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Thornburg v. Gingles: The Supreme Court's New Test for Analyzing Minority Vote Dilution

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Since its enactment in 1965, the Voting Rights Act has been instrumental in providing minorities with access to the political process in this country and in countering over a century of racially discriminatory election laws and policies. Besides prohibiting practices such as literacy tests and poll taxes which directly curtail a minority group’s access to the polls the Voting Rights Act, and section 2 specifically, also outlaw practices that deny minorities electoral participation by diluting the effectiveness of their votes.

Cases brought under section 2 of the Voting Rights Act involve claims of illegal discriminatory voting practices. These suits are premised on the argument that certain voting procedures and practices inherently diminish the impact of minority voters and restrict their ability to elect candidates of their choice. Within the last twenty years, plaintiffs who brought vote dilution

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5. Racial vote dilution results when certain electoral practices diminish the effect of a minority’s voting strength. This often occurs in large multimember or at-large voting districts that contain a concentrated minority voting population within the district. The multimember voting scheme, where voters elect several representatives from the entire area, i.e., a city-wide municipal election or county-wide state congressional election, can submerge the minority’s voting power. In contrast to the multimember districting plan, the use of subdistricts, wards, or single member districts will often ensure that minority voting power is not weakened. For example, in a municipal-wide election where city councilmen are elected from the entire district, each voter from throughout the district would vote for a specified number of representatives. If the electoral district had a minority voting population concentrated within one specific area of the city, and if the majority population within the entire municipal area voted to defeat minority candidates, then the minority candidates would virtually always be defeated. If however, the city were divided into wards or sub-districts, and the minority voting
claims met with varying degrees of success while courts created numerous definitions and tests to evaluate these cases.\textsuperscript{7}

After the Supreme Court decision in \textit{Mobile v. Bolden}\textsuperscript{8} in 1980, it was necessary for plaintiffs to show discriminatory intent in order to prove a vote dilution case based on constitutional claims.\textsuperscript{9} In response to the Court's decision in \textit{Bolden}, Congress amended section 2 in 1982. This amendment liberalized the establishment of statutory vote dilution claims by removing the requirement of proving discriminatory intent and established the "results test" as a standard.\textsuperscript{10} Under this test\textsuperscript{11} it is necessary only to prove that a challenged election process results in a denial or an abridgment of the right to vote to obtain relief under the Act.\textsuperscript{12}

population was sufficiently concentrated within one sub-district, so as to comprise a majority in that area, then the minority would be able to be represented by a candidate of its choice.

Minority or racial vote dilution often occurs where there are both at-large election districts and where the voting is polarized along racial lines. Racial bloc voting, or racial polarization is the practice of voters voting only for candidates from a specific racial group, i.e., whites voting for whites or to defeat minority candidates and minorities voting for minority candidates. \textit{See} Davidson, \textit{Minority Vote Dilution: An Overview}, in \textit{MINORITY VOTE DILUTION} 4-15 (C. Davidson ed. 1984); Derfner, \textit{Racial Discrimination and the Right to Vote}, 26 VAND. L. REV. 523, 552-60 (1973).

7. Several courts, primarily in the Fifth, Eleventh, and Seventh Circuits, have examined the parameters of a § 2 violation and have created several standards for adjudicating vote dilution cases. \textit{See} United States v. Dallas County Comm'n, 739 F.2d 1529 (11th Cir. 1984) (vote dilution analysis); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984); Johnson v. Halifax County, 594 F. Supp. 161 (E.D.N.C. 1984) (racially polarized voting).


9. \textit{Id.} at 74-75.


11. The "results test" which was established by the 1982 amendment to § 2 of the Voting Rights Act made it necessary only for minority plaintiffs to establish a violation of § 2 if the contested electoral practice, i.e., a multimember district, resulted in the dilution of the effectiveness of the minority's voting strength. Prior to the amendment, and after the Supreme Court's decision in \textit{Mobile v. Bolden}, a party had to show that the practice challenged constitutionally was specifically enacted for a discriminatory purpose. A plurality of the Justices also held that intent should be the standard for § 2 violations as well. This burden of showing an intent or purpose to discriminate made it nearly impossible for minority plaintiffs to successfully establish a vote dilution claim. \textit{See} McCrary, \textit{The Significance of the City of Mobile v. Bolden}, in \textit{MINORITY VOTE DILUTION} 47 (C. Davidson ed. 1984).

12. The 1982 amendment to § 2 of the Voting Rights Act provides in pertinent part: (b) A violation of subsection (a) of this section is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: \textit{Provided}, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.
Attempting to interpret the section 2 amendment, courts have relied heavily on both the guidelines provided in the legislative history and on leading section 2 cases. In the absence of any well-defined section 2 standards, however, courts developed various and often conflicting interpretations of the results test, vote dilution, and racial polarization.

*Thornburg v. Gingles* represents the first authoritative Supreme Court decision interpreting section 2 since the 1982 amendment. In *Thornburg v. Gingles*, black registered voters in North Carolina brought suit challenging a 1982 legislative redistricting plan. The gravamen of the plaintiffs' claim was that the plan submerged black voter concentration in one single member and five multimember districts. After the plaintiffs brought suit, Congress amended section 2 and established the results test as the standard for evaluating section 2 cases. Applying the results test, the district court, in *Gingles v. Edmisten*, upheld the plaintiffs' challenge and held that the 1982 North Carolina redistricting plan did amount to an illegal discriminatory voting practice because it resulted in a dilution of minority voting strength.

The Supreme Court, in *Thornburg v. Gingles*, unanimously upheld the findings of the district court in four of the five contested districts involved in the case, but the Court was not in total agreement on the legal analysis to be applied in vote dilution cases and in the definition of racially polarized voting. There were three concurring opinions and the Justices divided five to four over the issue of the proper legal analysis to be employed in vote dilution cases.

Justice Brennan wrote a five-part opinion, four parts of which were joined

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15. The terms "racial polarization" and "racial bloc voting" are used synonymously in this Note, and refer to a condition that occurs when an identifiable group of voters vote as a unit or a bloc to weaken the votes of another group. See supra note 6.
17. *Id.* at 2758.
18. *Id.* at 2758-62.
20. *Id.* at 350.
22. There were four separate opinions filed in this case. Justice Brennan wrote the opinion of the Court, which contained five separate parts. Part III-C of Justice Brennan's opinion was joined by only Justices Marshall, Blackmun, and Stevens. There were also three concurring. One by Justice White and another by Justice O'Connor, which was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist. Justice Stevens also wrote an opinion concurring in part and dissenting in part, which was joined by Justice Marshall and Justice Blackmun. *Id.* at 2758.
by a majority of the Court. In the majority opinion, Justice Brennan fashioned a new three-part test for analyzing vote dilution claims.\textsuperscript{23} The majority opinion also provided a definition of racially polarized voting and outlined a standard for legally significant racial block voting.\textsuperscript{24} Part III-C of Justice Brennan's opinion, which delineated the standard of statistical evidence necessary to determine racially polarized voting, was joined by only a plurality of the Justices.\textsuperscript{25}

Justice White, who concurred in part, disagreed with the majority's analysis of racially polarized voting and on the standard of statistical evidence necessary to sustain an allegation under section 2.\textsuperscript{26} In a separate concurrence, Justice O'Connor, who agreed only with the judgment of the Court, strongly objected to the new test for vote dilution established by the majority.\textsuperscript{27} She challenged the test as going beyond the intent of the legislature in its enactment of section 2, in effect, providing minorities with proportional representation.\textsuperscript{28}

This Note will first outline the history of vote dilution cases prior to the 1982 section 2 amendment and will then explore the ramifications of the "intent" test established in \textit{Mobile v. Bolden}. After tracing the legislative history and enactment of section 2, the Note will examine the impact of the 1982 amendment and the "results" test on section 2 litigation in the lower federal courts. The Note will analyze the Supreme Court's reasoning in \textit{Thornburg v. Gingles} and the three-part test provided in the majority opinion, focusing on the challenge to the majority's opinion presented by Justice O'Connor in her concurrence. It will then examine and contrast the majority's and the concurrence's views of the results test. Finally, the Note will conclude with an assessment of the impact of \textit{Gingles} on future section 2 cases.

\section{I. Vote Dilution Cases Before the 1982 Amendment}

Vote dilution claims are premised on the idea that certain election practices illegally infringe upon the ability of minority groups to elect candidates of their choice by diminishing the effectiveness or the strength of their votes.\textsuperscript{29} Practices such as the use of large multimember voting districts, ma-

\textsuperscript{23} Id. at 2765-66.

\textsuperscript{24} Id. at 2767-70.

\textsuperscript{25} Id. at 2770-79.

\textsuperscript{26} Id. at 2783-84.

\textsuperscript{27} Id. at 2784-95.

\textsuperscript{28} Id. at 2789.

Minority vote requirements, and anti-single shot voting provisions are frequently challenged because they result in the submergence or dilution of the voting power of minorities.

Racial vote dilution often will occur in large multimember voting districts where voters from throughout the entire voting area elect several representatives, especially if there are majority vote requirements and anti-single shot voting provisions. Such provisions prevent a candidate from winning unless he or she has gained a majority of the vote. They prohibit voters from voting for only one candidate and refraining from casting their other votes.

Under these circumstances, the use of large multimember districts, especially in an area where there is racially polarized voting, will almost always result in the inability of minority candidates to win elections. This occurs because in a multimember district where voting is polarized along racial lines, i.e., where minorities vote for minority candidates and whites vote for white candidates, a minority candidate will be unable to capture a majority of the votes. This could result even if the minority candidate has the support of a minority group that is fairly large and concentrated in one specific area if whites constitute a clear majority of the voters and typically vote to defeat minority candidates.30

Historically, plaintiffs could bring vote dilution suits under one of two

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30. Although multimember voting districts themselves may not necessarily result in dilution of minority voting strength, when they are combined with other electoral practices they increase the likelihood that vote dilution will occur. See supra note 6.

Majority vote requirements are an electoral practice where in order to win an election a candidate is required to obtain a majority of the votes and cannot win with only a plurality. This practice, when combined with large multimember districts, often works against minority candidates because it requires a runoff election between the two top candidates if a majority is not obtained. The runoff election could result in a defeat for minority candidates if the election is between a white candidate and a minority candidate and it follows an election where several white candidates divided the white majority vote. The runoff election which pits a white and a minority candidate against each other, if the white majority votes as a bloc to defeat the minority candidate, would result in the inability of minority candidates to gain electoral success.

Anti-single shot voting devices have been described as operating in the following manner:

In a pure at-large system without a majority requirement, there are typically several seats on a government body to be filled by an election, and candidates for all the seats compete against each other. Those with the most votes win. For example, if five seats on a school board are up for election, and twenty candidates declare, each voter has five votes, and the top five vote-getters are declared winners. This system enables a minority group to "single-shot." The group decides before the election to vote only for one or a few preferred candidates, and to withhold its remaining votes . . . . By single-shot voting, minority groups have been able partly to overcome the disadvantages of the at-large system, and elect some candidates of their choice. Responding to this strategy, white lawmakers have passed anti-single-shot or "full slate" ordinances, invalidating ballots on which the voter has not marked all the choices to which he or she is entitled.

Davidson, supra note 6, at 6-7.
legal theories. First, they could challenge election practices on constitutional grounds, alleging that the practices violated either the equal protection guarantees of the fourteenth amendment or fifteenth amendment rights. The second approach, under which plaintiffs seldom prevailed before the 1982 amendment, was to allege that vote dilution violated section 2 of the Voting Rights Act.

A. The Constitutional Challenges

The basis of modern vote dilution litigation can be traced to the earlier reapportionment case of Reynolds v. Sims and its progeny. In 1965 the Supreme Court in Reynolds originated the “one man, one vote” principle and established that the equal protection clause guarantees equal participation by all voters. Reynolds was one of the first Supreme Court cases to sanction the concept that the right to vote could be rendered ineffective or debased by a dilution of the power of a person’s vote just as effectively as by curtailing or prohibiting a person’s access to the election process.

31. Until the enactment of the Voting Rights Act in 1965, plaintiffs could only bring vote dilution cases on constitutional grounds. The first vote dilution case decided by the Supreme Court was Reynolds v. Sims, 377 U.S. 533 (1964).


33. Before the 1982 amendments to § 2 and § 5, although plaintiffs could challenge electoral redistricting plans on both constitutional and statutory grounds, courts generally decided these cases based on the constitutional issue. See Rogers v. Lodge, 458 U.S. 613 (1982) (vote dilution case based on constitutional, not § 2, violation); United Jewish Org. v. Carey, 430 U.S. 144 (1977); Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) (reapportionment decisions based on constitutional, not § 5, statutory grounds).

34. Reapportionment or malapportionment cases refer to an electoral practice where there are a number of voting districts and each district elects an equal number of representatives. Voters in a larger, more populous district could challenge the apportionment of the districts alleging that their votes are devalued in comparison to voters in smaller districts. The issue in a reapportionment case is whether the population deviation in the challenged district in comparison to the average district is unusually large. See generally Derfner, supra note 6, at 572-73.


36. Reynolds v. Sims was the first Supreme Court case to establish that malapportionment of voting districts violated the equal protection clause of the fourteenth amendment. The Court’s holding in Reynolds later gave rise to several similar cases. See, e.g., Town of Lockport v. Citizens for Community Action, 430 U.S. 259 (1977); Hadley v. Junior College District, 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968).


38. Id. at 555. The Supreme Court defined the principle behind vote dilution, stating: The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id.
Following its decision in *Reynolds*, the Supreme Court held in *Fortson v. Dorsey*, and later in *Burns v. Richardson*, that multimember districting plans, although not unconstitutional per se, could be challenged under the fourteenth amendment as either having a "discriminatory purpose" or an "invidious effect." In 1971, five years following *Burns*, the Court held in *Whitcomb v. Chavis*, that the validity of multimember districts is justiciable. However, the Court maintained that the plaintiff must carry the burden of proving that the voting districts unconstitutionally diminish or cancel the voting strength of the minority group.

In *Whitcomb v. Chavis* minority residents of Marion and Lake Counties in Indiana challenged the multimember districting plans of those counties as violations of the equal protection clause of the fourteenth amendment. Minority plaintiffs alleged that the legislative districts invidiously discriminated against ethnic groups living in the ghetto areas, thereby diluting their voting strength. As proof of the dilutive effect, the challengers proffered evidence that the number of minority legislators was not in proportion to the entire minority population. Rejecting this challenge, the *Whitcomb* Court held that a claim alleging a lack of proportional representation alone would not be sufficient to support a fourteenth amendment vote dilution challenge. The Court added that in order to sustain their claim, plaintiffs would also have to produce sufficient evidence that minority residents had less opportunity than other voters to participate in the political process. However, the Court did not outline what specific factors a party would have to show to prove that minorities were deprived of equal access to the voting process.

In *White v. Regester*, in 1973, the Supreme Court elaborated on their *Whitcomb* holding and provided several factors that would help to substantiate a minority plaintiff’s claim that multimember districts were being used to illegally cancel out or minimize minority voting power in violation of the equal protection clause of the fourteenth amendment. In *White*, the Court affirmed the challenge of minority group plaintiffs and held that multimember election districts in two Texas counties were invidiously discriminating

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41. Id. at 86-89.
42. 403 U.S. 124 (1971).
43. Id. at 144.
44. Id. at 128-29.
45. Id. at 148-49. See also Appendix to Opinion at 164.
46. 403 U.S. at 149-50.
48. Id. at 766-67.
against cognizable racial and ethnic groups.\textsuperscript{49} According to the \textit{White} Court, in order to sustain a vote dilution claim challengers must produce evidence that their minority group was denied participation in the “political processes leading to nomination and election” of candidates.\textsuperscript{50}

The Court outlined several factors crucial to a vote dilution case including the history of official racial discrimination in Texas’ election process, majority vote requirements, lack of minority elected officials in the community, a white-dominated political party, and the use of candidate slating and racial appeals in campaigns.\textsuperscript{51} Although the Court noted that these characteristics viewed by themselves were not necessarily invidious or improper, they did increase the likelihood of racial discrimination. In evaluating the plaintiffs’ claim, the Court viewed all the factors presented and decided the case based upon the “totality of the circumstances.”\textsuperscript{52}

Relying upon the “totality of the circumstances” standard handed down by the Court in \textit{White}, the Fifth Circuit in \textit{Zimmer v. McKeithen}\textsuperscript{53} invalidated a district court’s use of a per se rule for determining vote dilution claims based upon population statistics to the exclusion of all other factors.\textsuperscript{54} In \textit{Zimmer}, black voters in a rural Louisiana parish challenged an at-large reapportionment scheme for the election of school board members and police juries.\textsuperscript{55} The plaintiffs based their claims on both the equal protection clause of the fourteenth amendment and fifteenth amendment guarantees. The district court held that an at-large scheme cannot dilute black voting strength in a district where blacks constitute a majority of the population, even if they comprise only a minority of registered voters.\textsuperscript{56} In overruling the district court, the court of appeals stated “that access to the political process and not population was the barometer” in vote dilution cases.\textsuperscript{57} The court then noted that at-large and multimember districting schemes are not per se unconstitutional. But the court stated that according to the \textit{White} and \textit{Whitcomb} decisions, if a plaintiff can demonstrate that members of its minority group have less opportunity than other residents in the district to elect candidates of their choice, then the districting scheme is

\begin{itemize}
  \item \textsuperscript{49} Id. at 765.
  \item \textsuperscript{50} Id. at 766.
  \item \textsuperscript{51} Id. at 766-67.
  \item \textsuperscript{52} Id. at 769.
  \item \textsuperscript{54} Id. at 1302-03.
  \item \textsuperscript{55} Id. at 1300-02.
  \item \textsuperscript{56} Id. at 1303.
  \item \textsuperscript{57} Id.
unconstitutional.\textsuperscript{58}

Extending the Supreme Court's holding in \textit{White}, the United States Court of Appeals for the Fifth Circuit created a list of factors that would support a plaintiff's vote dilution claim. These factors were divided into two categories, primary and enhancing factors. The primary factors were: (1) lack of minority groups' access to the process of slating candidates, (2) unresponsiveness of legislators to the needs of minority groups, (3) "a tenuous state policy underlying the preference for multi-member or at-large districting," and (4) history of official discrimination.\textsuperscript{59} The court of appeals emphasized, as the Supreme Court had previously done in \textit{Whitcomb}, that it is not enough for a plaintiff to prove merely a "disparity between the number of minority residents and the number of minority representatives."\textsuperscript{60} Although it is not necessary to show the existence of all the factors outlined, a vote dilution claim would only be substantiated upon the showing of an "aggregate of the factors."\textsuperscript{61}

In 1976, the Supreme Court decided \textit{Washington v. Davis},\textsuperscript{62} a case involving racial discrimination in employment and held that a showing of intent to discriminate was necessary to substantiate a fourteenth amendment equal protection violation.\textsuperscript{63} Borrowing the intent standard established in \textit{Washington v. Davis}, the Fifth Circuit subsequently ruled in \textit{Nevett v. Sides}\textsuperscript{64} that a showing of intentional discrimination was also necessary to establish a vote dilution claim based either on the fourteenth or fifteenth amendments.\textsuperscript{65} However, the court in \textit{Nevett} also held that given an election plan that was racially neutral on its face with direct evidence of discriminatory intent lacking, the intent requirement could be proven by the use of an aggregate of the

\begin{thebibliography}{9}
\bibitem{58} Id. at 1303-05.
\bibitem{59} Id. at 1305.
\bibitem{60} Id.
\bibitem{61} Id.
\bibitem{62} 426 U.S. 229 (1976). In \textit{Washington v. Davis}, plaintiffs, black police officers in the District of Columbia, challenged a written personnel test administered by the police department. The test was given to evaluate the degree of verbal ability of prospective police recruits. \textit{Id.} at 234-35. The plaintiffs challenged the test as having a disproportionate impact upon black applicants and thereby discriminating against them in violation of the equal protection guarantees provided in the due process clause of the fifth amendment. \textit{Id.} at 233. The Supreme Court, in a landmark decision, ruled that the test did not violate the equal protection guarantees of either the fifth or the fourteenth amendments. \textit{Id.} at 246-48. The Court concluded that in order to establish an equal protection violation, disproportionate impact alone was insufficient and plaintiffs additionally must prove that there was a racially discriminatory motive or purpose in the enactment of the challenged rule or statute. \textit{Id.}
\bibitem{63} Id. at 244-45.
\bibitem{64} 571 F.2d 209 (5th Cir. 1978), \textit{cert. denied}, 446 U.S. 951 (1980).
\bibitem{65} Id. at 215, 217-19.
\end{thebibliography}
factors set out in Zimmer. This greatly facilitated the ability of the plaintiffs to establish vote dilution claims based upon circumstantial evidence and relieved them of the almost impossible task of proving that the districting or apportionment plans were enacted or maintained for discriminatory purposes.

In a sharply divided decision, the Supreme Court in Mobile v. Bolden held that proof of racially discriminatory intent is required to prove a vote dilution claim alleging a constitutional violation. In addition, a plurality of the Justices indicated that intent would also be the standard used to judge violations of section 2 of the Voting Rights Act. Justice Stewart, who delivered the plurality opinion, concluded that based on the holding of Washington v. Davis, only where a plaintiff shows "purposeful discrimination" can a court find a violation of the fourteenth amendment's equal protection clause. He stated that this principle applies to claims of racial discrimination affecting the right to vote as well as to all other racial discrimination claims. Repudiating the analysis established by the Fifth Circuit in Zimmer and Nevett, Justice Stewart concluded that the establishment by plaintiffs of intent to discriminate through proof of an "aggregate" of the Zimmer factors was inconsistent with the Court's previous holdings in Washington v. Davis and Arlington Heights v. Metropolitan Housing Development Corp. Although Justice Stewart acknowledged that the presence of the indicia relied on in Zimmer may offer some evidence of a discriminatory purpose, the factors in Zimmer alone would not be sufficient to prove an unconstitutionally discriminatory intent.

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66. Id. at 222-28.
67. 446 U.S. 55 (1980). There were six separate opinions written in Bolden. Justice Stewart wrote the opinion of the Court, which was joined by Chief Justice Burger, Justice Powell, and Justice Rehnquist. Justice Blackmun filed an opinion concurring in the judgment. Justice Stevens filed an opinion concurring in the judgment. Justice Brennan, Justice White, and Justice Marshall each filed their own dissenting opinions.
68. Id. at 60-65.
70. Bolden, 446 U.S. at 66.
71. Id. at 67.
72. Id. at 70-71.
73. 429 U.S. 252 (1977). In Arlington Heights the Metropolitan Housing Development Corporation sought to obtain rezoning on a parcel of land located within the Village of Arlington Heights to construct low income housing that would be racially integrated. When Metropolitan was denied rezoning from a single-family to a multi-family classification, it, along with three minority plaintiffs, brought suit alleging the denial was racially discriminatory and a violation of the fourteenth amendment's equal protection clause. Id. at 255-59. The Supreme Court rejected the plaintiffs' challenge and held that absent sufficient proof of racially discriminatory purpose or intent as a motivating factor in the official action, disproportionate impact alone would not be sufficient to sustain an equal protection challenge. Id. at 265.
74. Bolden, 446 U.S. at 73.
In addressing the fifteenth amendment challenge, Justice Stewart concluded that the fifteenth amendment, like the fourteenth, required a showing of purposeful discrimination.\footnote{Id. at 62, 66.} Justice Stewart also concluded that section 2 of the Voting Rights Act could extend no additional protection to minorities other than those already offered under the fifteenth amendment.\footnote{Id. at 61.} The plurality further held that the fifteenth amendment only protects against discriminatory voting practices that directly prohibit minorities from gaining access to the election process.\footnote{Id. at 65.} Having found that blacks in Mobile were allowed to register and vote freely, a majority of the Court held that no fifteenth amendment violation existed.\footnote{Id.}

Thus, the Supreme Court established in \textit{Mobile v. Bolden} that a party must prove intent to discriminate in order to prevail on a constitutional vote dilution claim.\footnote{Id. at 74.}

\textbf{B. The 1982 Amendment to Section 2}

Reacting to the Supreme Court's decision in \textit{Mobile v. Bolden}, Congress in 1982 enacted an amendment to section 2 of the Voting Rights Act.\footnote{42 U.S.C. § 1973(a) (1982).} Initially, the reason for the amendment was to both clarify the standard of proof required to establish a section 2 violation\footnote{Representative Sensenbrenner stated the purpose of the § 2 amendment as: an exercise of the broad remedial power of Congress to enforce the rights conferred by the 14th and 15th amendments. This includes the power to prohibit voting in electoral practices and procedures which have a racially discriminatory effect. 127 CONG. REC. 23,175 (1981) (statement of Rep. Sensenbrenner).} and to soften the "impossible burden" of proof required of plaintiffs under the \textit{Mobile} intent test.\footnote{In summarizing the purpose of the § 2 amendment, Representative Edwards of California stated: Section 2 was designed in 1965 by this Congress to stop the maintenance by State and local governments of laws that discriminate in voting or methods of elections. It does apply nationwide, so the Supreme Court in 1980 [Mobile v. Bolden] was interpreting an act of Congress and interpreted it in a way that we did not intend in 1965. It said that there must be direct proof of a discriminatory intention to establish a violation of section 2. The Court rejected the overwhelming proof that the Mobile system of at-large elections resulted in discrimination against the black voters in that city. Now, the problem with this ruling, this very radical ruling, contrary to what Congress intended, is that it is an impossible burden to prove intent to discriminate, even where the system clearly discriminates.}
After its initial passage in the House of Representatives a bitter debate emerged in the Senate focusing on the language of the proposed amendment. Proponents of the section 2 amendment wanted to overrule the restrictive intent standard of Mobile and restore, by means of a results test, the use of section 2 litigation to its pre-Bolden totality of the circumstances standard as articulated in Whitcomb v. Chavis. In contrast, opponents of the bill supported the intent standard of Bolden and questioned the need for an amendment to section 2. The concern of those opposing the bill centered on their fear that the results test would either be so ambiguous as to have no actual clear justiciable standard or it would operate to create the right of proportional representation.

In April of 1982, seven months after the bill was first introduced in the Senate, Senator Dole of Kansas introduced a substitute bill. This new version of the bill, which became known as the “Dole compromise,” attempted to strike a middle ground between the two positions by retaining most of the language of the results test but adding a disclaimer against proportional representation.

With regard to the compromise itself, we are all aware that the most controversial aspect of the committee’s consideration of S. 1992 relates to section 2 of the Voting Rights Act. Section 2 lies at the heart of the act insofar as it contains the basic guarantee that the voting rights of our citizens should not be denied or abridged on account of race, color, or membership in a language minority. In the 1980 case of Mobile v. Bolden, the Supreme Court interpreted section 2 as prohibiting only intentional discrimination.

Proponents of the results standard persuasively argue that intentional discrimination is too difficult to prove to make enforcement of the law effective. Perhaps more importantly, they have asked, if the right to exercise a franchise has been denied or abridged, why should plaintiffs have to prove that the deprivation of this fundamental right was intentional. On the other hand, many on the committee have expressed legitimate concerns that a results test could be interpreted by the courts to mandate proportional representation.

The supporters of this compromise believe that a voting practice or procedure which is discriminatory in result should not be allowed to stand, regardless of whether there exists a discriminatory purpose or intent. For this reason, the compromise retains the results standards. However, we also feel that the legislation should be strengthened with additional language delineating what legal standard should apply under the results test and clarifying that it is not a mandate for proportional representation. Thus, our compromise adds a new subsection to section 2,
the original House and Senate versions that directly addressed the standard, based upon *White v. Regester*, by which a section 2 violation would be established.\(^{88}\) This standard, which incorporated the totality of the circumstances language first introduced by the Court in *White*, was added as an attempt to re-establish the pre-*Bolden* reasoning used to judge vote dilution cases.\(^{89}\) In addition, the Senate Report issued by the Committee on the Judiciary that accompanied the Senate Bill included a list of nine typical factors that courts should use as a guideline in assessing the validity of a section 2 violation.\(^{90}\)

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which codified language from the 1973 Supreme Court decision of *White v. Regester*

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The new subsection clarifies as did *White* and previous cases, that the issue to be decided is whether members of a protected class enjoy equal access. I think that is the thrust of our compromise: equal access, whether it is open; equal access to the political process; not whether they have achieved proportional election results.

The new subsection also provides, as did this *White* line of cases, that the extent to which minorities have been elected to office is one circumstance which may be considered. But it explicitly states—let me make that very clear—in the compromise that nothing in this section establishes a right to proportional representation.

88. *Id.*
89. *Id.*
90. The factors listed in the Senate Judiciary Committee Report that accompanied the bill in the Senate, were:

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 qualifications, prerequisite to voting, or standard, practices or procedure is tenuous.

On June 18, 1982, Congress passed the amendment to section 2, essentially adopting the compromise bill proposed by Senator Dole. However, Congress did not expressly articulate either in the statutory language of section 2, or in its legislative history, the parameters of a section 2 violation. Although the Senate Report delineated nine factors courts should use in judging vote dilution cases, based to some degree upon the Fifth Circuit's reasoning in *Zimmer*, the report did not indicate how much weight should be attributed to any one individual factor. Instead the Senate Report and the language of section 2 indicated that courts consider the "totality of the circumstances" and flexibly use those factors to determine a section 2 violation.

II. THE IMPACT OF THE 1982 AMENDMENT ON SECTION 2 LITIGATION: FEDERAL COURTS FAIL TO REACH CONSENSUS

After the passage of the amendment to section 2, minority plaintiffs initially met with greater success in establishing vote dilution claims, thereby realizing one of the legislative goals of the amendment. Courts in the Fifth and the Eleventh Circuits began grappling with the problem of developing appropriate guidelines for judging a vote dilution claim based on the results test and the totality of the circumstances standard of section 2. Central to this problem was developing a definition and a standard for interpreting the impact of racial polarization.

In *United States v. Marengo County Commission*, the United States Court of Appeals for the Eleventh Circuit outlined the standard for analyzing alleged violation under the amended section 2. In *Marengo*, the court of appeals emphasized that Congress, in establishing the results test, wished to eliminate any intent requirement. The court sketched the parameters of the results test and pointed out that at-large elections are not prohibited per se. Noting that although the lack of proportional representation will not compel an automatic finding of a section 2 violation, it may still be considered as some evidence of a violation. The *Marengo* court also interpreted section 2 as focusing not on whether a particular minority group is the recipient of adequate public services, but rather whether they have been denied

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92. See supra note 90.
93. Id.
94. See supra note 82 and accompanying text.
95. Id.
96. 731 F.2d 1546 (11th Cir. 1984).
97. Id. at 1563-74.
98. Id. at 1550 n.1, 1557-58.
99. Id. at 1564-65.
equal access to participate in the electoral process. In so ruling, the court concluded that based upon the legislative history of section 2, the factor of local official responsiveness to minority needs was relegated to a position of lesser importance in the overall vote dilution analysis.

The analysis used by the Fifth Circuit in Jones v. City of Lubbock was similar to the Eleventh Circuit's analysis in Marengo, focusing on the list of typical factors outlined in the Senate Report. Stressing that there was no requirement that any particular number of factors must be proven to establish a section 2 violation, the Marengo court nevertheless emphasized, as the Lubbock court had previously, the importance of racial polarization and interpreted the legislative history to indicate that it would ordinarily be the "keystone" of a vote dilution case.

Even though the court in Marengo stated that no one formula existed for aggregating the factors that would apply in every case, it set up an hierarchical ordering to be used in aiding the results test analysis. This hierarchy, which emphasized racially polarized voting, also listed the other key factors such as the lingering effects of past discrimination, access to the slating process, and election practices. Other factors including racial voting appeals and the success of minority candidates were viewed by the court as less important under the results test.

Applying the reasoning articulated in Marengo, the United States Court of Appeals for the Eleventh Circuit in United States v. Dallas County Commissioner, and later in McMillan v. Escambia County, utilized the hierarchy of factors. In Dallas, the court noted that all nine factors listed in the Senate Report appeared in the case, but highlighted the importance of racial polarization, the structure of the election system, and the existence of past discrimination and its lingering effects as the most crucial factors to consider in a vote dilution case. Although the district court in Dallas

100. Id. at 1565.
101. 727 F.2d 364 (5th Cir.); reh'g en banc denied, 730 F.2d 233 (1984). Although the court in Lubbock held that the challenged redistricting plan did violate § 2, the court utilized a similar type of analysis relying on the nine typical factors outlined in the Senate Report.
102. Marengo, 731 F.2d at 1566-66.
103. Lubbock, 727 F.2d at 380. In reviewing the list of factors in the Senate Report, the court in Lubbock concluded that Congress intended that racially polarized voting be weighed more heavily. Id. at 385.
104. Marengo, 731 F.2d at 1566.
105. Id.
106. Id. at 1566-74.
107. 739 F.2d 1529 (11th Cir. 1984).
108. 748 F.2d 1037 (5th Cir. 1984).
109. Dallas, 739 F.2d at 1535.
110. Id.
found evidence of racially polarized voting, it discounted its effect because of a variety of other factors. In discounting the importance of racial polarization, the district court in *Dallas* emphasized the presence of three factors: first, the existence of apathy among black voters; second, that blacks who ran against white incumbents were fringe party candidates; and third, that blacks did not actively seek the votes of whites. *Id.* at 1535-36.

In repudiating the district court's conclusion, the court of appeals first emphasized the importance of the factor of racially polarized voting, citing its previous holding in *Marengo*. *Id.* at 1537.

In *Lee County Branch of NAACP v. City of Opelika*, the Eleventh Circuit summarized its development of the results test analysis since *Marengo* and pointed out that the nine factors listed in the Senate Report serve a different purpose in litigation involving a section 2 violation than they do in analyzing vote dilution cases on constitutional grounds. Contrasting these two analytical approaches, the court in *Opelika* distinguished between the more rigorous intent standard utilized in constitutional vote dilution cases and the results test of amended section 2. In vote dilution cases prior to the section 2 amendment, courts did not view racially polarized voting as significant a factor as they did under the standard of the results test. The reason for this dissimilar treatment, as both the *Opelika* and *Marengo* courts pointed out, is simply that the emphasis of plaintiffs' claims under the section 2 amendment has switched from a finding of racially motivated purpose in the adoption of a particular voting or electoral scheme, to the impact that such a practice has upon the effectiveness of the minority group's opportunity to elect candidates of their choice. Therefore, the *Opelika* court reasoned that the weighing of the factors under the results test would differ under the intent standard.

111. In discounting the importance of racial polarization, the district court in *Dallas* emphasized the presence of three factors: first, the existence of apathy among black voters; second, that blacks who ran against white incumbents were fringe party candidates; and third, that blacks did not actively seek the votes of whites. *Id.* at 1535-36.

112. *Id.* at 1537.

113. 748 F.2d 1473 (11th Cir. 1984).

114. *Id.* at 1479-81.

115. *Id.* A pattern of voting along racial lines is, as the court pointed out in *Marengo*, "[t]he surest indication of race-conscious politics." United States v. Marengo County Comm'n, 731 F.2d 1546, 1566-67 (1984).

116. *Opelika*, 748 F.2d at 1479-80 & n.9. The rationale expressed by the court in *Opelika* for relegating unresponsiveness and tenuousness to a less important role in the vote dilution analysis had been previously stated by the court in *Marengo*:

Unresponsiveness is of limited importance under section 2 for two reasons. First, section 2 protects the access of minorities not simply to the fruits of government but to participation in the process itself. Accordingly, evidence that officials meet the functional needs of minority citizens does not overcome evidence that the minorities are excluded from political participation. Second, responsiveness is a highly subjective matter, and this subjectivity is at odds with the emphasis of section 2 on objective factors.
Marengo and the later Eleventh Circuit cases established that although the Zimmer factors constitute indicia of a violation under either the intent or the results tests, the weighing of those factors would vary depending upon which standard was utilized. As evidenced by the judgment of the courts in Marengo and Dallas, the outcome of the vote dilution claim, although based on the totality of the circumstances, could be determined by the significance or weight attributed to any one specific factor outlined in the Senate Report. The court in Opelika reemphasized the importance of showing racial polarization and that under the results test unresponsiveness of the government to the minority's needs and tenuousness of state policies underlying an at-large voting plan would be viewed as less significant in the court's analysis.\(^{117}\)

The determination of a vote dilution claim often centers on the issue of the extent of racially polarized voting.\(^ {118}\) Due to the importance of this factor, the definition and analysis utilized by a court often becomes the pivotal question in a vote dilution case. Under the standards imposed by the 1982 amendment to section 2, the interpretation of racial polarization became more significant because the courts shifted the focus of their inquiry from one of intent to that of results.\(^ {119}\) In utilizing an intent standard, even where the community was severely racially polarized, plaintiffs would not be able to prevail unless they could establish that the challenged electoral practice was implemented for racially discriminatory reasons. In contrast, under the results test courts do not focus on the possible discriminatory motives for adopting voting practices but instead look to the effect that questioned practices have on minority voting strength. The factor of racially polarized voting under the results test became more critical because if it were present in a community it would contribute to diminished minority success at the polls.

In addition to the relevance of racial polarization, the court also recognized that the analysis of vote dilution claims requires the balancing of two competing principles articulated in the Senate Report and incorporated in the language of the amendment.\(^ {120}\) The first is the necessity of invalidating election practices that deny minorities equal access to the political process. The second is that the Constitution does not guarantee any group the right to proportional representation.\(^ {121}\)

In an attempt to determine the proper legal standard for adjudicating a section 2 claim that would maintain a balance between these two competing

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\(^{117}\) Marengo, 731 F.2d at 1572.

\(^{118}\) Opelika, 748 F.2d at 1479.

\(^{119}\) See Marengo, 731 F.2d at 1546.


\(^{121}\) See supra notes 4-12.

\(^{121}\) Id.
principles, the United States Court of Appeals for the Fourth Circuit in *Collins v. City of Norfolk* 122 affirmed the analysis of the district court that looked to the nine factors outlined in the Senate Report. 123 However, in contrast to the hierarchical approach developed by the Fifth and the Eleventh Circuits, the district court in *Collins* looked to the language of the statute to determine the guidelines for its analysis. 124 The district court weighed the factors based upon the totality of the circumstances standard called for by the statute to determine if blacks had been denied equal participation in the political process leading to the nomination or the election of representatives which resulted in providing them with less opportunity to elect candidates of their choice. 125

The factors that the district court considered most relevant to the plaintiffs' claim were the history of the adoption of the at-large system, the effect of the at-large system on elections to date, the history of official racial discrimination in the community, and racial polarization. 126 In analyzing these factors, the district court found two of them to be the most crucial: the history of official racial discrimination and its lingering effects, and the extent of racial polarization. 127 Although the district court found that there had been an egregious history of official racial discrimination in voting practices in the Norfolk community and in the state of Virginia, 128 it concluded that no lingering effects of that discrimination now inhibited blacks from fully participating in the electoral processes. 129 The district court based this conclusion on the fact that since the enactment of the Voting Rights Act in 1965, black registration and voter turnout rates had drastically increased to the point where, in the 1984 elections, black registration slightly exceeded that of whites. 130 The district court stressed also that despite the history of official discrimination in the area the city had now undertaken efforts to encourage blacks to register and vote. 131

In analyzing the extent of racial polarization in the community, the *Collins* court rejected as overly broad the definition of racially polarized voting

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123. 605 F. Supp. at 380-81.
124. *Id.* at 379-80.
125. *Id.* at 406.
126. *Id.* at 382-89.
127. *Id.*
128. *Id.* at 382-85.
129. *Id.* at 385.
130. *Id.*
131. *Id.*
offered by the plaintiffs' expert witness that racially polarized voting occurs when the majority of one racial group votes contrary to the majority of another racial group. The definition offered by the defendants and accepted by the district court in Collins required an inquiry into three factors before racial polarization could be determined. These three factors were: the "presence or absence of" white backlash, "the voting patterns of black and white voters over a period of years," and "whether whites attempt[ed] to limit the field of candidates." The court adopted the defendant's definition, characterizing it as "more sensible" and "more applicable to the multiple-candidate, multiple-office" elections in Norfolk.

Due to these three additional requirements, the definition of racial polarization adopted by the district court in Collins was more difficult for plaintiffs to establish. White backlash, which was defined in Collins as occurring when "white voters turn out in greater numbers than usual in response to the potential election of black candidates," would require plaintiffs to establish that the percentage of white voter turn-out is higher in an election where black candidates are present.

The court of appeals in Collins affirmed the reasoning of the lower court and found that the voting electorate in Norfolk was not racially polarized. In judging the case based upon the totality of the circumstances, the court upheld the district court's finding that the at-large voting plan in Norfolk did not violate section 2. The adoption of a very stringent definition of racial polarization by the Fourth Circuit in Collins made it extremely difficult for minority plaintiffs to establish a successful section 2 violation.

In McCord v. City of Fort Lauderdale, an Eleventh Circuit case, black...
citizens in Fort Lauderdale brought suit alleging that the at-large system violated section 2. 141 The court of appeals, however, rejected the plaintiffs' claim and upheld the findings of the district court that there had been no section 2 violation. 142

In deciding McCord, the court relied upon the three guidelines previously utilized by the Eleventh Circuit in Marengo. 143 These guidelines were: first, discriminatory intent is not needed to establish a violation; second, at-large elections are not prohibited per se (i.e., lack of proportional representation does not automatically require a finding of a section 2 violation); and finally, section 2 does not focus on whether minority groups receive public services but whether they have access to participate in the political process. 144 In analyzing Fort Lauderdale's electoral districting plan on the basis of these three principles, the court of appeals upheld the district court's finding that although there was a history of official discrimination in Florida and in Fort Lauderdale, it did not now adversely affect the plaintiffs' ability to participate in the election process. 145

The court distinguished McCord from Marengo, where the history of past discrimination had led the court to conclude that it had resulted in hindering black socio-economic and educational status, and instead likened it to Collins. 146 In Marengo the court had concluded that the lingering effects of the prior discrimination on minorities, which prevented minorities from obtaining equal access to the election process, was evidenced by the substantially lower black voter registration rate. 147 Relying upon the evidence of the percentage of black voter registration, the court in McCord, following the reasoning of Collins, 148 stated that because black citizens register to vote in equal or greater numbers than whites, the lingering effects of the community's long history of official discrimination had sufficiently been eliminated and did not presently affect the electoral process. 149

In challenging the conclusion reached by the majority in McCord, Judge Swygert, in a dissenting opinion, contended that the majority had exaggerated the importance of the high black voter turn-out rate. 150 He acknowledged that although this characteristic is not one usually associated with

141. Id. at 1529.
142. Id. at 1533.
143. Id. at 1531.
144. Id.
145. Id. at 1531-32.
146. Id. at 1531.
148. McCord, 787 F.2d at 1531.
149. Id. at 1531-32.
150. Id. at 1535-36.
voting rights claims, it does not necessarily signify that a section 2 violation could not be established.\textsuperscript{151} To put so much emphasis on this one factor, despite the long history of discrimination in the Fort Lauderdale area was, according to Judge Swygert, in effect, penalizing the community's blacks for exercising their fundamental constitutional right to vote.\textsuperscript{152}

In addition, Judge Swygert contended that the court in \textit{Marengo} had stated that the goal of the Voting Rights Act was to ensure not only participation in the voting process, but effective participation,\textsuperscript{153} and that registration and voter participation is “only the first hurdle to full effective participation in the political process.”\textsuperscript{154} Judge Swygert criticized the majority for not fully analyzing the plaintiffs' claim of vote dilution which would involve a consideration of the nine factors outlined in the Senate Report.\textsuperscript{155} In essence, he charged the majority with establishing that a black voter turnout rate is dispositive of a section 2 claim.\textsuperscript{156}

The \textit{Collins-McCord} development, when contrasted to the earlier cases of \textit{Dallas, McMillan} and \textit{Marengo}, illustrate the lack of consensus among the courts. Central to the disparate results in these cases is the emphasis that each court places on the importance and definition of the nine factors outlined by the Senate Report and, in particular, its definition of racial polarization and its method of statistical analysis.

\section*{III. \textit{Thornburg v. Gingles}: Development of the Standard for Judging Vote Dilution Cases Based on the 1982 Amendment to Section 2}

The Supreme Court, in \textit{Thornburg v. Gingles},\textsuperscript{157} addressed for the first time since the 1982 amendment to section 2 what specific factors must be proven in order to demonstrate that the use of multimember districts impairs the ability of minority voters to elect representatives of their choice.\textsuperscript{158} By creating a new three-part test for judging vote dilution cases, the majority in \textit{Gingles} succeeded in narrowing, to some extent, the initial focus of a section 2 inquiry. However, because of the fractured opinions in the case, the Court failed to answer completely all the questions raised in the Fourth, Fifth, and

\begin{itemize}
\item \textsuperscript{151} \textit{Id.}
\item \textsuperscript{152} \textit{Id.} at 1536.
\item \textsuperscript{153} \textit{Id.} at 1536-37.
\item \textsuperscript{154} \textit{Id.} at 1536 (emphasis in original).
\item \textsuperscript{155} \textit{Id.} at 1537.
\item \textsuperscript{156} \textit{Id.} at 1537-38.
\item \textsuperscript{157} 106 S. Ct. 2752 (1986).
\item \textsuperscript{158} \textit{Id.} at 2758.
\end{itemize}
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Eleventh Circuits concerning the definition of racial polarization and the proper legal standard that should be utilized to assess its impact.

In April 1982, North Carolina enacted a legislative redistricting plan for the state’s Senate and House of Representatives. Black registered voters in North Carolina challenged one single and six multimember districts alleging that the scheme prevented blacks from electing representatives of their choice in violation of section 2. After the plaintiffs brought suit, but before trial, Congress amended section 2 and established the results test. The district court in *Gingles v. Edmisten* unanimously affirmed the plaintiff’s section 2 challenge and held that the plan resulted in impermissible racial vote dilution. On appeal, two of the seven voting districts were dropped from the case and the Supreme Court affirmed the findings of the district court holding that there were section 2 violations in four of the five contested districts. The Court reversed the district court’s finding regarding violations in the other district.

Although the court was unanimous in judgment, the Justices were split on many of the crucial issues in the case. The disagreement among the Justices centered on the definition of racial polarization, the proper legal analysis to be utilized in vote dilution cases, and the statistical standard to be employed in section 2 cases.

A. The Three-part Test for Vote Dilution

The majority opinion, written by Justice Brennan, affirmed the result of the district court and also established a new three-part test for analyzing vote dilution claims. Justice Brennan stated that the essence of a section 2 case is the impairment of minority voters to freely elect candidates of their choice. He also stated that racial bloc voting is the crucial factor upon which to base a vote dilution claim involving multimember districts.

To reach these conclusions Justice Brennan reviewed the factors courts must examine when analyzing a section 2 challenge. Relying on the legislative history of the 1982 amendment to section 2, Justice Brennan reviewed the nine factors outlined in the Senate Report. He reasoned that although

160. *Id.* at 349-50.
161. *Id.* at 352.
162. *Id.* at 376.
164. *Id.* at 2772-79. Only a plurality of the Justices joined part III-C of the opinion, which addressed these specific issues. *See* Justice O’Connor’s concurrence. *Id.* at 2792-93.
165. *Id.* at 2766-67.
166. *Id.* at 2764-66.
167. *See* supra note 90.
all of these factors may be relevant, they will not be dispositive unless the plaintiffs can first show a conjunction of three circumstances. First, the minority group must be “sufficiently large and geographically compact to constitute a majority in a single member district.” Second, the minority group must be “politically cohesive.” Third, the white majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate.”

The majority’s new three-part test establishes that the degree of racial bloc voting is the hallmark of a vote dilution claim. In creating this test, Justice Brennan concluded that although all nine of the factors listed in the Senate Report were to some degree important, unless there is an initial showing of significant voting along racial lines the other factors, such as unusually large voting districts, anti-single shot voting, and majority vote requirements, will not demonstrate that the plaintiffs have suffered a substantial inability to elect their preferred candidate. Thus, Justice Brennan’s analysis and three-part test echoes, to some extent, the reasoning first presented by the Fifth and Eleventh Circuits in Lubbock, Marengo, and McMillan that racially polarized voting is the “keystone” of a section 2 vote dilution case. However, the new Gingles test also creates a more flexible and less mechanical approach than the hierarchical ordering of the factors previously used in the Senate Report.

The majority also accepted the definition of racially polarized voting utilized by the plaintiffs, that “racially polarized voting exists where there is a consistent relationship between the race of the voter and the way in which the voter votes.” The Court, in affirming the district court’s analysis and definition of racial bloc voting, rejected the more stringent definition pro-

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169. Id. Justice Brennan, in interpreting the parameters of the results test of § 2 and the factors outlined in the Senate Report, views the legislative history as limiting the finding of a § 2 violation to only those cases where all three prongs of the three-part test are present. Id.
170. Justice Brennan actually characterized three limits to the use of the Senate Report factors:
First, electoral devices, such as at-large elections, may not be considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process . . . . Second, the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone does not establish a violation . . . . Third, the results test does not assume the existence of racial bloc voting; plaintiffs must prove it.

Id. at 2764 (citations omitted).
171. See supra notes 97-104 and accompanying text.
172. 106 S. Ct. at 2768 n.21. The Court affirmed the definition adopted by the district court and presented by plaintiffs’ expert Dr. Grofman. The method used to determine racial polarization was extreme case analysis and bivariate ecological regression analysis. Id. at 2768 & nn.21-22.
vided by Collins and McCord. Conspicuously absent in the majority’s definition is the requirement previously developed in the Collins and McCord line of reasoning, that voter backlash was a necessary element to establish racial bloc voting.173

The majority also rejected the argument presented by the appellants and the Solicitor General of the United States, that adopting the test utilized by the district court for determining the degree of racial polarization would lead to results inconsistent with the legislative intent of the Act’s amendment.174 The district court analyzed the extent of racially polarized voting based upon both the statistical evidence presented by an expert witness and the supplemental testimony of lay witnesses.175 Justice Brennan stated that the Solicitor General had misinterpreted the result of the district court. The Solicitor General had characterized the district court’s view of racial bloc voting as occurring when “the results of the individual election would have been different depending upon whether it had been held among only the white voters or only the black voters in the election.”176 In analyzing the district court’s findings to ascertain if it had used a correct standard for determining legally significant racial bloc voting, Justice Brennan outlined the inquiry as being two-fold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc to defeat the minority’s preferred candidates.177 He emphasized however, that “no one simple doctrinal test”178 existed for measuring the extent of racial bloc voting, but instead courts should conduct “discrete inquiries”179 into the voting practices of white and minority voters.

Justice Brennan then outlined four general principles to guide the courts in their determination of whether the degree of racial polarization is legally significant based on the parameters stated in the second and third prongs of the test. The guidelines set forth by Justice Brennan to determine racial bloc voting are: (1) a showing that a minority group is cohesive and generally

173. Id. at 2768-69. See supra notes 134 and 137 and accompanying text.
174. 106 S. Ct. at 2776. The Court rejected appellants’ argument that polarization can only occur when whites vote as a bloc and that the white voting pattern must be motivated solely by racial animosity toward black candidates. Although not labeled as “white backlash,” the argument raised by appellants is essentially the same as that proposed and adopted by the court in Collins and McCord. See supra notes 134-37 and accompanying text.
176. Gingles, 106 S. Ct. at 2769 (citation omitted).
177. Id.
178. Id. at 2770.
179. Id. at 2769-70.
votes for the same candidates; (2) the presence of white bloc voting including a sufficient number of members to defeat minority candidates; (3) that a pattern of voting along racial lines, which has existed for several years, is more probative than the results of a single election; and (4) that in an area with a history of racially polarized voting, the results of one election where significant racial bloc voting has not occurred is not sufficient to sustain the argument that the area is now free from legally significant racial bloc voting. Also, the majority rejected the argument raised by appellants and the Justice Department that minimal minority voter success in a single election precludes as a matter of law a finding of a section 2 violation. In opposition to this view, the majority concluded that both the language of section 2 and its legislative history demonstrated that the electoral success of some minority candidates will not foreclose a section 2 claim.

B. The Plurality Opinion: Failure of the Court to Provide an Evidentiary Standard for Racial Bloc Voting

According to the majority in Gingles the degree of racial bloc voting is the key factor in determining a vote dilution claim based upon a section 2 violation. In part III-C of his opinion, Justice Brennan delineated the proper statistical and evidentiary standard that courts should utilize in determining the existence of racial bloc voting.

Justice Brennan reasoned that the legal concept of polarized voting refers only to the existence of a correlation between the race of voters and the selection of certain candidates and rejects the definition postulated by ap-

180. Id. The four principles stated by Justice Brennan were:

A showing that a significant number of minority group members usually vote for the same candidates . . . [the presence of] white bloc vote that normally will defeat the combined strength of minority support plus white “crossover” votes rises to the level of significant racial bloc voting . . . a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election . . . in a district where elections are shown to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Id.

181. Id. at 2779-80. The Court emphasized that the significance of black electoral success in any given election is less important than a history of “sustained success” of black voters over a period of several elections. In reversing the district court’s finding of vote dilution in House District 23, the Court did so on the basis of minority electoral success over the past six elections that have resulted in proportional representation. The Court viewed the proportional representation as inconsistent with a section 2 violation. Id.

182. Id.

183. Id. at 2772-80.

184. Id. at 2772-73.
pelleants, that racially polarized voting as a matter of law must only refer to voting patterns in which the principle cause is race.\textsuperscript{185} However, only a plurality of the Justices joined in this part of Justice Brennan's opinion, which undermined the authoritativeness of both the definition of racial bloc voting and Justice Brennan's delineation of the proper evidentiary standard to be utilized by a court in judging the presence of legally significant racially polarized voting.\textsuperscript{186}

In rejecting the appellant's definition of racially polarized voting, the plurality interpreted the legislative history to indicate that Congress intended that a section 2 inquiry should not focus on intent or causation, but rather, on results.\textsuperscript{187} Therefore, it is inappropriate to aim the investigation of minority voting patterns at the reasons behind minority voting behavior.\textsuperscript{188} Instead, a party only must establish that a degree of correlation exists between the voters' race and the election of certain candidates.\textsuperscript{189} The plurality further objected to the argument that the race of a voter should be the primary determinant of voter behavior without consideration of other socio-economic factors. The plurality stated that this argument substantially ignores the key fact that insular racial and ethnic groups often have shared socio-economic characteristics.\textsuperscript{190}

\begin{itemize}
\item \textsuperscript{185} Id. Central to this dispute is whether in determining the extent of racial bloc voting, a court should utilize a bivariate statistical analysis or multiple regression analysis. The debate about the use of the statistical standard appeared in earlier vote dilution cases. \textit{See supra} note 137. In \textit{Opelika}, the majority rejected the use of a statistical analysis calculation known as $R^2$ coefficient (bivariate statistical analysis). This type of analysis compares the percentage of the vote in a specific precinct for a minority candidate to the percentage of minority group voters registered in that precinct. The \textit{Opelika} court's objection to the use of $R^2$ coefficient analysis is that it focuses the analysis on the one factor of race. In contrast, the \textit{Opelika} court preferred the use of a multiple regression analysis because it takes into account and tests the relative importance of a variety of factors, such as age, religion, socio-economic status, education, and political party affiliation. Essentially, in analyzing voting patterns, bivariate statistical analysis does not focus on whether race was the primary or sole cause of voter support. Instead it demonstrates that there is a correlation between the race of a voter and the amount of support received by a particular candidate. Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473, 1481-82 (1984).
\item \textsuperscript{186} \textit{Gingles}, 106 S. Ct. at 2772-79.
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. at 2773.
\item \textsuperscript{189} Id.
\item \textsuperscript{190} Id. at 2775. According to the plurality, this definition would also run directly contrary to the legislative purpose outlined in the Senate Report, that instructs courts to make searching inquiries into the lingering effects of past discrimination on the minorities' access to the political process. In addition, the plurality noted that the imposition of the standard required by multiple regression analysis would in effect make it virtually impossible for minority voters to establish the existence of racially polarized voting even if both racial groups engaged in bloc voting to a large degree. Id.

Thus, the plurality repudiated the earlier line of reasoning first adopted by the Fifth Circuit
In his concurrence, Justice White disagreed with the plurality's analysis that the race of the voter is the crucial factor in identifying racially polarized voting and that the race of the candidate is irrelevant. Justice White's primary objection to the plurality's reasoning was that he viewed it as "interest group politics" rather than protecting against racial discrimination. He argued that if courts utilized the test offered by the plurality, focusing solely on the race of the voter, then a finding of racially polarized voting would result whenever the majority of white voters voted for different candidates than minority voters. Thus, Justice White concluded that a finding of racially polarized voting could theoretically occur whenever there was a divergence in voting patterns between whites and minority voters even if the motivating factor was not race. He argued, therefore, that the test is both inconsistent with congressional intent and contrary to the holding in *Whitcomb v. Chavis* because it failed to take into account the variety of other factors that may influence voting behavior.

C. The Challenge of Proportional Representation

Agreeing only with the result of the Court in *Gingles*, in a separate concurrence Justice O'Connor strongly objected to the majority's new three-part test for vote dilution. In addition, she opposed the plurality's analysis of the correct statistical standard to be used to evaluate racial bloc voting.

The basis for Justice O'Connor's objection to the majority's analysis was two-fold. First, she rejected the majority's definition of minority voting strength. Second, she argued that the Court's three-part test ignores the totality of the circumstances analysis developed in *Whitcomb*, *White*, and *Lubbock* and later expanded in *Opelika* that had rejected the use of bivariate analysis. *Id.* at 2773 & n.32. This line of reasoning, as developed in *Opelika*, usually resulted in the inability of plaintiffs to establish significant racial bloc voting and therefore they could not prevail in their vote dilution challenge. The courts justified this position on the basis that they characterized the bivariate analysis as not sufficiently analyzing any of the other factors besides race that may have an impact on voting patterns.

*But cf.* Justice O'Connor's opinion. *Id.* at 2792-93. Justice O'Connor suggests that the proper statistical analysis for judging the overall claim of vote dilution would not necessarily be limited to the exclusive use of a bivariate analysis. In addition, she suggests that although a multivariate analysis would probably not be appropriate to determine the degree of racial polarization, some evidence of other factors that contribute to divergent racial group voting patterns could be considered. *Id.* Justice O'Connor, does not, however, elaborate upon what specific weight these factors would have in evaluating the vote dilution claims.

191. *Id.* at 2783-84.
192. *Id.* at 2784.
193. *Id.; see supra* notes 48, 58, and accompanying text.
195. *Id.* at 2792-93.
196. *Id.* at 2787-91.
Zimmer, upon which Congress based the results test of section 2.\textsuperscript{197} According to Justice O'Connor, by combining its definition of minority voting strength with the three-part test for vote dilution, the majority has in effect created the "right to a form of proportional representation" for certain minority groups, thereby ignoring "the balance struck by Congress in amending section 2."\textsuperscript{198}

Justice O'Connor argued that the majority's analysis of minority voting strength emphasizes only the ability of minorities to elect their preferred candidates.\textsuperscript{199} She objected to this definition because it ignores any reference to the other aspects of political influence that may be available to a particular ethnic or racial group.\textsuperscript{200} She further reasoned that the majority has adopted a definition of minority voting strength that focuses solely on the amount of predicted minority success in an election and calculates the degree of dilution based upon the maximum feasible voting strength. Justice O'Connor concluded that, in essence, this would result in a mandatory finding of vote dilution in violation of section 2, unless the minority's preferred candidates were elected in rough proportion to the minority population.\textsuperscript{201}

Although the third prong of the majority's test for vote dilution requires plaintiffs to produce evidence of racial bloc voting, Justice O'Connor argued that this actually places no additional burden upon the plaintiffs beyond proving that the minority group is significantly large and geographically compact enough to constitute a majority in a single member district, that the group is politically cohesive,\textsuperscript{202} and that it fails to elect its preferred candidate. Justice O'Connor reasoned that the majority's definition of significant racial bloc voting, "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes,"\textsuperscript{203} translates to nothing more than determining racial bloc voting by the degree of minority success at the polls.\textsuperscript{204} According to Justice O'Connor, the majority has established electoral success as the "linchpin"\textsuperscript{205} of a vote dilution claim and has made it unnecessary for plaintiffs to establish any of the other factors outlined by the Fifth Circuit in Zimmer and adopted by Congress in the

\begin{footnotesize}
\begin{enumerate}
\item 197. \textit{Id.} at 2784, 2791-92.
\item 198. \textit{Id.} at 2784-85.
\item 199. \textit{Id.} at 2785-86.
\item 200. \textit{Id.} at 2786.
\item 201. \textit{Id.} at 2788.
\item 202. \textit{Id.} Justice O'Connor, in reaching this conclusion, ignores the significance of the principles outlined by Justice Brennan in determining racial polarization and oversimplifies the majority's analysis. \textit{Id.} at 2769-70. See discussion \textit{supra} notes 177-80 and accompanying text.
\item 203. \textit{Gingles}, 106 S. Ct. at 2769-70.
\item 204. \textit{Id.} at 2786-89.
\item 205. \textit{Id.} at 2789.
\end{enumerate}
\end{footnotesize}
In contrast to what she characterized as the majority's approach, Justice O'Connor advocated adherence to the analysis outlined in *Whitcomb, White,* and *Zimmer.* She emphasized that the Court should not just consider electoral success, but rather all relevant factors bearing on the issue of whether a minority group has less opportunity than others to fully participate in the political process. Justice O'Connor reasoned that the majority has gone beyond merely sustaining the district court's measurement of undiluted minority voting strength as reasonable and consistent with section 2 and instead has unnecessarily created a broad, new, and uniform standard for judging vote dilution claims. In contrast to the majority's use of the three-part test for vote dilution cases, which narrows the focus of section 2 inquiry, Justice O'Connor emphasized that all of the factors listed in the Senate Report could potentially be of probative value. Accordingly, she would prefer that instead of using the three-part test to assess the one crucial factor of racial polarization, courts weigh all of the factors and consider, on a case-by-case basis, which factor is more important in each circumstance. She further reasoned that when Congress amended section 2 it did not intend that a single, universally applicable standard for measuring vote dilution be created, especially if this standard did not take into account both local conditions and the extent of the lingering effects of past discrimination against minorities in the community.

Addressing the plurality opinion, Justice O'Connor disagreed with the relevance of the reasons for divergent voting patterns on the overall vote dilution inquiry. According to Justice O'Connor, in some circumstances the consideration of all of the evidence concerning voting preferences, in addition to the statistical evidence of racial voting patterns would be crucial to determining the degree of racial bloc voting. She noted that the Senate Report clearly outlines at least one factor, the lack of responsiveness of elected officials to minorities' needs, as having probative value in section 2 cases.

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206. *Id.* at 2788-89.
207. *Id.* at 2790-92.
208. *Id.* at 2792.
209. *Id.* at 2789.
210. *Id.* at 2789-91.
211. *Id.* at 2789-93.
212. *Id.* at 2792-93.
213. *Id.* at 2793.
214. *Id.* Justice O'Connor, however, fails to note that responsiveness was one of the factors that the Senate Report characterized as being of lesser probative value. *See supra* note 90 and accompanying text.
D. Assessment and Future Impact of Thornburg v. Gingles

Justice O'Connor challenged the Court's test for vote dilution as leaning too far in the direction of proportional representation. However, she erroneously characterized minority electoral success as the majority's “linchpin” of the three-part test. She also misinterpreted the emphasis of the majority's analysis in charging that it does not comply with the principles set down in Whitcomb, White, and Zimmer.

In reaching these conclusions, Justice O'Connor misconstrued the importance placed by the majority on racial polarization in their analysis of vote dilution claims. She charged the majority with creating a definition of racial bloc voting that in effect is no more than an assessment of the minority group's success at the polls. This conclusion ignores the four principles outlined by Justice Brennan to guide the courts in a determination of significant racial polarization which assess more than just electoral success. The four principles emphasize the degree of voting along racial lines that has occurred in a community over a period of several years. In order to make this determination courts are urged to make inquiries into the circumstances and electoral practices of the community.

The majority's rationale for creating the new three-part test for analyzing vote dilution claims is premised on the idea that racial bloc voting is the most crucial factor in section 2 litigation. This line of reasoning was first developed in the Fifth and Eleventh Circuits in Marengo and Escambia. It was also re-emphasized by Congress in the legislative history accompanying the section 2 amendment. The reason for making racial bloc voting the key to vote dilution claims is to narrow the section 2 inquiry. Without this initial showing that voting is polarized along racial lines, all of the other factors listed by the Senate Report may be given varying degrees of emphasis by different courts.

Contrary to Justice O'Connor's interpretation, Justice Brennan's analysis adhered to both Congress' legislative intent and the Court's reasoning in Whitcomb and White. Justice Brennan emphasized that proportional representation alone would not establish a section 2 claim. He also acknowledged the basic premise of Whitcomb and White, that at-large voting districts are not per se unconstitutional, but that a plaintiff has the burden of demonstrating, based upon the totality of the circumstances, that the at-

216. Id. at 2786-87.
217. Id. at 2769-70.
218. Id. at 2769.
219. See supra notes 168-69 and accompanying text.
220. 106 S. Ct. at 2769-70.
large system operates to diminish the minorities' voting strength. Justice Brennan concluded that under the results test the court does not assume the existence of racial bloc voting, but instead plaintiffs must prove it.\textsuperscript{221} Justice Brennan emphasized that the courts, in analyzing the degree of racial bloc voting, are not to interpret the test as a set, doctrinal principle, but rather are to perform discrete inquiries into the voting practices in the community.\textsuperscript{222} In applying the test to the five contested districts in the case, the Court viewed the voting patterns over several elections in order to determine the degree of racial polarization.\textsuperscript{223}

Justice O'Connor, on the other hand, argued that the majority's definition of minority voting strength ignores other aspects of political influence available to minority groups, and thus establishes electoral success as the guidepost of a vote dilution claim.\textsuperscript{224} She charged the Court with creating a standard that makes it unnecessary for the plaintiffs to establish any of the other factors outlined by the Fifth Circuit in \textit{Zimmer}.\textsuperscript{225} However, by strictly adhering to the guidelines outlined in \textit{Zimmer}, Justice O'Connor is, in fact, ignoring the re-evaluation of the \textit{Zimmer}-factors, by the legislature and its intent to establish a test based upon results rather than intent. Essentially Justice O'Connor is arguing for an evaluation of vote dilution cases that would allow the whole panoply of factors outlined in \textit{Zimmer} to be considered, without creating a structured hierarchy within which to evaluate them. This approach fails to address the essential issue of whether the electoral process results in the ability of minority groups to elect candidates of their choice.

Justice O'Connor urged adoption of a form of analysis that emphasizes other realms of political influence open to minorities outside of the electoral system.\textsuperscript{226} But, such an analysis does not reach the essence of a vote dilution claim. Many of the \textit{Zimmer} factors such as tenuousness and responsiveness are not, as Congress indicated in the Senate Report,\textsuperscript{227} necessarily dispositive of a vote dilution claim. In contrast, by narrowing the threshold inquiry to the factors of racial bloc voting and unusually large voting districts, the Court insures that other factors are not given disproportionate weight. The other factors outlined in \textit{Zimmer}, although indicative perhaps of systems that unfairly dilute minority voting strength, should not necessarily result in

\textsuperscript{221} \textit{Id.} at 2764.
\textsuperscript{222} \textit{Id.} at 2769-72.
\textsuperscript{223} \textit{Id.}
\textsuperscript{224} \textit{Id.} at 2786-87.
\textsuperscript{225} \textit{Id.} at 2788-89.
\textsuperscript{226} \textit{Id.} at 2791-92.
\textsuperscript{227} \textit{S. REP. NO. 417, 97th Cong., 2d Sess. 28-29, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206-07. See supra note 90.}
a finding of a section 2 violation.\textsuperscript{228}

Despite the Gingles Court's progress in clarifying many aspects of section 2 claims, the Court failed to provide necessary guidelines to lower courts on the key element of racial bloc voting. Justice Brennan, in creating the three-part test for judging vote dilution, also established racial bloc voting as the key element of a section 2 violation.\textsuperscript{229} Because only three other Justices agreed with Justice Brennan's\textsuperscript{230} definition of racial polarization and his outline of the legal analysis to be utilized in judging the existence of racial bloc voting, the Gingles Court failed to provide a definitive interpretation of racial bloc voting. In establishing racial bloc voting as the key element of a section 2 case, but in failing to provide a precise definition of it or an evidentiary standard for proving its presence that was agreed to by a majority of the Court, Justice Brennan succeeded only in creating a new test for lower courts to follow, without providing definitive guidance for its implementation. Thus, Justice White's split from what would have constituted a majority undermines not only the plurality opinion, but to some extent the authoritativeness of the majority opinion as well.

IV. CONCLUSION

In establishing the three-part test for vote dilution, the Supreme Court in Thornburg v. Gingles recognized that Congress intended that although section 2 claims should be based on factors outlined in Zimmer, it also wanted to limit the method of their interpretation of those factors. In creating the three-part test for a section 2 violation, Justice Brennan recognized racial bloc voting as the key element in a vote dilution claim. He also continued to try to balance the tension inherent in a section 2 analysis between assuring minority groups access to the electoral process and not merely granting a right of proportional representation. Recognizing the need to establish guidelines to interpret and assess the variety of factors present in vote dilution cases, Justice Brennan created a narrower test that provides a structure for the flexible analysis of the results test, while still adhering to its essential principles. This test should result in clarification of the relevant principles in vote dilution cases.

However, the Court failed to provide a definitive standard for determining the degree of significant racial bloc voting. The fractured opinions in Gingles undermine the weight of the plurality and to some extent the majority opinions. A majority of the Court joined Justice Brennan's opinion in setting

\textsuperscript{228} Gingles, 106 S. Ct. at 2766 & n.15.
\textsuperscript{229} Id. at 2766-67. See supra note 183 and accompanying text.
\textsuperscript{230} Gingles, 106 S. Ct. at 2758, 2772-75.
down a new test for vote dilution resting primarily on a definition of racial polarization and an inquiry into its presence or absence. But the Court failed to reach a consensus on the latter point. Consequently, no clear standards were provided to lower courts to assess the degree to which racial polarization, the key element of its new vote dilution test, is present and its effect. As a result, although Gingles represents a step forward because it has successfully narrowed the initial focus of inquiry, it falls short in providing a precise evidentiary standard by which lower courts can judge section 2 violations.

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