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." *Id.* at 240.

59. *Bolden*, 446 U.S. at 70. On remand, the trial court found sufficient evidence of discriminatory intent and ordered redistricting of Mobile's electoral scheme. *Bolden v. City of Mobile*, 542 F. Supp. 1050, 1077 (S.D. Ala. 1982).

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

61. *Id.* at 97-98 (White, J., dissenting).

62. *Id.* at 74.

difficulty the plaintiffs encountered was that the city commission had been established in 1911,⁶³ a time when literacy tests and poll taxes effectively disenfranchised blacks in Alabama. The irony of the Court's result was inescapable. Even though racism was the factor that prevented blacks from voting in 1911, the fact that blacks could not vote at the time the at-large system was established provided a defense that the electoral system was not designed with a discriminatory purpose.

Critics feared that *Bolden* had closed all avenues for minority plaintiffs.⁶⁴ In his dissent, Justice White called the intent requirement "flatly inconsistent" with *White*.⁶⁵ The Senate Committee on the Judiciary in 1982 labeled *Bolden* a "radical departure" from both Supreme Court and lower court precedent.⁶⁶ Civil rights activists were more outspoken. *Bolden's* attempt to reconcile the apparent inconsistency with the *White* standard was so unsatisfactory that it prompted one commentator to label the *Bolden* decision an example of "legal double think."⁶⁷

63. *Bolden*, 542 F. Supp. at 1064.

64. See, e.g., S. REP. NO. 417, 97th Cong., 2d Sess. 26 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 203-04 (noting that *Bolden* had placed "an acceptably difficult burden on plaintiffs" and that as a result, plaintiffs had "virtually stopped filing new voting dilution cases").

65. *Bolden*, 446 U.S. at 94 (White, J., dissenting).

66. S. REP. NO. 417, *supra* note 64, at 16, reprinted in 1982 U.S.C.C.A.N. at 193.

67. Richard L. Engstrom, *Racial Vote Dilution: The Concept and the Court*, in THE VOTING RIGHTS ACT: CONSEQUENCES AND IMPLICATIONS, *supra* note 35, at 13, 33 (quoting Bernard Grofman, *Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues*, 9 POLICY STUDIES J. 875, 880 (1980-81)). Two years after *Bolden*, Justice White had the last word, authoring the majority opinion in *Rogers v. Lodge*, 458 U.S. 613 (1982), the Supreme Court's last constitutionally based voter dilution decision. The Court may have timed its release of the *Rogers* opinion so as not to intrude on congressional decisionmaking, handing down its decision just days after Congress passed the 1982 amendment to § 2. 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, 1229 n.130 (1985). In *Rogers*, the Court held that facts very similar to those in *Bolden* were sufficient to support a finding of discriminatory intent. *Rogers*, 458 U.S. at 627; Barnes, *supra*, at 1229-30 n.130. *Rogers* reconciled the *White* "totality of the circumstances test" and the *Bolden* intent standard by stating that the circumstantial evidence outlined in *White* may be sufficient to support an inference of discriminatory intent. See, e.g., *Buchanan v. City of Jackson*, 708 F.2d 1066, 1070 (6th Cir. 1982); see Barnes, *supra*, at 1229-30 n.130. Had the Court delivered its opinion just a few days earlier, the *Rogers* decision would have rendered the hotly debated amended § 2 "largely superfluous." *Id.* at 1231 n.130. Because of congressional action amending § 2, the *Rogers* decision had little impact. *Id.* If, however, the Supreme Court had decided that the § 2 amendments did not apply to judicial elections, the *Rogers* interpretation of the constitutional standard would have assumed new significance because it "now represents the Constitutional standard for discriminatory vote dilution." *Id.* at 1231 n.130.

The 1982 Amendment to Section 2: The Statutory "Effects" Test

In response to the Supreme Court's holding in *City of Mobile v. Bolden*,⁶⁸ the House of Representatives passed an amended section 2 which facilitated the plaintiff's burden of proof in voter dilution claims by prescribing that discriminatory intent was not necessary to prove a voting rights violation.⁶⁹ Surprisingly, this "results test" sparked little debate in the House and sailed through by a vote of 389 to 24.⁷⁰ The results test, however, met greater resistance in the Senate.⁷¹ The Reagan administration and several key Republican senators opposed the amendment as one that "could well lead on to the use of quotas in the electoral process."⁷² After months of debate, Senator Robert Dole, an original sponsor of the Senate version of the bill, proposed an amendment that resolved the impasse.⁷³ The so-called Dole Compromise⁷⁴ inserted language into section 2 that mirrored the test advocated by the Supreme Court in *White v. Regester*.⁷⁵ The amendment made two significant changes to the language in *White*. In place of the *White* term "legislators," Congress used the more inclusive term "representatives."⁷⁶ Additionally, the

68. 446 U.S. 55.

69. S. REP. NO. 417, *supra* note 64, at 2, reprinted in 1982 U.S.C.C.A.N. at 179; see James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 689-701 (1983); Parker, *supra* note 38, at 747-50. For a detailed legislative history, see Thomas M. Boyd & Stephen J. Markham, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347 (1983).

70. S. REP. NO. 417, *supra* note 64, at 3, reprinted in 1982 U.S.C.C.A.N. at 180.

71. See generally Boyd & Markham, *supra* note 69, at 1379-425 (detailing the path to Senate approval).

72. Comments of Assistant Att'y Gen. Bradford Reynolds, S. REP. NO. 417, *supra* note 64, at 141, reprinted in 1982 U.S.C.C.A.N. at 313.

73. *Id.* at 3, reprinted in 1982 U.S.C.C.A.N. at 180; Boyd & Markham, *supra* note 69, at 1414-15; Parker, *supra* note 38, at 748-49.

74. Parker, *supra* note 38, at 748. The Dole proposal stated that:

A violation of [section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open . . . in that [minorities] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

S. REP. NO. 417, *supra* note 64, at 95, reprinted in 1982 U.S.C.C.A.N. at 268.

75. 412 U.S. 755 (1973). For a discussion of the adoption of the *White* test by the Senate, see League of United Latin American Citizens Council (LULAC) v. Clements, 914 F.2d 620, 624-25 (5th Cir. 1990) (en banc), *rev'd sub nom.* Houston Lawyers Ass'n v. Attorney General, 111 S. Ct. 2376 (1991) and S. REP. NO. 417, *supra* note 64, at 2, reprinted in 1982 U.S.C.C.A.N. at 179.

76. 42 U.S.C. § 1973(b) (1988); LULAC, 914 F.2d at 624-25.

amendment included a proviso stating 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."⁷⁷

The Senate Report that accompanied the 1982 Voting Rights Act Amendments stated that Congress' intent in amending section 2 was to "restore the legal standard that governed voting discrimination cases prior to the Supreme Court's decision in *Bolden*."⁷⁸ Borrowing from factors first described in *White* and outlined in the Fifth Circuit's decision *Zimmer v. McKeith*,⁷⁹ the Senate Report listed typical factors to consider in determining a Voting Rights Act violation.⁸⁰ The focus of inquiry was to be on these objective factors, rather than on the subjective intent of policymakers.⁸¹

77. 42 U.S.C. § 1973(b).

78. S. REP. NO. 417, *supra* note 64, at 15, *reprinted in* 1982 U.S.C.C.A.N. at 192.

79. 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).

80. The Senate Report stated that amended § 2 codifies the *White* test. S. REP. NO. 417, *supra* note 64, at 28, *reprinted in* 1982 U.S.C.C.A.N. at 205. The Report listed the following factors to consider in determining whether, based on a totality of the circumstances, an electoral system impermissibly dilutes minority votes:

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

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

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

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

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

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

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

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

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

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07.

81. Congress gave three primary reasons for rejecting the intent standard—that it

Thornburg v. Gingles: The Court's Interpretation of Section 2

In December, 1986, four years after the amended section 2 became law, the Supreme Court, in *Thornburg v. Gingles*,⁸² broadly interpreted section 2 and considerably facilitated voter dilution claims.⁸³ Members of the Court issued four separate opinions,⁸⁴ each agreeing that aspects of North Carolina's 1982 legislative redistricting plan violated amended section 2 but diverging as to the reasoning. A majority of the Court established a three-part threshold for establishing a violation of amended section 2.⁸⁵ The three-part threshold required a minority group to demonstrate only: (1) that it is sufficiently large and compact to create a majority in a single-member district; (2) that it is politically cohesive; and (3) that the majority votes as a sufficient block to defeat minority preferred candidates absent special circumstances.⁸⁶ In short, the *Gingles* criteria effectively eliminated intent as a factor and focused in large part on the feasibility of the remedy, establishing that when election results are disproportionate and voting is racially polarized, plaintiffs can state a voter dilution claim as long as demographics allow for single-member minority districts.

Concurring in the result, Justice O'Connor criticized the *Gingles* majority for "disregard[ing] the balance struck by Congress in amending § 2."⁸⁷ O'Connor objected to the *Gingles* analysis primarily because it abandoned the totality of the circumstances test outlined in *White* and codified in the 1982 amendment to section 2.⁸⁸ The *White* line of cases used a "multi-factor analysis"

was divisive because it required charging policymakers with racism, that it placed "an inordinately heavy burden" of proof on plaintiffs, and that it "ask[ed] the wrong questions." *Id.* at 36, reprinted in 1982 U.S.C.C.A.N. at 214.

82. 478 U.S. 30 (1986).

83. Miller & Packman, *supra* note 12, at 3. For a more polemic view, see ABIGAIL THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 193 (1987) ("The trickle [of § 2 cases] has turned out to be a flood, and minority plaintiffs almost always prevail Plaintiffs, in fact, usually prevail even before the trial has begun, since jurisdictions faced with politically costly and financially draining litigation are generally quick to settle out of court.").

84. *Gingles*, 478 U.S. at 33.

85. *Id.* at 48-51. Justices Brennan, White, Blackmun, Marshall, and Stevens formed the majority. *Id.* at 33.

86. *Id.* at 50-51.

87. *Id.* at 85 (O'Connor, J., concurring in the judgment). Chief Justice Burger and Justices Powell and Rehnquist joined Justice O'Connor's opinion. *Id.* at 83.

88. *Id.* at 94-95, 100-01; see also Miller & Packman, *supra* note 12, at 70 (discussing Justice O'Connor's concurring opinion). For a discussion of the *White* totality of the circumstances test, see *supra* notes 49-54.

in which election results and racially polarized voting were only two of many factors to consider: they were essential, though not sufficient to establish a Voting Rights Act violation.⁸⁹ O'Connor stated that the Court's opinion required localities to design electoral systems that would "maximize feasible minority electoral success."⁹⁰ This, she stated, amounted to "an entitlement to roughly proportional representation within the framework of single-member districts"⁹¹ and extended the reach of section 2 beyond congressional intent. In so doing, it altered the congressional agreement significantly and paid little credence to the proviso in amended section 2 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."⁹²

This result in *Gingles* appears to be at odds with the congressional compromise that allowed for the results test of amended section 2.⁹³ The *Gingles* criteria have in fact facilitated voter dilution claims considerably, perhaps more than Congress anticipated. One critic of *Gingles* has observed that the Court's interpretation has made section 2 claims "exceedingly hard to lose."⁹⁴ In the first four years after the passage of the amended section, the minority success rate in voter dilution cases decided by the courts surpassed ninety percent.⁹⁵ In addition, many more localities anxious to avoid costly litigation settled cases out of court.⁹⁶ The 1990 census and improved redistricting software are certain to add to plaintiffs' successes in the next decade.⁹⁷

The purpose of this Note is not to debate the merits of the *Gingles* criteria but to ask whether these same criteria should

89. Miller & Packman, *supra* note 12, at 74.

90. *Gingles*, 478 U.S. at 89.

91. *Id.*

92. 42 U.S.C. § 1973(b) (1988).

93. Miller & Packman, *supra* note 12, at 74.

94. THERNSTROM, *supra* note 83, at 193. For a response, see generally FRANK R. PARKER, BLACK VOTES COUNT 192-97 (1990).

95. THERNSTROM, *supra* note 83, at 228.

96. *Id.* at 229.

97. The Commonwealth of Virginia is a case in point. Of 29 voting rights cases filed in Virginia since 1965, plaintiffs have prevailed in 26, with one case withdrawn and two still pending. Most of these were settled out of court. The ACLU of Virginia estimates in 1991, based on computer analysis of 1990 census figures, that 58 small towns, 15 cities, and 29 counties in the state are vulnerable to voter dilution claims. Kent Willis, Director of the ACLU of Virginia, urged localities to redistrict voluntarily to avoid suit, warning that "[l]ooking at the history, [localities] will more than likely lose." Overton McGee & Susan Winlecki, *Localities are Warned by ACLU*, RICHMOND TIMES DISPATCH, Feb. 20, 1991, at A1, A3.

apply to judicial elections. Two members of the Fifth Circuit in the *LULAC* panel decision transparently expressed hostility to *Gingles*, writing that "[f]ew would quarrel with the assertion that Section 2(b) as interpreted [by the Supreme Court in *Gingles*] has worked a fundamental change in the Act, highly intrusive to the states."⁹⁸ Such comments imply that the Fifth Circuit's reluctance to apply section 2 to the judicial context stemmed from the *Gingles* interpretation rather than the statute itself. Before addressing that issue, however, this Note explores the statutory question and the policy implications involved in the applicability of section 2 to judicial elections.

THE STATUTORY QUESTION: DECIPHERING CONGRESSIONAL INTENT

In 1991, the Supreme Court chose to hear argument in two cases, one from Louisiana and one from Texas, each raising a different nuance to the question of whether the results test of amended section 2 applies to state judicial elections. The Louisiana case, *Chisom v. Roemer*,⁹⁹ raised the issue of whether justices elected to the state supreme court are subject to the Voting Rights Act. *Houston Lawyers' Ass'n v. Attorney General*¹⁰⁰ asked the same question regarding state trial court judges.

Chisom v. Roemer

In *Chisom v. Roemer*,¹⁰¹ a class of registered African-American voters from Orleans Parish, Louisiana, claimed that the design of districts for electing state supreme court justices violated the Voting Rights Act by impermissibly diluting minority votes.¹⁰² At the time the United States Supreme Court decided the case, seven justices served on the high bench in Louisiana. Of these seven, five were elected from single-member districts spread throughout the state. The remaining two justices were chosen from one multimember district, termed the First Supreme Court District, which consisted of four parishes in the New Orleans

98. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 902 F.2d 293, 301 (5th Cir.), *rev'd*, 914 F.2d 620 (1990) (en banc), and *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

99. 111 S. Ct. 2354 (1991).

100. 111 S. Ct. 2376 (1991).

101. 111 S. Ct. 2354.

102. *Id.* at 2358.

area, including Orleans Parish. Over half of the registered voters in the district were African-American.¹⁰³ In the other three parishes, three-fourths of the registered voters were white.¹⁰⁴ Petitioners in *Chisom* argued that the multimember districting in the New Orleans area diluted the impact of minority votes in Orleans Parish.¹⁰⁵ As a remedy, petitioners requested that the First Supreme Court District be divided into two single-member districts, one consisting of Orleans Parish and the other consisting of the remaining three parishes.¹⁰⁶ These two single-member districts would have roughly the same population.¹⁰⁷

At first blush, the facts of the Louisiana case seem to present the best possible factual scenario for applying section 2 of the Voting Rights Act to judicial elections. Despite the state's large black population, no black had ever been elected to the Louisiana high court.¹⁰⁸ The blacks of Orleans Parish constituted a large, geographically compact minority group,¹⁰⁹ as required under the *Gingles* criteria.¹¹⁰ Additionally, the state electoral system of electing most supreme court justices from single-member districts suggested that the state had no significant interest in maintaining a multimember district in the New Orleans area. Perhaps most importantly, the facts themselves suggested a simple remedy that would neither compromise the goals of the existing system nor lead to gerrymandering to serve the needs of minority voters: dividing the First Supreme Court District into two single-member districts.

Despite the apparent simplicity of the facts in *Chisom*, its road to the Supreme Court hearing was far from smooth. The United States District Court for the Eastern District of Louisiana dismissed the plaintiffs' complaint, agreeing with the state that the results test of section 2 did not apply to judicial elections¹¹¹ and that the plaintiffs' complaint did not state a constitutional viola-

103. *Id.* The other three parishes were St. Bernard, Plaquemines, and Jefferson.

104. *Id.*

105. *Id.*

106. *Id.* at 2359.

107. *Id.*

108. *Id.*

109. *See id.* at 2358.

110. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). Members of the Louisiana Supreme Court sit as a group in most decisions, and therefore the single-member office holder exception could not apply. For a discussion of the single-member office holder exception, see *infra* notes 124-31 and accompanying text.

111. *Chisom v. Edwards*, 659 F. Supp. 183, 187 (E.D. La. 1987), *rev'd and remanded*, 839 F.2d 1056 (5th Cir. 1988), *cert. denied*, 488 U.S. 955 (1988), *subsequent proceeding*, *Chisom v. Roemer*, No. 86-4057, 1989 U.S. Dist. LEXIS 10816 (E.D. La. Sept. 13, 1989), *aff'd and remanded*, 917 F.2d 187 (5th Cir. 1990), *and rev'd*, 111 S. Ct. 2354 (1991).

tion, because the plaintiffs had not alleged an intent to discriminate.¹¹² The Fifth Circuit reversed the district court, finding section 2 applicable to judicial elections.¹¹³ When the case was remanded, however, the district court found that despite the applicability of section 2, the evidence in *Chisom* was insufficient to establish a violation under the *Gingles* standard.¹¹⁴ The plaintiffs appealed this ruling, but while the appeal was pending, the Fifth Circuit, in its en banc rehearing of *LULAC*,¹¹⁵ explicitly overruled its prior decision in *Chisom* and held that Congress did not intend for amended section 2 to cover voter dilution claims in judicial elections.¹¹⁶ As a result, the Fifth Circuit directed the district court to dismiss the case.¹¹⁷

Houston Lawyers' Ass'n v. Attorney General

Unlike *Chisom*, the facts of *Houston Lawyers' Ass'n v. Attorney General*¹¹⁸ do not easily suggest a remedy. The Texas judicial scheme is a patchwork of electoral districts, each of which elects several trial court judges. These districts vary significantly both in the size of the population and the number of judges elected.¹¹⁹ If the Fifth Circuit, on remand from the Supreme Court, should affirm the earlier finding that the Texas state system in the challenged counties violates section 2, the only feasible remedy would be an overhaul of the entire judicial electoral system "from top to bottom."¹²⁰ For this reason, and because the case involved trial judges rather than supreme court justices, *Houston Lawyers' Ass'n* presented a more complex factual scenario for the application of section 2.

In 1988, the League of United Latin American Citizens, a state coalition of mainly Hispanic and African-American residents, first

112. *Id.* at 189.

113. *Chisom*, 839 F.2d at 1063-64.

114. *Chisom v. Roemer*, No. 86-4057, 1989 U.S. Dist. LEXIS 10816, at *43-44. The district court held against the plaintiffs because it found insufficient evidence of racially polarized voting. *See infra* note 317.

115. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

116. *Id.* at 624.

117. *Chisom v. Roemer*, 917 F.2d 187 (5th Cir. 1990), *rev'd*, 111 S. Ct. 2354 (1991).

118. 111 S. Ct. 2376 (1991).

119. The county election schemes challenged in *LULAC*, for example, ranged from Harris County, which elects 59 trial court judges at-large, to Midland County, which elects only three. *Id.* at 2379.

120. James C. Harrington, *Taking Liberties*, TEXAS LAW., July 15, 1991, at 17.

challenged the countywide judicial election systems in all Texas counties, claiming that countywide, multijudge elections impermissibly diluted minority voting strength.¹²¹ Plaintiffs based their claim on section 2 of the Voting Rights Act and on the Fourteenth and Fifteenth Amendments. The United States District Court for the Western District of Texas found against the plaintiffs on the constitutional claim, indicating that the claimants had not produced evidence sufficient to show discriminatory intent.¹²² On the Voting Rights Act claim, however, the district court found a violation and gave the Texas legislature less than three months to fashion a remedy.¹²³

On appeal, the Fifth Circuit panel accepted the district court's ruling that judicial elections were subject to section 2 but found that trial court judges, who make decisions independently rather than as a collective body, are excluded by the judicially created "single office holder exception."¹²⁴ In a rehearing en banc, the majority of the Fifth Circuit never reached the single office holder question because it rejected outright the applicability of section 2 to judicial elections.¹²⁵ Writing for the Fifth Circuit majority, Judge Gee asked whether by amending section 2 Congress had intended to "subject the selection of state judges to the same test as that for representative political offices."¹²⁶ He responded that "for the cardinal reason that judges need not be elected at all—we conclude that it did not."¹²⁷

The Fifth Circuit panel in *LULAC* and Judge Higginbotham in his concurring opinion in the Fifth Circuit's en banc ruling, argued

121. *Houston Lawyers' Ass'n*, 111 S. Ct. at 2378-79. The scope of the challenge was later narrowed to only 10 Texas counties. The Houston Lawyers Association, intervenors in the case at the Supreme Court level, is an organization of African-American attorneys from one of the challenged counties. *Id.*

122. *See id.* at 2379-80 (the U.S. district court issued an unpublished decision).

123. *Id.*; Jeri Clausen, *Appeals Court Upholds Countywide Judicial Elections*, UPI, Sept. 28, 1990. When the legislature failed to agree on a remedy and the court ordered nonpartisan elections, the state decided to appeal the decision. *Id.*

124. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 902 F.2d 293, 308 (5th Cir.), *rev'd*, 914 F.2d 620 (5th Cir. 1990) (en banc), and *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991). The source of the "single office holder" exception is *Butts v. City of New York*, 779 F.2d 141 (2d Cir. 1985), in which the Second Circuit found that at-large, primary runoff elections for mayor, city council president, and comptroller did not violate § 2. *Id.* at 143. The rationale behind the single office holder exception is that a single office cannot be divided. For example, plaintiffs could not succeed claiming voter dilution in a gubernatorial election because a governor is a single office holder and by definition elected at-large.

125. *LULAC*, 914 F.2d at 622.

126. *Id.*

127. *Id.*

that section 2 does not apply to trial court judges because of the single office holder exception.¹²⁸ The Fifth Circuit panel concluded that trial judges are not "members of a multi-member body"¹²⁹ and stated that because "the full authority of [the trial judge's] office is exercised exclusively by one individual"¹³⁰ that "there is no such thing as a 'share' of a single-member office."¹³¹

By granting certiorari in *Houston Lawyers' Ass'n* as well as in *Chisom*, the U.S. Supreme Court prepared to address not only the applicability of section 2 to state judicial elections but also the issue of whether trial court judges who act as sole decision-makers should be exempt from coverage of section 2 of the Voting Rights Act because of the single office holder exception. The Supreme Court in *Houston Lawyers' Ass'n* declined to adopt the single office holder exception in judicial elections. Had the Court adopted Judge Higginbotham's invocation of the single office holder exception, its decision would have significantly limited the reach of the Voting Rights Act in the judicial context. Instead, the Court's decision rejected the single office holder as a blanket exception to Voting Rights Act coverage of judicial elections but stated that such considerations are relevant either to the factual determination of whether a violation has occurred or in the design of a remedy.¹³² The Court determined, however, that such concerns were not relevant to the threshold question of statutory application.¹³³

The Supreme Court's Rejection of the Fifth Circuit's Arguments in LULAC

The *LULAC* en banc majority based its statutory holding primarily on three considerations: (1) that the terms "representative" and "judge" are mutually exclusive; (2) that the one-person, one-vote cases indicate that judicial elections are subject to different standards; and (3) that federalism concerns impede an application of section 2 to judicial elections without a clear statement of congressional intent.¹³⁴

128. *LULAC*, 902 F.2d at 303-08; *LULAC*, 914 F.2d at 649-51.

129. *LULAC*, 914 F.2d at 648.

130. *Id.* (quoting *Southern Christian Leadership Conf. v. Siegelman*, 714 F. Supp. 511, 518 (M.D. Ala. 1989)).

131. *Id.* at 649 (quoting *Butts v. City of New York*, 779 F.2d 141, 148 (2d Cir. 1985)).

132. *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376, 2380 (1991).

133. *Id.*

134. See *LULAC*, 914 F.2d at 623-30.

The "Representative" Argument in LULAC

The Fifth Circuit's en banc opinion in *LULAC* rested on the view that the terms "representative" and "judge" are mutually exclusive.¹³⁵ The court reasoned that if Congress had intended to include judicial elections under section 2, it would not have chosen the term "representative."¹³⁶ The court maintained that the word "representative" was a carefully chosen term of art.¹³⁷ The opinion cited fifteen published federal court decisions decided prior to 1982 to illustrate that the "settled legal meaning" of the term representatives excluded judges.¹³⁸ "Dim or no," wrote the majority of the Fifth Circuit, the use of the term representative "is the only light available to guide our footsteps."¹³⁹

In *Chisom v. Roemer*,¹⁴⁰ however, the Supreme Court refused to read the word representatives as a limiting term.¹⁴¹ According to a majority of the Court, the word "representatives" refers to "winners of representative, popular elections"¹⁴²—a definition of the term that necessarily includes elected judges. The majority of the Supreme Court also found the representative argument at odds with both the liberalizing thrust of the 1982 amendment to section 2 and its legislative history.¹⁴³ The Court recognized that section 2 undoubtedly did provide coverage for judicial elections before its amendment in 1982.¹⁴⁴ It reasoned, therefore, that if Congress had intended to limit the scope of section 2 in any way, it would have made this intent explicit in the language of the statute or at least would have referred to this intent in the legislative history.¹⁴⁵

135. *Id.* at 628-29.

136. *Id.* at 628.

137. *Id.* To bolster its contention, the court pointed to the fact that amended § 2 changed only one word from the *White* holding, replacing "legislator" with the term "representative." *Id.*

138. *Id.* at 626 n.9. For example, the majority cited *Wells v. Edwards*, a Fifth Circuit one-person, one-vote case affirmed without opinion by the Supreme Court, which states: "Judges do not represent people, they serve people." *Id.* at 627 (citing *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973)).

139. *Id.* at 631 n.15.

140. 111 S. Ct. 2354 (1991).

141. *Id.* at 2366.

142. *Id.*

143. *Id.*

144. *Id.* at 2362. Until its amendment in 1982, the protections of § 2 were held to be coextensive with the Fifteenth Amendment. *Id.*

145. *Id.* at 2364 & n.23. Justice Stevens wrote that congressional silence could "be likened to the dog that did not bark," a reference to a Sherlock Holmes tale in which the telling clue was the fact that a watchdog had not barked in the night. *Id.* at 2364 n.23.

Key to the Court's rejection of the Fifth Circuit's reasoning was the majority's view that amended section 2 of the Voting Rights Act does not create two separate rights: one covering voter dilution claims and the other covering claims of limited access.¹⁴⁶ Given this premise, were the Court to hold that amended section 2 did not apply to voter dilution claims in judicial elections, it would also have to hold that the statute did not cover challenges to judicial elections claiming such barriers to participation as limited voting hours or voting sites located so as to discourage minority voters.¹⁴⁷ Justice Scalia in his dissent, which Chief Justice Rehnquist and Justice Kennedy joined, interpreted section 2 as creating two rights.¹⁴⁸ In Scalia's view, judicial elections are covered by the "to elect" provision, but not by the "to participate" provision.¹⁴⁹ Justice Stevens disagreed, writing that the Court had no authority to bifurcate the single claim Congress had created, "[e]ven if the wisdom of Solomon would support the *LULAC* majority's proposal."¹⁵⁰

The "One-person, One-vote" Argument in LULAC

The Fifth Circuit majority in *LULAC* exhibited a two-fold reliance upon the one-person, one-vote argument. First, it bolstered the "representative" argument by indicating a line of cases that at the time of the 1982 amendment held that judges

146. *See id.* at 2364-65.

147. *Id.* at 2365.

148. *Id.* at 2370-71 (Scalia, J., dissenting).

149. *Id.* Scalia wrote:

The Court feels compelled to reach [its] implausible conclusion of a "singular right" because the "to participate" clause and the "to elect" clause are joined by the conjunction "and." It is unclear to me why the rules of English usage required that conclusion here, any more than they do in the case of the First Amendment—which reads "Congress shall make no law . . . abridging . . . the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

Id. at 2371.

150. *Id.* at 2365-66. Facilitating the Court's decision was its determination in *Clark v. Roemer*, 111 S. Ct. 2096 (1991), that § 5, requiring preclearance with the Department of Justice before existing electoral districts can be altered, is fully applicable to judicial elections. *Id.* at 2101-03. As Justice Stevens wrote in *Chisom*:

If Section 2 did not apply to judicial elections, a State covered by Section 5 would be precluded from implementing a new voting procedure having discriminatory effects with respect to judicial elections, whereas a similarly discriminatory system already in place could not be challenged under Section 2. It is unlikely that Congress intended such an anomalous result.

111 S. Ct. at 2367.

were not representatives.¹⁵¹ Second, the one-person, one-vote argument supported the position that judicial elections have been and should continue to be subject to different criteria than legislative elections. In arguing this latter view, the Fifth Circuit majority maintained that the one-person, one-vote cases "lead[] inexorably to the conclusion that judicial elections cannot be attacked along lines that their processes result in unintentional dilution of the voting strength of minority members."¹⁵²

The source of the one-person, one-vote doctrine is the case of *Reynolds v. Sims*,¹⁵³ the progeny of *Baker v. Carr*'s¹⁵⁴ foray into "the political thicket."¹⁵⁵ *Reynolds* found a right in the Equal Protection Clause to have one's vote accorded equal weight as the votes of citizens in other parts of the state.¹⁵⁶ "The [vote]," wrote Chief Justice Warren for the majority, is "preservative of other basic civil and political rights."¹⁵⁷ The majority in *Reynolds* reasoned that because "legislatures are responsible for enacting laws by which all citizens are bound to be governed, they should be bodies which are collectively responsive to the popular will."¹⁵⁸ Legislatures can be responsive to the community as a whole only if each vote is approximately equal to every other vote. A constitutional elective system, therefore, must ensure that each legislator represents a roughly equivalent number of voters. If this were not the case, the votes of citizens living in certain parts of the state were said to be "in a substantial fashion diluted."¹⁵⁹

When plaintiffs used the one-person, one-vote guarantee to challenge the design of judicial districts, courts determined that the rationale for the constitutional protection did not apply to judicial elections. In the first such case, *Buchanan v. Rhodes*,¹⁶⁰ plaintiffs challenged Ohio's judicial election scheme that permit-

151. See *infra* note 162 and accompanying text.

152. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620, 627 (5th Cir. 1990) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

153. 377 U.S. 533 (1964).

154. 369 U.S. 186 (1962).

155. *Reynolds*, 377 U.S. at 556 n.30, 566. Justice Frankfurter was one of the first to use the term "political thicket" in reference to reapportionment. See *Colgrove v. Green*, 328 U.S. 549, 556 (1946).

156. *Reynolds*, 377 U.S. at 565.

157. *Id.* at 561-62.

158. *Id.* at 565.

159. *Id.* at 568.

160. 249 F. Supp. 860 (N.D. Ohio 1966), *cert. denied*, 393 U.S. 839 (1968).

ted at least one judge per county. Plaintiffs claimed discrimination because heavily populated counties were allocated the same number of judges as lightly populated counties. The court dismissed the claim as a nonjusticiable political question and reconciled *Reynolds* by stating that "[j]udges do not represent people, they serve people. They must, therefore, be conveniently located to those people whom they serve."¹⁶¹ Cases that followed *Buchanan* similarly found that the one-person, one-vote principle did not require the allocation of state judges on the basis of population.¹⁶² In 1973, the Supreme Court affirmed this position in *Wells v. Edwards*.¹⁶³

The majority of the Fifth Circuit in *LULAC* reasoned that the one-person, one-vote guarantee "underlies the concept of minority vote dilution"¹⁶⁴ and that if the former principle does not apply to judicial elections, then neither does the latter. Following a "settled canon of construction," the majority presumed that Congress was aware of this judicial history and would have believed judicial elections invulnerable to voter dilution claims.¹⁶⁵ In his dissent, Justice Scalia agreed with the Fifth Circuit majority.¹⁶⁶ He called the extension of voter dilution guarantees into an area not previously subject to the one-person, one-vote requirement "a significant change in the law,"¹⁶⁷ and one that the Court should adopt only if Congress signaled this change with unmistakable language.¹⁶⁸ Scalia expressed his concern that if the one-person, one-vote standard is eliminated, no basis would exist from which to judge whether voter dilution has in fact occurred.¹⁶⁹ He challenged the petitioners in oral argument stating, "You need a standard. How do you know what watered beer is unless you know what beer is?"¹⁷⁰

161. 249 F. Supp. at 865.

162. *Gilday v. Board of Elections*, 472 F.2d 214 (6th Cir. 1972); *Buchanan v. Gilligan*, 349 F. Supp. 569 (N.D. Ohio 1972); *Wells v. Edwards*, 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973); *Holshouser v. Scott*, 335 F. Supp. 928 (M.D.N.C. 1971), *aff'd*, 409 U.S. 807 (1972); *New York State Ass'n of Trial Lawyers v. Rockefeller*, 267 F. Supp. 148 (S.D.N.Y. 1967).

163. 409 U.S. 1095 (1973).

164. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620, 628 (5th Cir. 1990) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

165. *Id.* at 628.

166. *Chisom v. Roemer*, 111 S. Ct. 2354, 2369 (1991) (Scalia, J., dissenting); *Houston Lawyers' Ass'n*, 111 S. Ct. at 2382 (Scalia, J., dissenting).

167. *Chisom*, 111 S. Ct. at 2374 (Scalia, J., dissenting).

168. *Id.* at 2375.

169. *Id.*

170. Walter Borges, *Lively LULAC Arguments Don't Signal Court's Intent, No Unity on Either Side as Eight Justices Join In*, TEXAS LAW., Apr. 29, 1991, at 1.

The majority opinions of the Supreme Court in *Chisom* and *Houston Lawyers' Ass'n*, however, make only passing mention of the one-person, one-vote concern. The opinion in *Chisom* distinguished *Wells v. Edwards*¹⁷¹ which was based on the Equal Protection Clause of the Fourteenth Amendment rather than on the Voting Rights Act. Because the purpose of the Voting Rights Act is to grant protection beyond that guaranteed by the Constitution, the majority found the *Wells* analogy unpersuasive.¹⁷²

Another weakness in the one-person, one-vote reasoning of the Fifth Circuit majority in *LULAC* is that none of the one-person, one-vote cases cited by the court involved racial discrimination. When the basis of plaintiffs' challenge to judicial elections was court delays and clogged dockets, courts historically either dismissed the case or accepted a rational basis for the state system; administrative convenience was a sufficient rationale to overcome a one-person, one-vote challenge to judicial elections.¹⁷³ Earlier courts had suggested, however, that a showing by plaintiffs of "arbitrary and capricious or invidious action" on the part of state governments would compel a court to intervene in judicial elections.¹⁷⁴

In 1980, the Fifth Circuit applied this reasoning in *Voter Information Project, Inc. v. City of Baton Rouge*, in which it found racial discrimination in judicial elections.¹⁷⁵ *Voter Information Project* challenged at-large elections for city and state judges in Louisiana. Although blacks comprised twenty-five percent of the population of the relevant area, no black judge had ever been elected.¹⁷⁶ In its *Voter Information Project* decision, the Fifth Circuit explained that the one-person, one-vote cases "make clear that they do not involve claims of race discrimination."¹⁷⁷ The Fifth Circuit went on to state that "[t]o hold that a system

171. 347 F. Supp. 453 (M.D. La. 1972), *aff'd mem.*, 409 U.S. 1095 (1973).

172. *Chisom*, 111 S. Ct. at 2368.

173. See, e.g., *Holshouser v. Scott*, 335 F. Supp. 928, 933 (M.D.N.C. 1971) (finding that the one-person, one-vote rule does not apply to the state judiciary), *aff'd*, 409 U.S. 807 (1972). For a discussion of the one-person, one-vote cases rejecting application of the doctrine to judicial elections, see Edward A. Sheridan, *The Equal-Population Principle: Does It Apply to Elected Judges?*, 47 NOTRE DAME L. REV. 316, 320-26 (1971).

174. *Wells*, 347 F. Supp. at 455; *Holshouser*, 335 F. Supp. at 933; see also Andrew S. Marovitz, *Casting a Meaningful Ballot: Applying One-Person, One-Vote to Judicial Elections Involving Racial Discrimination*, 98 YALE L.J. 1193, 1196 (1989) (arguing that if racial discrimination exists, closer scrutiny is warranted).

175. 612 F.2d 208 (5th Cir. 1980).

176. *Id.* at 210.

177. *Id.* at 211.

designed to dilute the voting strength of black citizens and prevent the election of blacks as Judges is immune from attack would be to ignore both the language and purpose of the Fourteenth and Fifteenth Amendments."¹⁷⁸

In *City of Mobile v. Bolden*,¹⁷⁹ the Supreme Court applied an analysis similar to the Fifth Circuit's reasoning in *Voter Information Project*. Countering a contention by the dissent that the one-person, one-vote and minority voter dilution claims had the same analytical roots,¹⁸⁰ the majority in *Bolden* held that the one-person, one-vote argument does not even apply in at-large districts.¹⁸¹ Thus, the *LULAC* majority's one-person, one-vote, reasoning failed to persuade because one-person, one-vote and minority voter dilution claims are subject to different criteria. Presuming, as did the Fifth Circuit majority in *LULAC*, that in 1982, Congress was aware of the judicial history, the Supreme Court reasoned that Congress also would have understood that the immunity of judicial election systems from one-person, one-vote claims did not indicate that judicial elections would be insulated from charges of racial discrimination.

The "Federalism" Argument in LULAC

State defendants in *LULAC* appealed to the principle of federalism¹⁸² to argue that section 2 cannot apply to the state judiciary.¹⁸³ States did not challenge congressional authority to legislate regarding state judicial elections. The Fourteenth and Fifteenth Amendments clearly grant Congress the power to usurp state prerogatives in order to counter racial discrimination.¹⁸⁴ The states however, argued that the judicial function is "unique"¹⁸⁵

178. *Id.* at 211.

179. 446 U.S. 55 (1980).

180. *Id.* at 116 (Marshall, J., dissenting).

181. *Id.* at 77-79.

182. "The true 'essence' of federalism is that the States as States have legitimate interests which the National Government is bound to respect even though its laws are supreme." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (citing *Younger v. Harris*, 401 U.S. 37, 44 (1971)).

183. Brief for State Respondents at *10-11, 15-17, *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991) (Nos. 90-813 & 90-974) (LEXIS, Genfed library, Briefs file).

184. Section 5 of the Fourteenth Amendment provides: "The Congress shall have power to enforce, by appropriate legislation, the provisions of this article." U.S. CONST. amend. XIV, § 5. Section 2 of the Fifteenth Amendment states: "The Congress shall have power to enforce this article by appropriate legislation." U.S. CONST. amend. XV, § 2.

185. Supplemental Brief for State Defendants-Appellants at 8, *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc) (No. 90-8014), *rev'd sub nom. Houston Lawyers' Ass'n*, 111 S. Ct. 2376.

and had been traditionally insulated from federal intervention.¹⁸⁶ In order to alter that traditional hands-off policy, Congress must clearly and unequivocally express its intent to do so.¹⁸⁷ In *Houston Lawyers' Ass'n*, the State of Texas argued that the requirement of a heightened statement of congressional intent "seems strongest when the federal statute might work fundamental institutional changes in the judicial function."¹⁸⁸

The federalism argument, however, did not convince the members of the Supreme Court. Justice O'Connor, the chief defender of the concept of state autonomy on the Court,¹⁸⁹ joined the majority opinion in *Chisom*.¹⁹⁰ Similarly, Justices Scalia, Rehnquist, and Kennedy refused to employ the state autonomy argument in their dissent.¹⁹¹ The majority of the Court, however, did indicate in *Houston Lawyers' Ass'n* that the state interest should be a factor for courts to consider in determining whether violations have occurred and what remedies should be granted.¹⁹²

THE POLICY QUESTION: WEIGHING THE STATE INTEREST

The problem sparking these section 2 challenges to judicial elections is that judicial election systems that demand majority voting in at-large elections tend to dilute the voting strength of

186. *Id.* at 5.

187. *Id.* at 6 (citing *Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (holding that anti-injunction statute 28 U.S.C. § 2283 is not an absolute bar to federal court injunctions of state proceedings) and *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234 (1985) (holding that Congress must explicitly state an intention to abrogate Eleventh Amendment immunity before federal courts hold states liable)).

188. *Id.* at 8.

189. See M. David Gelfand & Keith Werhan, *Federalism and Separation of Powers on a "Conservative" Court: Currents and Cross-Currents from Justices O'Connor and Scalia*, 64 TUL. L. REV. 1443, 1449-51 (1990); see also *supra* note 182 and accompanying text (containing Justice O'Connor's definition of federalism).

190. See *Chisom v. Roemer*, 111 S. Ct. 2354, 2357 (1991).

191. See *id.* at 2369-76 (Scalia, J., dissenting). The absence of the federalism argument from the Supreme Court opinion is perhaps not surprising considering that restricting its own authority by deciding cases on the basis of state authority is against the interests of the Court. The same day the Court decided *Chisom* and *Houston Lawyers' Ass'n*, however, it also issued *Gregory v. Ashcroft*, 111 S. Ct. 2395 (1991), one of the strongest states rights decisions since 1976. Marcia Coyle, *The Justices Rule on Judges*, NAT'L L.J., July 1, 1991, at 1. In *Gregory*, the Court determined that the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1988), does not cover state judges because the plain meaning of the statute does not make clear "to anyone reading the Act that it covers judges." *Gregory*, 111 S. Ct. at 2404. Justice O'Connor, who joined the majority in *Chisom* and *Houston Lawyers' Ass'n*, authored the opinion in *Gregory*. See *id.*

192. *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376, 2381 (1991).

minority voters.¹⁹³ As a result, relatively few minority judges have reached state benches through popular elections. A 1985 study indicated that of 7544 judges elected to serve on major state courts, only 238 were African-American.¹⁹⁴ Overall, regardless of the election process, 3.7% of the judges on appellate and general jurisdiction trial courts were African-American, 1.3% were Hispanic, and .3% were Pacific Islander/Asian.¹⁹⁵ Still fewer of these minority judges occupy seats on the highest state courts. In Louisiana, for example, no African-American has been elected to the state supreme court in the twentieth century, despite the fact that almost thirty percent of the state's population is black.¹⁹⁶ Similarly, a 1986 study showed that ten of fifteen states that elect judges to serve on their highest courts had no blacks sitting on the high bench.¹⁹⁷ The application of section 2 to judicial elections should correct this trend and have the salutary effect of bringing more minorities onto state courts.

State defendants, however, have cautioned against an application of section 2 to the judiciary. The states have claimed a

193. See, e.g., *Rogers v. Lodge*, 458 U.S. 613, 616 (1982).

At-large voting schemes and multimember districts tend to minimize the voting strength of minority groups by permitting the political majority to elect *all* representatives of the district. A distinct minority . . . may be unable to elect any representatives in an at-large election, yet may be able to elect several representatives if the political unit is divided into single-member districts.

Id. For a less critical view of multimember, at-large districts, see *Whitcomb v. Chavis*, 403 U.S. 124, 157-60 (1971).

194. FUND FOR MODERN COURTS, INC., *THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS* 18-19 (1985) [hereinafter FUND FOR MODERN COURTS]. More black judges serve on courts of limited jurisdiction. A 1986 study found 421 black judges serving nationwide on state courts of limited jurisdiction. Unfortunately, the study did not include figures on the total number of state judges serving on these courts. See Barbara L. Graham, *Judicial Recruitment and Racial Diversity on State Courts: An Overview*, 74 JUDICATURE 28, 30 (1990). Executive and legislative appointment schemes have been somewhat more successful than elections in bringing minority judges to the bench. FUND FOR MODERN COURTS, *supra*, at 20-21.

195. See FUND FOR MODERN COURTS, *supra* note 194, at 18-21.

196. *Clark v. Edwards*, 725 F. Supp. 285, 290 (M.D. La. 1988). One black, Jessie Stone, did serve by appointment for 17 days on the Louisiana Supreme Court in 1979. *Id.*

197. Graham, *supra* note 194, at 35. In 1986, no blacks sat on the highest state courts in 30 states, including ten that elect judges: Arkansas, Georgia, Indiana, Kentucky, Louisiana, Nevada, New Mexico, Tennessee, Texas, and West Virginia. One black justice sat on the high bench in each of the following states: Alabama, California, Florida, Maryland, Michigan, Mississippi, New York, North Carolina, Pennsylvania, South Carolina, and Virginia. *Id.* For a breakdown of state courts and how judges at each level are selected, see CONFERENCE OF STATE COURT ADM'RS AND THE NAT'L CTR. FOR STATE COURTS, *STATE COURT CASELOAD STATISTICS: ANNUAL REPORT 1988*, at 179-235 (1990).

significant interest in designing their own judicial election schemes¹⁹⁸ and have argued that the traditional remedy for section 2 violations—dividing at-large districts to create smaller, single-member districts with a predominately minority population—offends common assumptions of judicial independence and impartiality.¹⁹⁹ The states' concern has been that if judges are called "representatives" and are elected like representatives, they would tend to act more like politicians than judges, ruling on disputes with a bias in favor of constituents.²⁰⁰ State defendants therefore argued that the statutory issue extended beyond defining the structure of state elections to defining the function of the state judge.²⁰¹

The Fifth Circuit majority in *LULAC* agreed with the state defendants and stated that the intrusiveness of section 2 in judicial elections "strikes at federalism's jugular."²⁰² Chief Judge Charles Clark in his concurrence agreed, stating that "[t]he State of Texas has a strong interest and, indeed, a fundamental right to choose to have these judges elected in the manner provided here."²⁰³ This section explores broadly the nature of the state interest in judicial independence and discusses specifically the states' interest in maintaining multimember judicial districts.

The States' Interest in Judicial Independence

The principle of judicial independence is as old as the nation itself.²⁰⁴ It encompasses two aspects central to the judicial function: the institutional independence of the judiciary from the

198. Brief for State Respondents at *28-29, *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991) (Nos. 90-813 & 90-974) (LEXIS, Genfed library, Briefs file).

199. See *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620, 664, 668-69 (5th Cir. 1990) (en banc) (Johnson, J., dissenting), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

200. *Id.* at 668-69.

201. See Supplemental Brief for State Defendants-Appellants at 13-14, *LULAC*, 914 F.2d at 620 (No. 90-8014).

202. *LULAC*, 914 F.2d at 630.

203. *Id.* at 632 (Clark, J., concurring).

204. See generally *COMISKY & PATTERSON*, *supra* note 14, at 3-4 (noting that the independent judiciary was a key reform accompanying the American Revolution). The Declaration of Independence lists as one grievance that judges were "'dependent on [the King's] will alone, for the tenure of his offices, and the amount and payment of their salaries.'" *THE DECLARATION OF INDEPENDENCE* para. 9 (U.S. 1776), *quoted in* *COMISKY & PATTERSON*, *supra* note 14, at 3. The Founding Fathers, however, did not trust the electorate to select qualified judges. *COMISKY & PATTERSON*, *supra* note 14, at 3-4.

executive and legislative branches²⁰⁵ and the insulation of decisionmaking from pressure by the political majority.²⁰⁶ The application of section 2 does not threaten the first of these aspects of judicial independence. It could, however, intrude upon the second aspect—the independence of judicial decisionmaking.²⁰⁷ This second meaning of judicial independence emphasizes the countermajoritarian role of the courts.²⁰⁸ As expressed by the Fifth Circuit majority in *LULAC*, “public opinion [is] irrelevant to the judge’s role,” and the judge’s task is “to disregard or even to defy that opinion, rather than to represent or carry it out.”²⁰⁹ Lawyers for the State of Louisiana presented the same idea more colorfully when they stated, “‘Judges have but one constituency, the blindfolded lady with the scales and sword.’”²¹⁰

Competing with the principle of judicial independence, however, is a similarly powerful strain in American thought, that of judicial accountability.²¹¹ The principle of judicial accountability traces its origin to the era of Jacksonian democracy.²¹² With the sweep toward universal male suffrage, egalitarianism, and the popular participation in government that characterized the Jacksonian era, the state judge appointed for life became a symbol of aristocratic control.²¹³ Motivated by this new Jacksonian style of American democracy, state after state jettisoned appointed judgeships and opened the judiciary to popular elec-

205. “[T]here is no liberty, if the judiciary power be not separated from the legislative and the executive.” MARY L. VOLCANSEK & JACQUELINE L. LAFON, *JUDICIAL SELECTION: THE CROSS EVOLUTION OF FRENCH AND AMERICAN PRACTICES* 21 (1988) (quoting CHARLES D. MONTESQUIEU, *THE SPIRIT OF THE LAWS* (Thomas Nugent ed., 1966) (1748)).

206. *THE FEDERALIST* No. 10, at 43-44 (James Madison) (Max Beloff ed., 1987).

207. See comments by lawyers for the State of Louisiana, *infra* note 210 and accompanying text.

208. For a discussion of the countermajoritarian role of the judiciary, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 16-23 (1962); Larry W. Yackle, *Choosing Judges the Democratic Way*, 69 B.U. L. REV. 273 (1989).

209. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620, 622 (5th Cir. 1990) (en banc), *rev'd sub nom. Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

210. Ruth Marcus, *Supreme Court to Determine if Judge's Elections Are Biased; Minorities Challenge Voting Rights Act Provision*, WASH. POST, Jan. 19, 1991, at A2 (quoting lawyers for Louisiana Gov. Roemer).

211. PHILIP L. DUBOIS, *FROM BALLOT TO BENCH: JUDICIAL ELECTIONS AND THE QUEST FOR ACCOUNTABILITY* 28 (1980).

212. VOLCANSEK & LAFON, *supra* note 205, at 85, 88-92.

213. *Id.* at 89-90.

tions.²¹⁴ Characteristically, frontier states were particularly prone to trust judicial selection to the common man.²¹⁵ In fact, from 1845 to 1958, every new state in the union provided for a popularly elected judiciary.²¹⁶

This new popular accountability, however, created problems of its own. Along with democratization came pork-barrel politics; along with judicial accountability came judicial corruption.²¹⁷ In response, progressive reformers in the late nineteenth and early twentieth century urged a return to an independent state judiciary.²¹⁸ During this era, some elective states reverted to an appointive selection system. Virginia, for example, abandoned popular judicial elections and returned to a legislative appointment scheme.²¹⁹ Other states retained judicial elections but instituted a nonpartisan rather than partisan election scheme.²²⁰ Still other states instituted a hybrid of elective and appointive systems.²²¹ In short, each state sought its own balance between judicial independence and judicial accountability.²²²

214. *Id.* at 75-76.

215. *Id.*

216. *Id.* at 76.

217. See COMISKY & PATTERSON, *supra* note 14, at 4.

218. Kermit L. Hall, *Progressive Reform and the Decline of Democratic Accountability: The Popular Election of State Supreme Court Judges, 1850-1920*, 1984 AM. B. FOUND. RES. J. 345, 348-50.

219. Today, Virginia retains a legislative appointment scheme for the selection of state judges. VA. CONST. art. VI, § 7. Rhode Island and South Carolina are the only other states that leave judicial selection to the state legislature. R.I. CONST. art. 10, §§ 4, 5; S.C. CONST. art. V, §§ 3, 9, 14. The legislative selection schemes have been criticized for failing to bring a sufficient number of female judges to the bench. See, e.g., *Women Attorneys Call for Merit Judicial Selection Plan*, 1 VA. LAW. WKLY. 797 (Apr. 20, 1987). Some have found legislative appointment schemes, however, to be more effective in providing access for black judges. Barbara L. Graham, *Do Judicial Selection Systems Matter?*, 18 AM. POL. Q. 316, 333 (1990) (empirical study finding that legislative and gubernatorial appointment systems are more effective than electoral selection schemes in bringing black judges to the state trial bench).

220. COMISKY & PATTERSON, *supra* note 14, at 4.

221. *Id.* (discussing the adoption of merit selection schemes combined with retention elections). For an overview of merit selection and retention elections, see *id.* at 10-18.

222. The process of striking a satisfactory balance between judicial independence and judicial accountability continues. See, e.g., William M. Pearson & David S. Castle, *Alternative Judicial Selection Devices: An Analysis of Texas Judges' Attitudes*, 73 JUDICATURE 34 (1989). Much of the recent debate has centered around the benefits of merit selection plans and retention elections. See, e.g., Hans A. Linde, *Elective Judges: Some Comparative Comments*, 61 S. CAL. L. REV. 1995 (1988); Robert S. Thompson, *Judicial Retention Elections and Judicial Method: A Retrospective on the California Retention Election of 1986*, 61 S. CAL. L. REV. 2007 (1988).

Striking this balance requires one to make assumptions about the nature of law and the judicial function.²²³ For example, one whose model of the judge's role is that of the administrator of neutral principles,²²⁴ the "technician,"²²⁵ or the "moral expert,"²²⁶ will stress the need for judicial independence and will advocate selection systems most likely to achieve that end.²²⁷ On the other hand, one whose judicial model is that of the policymaker applying community values at the limits of the law²²⁸ is more likely to advocate democratic selection.²²⁹ The more pragmatic view, of course, is that the individual judge wears different hats, playing the role of policymaker in one case and that of technician or neutral logician in another. A proper state judicial selection scheme strives to achieve a delicate equilibrium between the judge as expert and the judge as purveyor of community values.

The States' Interest in Multimember Districts

The application of section 2 to judicial elections arguably would compromise this balance between judicial independence and judicial accountability. Opponents of section 2's application to judicial elections have claimed that multimember judicial election districts are essential to the fair, efficient, and impartial administration of justice.²³⁰ Opponents also have argued that judicial electoral districts must "extend over a wide enough area . . . to

223. Michael H. Shapiro, *Introduction: Judicial Selection and the Design of Clumsy Institutions*, 61 S. CAL. L. REV. 1555, 1555-57 (1988).

224. See, e.g., Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1 (1971).

225. DUBOIS, *supra* note 211, at 22-23 (quoting Judge W. St. John Garwood, *Democracy and the Popular Election of Judges: An Argument*, 16 SW. L.J. 216, 229 (1962)).

226. Shapiro, *supra* note 223, at 1557.

227. See, e.g., DUBOIS, *supra* note 211, at 22-23.

228. See BENJAMIN J. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-141 (1921).

If you ask how [the judge] is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. . . . No doubt the limits of the judge are narrower. He legislates only between gaps. He fills the open spaces of the law.

Id. at 113.

229. See, e.g., Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717, 1731-32 (1988); see also DUBOIS, *supra* note 211, at 23-24 (reviewing the debate between proponents of judicial independence and proponents of judicial accountability).

230. Supplemental Brief for Appellant Defendant-Intervenor at 28, *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620 (5th Cir. 1990) (Nos. 90-8014 & 90-9003) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

minimize forum-shopping and the control of courts by small, tight-knit special interest groups.”²³¹

The ‘states’ strongest objections to single-member districting in judicial elections stem primarily from three concerns: (1) the over-politicization of the judicial role;²³² (2) the “balkanization” of voter influence²³³ and (3) administrative entanglement.²³⁴

Multimember districts in judicial elections serve several purposes. First, they facilitate the administration of the judicial system. In general, the drawing of judicial districts is based on caseload rather than on population.²³⁵ Each judicial district is assigned a certain number of judges based on need. Trial court judges generally represent the entire district and judges work in a pool, taking the cases they are assigned. Judges serve at-large in order to compensate for varying caseloads and to allow for the efficient administration of justice.²³⁶ States have argued that by forcing judicial districting according to population, section 2 would create “an administratively insoluble problem”²³⁷ of trying to draw districts to give minority voters a “controlling say”²³⁸ while protecting both administrative efficiency and judicial independence from political pressures.²³⁹

Second, multimember districts serve to insulate elected judges from constituent pressure. In subdivided judicial districts, the risks of overpoliticization are clear. The smaller the group a judge serves, the greater the likelihood that constituents will expect a judge to be responsive to their special needs. Danger exists that the focus may move away from qualifications, integrity, and experience and toward an attitude of “what can this judge do for me.”²⁴⁰ When voters hold such an attitude, even the

231. *Id.*

232. See Brief for State Respondents at *21, *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991) (Nos. 90-813 & 90-974) (LEXIS, Genfed library, Briefs file).

233. See *id.* at *29.

234. See *infra* notes 235-39 and accompanying text.

235. In part for this reason, courts have determined that the principle of one-person, one-vote does not apply to judicial elections. See, e.g., *Buchanan v. Gilligan*, 349 F. Supp. 569, 571 (N.D. Ohio 1972).

236. ABA JUDICIAL ADMIN. DIV., STANDARDS RELATING TO COURT ORGANIZATION 19-20 (1990).

237. Supplemental Brief for Appellant Defendant-Intervenor at 29-30, *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620 (5th Cir. 1990) (Nos. 90-8014 & 90-9003) (en banc), *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991).

238. *Id.* at 30.

239. *Id.* at 29-30 (citing *Clark v. Edwards*, 725 F. Supp. 285, 294 (N.D. La. 1988)).

240. See Katherine I. Butler, *The Bench and the Ballot Box*, FULTON CO. DAILY REP., Nov. 4, 1991, at 6-7.

most conscientious judges may be tempted to bow to constituent pressures. Multimember judicial districts can provide a buffer that mitigates the accountability of each judge to a particular constituent group.²⁴¹ In single-member districting, however, that buffer is destroyed.²⁴²

These hypothetical concerns might be outweighed if single-member districting were guaranteed to enhance the interests of minority voters. In all likelihood, single-member districts would increase the number of minority members on state courts.²⁴³ The purpose of the Voting Rights Act, however, is to protect minority voters, not minority candidates.²⁴⁴ Lower courts will need to determine whether, given the factual situation in each case, single-member districting would serve the interests of minority voters. Judicial elections differ from legislative, multimember body elections in that a minority group with its chosen representatives sitting on a multimember body is reasonably assured that its voice will be heard and its views represented in each decision of the multimember body. In the case of trial judges, however, minority litigants could expect to face judges they had no input in electing.²⁴⁵ Consider, for example, a county that elects ten judges and in which minorities constitute twenty percent of the population. If districts were redrawn to allow greater minority participation, minorities might be able to elect two judges of their choice. An almost exclusive white majority, however, would elect the remaining eight judges in the district.²⁴⁶ Such a district-

241. *Id.*

242. The United States District Court for the Middle District of Louisiana in *Clark v. Roemer* stated that "[u]ndoubtedly subdistricts could be drawn so small as to be an unacceptable remedy." *Clark v. Roemer*, No. 86-435-A, 1991 U.S. Dist. LEXIS 14322 at *31 (M.D. La. Aug. 29, 1991). The court found, however, that the state interest against subdistricting was not compelling because Louisiana had an existing judicial district with an even lower population than the subdistricts proposed. *Id.* Similarly, in *LULAC v. Clements*, Justice Johnson in his dissent noted that the proposed subdistricts were unlikely to be smaller than some existing Texas judicial districts. *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 914 F.2d 620, 669 (5th Cir. 1990) (en banc) (Johnson, J., dissenting), *rev'd sub nom.* 'Houston Lawyers' Ass'n v. Attorney Gen., 111 S. Ct. 2376 (1991).

243. See Coyle, *supra* note 191, at 1.

244. See *Thornburg v. Gingles*, 478 U.S. 30, 57 (1986).

245. According to Judge Higginbotham's concurrence in the Fifth Circuit's en banc decision in *LULAC*, if a 59-judge district were subdivided, creating nine minority-dominated districts, a litigant "would have a 98.3% chance of appearing before a judge in whose election he had not been able to vote." *LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring). Furthermore, a minority litigant would have an 84.75% chance of appearing before a judge who was from a nonminority district. *Id.*

246. See *League of United Latin Am. Citizens Council (LULAC) v. Clements*, 902 F.2d

ing scheme could actually have a negative effect on the minority population because "only a minute proportion of the judiciary will be accountable to minority voters."²⁴⁷

Alternative Remedies

Courts have stalled repeatedly at the remedy phase of section 2 challenges to judicial elections,²⁴⁸ largely because of the inherent difficulties of subdividing judicial districts.²⁴⁹ Most courts have deferred to state legislators to fashion a remedy, but thus far only Mississippi has actually enacted a remedy for voter dilution in judicial elections.²⁵⁰

Proponents of the application of section 2 to judicial elections, however, have stressed that single-member subdistricting is not the only existing remedy to voter dilution.²⁵¹ One possibility is "limited voting" in which each voter, rather than voting once for each position, casts fewer votes than the number of vacancies to be filled.²⁵² Under limited voting, if five judgeships were up for election, each voter might vote for only three.²⁵³ Such a scheme would ameliorate the dilutive effects of at-large voting without "balkanization."²⁵⁴ At the same time, it makes each judge accountable to every voter in the district.²⁵⁵

293, 307-08 (5th Cir.), *rev'd*, 914 F.2d 620 (5th Cir. 1990) (*en banc*), and *rev'd sub nom.* *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991). This "balkanization" effect is not unique to the judicial context. Drawing single-member districts to concentrate minority votes makes the surrounding districts more white and more conservative. Such redistricting is a boon to conservative, mainly Republican, political candidates. *See, e.g.,* Stuart Taylor, Jr., *Electing by Race*, AM. LAW., June 1991, at 50.

247. Supplemental Brief for Appellant Defendant-Intervenor at 6, *LULAC*, 914 F.2d 620 (Nos. 90-8014 & 90-9003). The Fifth Circuit panel also advanced this argument. The court noted that in Harris county, which includes Houston, minority voters would have "an 84.75% chance of appearing before a judge who has no direct political interest in being responsive to minority concerns." *LULAC*, 902 F.2d at 307-08; *see LULAC*, 914 F.2d at 650 (Higginbotham, J., concurring).

248. *See* Laura L. Woolcott, Note, *State Judicial Elections and the Voting Rights Act: Will Section 2 Protect Minority Voters?*, 23 GA. L. REV. 787, 814 (1989).

249. *See supra* notes 230-47 and accompanying text.

250. *See supra* note 16.

251. *See, e.g.,* April D. Dulaney, Comment, *A Judicial Exception for Judicial Elections: "A Burning Scar on the Flesh of the Voting Rights Act,"* 65 TUL. L. REV. 1223, 1257-58 (1991).

252. Samuel Issacharoff, *The 37.5 Percent Solution*, TEX. LAW. 32, 32 (Mar. 5, 1990).

253. *Id.*

254. *Id.*

255. *Id.* at 33. Limited voting is currently in use in certain jurisdictions, among them Pennsylvania. *Id.*

Limited voting, however, may have negative consequences unanticipated by its proponents. Limited voting would, in effect, ensure that any minority group able to organize a bloc vote could elect candidates of its choice, even if those candidates could never have been elected by a majority of the voters. One could well imagine a situation in which this could work to the detriment of racial minorities. Suppose, for example, that a community is composed of a twenty percent racial minority and a twenty percent racist minority. Under a limited voting scheme, the racist minority would have as much opportunity to elect judges of its choice as would the racial minority. As one commentator has noted, alternatives to the majority vote "could well have the side effect of opening the door to fringe candidates like racebaiting former Klansman David Duke of Louisiana."²⁵⁶

A similar alternative remedy is "cumulative voting." Like limited voting, cumulative voting preserves existing districts. Cumulative voting differs only in that it allows voters to cast several votes for a single vacancy. Under this plan, voters could either concentrate their votes on a single candidate or allocate them between desirable candidates.²⁵⁷ Like limited voting, cumulative voting allows for increased minority success without sacrificing judicial independence or at-large accountability. Therefore, cumulative voting addresses the states' concern for judicial independence and administrative efficiency.²⁵⁸ Like limited voting, however, cumulative voting raises the spectre of other organized interest groups seizing control of a fraction of the state judiciary.²⁵⁹ This concern alone should caution against heralding limited and cumulative voting as panaceas for the contradictions inherent in applying section 2 to judicial elections.

256. Taylor, *supra* note 246, at 50.

257. Knoebel, *supra* note 14, at 28. "Cumulative voting" is currently in use in elections for certain local officials in Alamogordo, New Mexico, and in four Alabama counties: Centre, Chilton, Guin, and Myrtlewood. *Id.*

258. Some commentators have also proposed appointment schemes as a possible alternative remedy for § 2 violations. *See id.* An attempt to switch to an appointive scheme after courts had found a voting rights violation, however, would seem to violate § 5 preclearance requirements in states subject to § 5 and would likely be unacceptable in other states as well. *See id.*; *see generally* Issachoroff, *supra* note 252, at 32 (arguing that the Texas state legislature should adopt a system of limited voting for district court elections). The Supreme Court decision in *Chisom*, however, suggested that states would have the option of initiating a judicial appointment scheme. *See supra* note 218.

259. *See supra* note 256 and accompanying text.

APPLYING SECTION 2 TO JUDICIAL ELECTIONS

The recent Supreme Court decisions in *Chisom v. Roemer*²⁶⁰ and *Houston Lawyers' Ass'n v. Attorney General*²⁶¹ answer only one question: whether the results test of section 2 applies to judicial elections.²⁶² The most difficult questions, which involve what standard should apply and how to administer a remedy, are left for litigants to debate and subsequent courts to determine. Though the Supreme Court decided only the threshold statutory question, it made clear that section 2 challenges to judicial elections should be judged according to "the totality of the circumstances test."²⁶³ The Court did not explore exactly how to administer this test in the judicial context; it did, however, offer some encouragement to state defendants. First, the Court suggested that states have the option to abandon an electoral scheme and to initiate a judicial appointment system.²⁶⁴ Second, the Court opened the possibility that *Thornburg v. Gingles*²⁶⁵ may not set the governing standard for section 2 violations in judicial elections.²⁶⁶ Third, the Court recognized that in balancing the many factors in the totality of the circumstances test, the state interest in districtwide judicial elections may, in some cases, outweigh proof of racial voter dilution.²⁶⁷

The Change to an Appointment System

The Supreme Court's opinion in *Chisom* suggests that states faced with section 2 challenges can refrain from compromising their judiciary by changing from judicial elections to an appointment system.²⁶⁸ Justice Stevens noted that "Louisiana could, of course, exclude its judiciary from the coverage of the Voting Rights Act by changing to a system in which judges are appointed, and in that way, it could enable its judges to be indifferent to popular opinion."²⁶⁹

260. 111 S. Ct. 2354 (1991).

261. 111 S. Ct. 2376 (1991).

262. See *supra* notes 19-23 and accompanying text.

263. *Chisom*, 111 S. Ct. at 2368 (quoting 42 U.S.C. § 1973b (1988)).

264. *Id.* at 2367.

265. 478 U.S. 30 (1986).

266. See *infra* notes 277-78 and accompanying text.

267. *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376, 2381 (1991).

268. *Chisom*, 111 S. Ct. at 2367-68.

269. *Id.*

Despite the Court's suggestion, any switch from electoral to merit selection made in response to a section 2 challenge would seem to implicate section 5 of the Voting Rights Act.²⁷⁰ Section 5 demands that states violating the Voting Rights Act either seek a declaratory judgment from the United States District Court for the District of Columbia or have any changes in their electoral process approved by the U.S. Attorney General.²⁷¹ If the Attorney General finds an attempt to institute appointment selection to be against the interests of minority voters, he could refuse approval and raise a section 5 challenge.²⁷² Even a declaratory judgment or sanction from the Attorney General, however, would not bar a subsequent challenge to the new electoral scheme.²⁷³ Therefore, changing to an appointment system may not be a realistic alternative for those jurisdictions covered by section 5.²⁷⁴

Applicability of the Gingles Criteria

The Supreme Court stated that its opinions in *Chisom* and *Houston Lawyers' Ass'n* are "limited in character."²⁷⁵ The Court did not purport to decide the elements of a section 2 claim in judicial elections nor the appropriate remedy to administer.²⁷⁶ In this regard, however, what the Supreme Court did not decide may prove as significant as what it did decide. Noticeably absent from the Court's two majority opinions is any indication that *Gingles* should be the governing standard in section 2 challenges to judicial elections. The Supreme Court has left the lower courts the option of fashioning a new standard for section 2 challenges to judicial elections.²⁷⁷

As discussed above, *Gingles* established the standard in section 2 claims for multimember districtwide elections.²⁷⁸ *Gingles* estab-

270. 42 U.S.C. § 1973c (1988).

271. *Id.*

272. *Id.*

273. *Id.*

274. See Knoebel, *supra* note 14, at 28.

275. *Chisom v. Roemer*, 111 S. Ct. 2354, 2361 (1991); see *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376, 2380 (1991).

276. *Chisom*, 111 S. Ct. at 2361.

277. The Court cites *Gingles* only twice in the *Chisom* majority opinion. One citation simply supports the proposition that the one-person, one-vote rationale is not the essential basis of a § 2 challenge. *Id.* at 2368 n.32. The second citation gives *Gingles* as one source for the Court's interpretation of § 2's "totality of the circumstances" test. *Id.* at 2363 n.21. Interestingly, however, rather than citing Justice Brennan's majority opinion, the Court cites Justice O'Connor's concurrence.

278. See *supra* notes 82-86 and accompanying text.

lished a three-pronged threshold burden that plaintiffs must meet to state a section 2 claim.²⁷⁹ Once plaintiffs met this threshold burden, the Court applied the totality of the circumstances test.²⁸⁰ In its application of this test, the Court determined that the two most important factors to establish a section 2 violation were the “‘extent to which minority group members have been elected to public office in the jurisdiction’ and the ‘extent to which voting in the elections of the state or political subdivision is racially polarized.’”²⁸¹ The Court stated in *Gingles* that the remaining “Senate factors,”²⁸² if they existed, would support, but would not be essential to, a section 2 challenge.²⁸³

Several commentators have criticized the *Gingles* criteria for being overly intrusive even as applied to legislative elections.²⁸⁴ In the judicial context, however, the criteria could prove not only overly intrusive but also misleading. The goal of section 2, as expressed in the statute, is to outlaw election procedures that make elections “not equally open to participation by members” of protected minority groups.²⁸⁵ Courts are to determine whether the electoral process is “equally open” by balancing “the totality of the circumstances.”²⁸⁶ This test, as originally devised by Congress, is sufficiently fact-sensitive to weigh all of the policy arguments against single-member districting in judicial elections, including a balancing of what a given minority group will gain and what it will lose by implementing such a remedy and the costs to a state and its judicial system.²⁸⁷ No question exists that a pure totality of the circumstances test is difficult to administer.²⁸⁸ *Gingles* facilitated its administration by highlighting elec-

279. These three criteria are: (1) that the minority group be “sufficiently large and geographically compact to constitute a majority in a single-member district”; (2) that the minority group be politically cohesive; and (3) that the majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.” *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

280. *Id.* at 79-80.

281. *Id.* at 48 n.15 (quoting S. REP. NO. 417, *supra* note 64, at 29, reprinted in 1982 U.S.C.C.A.N. at 206-07).

282. *See supra* note 80.

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

284. *See, e.g.,* THERNSTROM, *supra* note 83, at 205-09; *see also* Elizabeth McCaughey, *Perverting the Voting Rights Act*, WALL ST. J., Oct. 25, 1989, § 1 at 18 (arguing that the courts and the Justice Department have transformed the Voting Rights Act into a system of racial gerrymandering).

285. 42 U.S.C. § 1973b (1988).

286. *Id.*

287. S. REP. NO. 417, *supra* note 64, at 27-30, reprinted in 1982 U.S.C.C.A.N. at 204-08.

288. *See generally* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L.

toral success and racial bloc voting as the essence of a voter dilution claim.²⁸⁹ In the judicial context, however, the *Gingles* test is too blunt a tool. A pure totality of the circumstances test, as advocated by Justice O'Connor in her *Gingles* concurrence, is the more appropriate measure for voter dilution in judicial elections.²⁹⁰

Policy considerations support the proposition that judicial elections need not be judged under the same standard as legislative elections. The judicial function differs significantly from the legislative function. One principal difference is that judges should not be overly responsive to their constituents.²⁹¹ Another is that judges, at least at the trial court level, do not make decisions as a collegial body. In a legislative body, section 2 helps minority voices be heard in the decisionmaking process, whereas in the judicial context, section 2 may actually decrease a minority group's overall influence on the judiciary.²⁹² Courts must be able to weigh these considerations in their decisionmaking.

Precedent also supports the position that judicial elections should be subject to different standards than legislative elections.²⁹³ The long line of one-person, one-vote cases demonstrates that courts have consistently recognized that judicial elections raise different concerns than do legislative elections.²⁹⁴ Among these is the fact that judges serve a different function than legislators and that judicial districts are designed to facilitate judicial administration rather than popular representation.²⁹⁵ Administrative concerns alone would rarely, if ever, be pressing enough to trump proof of racial voter dilution.²⁹⁶ These concerns,

REV. 1175 (1989) (advocating decisionmaking based on general principles rather than on a weighing of the totality of the circumstances). Scalia notes, however, that, as in § 2 of the Voting Rights Act, Congress can mandate that courts base their decision on the totality of the circumstances. *Id.* at 1183.

289. *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986); see *supra* notes 279-83 and accompanying text.

290. See *Gingles*, 478 U.S. at 83-105. For a discussion of Justice O'Connor's concurring opinion, see *supra* notes 87-92 and accompanying text.

291. See *supra* notes 204-29 and accompanying text.

292. See *supra* notes 243-47 and accompanying text.

293. See *supra* notes 135-38 and accompanying text.

294. See *supra* note 138 and accompanying text.

295. See *supra* note 162 and accompanying text.

296. See, e.g., *Voter Information Project v. City of Baton Rouge*, 612 F.2d 208, 211-12 (1980) (upholding a cause of action for racial voter dilution in judicial elections despite the difficulties highlighted by the one-person, one-vote line of cases). For a discussion of the courts' refusal to apply the one-person, one-vote principle to judicial elections, see *supra* notes 151-63.

however, support devising a section 2 standard that is more appropriate to judicial elections.

A Revised Threshold Standard

The *Gingles* three-part threshold test has aided courts in identifying the districts in which plaintiffs have raised a meritorious section 2 challenge.²⁹⁷ The *Gingles* threshold test, therefore, should be preserved to the extent that it works in the judicial context. Of the three threshold factors, only the first, which demands that plaintiffs demonstrate a minority group sufficiently large and geographically compact to form a single-member district,²⁹⁸ requires revision. Geographic compactness is an essential element in determining voter dilution only when the remedy sought is single-member redistricting.²⁹⁹ Although in some factual situations, single-member redistricting may be a feasible remedy for section 2 violations in judicial elections,³⁰⁰ policy concerns caution against wholesale subdistricting in judicial elections.³⁰¹

In place of geographic compactness, a revised threshold test should require plaintiffs to show that in each challenged district they have the "potential to elect [judges] in the absence of the challenged structure or practice."³⁰² In cases in which the plaintiffs seek subdistricting, they would need to meet the *Gingles* requirement of geographic compactness and a sufficiently large minority population.³⁰³ In cases in which the plaintiffs seek alternative remedies such as limited or cumulative voting, they would need to show that the remedies sought would actually provide relief. This would require a sufficiently large minority population to be able to elect judges under such an alternative scheme. Such a revised threshold test would serve the same function as the *Gingles* threshold test, that is, to identify meritorious claims, but in addition would allow for consideration of alternative remedies.³⁰⁴

297. See Shelley Wittevrangel, Case Note, *Sanchez v. Bond*, 110 S. Ct. 275 (1989): *Challenge to the Judicial Manageability of the Thornburg v. Gingles Threshold for Determining Minority Vote Dilution*, 13 HAMLINE L. REV. 127, 151-54 (1990).

298. *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986).

299. For a discussion of alternative remedies to § 2 violations in judicial elections, see *supra* notes 248-59 and accompanying text.

300. See generally *Martin v. Mabus*, 700 F. Supp. 327 (S.D. Miss. 1988) (ordering the adoption of single-member subdistricts for certain Mississippi judicial elections).

301. See *supra* notes 232-47 and accompanying text.

302. *Gingles*, 478 U.S. at 50 n.17.

303. *Id.* at 50-51.

304. See *id.* at 50 n.17.

The Totality of the Circumstances Test

After determining that plaintiffs have met their threshold burden of proof, a court then determines, based on the totality of the circumstances, whether illegal voter dilution has indeed occurred. The Senate Report that accompanied the 1982 Amendment to section 2³⁰⁵ identified nine factors to be considered in an application of the totality of the circumstances test to measure racial vote dilution.³⁰⁶ The Court in *Gingles* chose to emphasize two of these factors: the degree of minority candidates' electoral success and the extent of racial bloc voting.³⁰⁷ In the case of judicial elections, all factors should be considered equally to determine, based on a balancing test, whether members of a minority group have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."³⁰⁸ The state interest, which is listed in the Senate factors as "whether the policy underlying the state[s] . . . practice or procedure is tenuous,"³⁰⁹ should be one of the important factors a court considers in determining whether illegal voter dilution has occurred.

Consideration of the state interest factor will also allow courts to derive alternative remedies to single-member districting. Feasible remedies might include cumulative or limited voting,³¹⁰ despite potential abuses,³¹¹ or even the transition to a merit selection system, depending on the facts of each claim. Courts should have the flexibility to consider these alternative remedies under a revised totality of the circumstances standard.

Racial Bloc Voting

Under the pure totality of the circumstances test, racial bloc voting and electoral success would remain two of the many factors courts consider in judging section 2 challenges. Courts should be

305. S. REP. NO. 417, *supra* note 64, reprinted in 1982 U.S.C.C.A.N. at 177.

306. For a list of the Senate factors, see *supra* note 80.

307. *Gingles*, 478 U.S. at 48 n.15. Justice Brennan, writing for the Court, stated that, "if difficulty in electing and white bloc voting are not proved, minority voters have not established that the multimember structure interferes with their ability to elect their preferred candidates." *Id.* at 49 n.15.

308. 42 U.S.C. § 1973b (1988).

309. *Gingles*, 478 U.S. at 37 (quoting S. REP. NO. 417, *supra* note 64, at 29, reprinted in 1982 U.S.C.C.A.N. at 207).

310. See *supra* notes 248-59.

311. *Id.*

sensitive to the differences between legislative and judicial elections in determining racial bloc voting and electoral success. In judging racial bloc voting and electoral success in the case of judicial elections, courts should focus their attention primarily on whether judicial elections themselves are racially polarized. In *Chisom*, the United States District Court for the Eastern District of Louisiana determined that all elections are relevant to an analysis of racial bloc voting but that the greater weight of the inquiry should be on judicial elections.³¹²

This argument is persuasive, primarily because it factors into the analysis a recognition of the difference in voter behavior in judicial and legislative elections. Compared to legislative elections, judicial elections attract lower voter turnout, and much less voter interest.³¹³ Judicial elections are frequently uncontested and incumbents hold an even greater advantage than they do in legislative campaigns.³¹⁴ Another peculiar aspect of judicial elections is that, when they are partisan, many judicial candidates will be chosen by voters who cast a straight party ballot.³¹⁵ This is due primarily to the fact that judicial elections do not normally attract great voter interest. Consequently, political affiliation rather than race can be the best indicator of how a candidate will fare.³¹⁶ Straight ticket voting can lead to cross-racial voting and to mitigate against racially polarized elections.³¹⁷ Even when

312. *Chisom v. Roemer*, No. 86-4057, 1989 U.S. Dist. LEXIS 10816, at *13-14 (E.D. La. Sept. 13, 1989), *aff'd*, 917 F.2d 187 (5th Cir. 1990), and *rev'd*, 111 S. Ct. 2354 (1991).

313. *Id.*

314. *Id.* at *14. Many states are able to convert electoral selection systems into a pseudo-appointive system in practice by encouraging judges to retire midterm and appointing favored candidates who in the next election will have the advantage of running as incumbents. See COMISKY & PATTERSON, *supra* note 14, at 9; see also N. Houston Parks, *Judicial Selection — The Tennessee Experience*, 7 MEM. ST. U. L. REV. 615, 629 (1977) (noting the prevalence in Tennessee of gubernatorial appointments despite the existence of an electoral system).

315. Brief for the State Respondents at *8 & n.10, *Houston Lawyers' Ass'n v. Attorney Gen.*, 111 S. Ct. 2376 (1991) (Nos. 90-813 & 90-974) (LEXIS, Genfed library, Briefs file).

316. *Id.* at *9 n.11.

317. See *Chisom*, 1989 U.S. Dist. LEXIS 10816 at *43-44. The District Court for the Eastern District of Louisiana found considerable cross-racial voting in judicial elections in the First Supreme Court District of Louisiana. *Id.* at *37-38. The court found that black judicial candidates actually stood a better chance of being elected than white judicial candidates in the First District. The court also found that at least two unsuccessful black candidates had attempted to avoid publicity to keep their race a secret from voters. *Id.* at *28-29. This was obviously not a successful campaign tactic. In addition, the court was reluctant to take their defeat as an indication of racially polarized voting when those candidates had not run openly as black candidates. As the court stated,

[t]he overall present reality in the Court's view is not a picture of racial

straight party voting results in racial bloc voting, courts should not find a section 2 violation if the evidence shows that voters cast their ballots by party, irrespective and perhaps uninformed of the race of the candidates.³¹⁸

CONCLUSION

Section 2 is a garment that does not quite fit judicial elections. In large part, however, the *Gingles* criteria rather than the statute itself is incongruous with judicial elections. The present interpretation of section 2 requires alteration to truly serve the judicial context. Several factors support the position that despite the applicability of section 2, a different, less intrusive standard of proof should govern judicial elections. Many aspects of the judicial function distinguish it from the function of legislators and other elected officials. While the national government cannot tolerate racial discrimination in *any* election, it need not apply the *Gingles* criteria to the judicial context.

This Note suggests a revision of the *Gingles* standard for judging section 2 challenges to judicial elections. Single-member districting should not be the assumed remedy. The traditional remedy of subdistricting along racial lines, if applied as a whole-sale remedy, threatens to disrupt a balance between the independence of the state judiciary from political pressures and the accountability of the judiciary to the electorate. Courts can be sensitive to these policy concerns in determining section 2 violations by revising the *Gingles* threshold test to allow for alternative remedies when appropriate and by supplanting the *Gingles* criteria with a pure "totality of the circumstances test" that would be more suitable to judicial elections. In this totality of the circumstances test, the state interest in multimember districts should be a major factor that courts weigh equally with other factors to determine whether illegal voter dilution has

polarization to the detriment of the minority plaintiffs . . . but rather is an emerging political process in Metropolitan New Orleans, wherein the talents of black individuals as leaders in the judiciary and in other traditionally political offices have been recognize [sic] by black and white voters.

Id. at *43-44.

318. The Tenth Circuit addressed this question in the context of a county commissioner election. *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), *cert. denied*, 111 S. Ct. 340 (1990). An argument that straight party voting could preclude a finding of racial bloc voting may be stronger in the judicial context in which voters are generally less informed about the individual candidates. *See* COMISKY & PATTERSON, *supra* note 14, at 8-9.

occurred. In this way, section 2 of the Voting Rights Act will continue to protect minority voters but will not destroy the traditional function of the state judiciary.

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