Majority Rule, Minority Rights, and the Right to Vote: Reflections Upon a Reading of *Minority Vote Dilution*

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A modern prophet translated the biblical injunction to possess the truth, for "the truth shall make you free,"[1] into a vision in which the instrument of freedom is the vote rather than the truth. Dr. Martin Luther King, Jr. articulated the basis of much of the early civil rights movement when he stated: "Voting is the foundation stone for political action. With it the Negro can vote out of office public officials who bar the doorway to decent housing, public safety, jobs, and decent integrated education."[2] Acknowledge and protect our constitutional rights to register and to vote, Dr. King suggested, and we will not only respect existing American institutions, we will use them to defeat racism fairly and squarely.

This philosophy, linked so inexorably to the twin American ideologies of the vote as the most basic of all rights and of resolving social conflict through established political channels, served as the premise for one of our most important civil rights statutes, the Voting Rights Act of 1965.[3] In addition, this philosophy led the federal courts in the 1970s to adopt interpretations of the fourteenth and fifteenth amendments that strove to break down barriers preventing the minority community from participating meaningfully in the political process.[4] These decisions attempted to remedy the worst instances of "minority vote dilution." They recognized that when certain electoral structures, such as at-large elections, were coupled with severe racial bloc voting, even a sub-

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1. *John* 8:32 (King James).

2. *Quoted in* Milton Morris, *Black Electoral Participation and the Distribution of Public Benefits*, in Minority Vote Dilution 271 (Chandler Davidson ed. 1984).

3. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

4. *See, e.g.*, White v. Regester, 412 U.S. 755 (1973); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

stantial minority community could not elect *any* officeholders. More recently, after the Supreme Court rejected any meaningful constitutional protection of minority political participation,[5] Congress amended the Voting Rights Act to provide a statutory basis for that right.[6]

A recent collection of essays entitled *Minority Vote Dilution*,[7] edited by Professor Chandler Davidson, a sociologist at Rice University, addresses these developments and analyzes several important issues of minority voting rights on the horizon of the law. On the whole, the essays are thoughtful and informative, and the collection should be of interest to both the specialist and the novice.

Moreover, the essays provide a springboard for an assessment of many aspects of minority voting rights. The combination of ideas, ideology, and idealism that surrounds voting issues is fascinating. Discussions of minority voting rights can proceed on many planes—e.g., the empirical, the philosophical, the symbolic—and involve many sensitive questions. My own vision of minority voting rights was sharpened by reading the writings collected in *Minority Vote Dilution*, and this essay is an attempt to present several snapshots of what I see. My hope is that my reflections on, and beyond, the material in *Minority Vote Dilution* may contribute something to the diverse stream of thinking in an area of immense philosophical and empirical complexity as well as great practical importance.

A short background in the Voting Rights Act and the constitutional decisions protecting minority voting rights is essential to an understanding of this topic, and I devote the next section to these subjects. I will then assess several of the more important essays in *Minority Vote Dilution*. Finally, I will conclude with some broader ruminations on minority voting rights that have been provoked, at least in part, by reading these essays.

I.

The Voting Rights Act identified areas of this country where voting discrimination was rampant[8] and proposed two types of

5. City of Mobile v. Bolden, 446 U.S. 55 (1980).

6. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134.

7. Minority Vote Dilution, *supra* note 2.

8. Section 4(b), 79 Stat. 438, provided that the Act applied to:

> any State or . . . any political subdivision of a state which (1) the Attorney General determines maintained on November 1, 1964, any test or device, and with respect to which (2) the Director of the Census de-

remedies. First, to facilitate minority registration and voting, the statute outlawed discriminatory voter registration requirements and made available both federal examiners—to register minority voters when local voting registrars refused to act in a nondiscriminatory fashion—and federal election observers to stand watch at the polls.[9] Second, the Act was designed to protect this newly won minority electoral strength from schemes designed to limit or reduce it. Accordingly, the statute prohibited covered jurisdictions from implementing new electoral devices without first obtaining "preclearance": a determination from either the United States Department of Justice or a three-judge court of the United States District Court for the District of Columbia that the new electoral rule was not tainted by a discriminatory purpose *and* did not have a discriminatory impact upon minority voting power.[10] The Act provided a method by which a covered jurisdiction could "bail out" of the Act's coverage, but in practice the right to bail out proved more illusory than real.[11]

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termines that less than 50 per centum of the persons of voting age residing therein were registered on November 1, 1964, or that less than 50 per centum of such persons voted in the presidential election of November 1964.

Section 4(c), 79 Stat. 438-39, defined "test or device" as

> any requirement that a person as a prerequisite for voting or registration for voting (1) demonstrate the ability to read, write, understand, or interpret any matter, (2) demonstrate any educational achievement or his knowledge of any particular subject, (3) possess good moral character, or (4) prove his qualifications by the voucher of registered voters or members of any other class.

Although the coverage formula is expressed in neutral terms, when applied it brought the entire Deep South within its sweep.

9. Voting Rights Act of 1965, Pub. L. No. 89-110, §§ 3(a), 3(b), 4, 6-10, 79 Stat. 437-43 (codified as amended at 42 U.S.C. §§ 1973a(a)-(b), 1973b, 1973d-1973h (1982)).

10. *Id.* § 5, 79 Stat. 439 (codified as amended at 42 U.S.C. § 1973c (1982)).

11. *Id.* § 4(a), 79 Stat. 438 (codified as amended at 42 U.S.C. § 1973b(a) (1982)), provided that a covered jurisdiction could bail out of the Act's coverage if:

> the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the five years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of five years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff.

The renewals of the Act in 1970 and 1975 correspondingly extended the original five-year period set forth in this section. *See* Pub. L. No. 91-285, § 3, 84 Stat. 315 (1970); Pub. L. No. 94-73, § 101, 89 Stat. 400 (1975).

As interpreted by the Supreme Court, all cities and counties in a covered state

The 1965 statute provided that these remedies would be in effect for five years.[12] In 1970, Congress renewed the Act for another five years,[13] and in 1975 it added another seven-year term.[14] Most recently, Congress in 1982 extensively amended the Act and renewed these remedies for another twenty-five years.[15]

The Supreme Court found no constitutional flaw in the 1965 Act.[16] In addition, the Court has generally construed the Act broadly to effectuate its remedial purposes. In perhaps the most important decision, the Court held that even a minor change in an electoral scheme of a covered jurisdiction had to be "precleared" in Washington before implementation.[17]

The electoral devices that create the most problems for minority voting strength, however, are not minor in character. Perhaps the most obvious electoral structure that weakens minority voting power is the use of at-large, rather than ward, electoral structures in a jurisdiction in which racial bloc voting is prevalent and the minority community is geographically concentrated. In such a jurisdiction, the candidates supported by the white bloc-voting majority are assured of winning all offices, and the candidates supported only by the bloc-voting minority community have no chance of success. Conversely, if ward elections were held, the geographically concentrated racial minority would have a far better opportunity to elect at least some candidates of their choice. Because of the obvious discriminatory effect created by at-large electoral systems in an environment of racial bloc voting, preclearance has been routinely denied to a covered jurisdiction that wished to

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were subject to the Act and could not bail out individually. *See* City of Rome v. United States, 446 U.S. 156, 162-70 (1980). Thus, the only method by which such a locality could escape the Act is if the state in which it is located brought a successful bail-out action. Under the plain language of section 4(a) a covered state could bail out only if it showed something that no southern state could possibly prove: that no test or device had been used anywhere within its borders for the purpose or with the effect of disadvantaging the minority vote. The practical result was that the states of the Deep South and their political subdivisions were locked into the Act.

The 1982 amendments to the Act include a less rigid bail-out mechanism that took effect in 1984. *See* Pub. L. No. 97-205, § 2, 96 Stat. 131, 131-34 (1982). *See generally* S. Rep. No. 417, 97th Cong., 2d Sess. 43-62 (1982); Richard Williamson, *The 1982 Amendments to the Voting Rights Act: A Statutory Analysis of the Revised Bailout Provisions*, 1984 Wash. U.L.Q. 1.

12. *See supra* note 11.

13. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 3, 84 Stat. 315.

14. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, § 101, 89 Stat. 400.

15. Voting Rights Act Amendments of 1982, *supra* note 6.

16. South Carolina v. Katzenbach, 383 U.S. 301 (1966).

17. Allen v. State Bd. of Elections, 393 U.S. 544 (1969). In addition, see Perkins v. Matthews, 400 U.S. 379 (1971) (preclearance required for moving polling places).

change from a ward system to an at-large system of electing officeholders.[18]

The Voting Rights Act as adopted in 1965 and as extended in 1970 and 1975 prohibited only certain barriers to registration and voting, such as the literacy test, and *changes* in electoral rules in certain geographical areas that are discriminatory in purpose or effect; the Act did not reach preexisting electoral structures that disadvantaged minorities but did not deny them the opportunity to register and to vote. Thus, the Act did not affect at-large electoral schemes that were in place at the time of its effective date. Such schemes were prevalent in the South long before the Act was adopted, and minority plaintiffs wishing to attack them had to look beyond the Act to the Constitution. The fifteenth amendment's mandate that the right to vote shall not be "denied *or* abridged" on account of race,[19] as well as the equal protection clause of the fourteenth amendment, became the grounds relied upon by the Supreme Court, in *White v. Regester*,[20] and by lower courts[21] to invalidate at-large electoral schemes. These schemes, when coupled with demonstrable racial bloc voting and perhaps other electoral devices disproportionally disadvantaging the minority vote, froze the minority community out of the political process.

A fair reading of *White* and of the major lower court interpretation of it, the Fifth Circuit's decision in *Zimmer v. McKeithen*,[22] demonstrates that these decisions were based on the discriminatory effect of the electoral schemes at issue, rather than on any consideration of whether those schemes had been adopted or maintained for discriminatory reasons.[23] However, three years after *White* was decided, the Supreme Court held, in *Washington v. Davis*,[24] that a facially neutral law that disproportionally disadvantaged a racial minority was invalid under the equal protection

18. *See* Frank Parker, *Racial Gerrymandering and Legislative Reapportionment*, in Minority Vote Dilution, *supra* note 2, at 102.

19. Section 1 of the fifteenth amendment provides that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

20. 412 U.S. 755 (1973).

21. For a summary of such cases, see *Extension of the Voting Rights Act: Hearings Before the Sub-Committee on Civil and Constitutional Rights of the House Committee on the Judiciary*, 97th Cong., 1st Sess. 493-547 (1981) (prepared statement of Frank Parker).

22. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976) (per curiam).

23. *See, e.g.*, S. Rep. No. 417, *supra* note 11, at 19-24; Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After* Washington v. Davis, 76 Mich. L. Rev. 694, 699-701 (1978).

24. 426 U.S. 229 (1976).

clause only if it were shown that the law was tainted by a discriminatory purpose. The Court in *Washington v. Davis* made no effort to clarify whether *White v. Regester* was consistent with the new rule it announced.

The judicial treatment of the Act and of the constitutional protection against vote dilution remained largely favorable to minority interests until 1980, when the statutory and constitutional paths drastically diverged. On the same day in April of that year the Supreme Court decided *City of Rome v. United States*[25] and *City of Mobile v. Bolden*.[26] *Rome* upheld the constitutionality of the 1975 extension of the Voting Rights Act and affirmed a lower court's refusal to grant preclearance to a variety of electoral changes in Rome, Georgia, that would have had a discriminatory effect upon minority voting strength. In contrast, *Mobile*, for all practical purposes, gutted the constitutional right to be free from racial vote dilution.

At issue in *Mobile* was the constitutionality of the at-large electoral scheme long used to choose city commissioners in Mobile, Alabama. Although Blacks made up about one-third of Mobile's population, they had never elected a city commissioner because of the presence of rock-hard racial bloc voting. A plurality of the Supreme Court in *Mobile* first concluded that no fifteenth amendment claim was present because that amendment outlaws only devices that interfere with minority registration or voting, and not devices that disproportionally disadvantage minority citizens who may register and vote without hindrance.[27] Second, the plurality recast *White v. Regester* into a case involving purposeful racial discrimination and announced that the intent requirement of *Washington v. Davis* controlled the construction of the equal protection clause even in a vote-dilution case.[28] Thus, the plurality concluded that Blacks in Mobile were not entitled to relief unless they demonstrated that the at-large electoral system had been adopted or maintained for discriminatory purposes.[29]

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25. 446 U.S. 156 (1980).

26. 446 U.S. 55 (1980).

27. *Id.* at 61-65 (plurality opinion of Stewart, J.).

28. *Id.* at 65-80.

29. Chief Justice Burger and Justices Powell and Rehnquist joined the plurality opinion of Justice Stewart. Justice Blackmun concurred in the judgment, concluding that although there was a constitutional violation the district court's imposition of single-member districting was an abuse of discretion. Justice Stevens also concurred in the judgment, and his views are discussed in the text accompanying notes 85-97. Justice White dissented, asserting that there was sufficient evidence of intentional discrimination to affirm the judgment of the district court. Justice Marshall also dissented. Marshall argued that a showing of intentional discrimination was not required by either the fourteenth or the fifteenth amendments, and that if in-

The *Mobile* decision provoked enormous controversy in the civil rights community. A drive to change the result in *Mobile* by statute became linked to the lobbying effort to renew the Voting Rights Act, which was set to expire in 1982. In a legislative victory as monumental as it was surprising, supporters of minority voting rights convinced Congress to renew the basic remedies of the Act and to amend the Act to provide statutory protection in the context of minority vote dilution that is in large part equivalent, and in some ways superior, to the discriminatory-impact approach of *White v. Regester* and *Zimmer v. McKeithen*. As amended, section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner that results in the denial or abridgement* of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of the 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 subsection establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[30]

Ironically, two days after President Reagan signed this legislation the Supreme Court decided *Rogers v. Lodge*.[31] The Court avoided the question whether the plurality in *Mobile* was correct in concluding that vote-dilution claims are not cognizable under the fifteenth amendment,[32] but it did accept the *Mobile* plurality's conclusion that proof of discriminatory intent was necessary to establish a vote-dilution claim under the equal protection clause.[33] The Court in *Rogers*, however, upheld the factual findings of the

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tentional discrimination must be proved the evidence was sufficient on that score to affirm the district court. Justice Brennan filed a short dissenting opinion agreeing with the conclusions of Justice Marshall.

30. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 3, 96 Stat. 131, 134 (codified at 42 U.S.C. § 1973 (1982)) (emphasis added). Section 4(f)(2), cited in section 2(a), concerns language minorities.

31. 458 U.S. 613 (1982).

32. *Id.* at 619 n.6.

33. *Id.* at 616-22.

district court, affirmed by the Fifth Circuit, that the maintenance by local officials of an at-large electoral scheme in Burke County, Georgia unconstitutionally diluted the Black vote. Much of the evidence relied upon by the lower courts was similar to, although perhaps starker than, the evidence in *Mobile*, and Justice Powell in dissent complained: "Whatever the wisdom of *Mobile*, the Court's opinion cannot be reconciled persuasively with that case. There are some variances in the largely sociological evidence presented in the two cases. But *Mobile* held that this *kind* of evidence was not enough."[34]

There is some force to Powell's lament. *Rogers* is a classic example of a narrowly written opinion affirming the lower courts: it stresses that the legal standard applied by the lower courts was at least facially consistent with that announced in the plurality opinion in *Mobile* and that the Supreme Court hesitates to overturn the factual findings of two lower courts. One is left with the impression that the majority in *Rogers* lacked the desire either to engage in the detailed factual review *Mobile* seems to suggest or to reconsider whether the legal standard proposed by the *Mobile* plurality is appropriate.

II.

This history provides the backdrop for my examination of the essays in *Minority Vote Dilution*. The essays were commissioned by the Joint Center for Political Studies, a civil rights "think tank." Not surprisingly, every essay lies in the mainstream of civil rights thought and tradition and is imbued with Dr. Martin Luther King's view of the central importance of the vote to equality. Several of the authors are academics—political scientists, sociologists, or historians—who have brought their disciplines to bear on the difficult historical and empirical questions involved in minority vote dilution. The other authors are civil rights lawyers, who have avoided the pitfalls of recounting great cases they have won (or lost) and instead presented interesting and useful legal analyses of minority voting issues.

A.

Three empirical studies are of special interest. For newcomers to this area, the introduction by Chandler Davidson is a useful overview of electoral devices that can dilute the minority vote.[35]

34. *Id.* at 629 (Powell, J., dissenting) (emphasis in original).

35. Chandler Davidson, *Minority Vote Dilution: An Overview*, in Minority Vote Dilution, *supra* note 2, at 1-23.

Throughout this essay I have focused exclusively on at-large elections, and problems of minority vote dilution usually are associated with that electoral system. Other electoral devices also can diminish the minority vote, however, and Davidson identifies a number of those devices and explains why they can have such a discriminatory impact.[36] He also provides a helpful introduction to the writings that follow.

In another essay, Davidson, in collaboration with George Korbel, reviews the empirical studies on the question of whether at-large elections actually dilute minority voting strength.[37] Davidson and Korbel demonstrate that these studies almost unanimously conclude that across the United States at-large elections have this discriminatory effect, and they explain why the few studies that suggest the contrary are not trustworthy. In addition, Davidson and Korbel present new empirical data suggesting that minorities fared better at the polls in those Texas jurisdictions that changed from at-large electoral systems to ward or mixed systems between 1970 and 1979. This study, which first appeared in a respected political science journal,[38] removes any lingering doubt about whether at-large elections have demonstrable discriminatory effects.

Finally, Davidson joined with Luis Ricardo Fraga to examine the discriminatory effect that can arise when a nonpartisan slating group controls the nomination of candidates in an at-large electoral scheme.[39] The authors make no attempt to present a systematic, statistically significant study of this question, but rather rely on case studies of the political process in four Texas cities: Abilene, Wichita Falls, Dallas, and San Antonio. These histories bring to mind Floyd Hunter's venerable "power elite" case study of Atlanta community politics in the 1940s.[40] According to Davidson

36. Davidson analyzes the vote-dilutive effects of at-large elections, runoff requirements, anti-single-shot devices, decreasing the size of elected governmental bodies, exclusive slating groups, and gerrymandering. *Id.* at 5-9.

37. Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Re-examination of Historical and Contemporary Evidence*, in Minority Vote Dilution, *supra* note 2, at 65-81.

38. Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Re-examination of Historical and Contemporary Evidence*, 43 J. Pol. 982 (1981).

39. Chandler Davidson & Luis Ricardo Fraga, *Nonpartisan Slating Groups in an At-Large Setting*, in Minority Vote Dilution, *supra* note 2, at 119-43. Davidson and Fraga define "nonpartisan slating group" as "an organization whose purpose is to recruit candidates, nominate them, and campaign for their election to office in a nonpartisan election system." *Id.* at 119.

40. *See* Floyd Hunter, Community Power Structure (1953). *See also* Robert Lynd & Helen Lynd, Middletown in Transition (1937) (examining Muncie, Indiana). The classic study finding the absence of a local power elite is Robert Dahl,

and Fraga, electoral politics in each of these four cities has been dominated, or at least was controlled for a substantial period of time, by a nonpartisan, white, upper class, business-oriented group. This group systematically identified and ran for office candidates who consider the promotion and protection of local business a paramount governmental concern and who view the role of the elected official to be running the government as a business. The slating groups have supported only a few token minority candidates, and no candidate, white or otherwise, is acceptable if he or she has an axe to grind. Plainly and simply, each slating group is described as a local power elite unconcerned with minority interests.

Davidson and Fraga state that the candidates nominated by these slating groups have been elected approximately ninety percent of the time in Abilene, Wichita Falls, and, for a time, Dallas. The slating group was also highly successful in San Antonio until it splintered over local development issues and was politically weakened when single-member districting replaced at-large elections as the result of a deal struck with the Department of Justice to obtain preclearance under the Voting Rights Act for certain annexations of white suburbs. Similarly, the Dallas slating group lost its power in 1975 when a federal district court concluded that Dallas' at-large electoral scheme unconstitutionally diluted the vote of that city's minority community and imposed some single-member districts to remedy the problem.

The courts have recognized that the openness of slating groups to minority candidates is a factor worth examining in assessing a vote dilution claim,[41] but that factor is rarely thought to be crucial. The work of Davidson and Fraga indicates that this consideration deserves more attention. In combination with an at-large electoral scheme and a white bloc-voting majority, the presence of a powerful slating group closed to meaningful minority candidates should be forceful evidence of vote dilution.

B.

The collection includes three legal essays that are especially important. They are the work of Armand Derfner, Frank Parker,

Who Governs?: Democracy and Power in an American City (1961) (examining New Haven, Connecticut).

41. The exclusivity of a slating group was one factor leading to the result in White v. Regester, 412 U.S. at 766-67, and it was one of the questions to be considered under the test of Zimmer v. McKeithen, 485 F.2d at 1305.

and James Blacksher and Larry Menefee, among the finest voting rights attorneys.

1.

The essay by Frank Parker focuses on the danger that legislative reapportionment, required by the "one person, one vote" concept, can be manipulated in a discriminatory fashion.[42] Although claims that district line-drawing is *unconstitutionally* discriminatory require proof that the cartography was discriminatorily motivated,[43] redistricting as a result of the decennial census in jurisdictions covered by the Voting Rights Act constitutes a change in voting structure that must be precleared under the Act as having neither a discriminatory purpose nor a discriminatory effect.[44] As Parker notes, in this age of computer cartography literally hundreds of alternative districting schemes can be created that comply with the "one person, one vote" concept, and in his view "the challenge in the 1980s . . . is to develop objective and nondiscriminatory standards for selection of the 'best' plan among the wide range of choices."[45]

How does one make the decision whether reapportionment has a discriminatory effect upon minority voting rights? One obvious issue is whether the minority community is better off being split into a substantial minority of voters in several districts, so that it may be able to cast swing votes and spread its power, or whether the minority community would be better protected if it is concentrated into a smaller number of districts in which minority voters predominate. Parker forcefully argues that, whenever demonstrable racial bloc-voting is present, minority voters are obviously disadvantaged whenever the districting plan splits their community into several districts in which they do not constitute a majority of voters. Moreover, since the minority community tends to be younger than the general population, voting-age population statistics must be considered in assessing the strength of the minority vote. The present effects of past racial discrimination also hamper minority voting, and thus statistics concerning registered voters and voter turnout must be considered as well. These factors suggest to Parker, as they have to the Department of Justice and the courts in exercising their preclearance responsibilities under the Voting Rights Act, that a district must have at least sixty-five

42. Parker, *supra* note 18.
43. *See* Wright v. Rockefeller, 376 U.S. 52 (1964).
44. Georgia v. United States, 411 U.S. 526 (1973).
45. Parker, *supra* note 18, at 106.

percent minority citizens to assure the minority community a fair opportunity— perhaps a fifty-fifty chance—to elect a candidate of its choice.[46]

Parker's analysis may be read as promoting proportional representation, a concept neither the Voting Rights Act nor the Supreme Court decisions interpreting the fourteenth and fifteenth amendments support. Under the Voting Rights Act amendments of 1982, however, when preclearing changes, the Department of Justice and the courts seem to be required to assess not only whether the proposed electoral scheme causes a retrogression in minority voting power—the traditional issue under section 5, the preclearance provision of the Act—but also whether the overall electoral scheme of the jurisdiction violates amended section 2's prohibition of systems that "result" in minority vote dilution.[47] In settings where severe racial bloc voting exists, the only effective means to protect against violations of section 2 will be to create one or more districts in which the minority community has a supermajority of voters. In settings where racial separateness is not so drastically politicized, such districting is not necessary. In short, rather than requiring universal proportional representation, an approach similar to the "sixty-five percent rule" is simply a technique of thwarting vote dilution that would violate amended section 2.[48]

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46. *Id.* at 111. *See* Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 Yale L.J. 189, 201 (1984).

47. The Senate committee report supporting the 1982 amendments to the Voting Rights Act states:

> Under the rule of *Beer v. United States*, 425 U.S. 130 (1976), a voting change which is ameliorative is not objectionable unless the change "itself so discriminates on the basis of race or color as to violate the Constitution." 425 U.S. at 141 . . . . In light of the amendment to section 2, it is intended that a section 5 objection also follow if a new voting procedure itself so discriminates as to violate section 2.
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> In analyzing submissions, the Attorney General has correctly taken the position that the immediately preceding plan is not necesarily [sic] the standard against which to measure retrogression if that plan was precleared without the appropriate section 5 review. . . . The same should also hold true if the prior plan was precleared under standards that no longer apply. . . . This rule is in keeping with the Attorney General's statement that redistricting submissions under section 5 are to be treated on a case-by-case basis, "in light of all the facts." Letter from AAG Reynolds to Chairman Hatch, February 25, 1982.

S. Rep. No. 417, *supra* note 11, at 12 n.31. *See* Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 Yale L.J. 139, 149-62 (1984).

48. The distinction between impermissible proportional representation and remediable vote dilution in the context of redistricting is a fundamental issue in a case now pending before the Supreme Court. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984) (three-judge court), *prob. juris. noted sub nom.* Thornburg v. Gingles, 105 S.Ct. 2137 (1985).

Another possible criticism of Parker's essay is that his proposal for "supermajority minority districts" might appear to propose extraordinary protections for citizens who have the opportunity to protect themselves. After all, this argument would go, under the Voting Rights Act minority citizens have the opportunity to register and to vote without hindrance, and if their political power is diluted because proportionally more of them do not choose to register and to vote they have only themselves to blame. Parker recognized this argument and responded as follows:

> [T]hese disparities [in registration and turnout] are directly attributable to the extensive history of past discrimination, including purposeful denial to blacks of the opportunity to register and vote, and depressed socioeconomic conditions in the black community which limit electoral participation and are also the direct result of past discrimination. In addition, low turnout may result from alienation of eligible black voters caused by past exclusion and racial gerrymandering, giving rise to the perception that these official, continuing barriers and continued racial bloc voting have made black political participation futile.[49]

In other words, the disproportionally lower registration and voting of minority citizens are so intimately linked to past, official, intentional discrimination that they provide further proof of the need for systematic relief for minority vote dilution. Holding disproportionally lower minority registration and voting against the minority, Parker's analysis suggests, would be another instance of what William Ryan described as "blaming the victim."[50]

2.

The second important legal essay is Armand Derfner's description of the legislative history of the crucial 1982 amendment to section 2 of the Voting Rights Act.[51] Derfner is well qualified to tell the civil rights community's side of this story, as he (as well as

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49. Parker, *supra* note 18, at 110.

50. William Ryan, Blaming the Victim (1971). In brief, Ryan argued persuasively that the disadvantaged in American society do not suffer that fate because they are "inferior" in any sense or because they have been socialized into a "culture of poverty." Rather, he contended,

> The overwhelming majority of the poor are poor because they have, first: insufficient income; and second: no access to methods of increasing that income—that is, no power. They are too young, too old, too sick; they are bound to the task of caring for small children, or they are simply discriminated against. The facts are clear, and the solution seems rather obvious— raise their income and let their 'culture,' whatever it might be, take care of itself.

Id. at 134-35.

51. Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982*, in Minority Vote Dilution, *supra* note 2, at 145-63.

Parker and several others) was a central figure in the lobbying that led to this legislation. Yet, despite the less than objective stance I assumed he would bring to his essay, I have difficulty criticizing it. Because I believe that the amendment to section 2 is necessary to remedy *Mobile*, my evaluation of Derfner's essay may reflect my own prejudices. After extended reflection, however, I honestly believe that Derfner accurately presents the legislative history, and that (in addition to his honorable character) there is an obvious explanation for his lack of bias. The simple fact is that the civil rights community achieved essentially all of their goals in the 1982 amendments to the Act.[52] In this light, it seems obvious to me why Derfner is such an accurate reporter of the legislative history: he had a major hand in creating it and, since it embodies the goals of the civil rights community, he has no reason to distort or exaggerate it.

Two major issues regarding amended section 2 are now probably on their way to the Supreme Court. The first concerns the proper interpretation of the statute's ban on electoral schemes that disproportionally disadvantage minority voting. The second is whether the statute itself is constitutional. Both are among the most crucial civil rights questions now pending in the courts.

Derfner provides the unassailable answer to the first issue. The report of the Senate committee responsible for the version of amended section 2 enacted into law demonstrates beyond doubt that the statute was intended to overrule the approach of *Mobile* and to impose a discriminatory-effect standard similar in many, but not all, ways to the approach of *White v. Regester* and *Zimmer v. McKeithen*. The Senate committee report lists extensive criteria a court should consider in assessing whether the electoral scheme under review violates section 2. There is no honest argument that these factors have any purpose other than identifying discriminatory *effect* sufficiently substantial to constitute a statu-

52. The Senate's amendment to the proposal to amend section 2, which is discussed in the text accompanying notes 56-60, has been viewed by some as a "compromise" that was necessary to assure passage of any amendment legislatively overturning *Mobile*. *See* Mississippi Republican Executive Committee v. Brooks, 105 S. Ct. 416, 418 (1984) (Rehnquist, J., dissenting); James Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 694-701 (1983). However, that amendment maintained the discriminatory effects approach sought by the civil rights community and simply disclaimed any requirement of proportional representation, which civil rights lobbyists had not sought. Thus, the Senate amendment was not a substantive compromise on the part of the civil rights community. *But cf. infra* note 105.

tory violation.[53] Arguments to the contrary can only be seen as attempts to provide the Supreme Court with a hook upon which to hang an interpretation eviscerating the amendment.

Derfner describes the basis for one of these arguments. Opponents to the amendment to section 2 either minimized or exaggerated its meaning: it was painted as either nothing more than a ban on electoral systems adopted or maintained for discriminatory purposes or as a requirement of outright proportional representation.[54] This all-or-nothing outlook should have no impact upon the judicial construction of the amendment, since it came from opponents to the legislation whose comments cannot be deemed trust-

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53. *See* S. Rep. No. 417, *supra* note 11, at 28-29 (footnotes, which explicate several of these factors, are omitted):

> If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of [section 2]. To establish a violation, plaintiffs could show a variety of factors, depending upon the kind of rule, practice, or procedure called into question.
>
> Typical factors include:
>
> 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.
>
> While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.
>
> The cases demonstrate, and the Committee intends that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other.

54. *See* Derfner, *supra* note 51, at 159-60.

worthy interpretations.[55]

The second argument seeking to gut amended section 2 relates to the first. As enacted, section 2 includes language taken directly from *White v. Regester* that the Senate inserted to allay fears that the statute would require proportional representation.[56] Opponents of a proper interpretation of new section 2 might contend that *White* dealt with discriminatory intent, not discriminatory effect, that this reading is unassailable since the Supreme Court in *Mobile* interpreted *White* in this fashion, and therefore that an electoral system must be shown to be infected by discriminatory intent before it can violate section 2.[57] However, Congress' intent, and not the Supreme Court's interpretation of *White*, controls the construction of amended section 2. The legislative history makes clear that Congress interpreted *White* as a case concerned with discriminatory impact, not discriminatory intent, and that Congress disagreed with the Court's differing interpretation of *White* in *Mobile*.[58] Of course, Congress recognized that, short of constitutional amendment, the Supreme Court has the last word concerning its own precedent and the interpretation of the fourteenth and fifteenth amendments.[59] What the Court has done, however, in no way inhibits Congress from disagreeing with the policy outcomes of the Court's decisions and reversing those outcomes in new legislation, so long as that legislation is constitutional. Indeed, Senator Dole, a chief architect of the amendment adding the language from *White* to section 2, expressed his clear understanding that his amendment maintained the discriminatory impact approach of section 2 while clarifying that it did not man-

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55. Although the Supreme Court often appears willing to consider any aspect of the legislative history of a statute, *see, e.g.*, Patricia Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195 (1983), the opinions of opponents to the statute are usually accorded little weight. As the Court has recognized, opponents, "in their zeal to defeat a bill . . . tend to overstate its reach," Ernst & Ernst v. Hochfelder, 425 U.S. 185, 204 n.24 (1976), or otherwise mangle its true purposes.

56. *Compare* the language of amended section 2(b), which is quoted in the text accompanying note 30, *with* White v. Regester, 412 U.S. at 766: "The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." (citation omitted). *See* S. Rep. No. 417, *supra* note 11, at 27.

57. *See* United States v. Marengo County Comm'n, 731 F.2d 1546, 1564 n.29 (11th Cir.), *appeal dismissed and cert. denied*, 105 S. Ct. 375 (1984); Derfner, *supra* note 51, at 156.

58. *Marengo County*, 731 F.2d at 1564 n.29, cites the relevant legislative history.

59. See S. Rep. No. 417, *supra* note 11, at 41.

date proportional representation.[60] In light of the above, the argument that Congress incorporated the *Mobile* interpretation of *White* into amended section 2 is absurd—it would not have changed the law at all.

The major lower court interpretation of amended section 2 thus far has properly held that "discriminatory intent need not be shown to establish a violation [of section 2]."[61] Moreover, recently the Supreme Court summarily affirmed a district court decision agreeing with this conclusion.[62] The most this summary affirmance accomplished, however, was to settle that amended section 2 prohibits some discriminatory effects. Exactly what effects the statute prohibits remain unsettled, and indeed that question provoked two separate opinions by Justices.[63]

Amended section 2 has a good deal of play in its joints. The factors identified in the legislative history as relevant indicia of prohibited vote dilution[64] are vague and invest enormous discretion in the federal district judge who makes findings of fact in a vote dilution case. Unless district judges inform their factfinding with the spirit of the legislative history of section 2, it is likely that some judges will narrowly apply the vague criteria and improperly deny relief. Unless appellate judges are prepared to examine district judges' findings of facts closely, some future cases may only be explained by which district judges were assigned the cases, not by the merits of the various plaintiffs' claims.

This unfortunate possibility, however, should not leave us forlorn. Designing a workable standard based on discriminatory effects has always been a problem.[65] That difficulty alone must not deter attempts to solve the problem. Moreover, the possibility that some deserving plaintiffs may not receive relief because the discriminatory effects standard is vague and manipulable should not detract from the fact that many more deserving plaintiffs now have a realistic chance of prevailing. Neither should we underesti-

60. *See id.* at 193-95 (additional views of Senator Dole); 128 Cong. Rec. S7119 (daily ed. June 17, 1982) (statement of Senator Dole).

61. *Marengo County*, 731 F.2d at 1564 (Wisdom, J.). To the same effect is Jones v. City of Lubbock, 727 F.2d 364, 380 (5th Cir. 1984).

62. Jordan v. Winter, No. GC82-80-WK-0 (N.D. Miss., Apr. 16, 1984), *summarily aff'd sub nom.* Mississippi Republican Executive Committee v. Brooks, 105 S. Ct. 416 (1984).

63. *Id.* at 416 (Stevens, J., concurring); *id.* at 418 (Rehnquist, J., joined by Burger, C.J., dissenting).

64. *See supra* note 53.

65. One classic example is Hawkins v. Town of Shaw, 461 F.2d 1171 (5th Cir. 1972) (en banc), *disapproved in* Washington v. Davis, 426 U.S. 229, 244-45 & n.12 (1976). *See generally* Michael Perry, *The Disproportionate Racial Impact Theory of Racial Discrimination*, 125 U. Pa. L. Rev. 540 (1977).

mate the deterrent value of amended section 2. Section 2 provides minority leaders with a valuable bargaining chip with local government officials, and the threat of vote-dilution lawsuits may well deter a variety of improper governmental activities and may lead to negotiated settlements to local political problems, whether they are structural or substantive.

The second major issue concerning amended section 2 is whether it will survive constitutional attack. A recent summary affirmance by the Supreme Court may bar future arguments that this statute's prohibition on discriminatory effects renders it facially unconstitutional.[66] But it is unresolved precisely what discriminatory effects fall within the statute, and it is possible the Court will find the statute unconstitutional as applied in some circumstances.

The extent of Congress' authority to enforce the protections of the fourteenth and the fifteenth amendments "by appropriate legislation"[67] has never been definitively resolved,[68] and Derfner's essay does not address this issue.[69] Although an extensive analysis of this question is beyond the scope of this essay, some arguments in support of the statute seem apparent.

In light of *Katzenbach v. Morgan*,[70] it can be argued that

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66. As Justice Stevens pointed out in his opinion concurring in the summary affirmance in *Mississippi Republican Executive Committee v. Brooks*, a summary affirmance rejects the specific challenges raised in the jurisdictional statement in the case at bar. The jurisdictional statement in the *Brooks* case raised the issues "[w]hether Section 2 as amended prohibits only those electoral schemes intentionally designed or maintained to discriminate on the basis of race," and "[w]hether Section 2, if construed to prohibit anything other than intentional discrimination on the basis of race in registration and voting, exceeds the power vested in Congress by the Fifteenth Amendment." 105 S. Ct. at 416 (Stevens, J., concurring) (citation and footnote omitted).

67. Section 5 of the fourteenth amendment provides that "[t]he Congress shall have power to enforce, by appropriate legislation, the provisions of this article," and section 2 of the fifteenth amendment states that "[t]he Congress shall have power to enforce this article by appropriate legislation."

68. *See, e.g.*, Sidney Buchanan, Katzenbach v. Morgan *and Congressional Enforcement Power Under the Fourteenth Amendment: A Study in Conceptual Confusion*, 17 Hous. L. Rev. 69 (1979); Robert Burt, Miranda *and Title II: A Morganatic Marriage*, 1969 Sup. Ct. Rev. 81; Jesse Choper, *Congressional Power to Expand Judicial Definitions of the Substantive Terms of the Civil War Amendments*, 67 Minn. L. Rev. 299 (1982); William Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 Stan. L. Rev. 603 (1975); Note, *Toward Limits on Congressional Enforcement Power Under the Civil War Amendments*, 34 Stan. L. Rev. 453 (1982).

69. Both congressional committee reports did address this issue, however, and concluded that amended section 2 fell within Congress' authority to enforce the fourteenth and fifteenth amendments. *See* S. Rep. No. 417, *supra* note 11, at 39-43; H.R. Rep. No. 227, 97th Cong., 1st Sess. 28-31 (1981).

70. 384 U.S. 641 (1966).

Congress has the constitutional authority to expand, but not to contract, the protections of the Civil War amendments beyond what the Supreme Court has construed them to mean. This "one way rachet" theory would easily justify the amendment to section 2 as based on Congress' disagreement with the Court about the appropriate construction of the fourteenth and fifteenth amendments. This rationale is intensely controversial, however, and has not been directly relied upon by the Court since the *Morgan* decision.

A less controversial argument is based on the Court's apparent rationale in the *Rome* decision,[71] which upheld the constitutionality of the 1975 extension of the Voting Rights Act. *Rome* found constitutional the preclearance mechanism of section 5, which allows covered jurisdictions to change electoral laws only so long as the new electoral structure is not tainted by discriminatory intent *and* does not have a discriminatory effect upon minority voting strength. *Rome* did not hold that Congress may always outlaw discriminatory effects, but it did clearly suggest that Congress may prohibit discriminatory effects whenever it reasonably concludes that such action is necessary to reduce the risk of constitutional violations—that is, intentional discrimination.[72] The Court used this rationale to uphold applying section 5's prohibition on changes with discriminatory effects to Rome, Georgia, even though the city had proved to the district court that the electoral changes at issue were not tainted by discriminatory intent.[73] Thus, Congress may constitutionally adopt an across-the-board prohibition on electoral schemes with discriminatory effects so long as Congress has reasonably concluded that these effects may be linked to discriminatory intent, even if the prohibition is overinclusive. As Justice Stewart once recognized in discussing Congress' authority to enforce the Civil War amendments, "Congress may paint with a much broader brush than may this Court, which must confine itself to the judicial function of deciding individual cases and contro-

71. City of Rome v. United States, 446 U.S. 156 (1980).

72. The Court in *Rome* stated:

> [T]he Act's ban on electoral changes that are discriminatory in effect is an appropriate method of promoting the purposes of the Fifteenth Amendment, even if it is assumed that § 1 of the Amendment prohibits only intentional discrimination in voting. Congress could rationally have concluded that, because electoral changes by jurisdictions with a demonstrable history of intentional racial discrimination in voting create the risk of purposeful discrimination, it was proper to prohibit changes that have a discriminatory impact.

Id. at 177 (footnote omitted).

73. *Id.* at 209 (Rehnquist, J., dissenting).

versies upon individual records."[74]

Regardless of the reasons local officials adopt an electoral system that has a disproportionate impact upon minority voting strength, it is certainly unconstitutional under *Mobile* and *Rogers* for local officials to *maintain* that scheme for discriminatory reasons.[75] In light of *Rome*, Congress would appear to have the authority to outlaw all electoral schemes that disproportionally disadvantage the minority; the maintenance of such schemes clearly risks constitutional violations, and the difficulty of proving intentional discrimination is enormous. In enacting amended section 2, Congress adopted a more limited remedy, outlawing only those schemes that meet the criteria specified in the legislative history, which are designed to identify systems having a plain and substantial discriminatory impact upon current minority voters—precisely the systems that government officials harboring discriminatory motivations would wish to perpetuate.

Rome supports another argument sustaining amended section 2. Under *Mobile*, an electoral system that disproportionally disadvantages the minority community is unconstitutional if it was adopted for discriminatory purposes, even if current officials have maintained the system for entirely neutral, nonracial reasons.[76] There is substantial historical evidence that many at-large electoral schemes were adopted at least in part to ensure that minority voters would not have meaningful power in electoral politics.[77] In-

74. Oregon v. Mitchell, 400 U.S. 112, 284 (1970) (Stewart, J., joined by Burger, C.J. and Blackmun, J., concurring in part and dissenting in part).

75. The plurality opinion in *Mobile* stated that "[a] plaintiff must prove that the disputed [electoral] plan was 'conceived or operated as [a] purposeful devic[e] to further racial . . . discrimination.'" 446 U.S. at 66 (quoting Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)). In addition, see *Mobile*, 446 U.S. at 70, 74 n.21. In *Rogers v. Lodge*, the majority opinion of the Court affirmed a lower court finding that the at-large system in question was unconstitutional because it "was being maintained for the invidious purpose of diluting the voting strength of the black population." 458 U.S. at 622.

76. *See* the quotation from *Mobile*, *supra* note 75. In addition, see Hunter v. Underwood, 105 S.Ct. 1916, 1923 (1985).

77. The widespread adoption of at-large electoral schemes and other "reform" structures occurred during the Progressive Era in American history, which ran roughly from 1893-1917. A substantial historical literature indicates that, although the Progressives thought of themselves as reformers, in fact the structural changes they embraced were designed to enhance white business interests and to diminish the political influence "of the working classes and ethnic and political minorities, and they usually had that effect." Davidson, *supra* note 35, at 11. *See* Bradley Rice, Progressive Cities (1977); Davidson & Korbel, *supra* note 38, at 67-71; Samuel Hays, *The Politics of Reform in Municipal Government in the Progressive Era*, 55 Pac. Nw. Q. 160 (1964); James Weinstein, *Organized Business and the City Commission and Manager Movements*, 28 J. So. Hist. 168 (1962). An essay in *Minority Vote Dilution* presents evidence that the adoption of at-large electoral systems in southern jurisdictions was in part racially motivated even though laws disen-

deed, the district court on remand in *Mobile* found that the at-large electoral systems for both the city commission and for the school commission had been installed for discriminatory purposes. The finding in the school case—the only case appealed—was affirmed by the Eleventh Circuit and the Supreme Court.[78] When decades have passed since the time of adoption, however, it is usually impossible to prove that any particular electoral structure was adopted for discriminatory reasons.[79] Moreover, such an undertaking requires an enormous investment of attorney time and expert witness consultation that few minority plaintiffs could afford.[80]

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franchising Blacks were already on the books. The author, historian J. Morgan Kousser, points out that some Blacks did vote despite the presence of those laws and asserts that the move to at-large elections was one way in which whites attempted to guarantee that Blacks remained politically powerless. *See* J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in Minority Vote Dilution, *supra* note 2, at 27-46.

78. *See* Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982) (city commission); Brown v. Board of School Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982) (school commission), *aff'd*, 706 F.2d 1103 (11th Cir. 1983), *aff'd mem.*, 104 S.Ct. 520 (1983).

79. The difficulty of proving intentional discrimination many years after the fact was one factor that convinced Congress to amend section 2 to prohibit discriminatory "results." *See* S. Rep. No. 417, *supra* note 11, at 36-37; H.R. Rep. No. 227, *supra* note 69, at 29, 31. In addition, Congress found a more fundamental problem with a standard under which discriminatory intent must be shown:

> [That] test asks the wrong question. In the *Bolden* case on remand, the district court after a tremendous expenditure of resources by the parties and the court, concluded that officials had acted more than 100 years ago for discriminatory motives. However, if an electoral system operates today to exclude blacks or Hispanics from a fair chance to participate, then the matter of what motives were in an official's mind 100 years ago is of the most limited relevance. The standard under the Committee amendment is whether minorities have equal access to the process of electing their representatives. If they are denied a fair opportunity to participate, the Committee believes that the system should be changed, regardless of what may or may not be provable about events which took place decades ago.

S. Rep. No. 417, *supra* note 11, at 36. The committee report continued by noting another difficulty with a discriminatory intent standard:

> [T]he Committee has heard persuasive testimony that the intent test is unnecessarily divisive because it involves charges of racism on the part of individual officials or entire communities. As Dr. Arthur S. Flemming, Chairman of the United States Commission on Civil Rights, testified . . .:
>
> > [L]itigators representing excluded minorities will have to explore the motivations of individual council members, mayors, and other citizens. The question would be whether their decisions were motivated by invidious racial considerations. Such inquiries can only be divisive, threatening to destroy any existing racial progress in a community. It is the intent test, not the results test, that would make it necessary to brand individuals as racist in order to obtain judicial relief.

S. Rep. No. 417, *supra* note 11, at 36 (footnote omitted). In addition, see *id.* at 193 (additional views of Senator Dole).

80. Davidson reports that the trial on remand in the *Mobile* cases "took 6,000

Yet because there is a substantial risk that any such system was adopted at least in part for discriminatory reasons, and because the difficulties of proving the taint of discriminatory motivation are so enormous as to deter almost all plaintiffs, Congress would seem to be empowered under *Rome* simply to outlaw all at-large schemes—and any other electoral devices that historical evidence suggests are likely to be tainted by discriminatory intent—that currently have a discriminatory effect upon the minority. In adopting amended section 2, as noted above, Congress did something much more limited and much less controversial.[81]

3.

The third important legal essay, written by James Blacksher and Larry Menefee, traces the tortuous history of litigation addressing the constitutional protection against vote dilution and attempts to create a standard for judging unconstitutional vote dilution that is superior to any articulated in the cases.[82] Blacksher and Menefee, who litigated the *Mobile* case, assert that all the standards proposed in *Mobile*—including that suggested by Justice Marshall, which was the most favorable from the perspective of minority plaintiffs—are infirm. In a way, I wonder whether this essay, as well as the law review article upon which it is based,[83] might be the brief that Blacksher and Menefee wish in retrospect they had filed in *Mobile*. In any event, the essay is thoughtful, provocative, and, as the rejection of Justice Marshall's approach suggests, much more than a mere result-oriented effort.

Not surprisingly, Blacksher and Menefee reject the approach of the plurality in *Mobile* and the majority in *Rogers v. Lodge*, which requires a showing of discriminatory intent to invalidate an electoral system that disproportionally disadvantages minority voters. Blacksher and Menefee stress that this approach not only derogates minority voting concerns, it constitutionally prefers the "one person, one vote concept"—a violation of which does not re-

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hours of lawyers' time, along with 7,000 for researchers and expert witnesses; cost $120,000 not counting lawyers' fees; and lasted two and a half weeks, during which the most minute change in city government from 1819 to the present was explored." Davidson, *supra* note 35, at 17.

81. For lower-court decisions upholding the constitutionality of amended section 2, see cases cited *supra* note 61.

82. James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in Minority Vote Dilution, *supra* note 2, at 203-48.

83. James Blacksher & Larry Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden*: Have the White Suburbs Comandeered the Fifteenth Amendment?*, 34 Hastings L.J. 1 (1982).

quire a showing of discriminatory animus—over the concern of the minority for a fair chance to participate politically. These reasons why a discriminatory effects standard rather than a discriminatory intent standard is appropriate have been noted elsewhere,[84] however, and while Blacksher and Menefee provide perhaps the best analysis to date, their arguments are not novel.

Blacksher and Menefee make two major contributions. First, they take on the views of Justice Stevens in *Mobile*[85] and in *Rogers*[86] and attempt to demonstrate that his analysis is not convincing. Second, they do their best to propose a workable constitutional vote-dilution standard free from the weaknesses of others that have been proposed.

In his opinions in *Mobile* and *Rogers*, Justice Stevens has argued that vote dilution arising from an at-large electoral scheme is essentially the same problem as that in any gerrymandering case and is a much different problem from that in "one person, one vote" cases. In at-large electoral cases and gerrymandering cases, Stevens believed that what was at issue was whether a politically cohesive *group*, whether racial or nonracial, had suffered vote dilution. In contrast, in the "one person, one vote" context, he believed each *individual* had a right to complain about the dilution of her vote caused by unequal population among districts. Stevens saw such individual rights at the core of the equal protection clause, while the group rights he found in the gerrymandering and dilution cases lay at the periphery.

Stevens' approach would radically expand and contract voting rights at the same time. His willingness to provide a measure of protection to all cohesive political groups, including those of a nonracial nature, has not been shared by other Justices.[87] On the other hand, his refusal to provide racial groups with protection greater than that he would accord nonracial groups is also inconsistent with the views of his judicial colleagues. To Stevens, the use of "group" criteria—whether racial, ethnic, geographic, or

84. *See, e.g.*, City of Mobile v. Bolden, 446 U.S. at 103-35 (Marshall, J., dissenting); S. Rep. No. 417, *supra* note 11, at 27-37; H.R. Rep. No. 227, *supra* note 69, at 28-32; Note, *supra* note 23, at 720-32.

85. City of Mobile v. Bolden, 446 U.S. at 83-94 (Stevens, J., concurring in the judgment).

86. Rogers v. Lodge, 458 U.S. at 631-53 (Stevens, J., dissenting).

87. *See* Karcher v. Daggett, 103 S. Ct. 2653, 2667-2668 (1983) (Stevens, J., concurring). In addition, see Karcher v. Daggett, 104 S. Ct. 1691, 1692 (1984) (Stevens, J., concurring in denial of application for stay); *id.* at 1692-97 (Brennan, J., joined by White, J., and Marshall, J., dissenting from denial of application for stay). The Court recently noted probable jurisdiction of an appeal raising the issue whether political gerrymandering presents a claim cognizable under the equal protection clause. *See* Davis v. Bandemer, No. 84-1244, *prob. juris. noted*, 105 S.Ct. 1840 (1985).

whatever else makes the group a group—is inherent in the drawing of districting lines, and race is no more pernicious a criterion than any other.[88]

At bottom, Stevens saw it predictable that those in political power would attempt to gerrymander to keep themselves "in" and the "outs" out. He perceived no manageable way for a court to regulate in such a political thicket unless the districting in question was obviously arbitrary on its face or could be explained only by a desire to disadvantage a politically cohesive group. His standard seems essentially equivalent to the garden-variety rational basis test so common in constitutional adjudication. Stevens' approach, so harshly expressed in his separate opinion in *Mobile*,[89]

88. In his separate opinion in *Mobile*, Stevens stated:

> By definition, gerrymandering involves drawing district boundaries (or using multimember districts or at-large elections) in order to maximize the voting strength of those loyal to the dominant political faction and to minimize the strength of those opposed to it. In seeking the desired result, legislators necessarily make judgments about the probability that the members of certain identifiable groups, whether racial, ethnic, economic, or religious, will vote in the same way. The success of the gerrymander from the legislators' point of view, as well as its impact on the disadvantaged group, depends on the accuracy of those predictions.
>
> A prediction based on a racial characteristic is not necessarily more reliable than a prediction based on some other group characteristic. Nor, since a legislator's ultimate purpose in making the prediction is political in character, is it necessarily more invidious or benign than a prediction based on other group characteristics. In the line-drawing process, racial, religious, ethnic, and economic gerrymanders are all species of political gerrymanders.
>
> From the standpoint of the groups of voters that are affected by the line-drawing process, it is also important to recognize that it is the group's interest in gaining or maintaining political power that is at stake. The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. For the political strength of a group is not a function of its ethnic, racial, or religious composition; rather, it is a function of numbers— specifically the numbers of persons who will vote in the same way. In the long run there is no more certainty that individual members of racial groups will vote alike than that members of other identifiable groups will do so. And surely there is no national interest in creating an incentive to define political groups by racial characteristics. But if the Constitution were interpreted to give more favorable treatment to a racial minority alleging an unconstitutional impairment of its political strength than it gives to other identifiable groups making the same claim, such an incentive would inevitably result.

446 U.S. at 87-89 (citations and footnotes omitted).

89. Stevens stated:

> In my view, the proper standard is suggested by three characteristics of the gerrymander condemned in *Gomillion* [*v. Lightfoot*, 364 U.S. 339 (1960)]: (1) the 28-sided configuration was, in the Court's word, 'uncouth,' that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had a significant adverse impact

may have softened somewhat in his dissenting opinion in *Rogers*, where he suggested that districting was arbitrary and capricious if done only to keep the "ins" in and that upon the showing of a prima facie case, the burden might shift to defendants "to identify legitimate local policies that might justify the use" of the electoral devices in question.[90]

The Stevens analysis is provocative. My most basic criticism of this approach is that, by not providing racial minority groups superior protection to that given other cohesive political groups, it embodies a policy forbidden by the fifteenth amendment and in no way suggested by the fourteenth amendment. The language of the fifteenth amendment expressly provides that the right to vote "shall not be denied *or abridged* . . . on account of race, color, or previous condition of servitude." The fourteenth amendment has

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on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. . . . In this case, if the commission form of government in Mobile were extraordinary, or if it were nothing more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it.

Conversely, I am also persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention. The standard for testing the acceptability of such a decision must take into account the fact that the responsibility for drawing political boundaries is generally committed to the legislative process and that the process inevitably involves a series of compromises among different group interests. If the process is to work, it must reflect an awareness of group interests and it must tolerate some attempts to advantage or to disadvantage particular segments of the voting populace. . . . The standard cannot, therefore, be so strict that any evidence of a purpose to disadvantage a bloc of voters will justify a finding of "invidious discrimination"; otherwise, the facts of political life would deny legislatures the right to perform the districting function. Accordingly, a political decision that is supported by valid and articulable justifications cannot be invalid simply because some participants in the decisionmaking process were motivated by a purpose to disadvantage a minority group.

The decision to retain the commission form of government in Mobile, Ala., is such a decision. I am persuaded that some support for its retention comes, directly or indirectly, from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government. I deplore that motivation and wish that neither it nor any other irrational prejudice played any part in our political processes. But I do not believe otherwise legitimate political choices can be invalidated simply because an irrational or invidious purpose played some part in the decisionmaking process.

Id. at 90-92 (footnotes omitted).

90. 458 U.S. at 640-41.

no such language directly governing the right to vote, and while I agree with interpretations of it that forbid certain forms of voting discrimination,[91] the general terms of the equal protection clause should not override or reduce the force of the more specific protections of the fifteenth amendment. The core historical purpose of both amendments was, after all, to provide enhanced protections to racial minorities. Moreover, Stevens' race-neutral approach is grounded in a distorted view of the political power of minority groups in American society in general and on the local level in particular.[92] In short, Stevens seems blind both to the constitutional basis for enhanced protection of minority political power and to the present social need for that protection. Blacksher and Menefee do not make this critique in precisely these terms, but they recognize its force.

In addition, Blacksher and Menefee make a second telling argument: under Stevens' approach, no at-large electoral system will ever be invalidated, since there is always a facially neutral justification—e.g., the desire to encourage officeholders to take a city-wide view of problems, to avoid ward-heeling, and so on—available to sustain it. Unlike in the ordinary gerrymandering case, at-large schemes by nature involve population equality, a compact district, and no bizarre districting lines that might suggest arbitrary or discriminatory political cartography. Thus, at-large systems are simply immune under a standard based on facial arbitrariness.

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91. *Compare* Reynolds v. Sims, 377 U.S. at 589-632 (Harlan, J., dissenting) (framers of fourteenth amendment did not intend equal protection clause to regulate voting) *with* William Van Alstyne, *The Fourteenth Amendment, The "Right" to Vote, and the Understanding of the Thirty-Ninth Congress*, 1965 Sup. Ct. Rev. 33.

92. In his dissenting opinion in *Rogers*, Stevens stated:

> A constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause. Those groups are no more or no less able to pursue their interests in the political arena than are groups defined by other characteristics. Nor can it be said that racial alliances are so unrelated to political action that any electoral decision that is influenced by racial consciousness—as opposed to other forms of political consciousness—is inherently irrational. For it is the very political power of a racial or ethnic group that creates a danger that an entrenched majority will take action contrary to the group's political interests. "The mere fact that a number of citizens share a common ethnic, racial, or religious background does not create the need for protection against gerrymandering. It is only when their common interests are strong enough to be manifested in political action that the need arises. Thus the characteristic of the group which creates the need for protection is its political character." *Cousins v. City Council of Chicago*, 466 F.2d 830, 852 (CA7 1972) (Stevens, J., dissenting). It would be unrealistic to distinguish racial groups from other political groups on the ground that race is an irrelevant factor in the political process.

458 U.S. at 651.

Carrying this theme to its logical conclusion, Blacksher and Menefee state:

> [Stevens] failed to observe that at-large districting is not just another potential gerrymander. Rather, it is a decision not to district at all. It is a legislative decision not to engage at all in the political process of apportioning seats to geographic areas, but instead to allow the same citywide or countywide majority to control all of the seats. Since no political apportionment choices are made, there is no chance for them to be made invidiously or irrationally. Meanwhile, under [his] rational basis standard, the at-large scheme enjoys its guaranteed, boilerplate acceptability. The rational basis standard may or may not be a workable, constitutionally acceptable approach to claims that equally populated districts have been drawn to carve up the voting strength of a protected group. But it will always flop as a measure of at-large dilution.[93]

That result might satisfy Stevens if he intended to prohibit any relief in all vote-dilution cases involving at-large systems. That was not his stated motivation, however, and would seem inconsistent with his somewhat sympathetic analysis of the facts in *Rogers*.[94] In any event, if he wanted to reach that result it would be much easier to get there by alternative theories. It seems that, at least in the context of minority vote dilution claims challenging at-large systems, Stevens has been, as the British say, "too clever by half."

Moreover, Stevens' approach is suspect even if the policies of the fifteenth amendment are ignored in considering the fourteenth amendment. Blacksher and Menefee criticize Stevens for inconsistently adhering to the strict scrutiny applied in the "one person, one vote" context while adopting a much more deferential standard in vote dilution cases. If the goal of the equal protection clause is to give each citizen an "equally effective voice," as *Reynolds v. Sims* indicated,[95] that goal ought to apply equally in the dilution context as in the "one person, one vote" context. As Blacksher and Menefee note: "Equally populated districts . . . simply create *groups* on the basis of geography. To determine whether individual voters have equally effective voices, reference must be made to the voting propensities of other voters both

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93. Blacksher & Menefee, *supra* note 82, at 230.

94. In *Rogers*, 458 U.S. at 638-39, Stevens noted that there were three features of the electoral system in question that "make it especially difficult for a minority candidate to win an election": a requirement that each commissioner run for a separately designated position; a majority-vote requirement; and the absence of any residency requirement, which would allow all candidates to come from a single white neighborhood. Stevens opined that "[u]nless these features are independently justified, they may be invalid simply because there is no legitimate justification for their impact on minority participation in elections." *Id.* at 640.

95. 377 U.S. 533, 565 (1964).

within and without a particular person's district as well as to the relative size of the district."[96] The essential point is that *Reynolds* embraced the *concept* of equal voting power, and the equal-population requirement adopted in that case is simply one *conception* of that principle.[97]

It is possible, of course, that the Court in *Reynolds* only intended to correct vote dilution caused by population inequality among districts, because that problem could be identified and remedied by simple mathematics. The rhetoric of *Reynolds*, however, suggests far more than that. The Court's refusal to address the difficult issues that stand in the way of turning rhetoric into reality is troubling because it comes at the expense of those who can least protect themselves in the political process.

Converting the *Reynolds* rhetoric into meaningful protection of minority voting rights requires creating a workable standard by which to measure unconstitutional minority vote dilution. In his dissenting opinion in *Mobile*, Justice Marshall tried to articulate such a standard that would identify what types and magnitudes of discriminatory effects should add up to unconstitutional minority vote dilution.[98] Marshall's theory largely reflects the earlier standards suggested in *White v. Regester* and refined by the Fifth Circuit in *Zimmer v. McKeithen*. It tries to discern whether under the totality of the circumstances the minority community has sufficient "access to the political process"—not simply in the narrow

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96. Blacksher & Menefee, *supra* note 82, at 229.

97. Justice Marshall made essentially the same point in his dissenting opinion in *Mobile*, 446 U.S. at 116 n.14. The distinction between concepts and conceptions is, of course, borrowed from the work of Ronald Dworkin. Ronald Dworkin, Taking Rights Seriously 134-37 (1977).

98. Justice Marshall stated:

> When all that is proved is mere lack of success at the polls, the Court will not presume that members of a political minority have suffered an impermissible dilution of political power. Rather, it is assumed that these persons have means available to them through which they can have some effect on governmental decisionmaking. For example, many of these persons might belong to a variety of other political, social, and economic groups that have some impact on officials. In the absence of evidence to the contrary, it may be assumed that officials will not be improperly influenced by such factors as the race or place of residence of persons seeking governmental action. Furthermore, political factions out of office often serve as watchdogs on the performance of the government, bind together into coalitions having enhanced influence, and have the respectability necessary to affect public policy.
>
> Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy.

Mobile, 446 U.S. at 111 n.7.

sense of being able to register and to vote without hindrance, but also in the broader sense of being able to wheel and deal in the political forum. His test also resembles the discriminatory "results" approach Congress adopted when it amended section 2 of the Voting Rights Act in 1982. Blacksher and Menefee are obviously sympathetic to the Marshall view, but seem to agree with Justice Stewart's critique, found in his plurality opinion in *Mobile*, that Marshall's test would require courts to examine "gauzy sociological considerations"[99] without any judicially manageable standards.[100]

Blacksher and Menefee propose an alternative standard for measuring whether an electoral system sufficiently disadvantages minority voting strength as to violate the Constitution:

> An at-large election scheme for a state or local multirepresentative body is unconstitutional where jurisdictionwide elections permit a bloc voting majority, over a substantial period of time, consistently to defeat candidates publicly identified with the interests of and supported by a politically cohesive, geographically insular racial or ethnic minority group.[101]

Blacksher and Menefee indicate that the "racial or ethnic group[s]" that would benefit under this approach include only groups made up of persons entitled to claim the protection of the fifteenth amendment.[102] Thus, their test properly recognizes that groups that come within the fifteenth amendment should be ac-

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99. *Id.* at 75 n.22.

100. Blacksher and Menefee state:

> The 'access to the political process' standard espoused by . . . Marshall . . . probably deserves the 'amorphous' label some members of the Court bestowed on it. Most of the cases which concluded under the *Zimmer v. McKeithen* guidelines that at-large schemes were constitutional could not honestly be distinguished analytically from those which reached a contrary result—on any basis other than the varying personal views of the trial and appellate judges who decide them. Capriciousness is an inherent risk of the 'intensely local appraisal' of each 'totality of circumstances.'
>
> To the extent that Justice Marshall embellishes the *White v. Regester—Zimmer v. McKeithen* standard by calling for proof of 'historical and social factors' which make it difficult for the 'political minority' to influence public policy by means outside the at-large election process, he might introduce more uncertainty and hence even less judicial manageability. The quality and quantity of proof sufficient to demonstrate that blacks are unable to influence elected officials through 'a variety of other political, social and economic groups' or are unable to form effective out-of-office factions to 'serve as watchdogs on the performance of the government' are sure to vary widely from case to case and from court to court.

Blacksher & Menefee, *supra* note 82, at 226 (footnotes omitted).

101. *Id.* at 231.

102. *Id.* at 232-38.

corded protection against vote dilution superior to any such protection afforded to all groups by the equal protection clause.

Blacksher and Menefee contend that their standard would provide meaningful protection to the minority community and would be far more manageable judicially than that proposed by Marshall. The elements of a vote-dilution claim under their standard can be proved objectively, although of course there will be close questions at the margin. The proposed test avoids the problem of a district judge being required to make a finding on the inherently vague and manipulable ultimate question at the heart of the proposal suggested by Marshall and derived largely from *White* and *Zimmer*: whether the minority community is sufficiently fenced out of the political process to merit relief. Under the approach of Blacksher and Menefee, the judge does not address this ultimate question; rather, the judge makes findings on anterior issues that can be proved objectively and those findings demonstrate, as a matter of law, whether remediable vote dilution is present.

For these reasons, the standard proposed by Blacksher and Menefee is an attractive alternative to those previously addressed in the cases and literature. It does, however, have at least one potentially troubling aspect. It could be viewed as imposing a guarantee of proportional representation, albeit a weak one, in that the only proof minority plaintiffs must show is their historical inability to elect any candidates of their choice due to racial bloc voting. In contrast, the approach developed by Justice Marshall in *Mobile* and the standards set forth in *White* and in *Zimmer* use other factors that measure the political influence of the minority in broader terms than electoral success alone. Blacksher and Menefee correctly criticize the vagueness and manipulability of those factors, but the broader focus these factors provide is relevant when assessing whether fifteenth amendment values are at stake.

Whatever the merits of their proposal, the chance that it will be adopted by the Supreme Court seems slight. There are at least two major obstacles to its acceptance as a rule of constitutional law.

First, in *Rogers* a majority of the Court purported to embrace a discriminatory intent standard for evaluating unconstitutional minority vote dilution. Yet *Rogers* upheld a lower-court finding of unconstitutional vote dilution on evidence that is difficult to distinguish from evidence that a plurality of the Court in *Mobile* rejected as insufficient to support such a finding.[103] It appears that,

103. *See supra* text accompanying notes 31-34.

in place of any discriminatory effects approach, a majority of the Court has settled on a discriminatory intent standard under which minority plaintiffs have at least some chance of prevailing, or at least under which appellate courts will not always reverse trial court findings of unconstitutional vote dilution. Considering the hostility the Court has shown to any mode of analysis deviating from a strict requirement of discriminatory intent,[104] *Rogers* might represent the best approach that civil rights lawyers could realistically hope to achieve.

Second, the next wave of vote-dilution cases will be litigated under the discriminatory effects standard of amended section 2, which differs from that proposed by Blacksher and Menefee, rather than under constitutional theories.[105] If amended section 2 receives a proper judicial interpretation, minority plaintiffs should prevail in a number of cases, and future plaintiffs will have no practical reason to argue for a constitutional standard different from that of *Rogers*. These probable developments are unfortunate in one sense, because the standard proposed by Blacksher and Menefee seems superior to that of amended section 2, which among other things places enormous discretion in the district

104. *See, e.g.*, Personnel Administrator v. Feeney, 442 U.S. 256 (1979).

105. The version of amended section 2 adopted by the House of Representatives, but rejected by the Senate in favor of the version that was enacted into law, provided:

> 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] *in a manner which results in a denial or abridgement of* the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). *The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.*

See H.R. Rep. No. 227, *supra* note 69, at 48 (emphasis in original to indicate proposed changes from existing law; brackets indicate language to be changed). In explaining the meaning of this amendment, the House report stated that "[i]t would be illegal for an at-large election scheme for a particular state or local body to permit a bloc voting majority over a substantial period of time consistently to defeat minority candidates or candidates identified with the interests of a racial or language minority." *Id.* at 30. The similarity between this sentence and the standard proposed by Blacksher and Menefee, *see supra* text accompanying note 101, is so striking that it cannot be coincidental. If the House version of amended section 2 had been enacted into law, the courts might have treated this sentence in the legislative history as authoritative in construing the amendment. The civil rights community gave up this possibility when it agreed to support the Senate version of amended section 2, and thus perhaps the civil rights community made some small compromises in achieving the enactment of amended section 2, *see supra* text accompanying notes 51-52. Courts rarely seize on one sentence in one committee report as a definitive guide to statutory construction, however, and the extensive discussion in the Senate committee report concerning the meaning of amended section 2 should lead courts to the same results they would have reached under the House version of the amendment in most, if not all, cases.

judge handling the case and makes appellate review difficult. However, the "bird in the hand" of amended section 2 is far superior to the slight possibility of convincing the Court to adopt the approach of Blacksher and Menefee as a rule of constitutional law.

III.

The American approach to voting rights has operated on at least two inconsistent levels. One track is based on the simple ideology that the citizenry's right to vote preserves all their other rights. Dr. Martin Luther King, Jr. subscribed to this view, and saw the vote as providing the minority community with the ability to protect itself. It is reported that Chief Justice Warren felt the same: he chose *Baker v. Carr*,[106] the precursor to *Reynolds*, as his most important constitutional decision "because he believed that if each of us has an equal vote, we are equally armed with the indispensable means to make our views felt."[107]

This philosophy, which permeates the "one person, one vote" concept of *Reynolds*, is linked inexorably to the vision of America as the great melting pot. In this nation of minorities, give all citizens the vote and therefore the same political weapon, so the theory goes, and let them fight out their problems in the pluralistic poltical arena; the resulting political compromises will not systematically favor any person or group to the exclusion of others, and all citizens will be sufficiently protected in the political struggle. Over time, it is said, the melting-pot phenomenon will homogenize the citizenry, bring minorities into the heart of the American political and economic process, and place sufficient political power in the hands of minorities so that they can fully protect themselves against any residual discrimination. In its most simplistic form, this ideology sees all citizens as fungible once they are free to register and to vote for candidates of their choice.

This scenario is a myth, both historically and currently. It is plain beyond doubt that it ignores the warping effect of racial prejudice as well as the legitimate interests of persons of different cultural heritages to develop their own approaches to participating in public life. It does not even accurately reflect its prototypic example, the way in which European immigrants in nineteenth century America supposedly became assimilated in melting-pot fashion. The best structural friend those immigrants had was ward elections—which promote heterogeneity, not homogeneity. When im-

106. 369 U.S. 186 (1962).

107. William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 492-93 (1977).

migrants and their offspring achieved political power in American cities, the white business elite reacted with the "Progressive" notion of at-large electoral schemes, which were adopted at least in part to dilute immigrant political power.[108] It remains true today that, when bloc voting by the white majority is severe and the electoral structure—for example, at-large elections—provides a winner-take-all opportunity to the majority, the minority community is disenfranchised. In this situation, the right to vote does not only fail to preserve all other rights, it is essentially meaningless. Minority citizens perceive this fact, and their disproportionately low voting rate is a rational response to it.

A second, more realistic approach to the right to vote grew out of a recognition of these facts. This approach seeks to guarantee that minority groups are not fenced out of the political arena by electoral structures that substantially dilute their vote. When the courts proved reluctant to embrace this conception of the right to vote, Congress reacted by amending section 2 of the Voting Rights Act. That statute promotes a new vision of the melting-pot theory under which the minority community has a right to be thrown in the pot and, perhaps, retain some of its essential flavor. That approach may seem bold and unwise to judges who persist in the simple melting-pot view and see protections for distinct minority groups as a barrier to social progress.[109]

Yet even the new statutory remedy for minority vote dilution envisions the vote as indirectly preservative of other rights. Rather than guaranteeing any policy outcomes favorable to the minority community, amended section 2 simply seeks to provide that community with a fighting chance to win some benefits in the political arena. The new statute continues old traditions by refusing to attack social problems directly and by internalizing social disputes into established political channels.[110] In addition, the statute reflects the same philosophy that led the courts to label certain individual rights of freedom against the state as fundamental while refusing to place affirmative obligations upon the state that would often more dramatically benefit minorities.[111]

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108. *See supra* sources cited note 77.

109. *See* Rogers v. Lodge, 458 U.S. at 651-53 (Stevens, J., dissenting); United Jewish Organizations v. Carey, 430 U.S. 144, 186-87 (1977) (Burger, C.J., dissenting).

110. *Cf.* the penultimate sentence in Justice Marshall's dissent in *Mobile*: "If this Court refuses to honor our long-recognized principle that the Constitution 'nullifies sophisticated as well as simple-minded modes of discrimination,' . . . it cannot expect the victims of discrimination to respect political channels of seeking redress." 446 U.S. at 141 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

111. Consider the comment of John Hart Ely:

> Experience suggests that in fact there will be a systematic bias in judi-

Is the fundamental ideology supporting the American approach to voting rights misguided? Minorities have come a long way in American politics. Yet, can we assume that outlawing some demonstrably discriminatory electoral structures will substantially enhance minority political power and result in a more favorable allocation of public resources to the minority community?[112] The alternative, more direct and radical methods of changing existing power relationships in American society, is, it is needless to say, not likely to happen through existing political institutions.

Yet amended section 2 is not simply another liberal effort to effect incremental social change by tinkering at the margins of our political institutions. To be sure, Congress' overwhelming support for the amendment to section 2 can be simply explained by the power of the ideology supporting voting rights and by the widespread understanding that fair allocation of voting power is a substitute for fundamental social change. It may also reflect that the civil rights community spent much of its limited political influence to achieve the passage of the amendment. If properly interpreted, however, amended section 2, is, by American standards, a surprisingly powerful national intrusion into state and local affairs. To borrow the language of my colleague Gerald Torres from a different context, the statute is not simply a typical liberal effort "to change the complexion of institutions while leaving the structure of those institutions intact."[113] It has the potential to change a number of facially neutral local political structures in the name of

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> cial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges . . . are drawn. People understandably think that what is important to them is what is important, and people like us are no exception. Thus the list of values the Court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy . . . . But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: those are important, sure, but they aren't *fundamental*.

John Hart Ely, Democracy and Distrust 58-59 (1980) (footnotes omitted; emphasis in original).

112. That there is a positive relationship between minority electoral participation and governmental responsiveness to minority concerns seems intuitive, but is by no means certain. *Minority Vote Dilution* contains one essay that suggests that Black voting does influence the distribution of public resources at the local level. *See* Morris, *supra* note 2, at 271-85. The classic study on the overall relationship between political participation and policy responsiveness suggests that "the vote in its aggregate effects is perhaps the most important means of citizen control because it can keep pressure on leaders." Sidney Verba & Norman Nie, Participation in America 326 (1972).

113. Gerald Torres & James Morales, Book Review, 7 Chicano L. Rev. 125, 126 (1984).

racial justice. Even if public policy is not significantly altered by these changes, amended section 2 is a useful precedent for holding the federal government responsible to intervene in intensely local affairs to promote the goals of the fourteenth and fifteenth amendments.

Moreover, amended section 2 somewhat protects minorities against the risks inherent in the present shift from federal to state and local control over public spending. In the 1960s, the federal government pumped billions of dollars into local social programs. Control over those programs rested at the federal level, where minority influence was greater than in many localities. Today, federal money flows to state and local governments with few strings attached, and federal control is minimal. Amended section 2 could provide minorities with greater opportunity to influence how the states and localities use these funds.

To be sure, if the goal were to promote social change at more than just an incremental rate, federal intervention should be directed toward the ends of policy, not toward the structure by which policy is made. But identifying and formulating the policy changes necessary to achieve major social change would be intensely controversial, and an overall federal solution could not take account of local concerns. The federal intervention embodied in amended section 2 has a more modest, but still substantial and worthwhile goal. Whether that goal is achieved to any meaningful extent remains to be seen. And, even if structural reform of some local governments does result, we must still question whether it will bring any substantial benefits to the minority community.

Amended section 2 may represent the practical limit to which federal intervention into state and local affairs is likely to occur in the present American political system. Thus, the answers to these questions will perhaps measure the extent to which minority goals can be achieved in the best of all politically feasible worlds. If this is so, all eyes in the civil rights community—as well as those in other parts of society concerned with racial justice—will focus on the judicial treatment of minority voting rights in the years ahead.