Voting Rights Act VI

OA 9439

Uhlmann, Michael M.: Files

Voting Rights Act

Q. There were reports of strong disagreement within the Administration on whether to extend the Voting Rights Act. A number of reports had you and Mr. Meese favoring acceptance of the House bill, while the Attorney General was said to be strongly opposed to such action. What was the situation?

A. Of course there were disagreements. There ususally are differences of opinion on any issue of importance. I get a little suspicious myself when there appears to be too much unanimity of opinion on anything.

To respond to your particular question, the President was informed of the full range of options. He met with congressional leaders and interested outsiders in addition to receiving input from various members of the Administration. The Voting Rights Act was fully aired at a Cabinet meeting last week, and the President reached his decision two days later after a final round of consultations.

I should make clear, however, that these disagreements within the Administration were primarily over matters of detail. What was never in issue was whether the Act's special provisions should be extended. There was widespread agreement on that point from the outset, which the president made clear in a number of eariler statements on the subject.

What was in issue was the best way of doing so, and as the President indicated in his statement on Friday, there are questions of legal detail on which reasonable people can disagree. The President does not want those questions of detail to interfere in any way with this Administration's commitment to guaranteeing the right to vote regardless of race or color.

Q. But it was reported that the Attorney General was angry over the proposed statement and insisted on an eleventh-hour meeting with the President on Friday. It was that meeting, apparently, which caused a cancellation of a scheduled news conference and led to a change in the President's final decision.

A. Again, I want to emphasize how little disagreement there was over any matter of principle. There were some last-minute changes in wording, but none of these had anything to do with the most important part of the President's decision -- namely, his strong commitment to extending the special provisions of the Act.

The Attorney General's reservations were of a technical and legal character. As the Administration's chief law enforcement officer, he has to be concerned over legal details that the rest of us sometimes tend to overlook. He was particularly concerned that some of the changes proposed by the House bill might have far-reaching effects beyond the issue of voting rights itself.

Q. Can you be more specific?

A. He was concerned that the House bill might open every state in the Union to an accusation that it had violated the Act simply because a certain number of minority office-holders were not elected -- without any need to demonstrate a discriminatory purpose.

The House bill is somewhat ambiguous on this point, but some of its sponsors were pretty clear about their intent to go after multi-member and at-large electoral systems all across the nation, on the grounds that they "dilute" minority voting strength. When you realize that literally thousands of counties and municipalities throughout the nation elect representatives in this manner -- and the fact that over half of all state legislators are elected in the same manner -- you begin to get a sense of what concerned the Attorney General.

Q. But civil rights leaders argue that current law imposes an impossible test -- i.e., proof of intent. In opposing the "effects" test added by the House, aren't you really "gutting" the Act?

A. Absolutely not. The Act as it stands is perfectly consistent with constitutional standards enunciated by the Supreme Court under the 14th and 15th Amendments.

What the addition of an "effects" test would do is to make a lawyer's job of bringing a complaint under the Act easier. But it also does a lot more than that, as I indicated earlier.

It should be pointed out that "intent" is not all that difficult to prove. We do it everyday in criminal cases, where intent has to be proved beyond a reasonable doubt. You don't have "to climb into" someone's mind to find invidious intent, as some would have you believe. You don't have to find "a smoking gun". The Supreme Court has made clear that intent may be found after a review of the circumstances surrounding the alleged violation.

Where there has been a violation of voting rights on account of race, this Administration is not going to be deterred by clever artifice or the failure to find "a smoking gun" in racial cases anymore than we are in criminal cases. Racial

discrimination in voting is simply not going to be tolerated by President Reagan.

Civil Rights Generally

Q. There is a widespread perception among blacks and other minorities that the Administration is cutting back in civil rights enforcement across a broad front -- from affirmative action to school desegregation and, just the other day, to voting rights. How do you reply to such charges?

A. Such charges are not based on fact. Both the President and the Attorney General have indicated on a number of occasions that there will be no slacking off in this Administration's enforcement of basic civil rights. The nation's commitment to equal opportunity in jobs, in education, and in voting regardless of race or sex remains firm and undiluted.

In the voting rights area, for example, the Department of Justice has entered major objections to proposed changes submitted by a number of jurisdictions covered by the Voting Rights Act. Corrective action is taking place because of it.

The Department has filed actions claiming employment discrimination by the New Hampshire State Police, voting discrimination in Alabama, and discrimination in public facilities in the City of Chicago. There are other cases being vigorously pursued having to do with school desegregation and prison conditions.

There is no slacking off at all. The business of the Department goes on day-in and day-out to enforce the laws, including civil rights laws. Only a few of these cases ever reach the headlines, which may be part of the problem.

Such controversy as there is seems to be concerned mostly with the question of remedies -- that is, with the question of how best to deal with a violation once you have proved it. That is a point on which reasonable people equally dedicated to civil rights can and do disagree.

Consistent with the overwhelming majority of the American people -- including blacks, I should add - we oppose bussing for the sake of achieving racial balance in the schools. But that does not mean we will be blind or indifferent to state-imposed segregation.

Similarly, the President has for many years indicated his opposition to the imposition of quotas in hiring. But to oppose quotas is not the same thing as opposing affirmative action.

There has been a tendency in recent civil rights enforcement, we think, to focus on processes rather than on results. In

the past decade, for example, bussing seems to have become an end in itself. Much the same has occurred with respecyt to "goals and time-tables" in hiring. What we're trying to do is to look at the purpose for these devices -- and the purpose is, quite simply, the achievement of equal opportunity regardless of race or sex.

Ultimately, we are trying to reach the situation where neither special benefits nor special burdens will be imposed by government because of one's race or sex. That is a noble goal, and we intend to pursue it.

Affirmative Action

Q. There appears to be much dispute within the Administration on the issue of affirmative action. The Attorney General and the Assistant Attorney General for Civil Rights, Brad Reynolds, seem to be in favor of cutting back, but they have been opposed in public by Secretary Donovan and by Clay Smith, Acting Chairman of the EEOC. What is the real policy of the Adminstration?

A. There is no dispute over the achievement of our ultimate goal, namely, a truly color-blind society. That means a society in which everyonge will be given an equal opportunity to get ahead, one in which men and women will be judged on their merits.

There will inevitably be disagreements over how best to achieve that goal, and these are for the most part minor. The Depqrtment of Justice has indicated that in its enforcement of Title VII it will seek remedial relief for actual victims of discrimination, but will not extend relief to those who have suffered no discrimination, nor impose burdens on those who have engaged in no discriminatory conduct whatsoever.

The Department of Labor enforces a somewhat different set of laws, which deal with government contractors. Those regulations as they now stand mandate affirmative action hiring with goals and timetables. In a number of cases in prior administrations those regulations have been enforced as if they required quotas. It is that interpretation we are seeking to revise, and the Department of Labor is in full agreement. We ill continue to require affirmative action, but we will not impose quotas for hiring. We have got to get away from this idea of attaching government benefits or burdens to membership in a race. Rights under our constitution are individual; they should not depend on what race one belongs to.

97TH CONGRESS
2d Session
COMMITTEE PRINT

VOTING RIGHTS ACT

REPORT

together with
ADDITIONAL VIEWS

OF THE

SUBCOMMITTEE ON THE CONSTITUTION

TO THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

S. 1992

APRIL 1982

Printed for the use of the Committee on the Judiciary

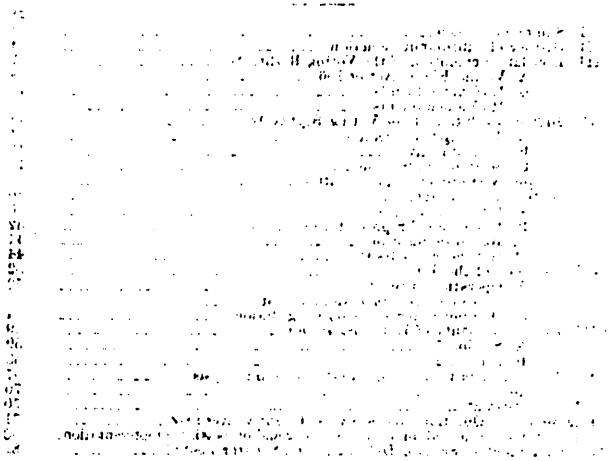
U.S. GOVERNMENT PRINTING OFFICE
91-862 O WASHINGTON: 1982

PREFACE

This report of the Subcommittee on the Constitution has been prepared because of the importance of the issues involved in current proposals to change the Voting Rights Act of 1965 and the far-reaching constitutional and public policy implications of these proposed changes.

ORRIN G. HATCH
Chairman, Subcommittee on the Constitution.

CONTENTS



VOTING RIGHTS ACT

The Committee on the Judiciary's Subcommittee on the Constitution, to which was referred S. 1992 to amend the Voting Rights Act of 1965, to extend certain provisions of the Act, having considered the same, reports favorably thereon with amendments and recommends to the full Committee that the bill as amended do pass. The bill would extend intact the Voting Rights Act for another period of ten years.

I. Summary of Issue

The forthcoming debate in the United States Senate on the Voting Rights Act will focus upon one of the most important public policy issues ever to be considered by this body. It is an issue with both profound constitutional implications and profound practical consequences. In summary, the issue is how this Nation will define "civil rights" and "discrimination".

Both in popular parlance and within judicial forums, the concept of racial discrimination has always implied the maltreatment or disparate treatment of individuals because of race or skin color. As the Fifteenth Amendment to the Constitution states, in part:

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

In other words, discrimination has been viewed as a process by which wrongful decisions were made—decisions reached at least in part because of the race or skin color of an individual.

This conception of discrimination has always been reflected in the constitutional decisions of the judicial branch of our Nation. In interpreting the Equal Protection Clause of the Fourteenth Amendment, for example, the Supreme Court has observed:

> A law, neutral on its face and serving ends otherwise within the power of government to pursue, is not invalid under the Equal Protection Clause simply because it may affect a greater proportion of one race than of another.[1]

In other words, as the Court subsequently observed:

> Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause . . . official action will not be held unconstitutional solely because it results in a racially disproportionate impact.[2]

Proof of discriminatory intent or purpose is the essence of a civil rights violation for the simple reason that there has never been an

[1] *Washington v. Davis*, 426 U.S. 229, 242 (1976).
[2] *Village of Arlington Heights v. Metropolitan Housing Development Authority*, 429 U.S. 252, 264–5 (1977).

obligation upon either public or private entities to conduct their affairs in a manner designed to ensure racial balance or proportional representation by minorities in employment, housing, education, voting, and the like. The traditional obligation under civil rights laws has been to conduct public or private affairs in a manner that does not involve disparate treatment of individuals *because* of race or skin color.

What is being proposed in the context of the present Voting Rights Act debate is that Congress alter this traditional standard for identifying discrimination, i.e., the "intent" standard, and substitute a new "results" standard. Rather than focusing upon the process of discrimination, the new standard would focus upon electoral results or outcome. The proposed amendment would initiate a landmark transformation in the principal goals and objectives of the Voting Rights Act. It should be understood at the outset that proponents of the results test are no longer talking about "discrimination"; they are simply talking about "disparate impact." These concepts have little to do with one another.

Rather than simply focusing upon those public actions that obstructed or interfered with the access of minorities to the registration and voting processes, the proposed results test would focus upon whether or not minorities were successful in being elected to office. Discrimination would be identified on the basis of whether minorities were proportionately represented (to their population) on elected legislative bodies rather than upon the question of whether minorities had been denied access to registration and the ballot because of their race or skin color.

Despite objections to the description of the results test as one focused upon proportional representation for minorities, there is no other logical meaning to the new test. To speak of "discriminatory results" is to speak purely and simply of racial balance and racial quotas. The premise of the results test is that any disparity between minority population and minority representation evidences discrimination. As the Supreme Court observed in the recent *City of Mobile* v. *Bolden* decision:

> The theory of the dissenting opinion [proposing a "results" test] appears to be that every political group or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its numbers . . . The Equal Protection Clause does not require proportional representation as an imperative of political organization.[3]

Apart from the fact that the results test imports into the Voting Rights Act a theory of discrimination that is inconsistent with the traditional understanding of discrimination, the public policy impact of the new test would be far-reaching. Under the results test, Federal courts will be obliged to dismantle countless systems of State and local Government that are not designed to achieve proportional representation. This is precisely what the plaintiffs attempted to secure in the *Mobile* case and, in fact, were successful in achieving in the lower Federal courts. Despite the fact that there was no proof of discrimi-

[3] 446 U.S. 55, 75 (1980).

natory purpose in the establishment of the electoral (at-large) system in Mobile and despite the fact that there were clear and legitimate nondiscriminatory purposes to such a system, the lower court in Mobile ordered a total revampment of the city's municipal system because it had not achieved proportional representation.

The at-large system of election is the principal immediate target of proponents of the results test.[4] Despite repeated challenges to the propriety of at-large systems, the Supreme Court has consistently rejected the notion that the at-large system of election is inherently discriminatory toward minorities.[5] The court in *Mobile* has observed that literally thousands of municipalities and other local governmental units throughout the Nation have adopted an at-large system.[6]

To establish a results test in section 2 would be to place at-large systems in constitutional jeopardy throughout the Nation, particularly if jurisdictions with such electoral systems contained significant numbers of minorities and lacked proportional representation on their elected representative councils or legislatures. Legislative bodies generally that lacked proportional representation of significant minority groups would be subject to close scrutiny by the Federal judiciary, under the proposed results test. To the extent that electoral results become the focus of discrimination analysis, and indeed to conceive how proportional representation by race can avoid being define the existence or nonexistence of discrimination, it is difficult established in the law as the standard for identifying discrimination and, equally important, as the standard for ascertaining the effectiveness of judicial civil rights remedies.

Beyond the fact, however, that the results test, in the view of the subcommittee, will lead to a major transformation in the idea of discrimination as well as to a sharp enhancement of the role of the Federal courts in the electoral process, the results test is an inappropriate test for identifying discrimination for several other reasons. First, the results test will substitute, in the place of a clear and well-

[4] One prominent voting rights litigator, Mr. Armand Derfner of the Joint Center for Political Studies, and formerly of the Lawyers Committee for Civil Rights Under Law, observed during the 1975 hearings on the Voting Rights Act,

> And I would hope that maybe ten years from now we would have learned and progressed enough to say that for some of the things that Section 5 has done we no longer need it while for other things it might be time to put in permanent bans. For example, we might want to put in permanent bans that bar at-large elections not only in the covered states but perhaps in the rest of the country as well. Hearings Before the House Subcommittee on Constitutional and Civil Rights on the Voting Rights Act Extension, March 17, 1975 at 682.

Professor O Rourke has observed:

> If the revision of Section 2 is not intended to invalidate nationwide at-large elections in every city with a significant minority population, there is nevertheless nothing in the language of Section 2 to foreclose this development. Statement submitted to the Subcommittee on the Constitution by Timothy O'Rourke, Professor, University of Virginia, March 3, 1982.

[5] See, e.g., *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *White* v. *Regester*, 412 U.S. 755 (1973); *Whitcomb* v. *Chavis*, 403 U.S. 124 (1971).

[6] 446 U.S. at 60. Approximately 12,000, or two-thirds of the 18,000 municipalities in the Nation, have adopted at-large systems of election. The Municipal Yearbook, International City Managers Association (1972). In addition, of the fifty largest school boards in the United States, approximately two-thirds of those use at-large election systems as well. *Black Voters* v. *Mullenaugh*, 685 F.2d 1, 2 (1st Cir. 1977). For general discussion of various methods of municipal election and the arguments for each, see E. Banfield & J. Wilson, City Politics 161 (1963); Jewell, Local Systems of Representation; Political Consequences and Judicial Choices, 56 (fee. Wash. L.Rev. 790 (1968); M. Seasongood, Local Government in the United States (1933). The growth of the at-large electoral system occurred during the early decades of the 20th century as a Progressive-inspired reform in response to the corruption that had often been characteristic of municipal ward systems. The theory was that more responsible municipal actions would be taken if each member of the city council was responsible to the entire electorate rather than solely to his own ward or district.

understood rule of law that has developed under the intent standard, a standard that is highly uncertain and confusing at best. The rule of judges will effectively replace the rule of law that, up to now, has existed in the area of voting rights. There is no guidance offered to either the courts or to individual communities by the results test as to which electoral structures and arrangements are valid and which are invalid. Given the lack of proportional representation and the existence of any one of a countless number of "objective factors of discrimination," it is difficult to see how a prima facie case (if not an irrebuttable case) of discrimination would not be established.

Second, the results test is objectionable because it would move this Nation in the direction of increasingly overt policies of race-consciousness. This would mark a sharp departure from the constitutional development of this Nation since the Reconstruction and since the classic dissent by the elder Justice Harlan in *Plessy* v. *Ferguson* in 1897 calling for a "colorblind" Constitution.[1] This would mark a sharp retreat from the notions of discrimination established as the law of our land in *Brown* v. *Board of Education*, the Civil Rights Act of 1964, and indeed the Voting Rights Act itself.

If the results test is incorporated into the Voting Rights Act—and then quite likely into other civil rights statutes as a result— the question of race will intrude constantly into decisions relating to the voting and electoral process. Racial gerrymandering and racial bloc voting will become normal occurrences, given legal and constitutional recognition and sanction by the Voting Rights Act. Increasing, rather than decreasing, focus upon race and ethnicity will take place in the course of otherwise routine voting and electoral decisions.

The Voting Rights Act has proven the most successful civil rights statute in the history of the Nation because it has reflected the overwhelming consensus in this Nation that the most fundamental civil right of all citizens—the right to vote—must be preserved at whatever cost and through whatever commitment required of the Federal Government. Proponents of the House measure would jeopardize this consensus by effecting a radical transformation in the Voting Rights Act from one designed to promote equal access to registration and the ballot box into one designed to ensure equality of outcome and equality of results. It is not a subtle transformation; rather it is one that would result in a total retreat from the original objective of the Voting Rights Act that considerations of race and ethnicity would someday be irrelevant in the electoral process. Under the House-proposed amendments, there would be nothing more important.

II. History of Subcommittee Action

The Subcommittee on the Constitution of the Senate Committee on the Judiciary had referred to it during the 97th Congress five bills relating to the Voting Rights Act: S. 53 (introduced by Senator Hayakawa), S. 895 (introduced by Senator Mathias and Senator Kennedy), S. 1761 (introduced by Senator Cochran), S. 1975 (introduced by Senator Grassley), and S. 1992 (introduced by Senator Mathias

[1] *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1897).

and Senator Kennedy). The latter bill was identical to legislation, H.R. 3112, approved by the House of Representatives on October 5, 1981.

As the first priority of the subcommittee during the 2d session of the 97th Congress, the subcommittee held nine days of hearings on the Voting Rights Act from January 27, 1982 through March 1, 1982. Appearing before the subcommittee were the following witnesses: On January 27, the subcommittee took testimony from William French Smith, the Attorney General of the United States; Professor Walter Berns, American Enterprise Institute; Benjamin Hooks, Executive Director, NAACP; Vilma Martinez, Executive Director, Mexican American Legal Defense and Education Fund; Ruth Hinerfeld, President, League of Women Voters; and U.S. Senator Charles Mathias of Maryland.

On January 28, the Subcommittee heard U.S. Senator Thad Cochran of Mississippi; Laughlin McDonald, Director of the Southern Regional Office of the American Civil Liberties Union; U.S. Representative Henry Hyde of Illinois; Professor Barry Gross, City College of New York; Henry Marsh III, the Mayor of Richmond, Virginia; U.S. Representative Thomas Bliley of Virginia; and Professor Edward Erler, National Humanities Center.

On February 1, the subcommittee heard U.S. Representative Caldwell Butler of Virginia; Professor Susan McManus, University of Houston; Joaquin Avila, Associate Counsel of the Mexican-American Legal Defense and Education Fund; Steven Suitts, Executive Director of the Southern Regional Council; and David Walbert, Attorney and former Professor at Emory University.

On February 2, the subcommittee took testimony from Professor John Bunzel, Hoover Institution at Stanford University; State Senator Henry Kirksey of Mississippi; Professor Michael Levin, City College of New York; Abigail Turner, Attorney; and Armand Derfner, Joint Center for Political Studies.

On February 4, the subcommittee heard U.S. Senator S. I. Hayakawa of California; Governor William Clements of Texas; U.S. Representative James Sensenbrenner of Wisconsin; E. Freeman Leverett, Attorney; Professor Norman Dorsen, New York University, representing the American Civil Liberties Union; Joseph Rauh, Leadership Conference on Civil Rights; and Rolando Rios, Legal Director of the Southwest Voter Registration Project.

On February 11, the subcommittee heard Robert Brinson, Attorney; Thomas McCain, Chairman, Democratic Party of Edgefield County, South Carolina; Arthur Flemming, Chairman of the U.S. Commission on Civil Rights; and Frank Parker, Director of the Voting Rights Project, Lawyers' Committee for Civil Rights under Law.

On February 12, the subcommittee heard Professor Henry Abraham, University of Virginia; Julius Chambers, President, NAACP Legal Defense Fund; Professor Donald Horowitz, Duke University; Professor James Blumstein, Vanderbilt University; and Professor Drew Days, Yale University.

On February 25, the subcommittee heard Irving Younger, Attorney; Professor Archibald Cox, Harvard University, representing Common Cause; Professor George Cochran, University of Mississippi;

Nathan Dershowitz, American Jewish Congress; David Brink, President, American Bar Association; Arnoldo Torres, Executive Director, League of United Latin American Citizens; and Charles Coleman, Attorney.

On March 1, the subcommittee heard from U.S. Representative Harold Washington of Illinois; U.S. Representative John Conyers of Michigan; U.S. Representative Walter Fauntroy of the District of Columbia; and William Bradford Reynolds, Assistant Attorney General of the United States for Civil Rights.

In addition, the subcommittee received a large number of written statements from other interested individuals and organizations that will become part of the permanent record of these hearings. Senator Orrin G. Hatch of Utah, Chairman of the Subcommittee on the Constitution, chaired the hearings of the subcommittee.

On March 24, 1982, the Subcommittee on the Constitution met in executive session to consider legislation to extend the Voting Rights Act. S. 1992, introduced by Senators Mathias and Kennedy, was reported out of subcommittee by a unanimous 5–0 vote following the adoption of a group of five amendments offered en bloc by Senator Grassley. The amendments were as follows:

Amendment 1

Strike everything in Section 1 from page 1, line 3 through page 8, line 14 and insert in lieu thereof, "That this Act may be cited as the "Voting Rights Act Amendments of 1982."

Amendment 2

Strike everything in Section 2 from page 8, line 15 through page 8, line 22 and insert in lieu thereof—

> SEC. 2. Section 4(a) of the Voting Rights Act of 1965 is amended by—
>
> (1) striking out "seventeen" each time that it appears and inserting in lieu thereof "twenty-seven"; and
>
> (2) striking out "ten" each time that it appears and inserting in lieu thereof "seventeen".

Amendment 3

Striking everything in Section 4 from page 9, line 1 through page 9, line 7.

Amendment 4

Strike everything in Section 5 from page 9, line 8 through page 9, line 10.

Amendment 5

Strike the description of the bill preceding the enactment clause and substitute in lieu thereof: "To amend the Voting Rights Act of 1965 to extend certain provisions for ten years."

The effect of the amendments was to transform S. 1992 into a straight ten-year extension of the Voting Rights Act, the longest such extension in the Act's history. Voting in favor of final reporting of the bill as amended were Chairman Hatch and Subcommittee Members Thurmond, Grassley, DeConcini, and Leahy (by proxy). Because the House-approved legislation, H.R. 3112, has already been placed

directly upon the Senate calendar contrary to normal parliamentary practice, the subcommittee chose to prepare this report.

III. Legislative Evolution of the Voting Rights Act

The Fifteenth Amendment to the United States Constitution, ratified in 1870, states:

> SEC. 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
>
> SEC. 2. The Congress shall have power to enforce this article by appropriate legislation.

Shortly after ratification, Congress enacted two laws pursuant to its enforcement authority in the Fifteenth Amendment designed to outlaw activities interfering with the voting rights of the newly-freed slaves. The Civil Rights Act of 1870 [8] established Federal penalties for interfering with voting in state and Federal elections for reasons of race or color discrimination while the Anti-Lynching (Ku Klux Klan) Act of 1871 [9] sought to penalize state actions which deprived persons of their civil rights.

Despite these efforts, the progress of blacks in securing the protections of the Fifteenth Amendment was slow and erratic. The use of poll taxes, literacy tests, morals requirements, racial gerrymandering, and outright intimidation and harassment continued largely unchecked until well into the 20th century. It was not until the late 1950's that the Federal Government reiterated its constitutional commitment to equality of voting rights by enacting new enforcement legislation. Between 1957 and 1964, Congress enacted three statutes designed to enhance the ability of the Federal Government to challenge discriminatory election laws and procedures.

In 1957, Congress enacted civil rights legislation [10] which authorized the Attorney General to initiate legal action on behalf of individuals denied the opportunity to register or vote on account of race or color. Most importantly, this enabled the aggrieved registrant or voter to shift the cost of the legal challenge to the Federal Government. In addition, the Civil Rights Act of 1957 established the United States Commission on Civil Rights and provided it with responsibility for investigating and reporting on those procedures and devices used by jurisdictions in a discriminatory manner against racial minorities.

In 1960, Congress again acted to strengthen the national government's commitment to full and fair voting rights through passage of additional legislation.[11] The Civil Rights Act of 1960 went significantly beyond the earlier legislation by requiring the retention by local and state officials of Federal election records for a period of 22 months and authorized the Attorney General to inspect such records at his discretion. It also enabled Federal courts to identify "patterns and practices"

---

[8] Act of May 31, 1870 (16 Stat. 140), amended by Act of February 28, 1871 (16 Stat. 433). The surviving statutes of this period are 18 U.S.C. See 241–2 and 42 U.S.C. Sec. 1971(a), 1983, 1985(3).

[9] Act of April 20, 1871 (17 Stat. 13).

[10] Civil Rights Act of 1957, 71 Stat. 634 (42 U.S.C. 1075).

[11] Civil Rights Act of 1960, 74 Stat. 86 (42 U.S.C. 1971).

of racial voting discrimination and to order on a class basis the registration of qualified persons of that race who had been victims of such a "pattern and practice". The Federal courts were authorized to appoint "voting referees" who would be empowered to enter a jurisdiction and register voters.

Finally, Congress enacted the Civil Rights Act of 1964 [12] which established landmark civil rights reforms in a wide number of areas. Title I of the Act prohibited local election officials from applying to applicants for registration tests or standards different from those that had been administered to those already registered to vote. It also established a presumption of literacy (although rebuttable) for potential registrants who had completed a 6th grade English-speaking school education. In addition, the act established expedited procedures for judicial resolution of voting rights cases.

A. VOTING RIGHTS ACT OF 1965

Despite this renewed commitment by the Federal Government to enforcement of the guarantees of the Fifteenth Amendment, substantial registration and voting disparities along racial lines continued to exist in many jurisdictions. It was finally in response to the incontrovertible evidence of continuing racial voting discrimination that Congress enacted the single most important legislation in the Nation's history relating to voting rights—the Voting Rights Act of 1965.[13]

This Act marked a significant departure from earlier legislative enactments in the same area in establishing primarily, for the first time, an administrative process aimed at eliminating voting discrimination. Earlier legislation had primarily relied upon the judicial process for the resolution of these problems. The major objectives of the new administrative procedures were to ensure expeditious resolution of alleged voting rights difficulties and to avoid the often-cumbersome process of judicial case-by-case decisionmaking.

Perhaps the most important provision of the Voting Rights Act was section 5 which required any state or political subdivision covered under a formula prescribed in section 4 of the Act (designed to identify jurisdictions with a history of voting discrimination) to "preclear" any changes in voting laws or procedures with the United States Justice Department. No such change could take effect without the permission of the Department. Under section 5, the political subdivision has the responsibility of showing that the proposed change "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color."

"Covered" jurisdictions, i.e. those required to preclear with the Justice Department, included all states or political subdivisions which met the two-part test of section 4:

> (1) Such a state or subdivision must have employed a "test or device" as of November 1, 1964. Such a "test or device" was defined to include literacy tests, tests of morals or character, or tests requiring educational achievement or knowledge of some particular subject; *and*

[12] Civil Rights Act of 1964, 78 Stat. 241 (42 U.S.C. 2000a).
[13] Voting Rights Act of 1965, 79 Stat. 437 (42 U.S.C. 1971, 1973 et. seq.).

> (2) Such a state or political subdivision must have had either a voter registration rate of less than 50 percent of age-eligible citizens on that date, or a voter turn-out rate of less than 50 percent during the 1964 election.

No part of the trigger formula in section 4 referred to racial or color distinctions among either registrants or voters, or to racial or color populations within a jurisdiction.

Jurisdictions covered by the trigger formula in the 1965 Act included the entire States of Alabama, Georgia, Louisiana, Mississippi, South Carolina, and Virginia, and counties in North Carolina, Idaho, Arizona, Alaska, and Hawaii.

Covered jurisdictions were to be eligible for "bail-out" (or release) from coverage after a five-year period during which they were required to preclear voting law changes and to temporarily abolish the use of all "tests or devices." In establishing such a time period, Congress recognized that the remedy of preclearance was an extraordinary one that deviated sharply from traditional notions of federalism and state sovereignty over state electoral processes.[14]

Other important provisions of the 1965 Act included:

Section 2, a statutory codification of the Fifteenth Amendment, restated the general prohibitions of that Amendment against the "denial or abridgement" of voting rights "on account of" race or color.

Section 6 authorized the Attorney General to send Federal examiners to list voters for registration in any covered county from which he received twenty or more written complaints of denial of voting rights or whenever he believed on his own that such an action would be necessary.

Section 8 authorized the Attorney General to send election observers to any political subdivision to which an examiner had been earlier sent.

Section 10 prohibited the use of poll taxes in state elections.[15]

Section 11 established various criminal offenses with respect to failure to register voters, or count votes, intimidating or threatening voters, providing false registration information, and voting more than once.

Section 12 established criminal offenses with respect to altering ballots or voting records, and conspiring to interfere with voting rights.

It is important to emphasize that the Voting Rights Act of 1965 is a permanent statute that is not in need of periodic extension. The only temporal provision in the law is the applicability of the preclearance and certain other requirements to covered jurisdictions. By the terms of the 1965 Act, such extraordinary remedies were to be applied for a five-year period after which time Congress presumed the residual effects of earlier discrimination were likely to be sufficiently attenuated, and the covered jurisdictions would be allowed to seek bail-out.

[14] One high-ranking official of the Justice Department has said of the Act that it "represents a substantial departure from . . . ordinary concepts of our federal system." Hearings on Voting Rights Act Extension Before Senate Judiciary Subcommittee on Constitutional Rights. 94th Congress, 1st Session, J. Stanley Pottinger, Assistant Attorney General of the United States, at 536.
[15] The Twenty-Fourth Amendment to the Constitution had earlier been ratified in 1964, outlawing poll taxes in Federal elections. The Supreme Court held in 1966 that state poll taxes violated the Equal Protection clause of the Fourteenth Amendment. *Harper v. Virginia State Board of Elections*, 383 U.S. 663 (1966).

B. 1970 AMENDMENTS

In 1970, however, upon reviewing the impact of the Voting Rights Act, Congress concluded that, while significant progress had been made with respect to voting rights, there was need for an additional extension of the preclearance period for covered jurisdictions. Such jurisdictions, thus, were required to continue to preclear voting law changes for an additional five-year period as Congress redefined the basic bail-out requirement. Instead of covered jurisdictions being required to maintain "clean hands" for a five-year period as provided for in the original 1965 Act, this requirement was changed to ten-years. "Clean hands" simply meant the avoidance by the jurisdiction of a proscribed "test or device" for the requisite period.

In addition, the basic coverage formula was amended by updating it to include the 1968 elections as well as the 1964 elections. As a result of this change in the trigger formula, counties in Wyoming, California, Arizona, Alaska, and New York were covered, as well as political subdivisions in Connecticut, New Hampshire, Maine, and Massachusetts. The 1970 amendments to the Act also extended nationwide the five-year ban on the use of "tests or devices" as defined by the Act and sought to establish a minimum voting age of 18 in Federal and state elections.[16] Section 202 abolished residency requirements in Federal elections.

C. 1975 AMENDMENTS

In 1975, Congress again reviewed the progress achieved under the 1965 Act and the 1970 amendments and concluded once more that it was necessary to redefine the bail-out requirements for covered jurisdictions. Such jurisdictions were on the verge of satisfying their ten-year obligation of preclearance and the avoidance of voting "tests or devices". In the 1975 amendments to the Voting Rights Act, Congress redefined the bail-out formula to require seventeen years of "clean hands". Jurisdictions covered under the 1965 formula could not hope to bail-out prior to 1982 under the amended formula.

In addition, Congress once again amended and updated the basic coverage formula in section 4 to include the 1972 election as well as the 1964 and the 1968 elections. Most significantly, however, Congress chose to redefine the meaning of what constituted a wrongful "test or device". Such a "test or device" was newly defined to include the use of English-only election materials or ballots in jurisdictions where a single "language-minority" group comprised more than 5 percent of the voting-age population. In addition to states already covered, preclearance was required of those states or political subdivisions which, in 1972, had (a) less than 50 percent voter registration or voter turn-out; (b) employed English-only election materials or ballots; and (c) had a "language-minority" population of more than 5 percent. Such "language-minorities" were defined to include American Indians, Asian Americans, Alaskan Natives, and persons of Spanish heritage.[17]

[16] In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), the Supreme Court subsequently struck down as unconstitutional this provision insofar as it attempted to set requirements for state elections ("the 18 year old vote provisions of the Act are constitutional and enforceable insofar as they pertain to federal elections and unconstitutional and unenforceable insofar as they pertain to state and local elections."). Id. at 118. The Twenty-Sixth Amendment was ratified in 1971 overturning *Oregon* v. *Mitchell* in this regard and establishing a constitutional right in eighteen year olds to vote in all elections.

Included under the 1975 coverage formula were, in addition to those states covered by the 1965 and 1970 provisions, the states of Texas, Arizona, and Alaska, and counties in California, Colorado, Florida, Michigan, North Carolina, and South Dakota. In addition to the significant expansion in the concept of what constituted a wrongful "test or device" to encompass the use of English-only materials. Congress also established other requirements relating to bilingualism. In section 203 of the Act, Congress required bilingual ballots and bilingual election materials and assistance in all jurisdictions in which there were populations of "language minorities" greater than 5 percent and in which the literacy rate among that "language minority" was less than the national average.[18] Finally, the 1975 amendments to the Voting Rights Act made permanent the nationwide ban on literacy tests and other "tests or devices".

In the impending debate, a major issue again will be whether or not Congress will redefine the bail-out standard when a number of jurisdictions covered by the original 1965 Act are on the verge of satisfying the earlier standard, i.e. seventeen years of avoidance of the use of "tests or devices". In the absence of action by Congress, the Voting Rights Act will not "expire" as some have wrongly suggested. Rather what will occur on August 6, 1982 is that a number of covered jurisdictions will finally be permitted to apply to the District Court for the District of Columbia for a declaratory judgment that they have abided by their statutory obligations and ought to be permitted to bail-out. None of the permanent provisions of the Voting Rights Act will "expire", e.g. ban on literacy tests, poll taxes, and discriminatory tests or devices; prohibitions upon certain residency requirements; laws against harassment and intimidation in the voting process; protection of voting rights from denial or abridgement on account of race or color; and so forth. Moreover the present law requires any state or subdivision that has been granted bail-out to remain within the District Court's jurisdiction for an additional five-year "probationary" period.

IV. Judicial Evolution of the Voting Rights Act

A. THE ORIGINAL OBJECTIVE

The Voting Rights Act of 1965 was designed by Congress to "banish the blight of racial discrimination in voting." [19] The racial discrimination to which the Act was directed entailed methods and tactics used to disqualify blacks from registering and voting in Federal and state elections.[20] As discussed previously the Act was the fourth modern legislative attempt at ensuring the rights of disenfranchised Southern blacks, and has proven highly effective.

[17] There is no requirement that there be a showing that such language minorities speak only that language. They may be entirely fluent in English. Department of Justice Regulation, 28 C.F.R. Section 55.1 et. seq. (1976). See infra note 238.

[18] Section 203(b) coverage extends to approximately 380 jurisdictions in 29 states.

[19] *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308 (1966).

[20] For a history of events which led to enactment, and discussions of the original purposes of the Act, see H.R. Rep. No. 439, 89th Cong. 1st Sess. 8–16; S. Rep. No. 162, pt. 2, 89th Cong. 1st Sess. 8–16; *South Carolina* v. *Katzenbach*, 383 U.S. 301, 308–25 (1966).

The emphasis in the original Voting Rights Act was upon equal electoral access through facilitating registration and securing the ballot. As Roy Wilkins, representing the Leadership Conference on Civil Rights, stated in 1965 in testimony before this committee:

> The history of the struggle for the right to participate in Federal, state and local elections goes back to the period of Reconstruction. . . . In too many areas of the Nation, Negroes are still being registered one by one and only after long litigation. We must transform this retail litigation method of registration into a wholesale administration procedure registering all who seek to exercise their democratic birthright.[21]

Professor Gross described the original objectives of the Act as follows:

> The purpose of the Act was precisely and only to increase the number of black registered voters. In the 1960's and earlier, to those who fought for it, equality meant equality of opportunity—in this case, the opportunity to vote.[22]

Professor Bunzel was in firm agreement:

> Originally, the Voting Rights Act was clear that it was directed to remedying disenfranchisement.[23]

This original congressional objective of massive registration and enfranchisement of blacks has been substantially transformed since 1965. The present debate reflects this transformation since it focuses upon claims to equal electoral "results," maximum political "effectiveness," and "diluted" votes. The evolution of the 1965 Act is in large part attributable to a number of important judicial decisions.

The legislation was challenged shortly after its enactment in *South Carolina* v. *Katzenbach*,[24] wherein the Supreme Court upheld the challenged provisions of the Act as constitutionally permissible methods of protecting the right to register and vote. Although acknowledging that the preclearance provisions of section 5 "may have been an uncommon exercise of congressional power," [25] Chief Justice Warren, speaking for the Court, stated that "exceptional conditions can justify legislative measures not otherwise appropriate." [26] Thus, the preclearance provisions were upheld "under the compulsion of . . . unique circumstances" [27] which Congress had found from its own evidentiary investigation to exist in the covered jurisdictions.[28] From this rather limited holding based upon "exceptional conditions" and

[21] Statement of Roy Wilkins, Executive Director, NAACP, and Chairman, Leadership Conference on Civil Rights, Hearings Before the Senate Committee on the Judiciary, on the Voting Rights Act, 89th Congress, 1st Session (1965) at 1005–07.

[22] Hearings on the Voting Rights Act Extension Before the Senate Judiciary Subcommittee on the Constitution, 97th Congress, 2d Session (1982) (hereafter "Senate Hearings") January 28, 1982, Barry Gross, Professor, City College of New York.

[23] Senate Hearings, February 2, 1982, John Bunzel, Senior Fellow, Hoover Institution, Stanford University.

[24] 383 U.S. 301 (1966).

[25] Id. at 334.

[26] Id. at 351. In his dissent as to the constitutionality of Section 5 in *South Carolina* v. *Katzenbach*, Justice Black noted:

> One of the most basic premises upon which our structure of government was founded was that the Federal Government was to have certain specific and limited powers and no others, and all other power was to be reserved either "to the States respectively, or to the people." Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them.
>
> 383 U.S. at 359. (Footnote omitted.)

[27] Id. at 334.

[28] Id. at 335.

"unique circumstances" then extant in the covered jurisdictions, there evolved a series of cases through which the Court identified additional objectives under the Act's preclearance provisions.

The principal case in the judicial evolution of the Voting Rights Act was the Court's 1969 decision in *Allen* v. *State Board of Elections*.[29] In an opinion by Chief Justice Warren, the Court held that the Act's preclearance provisions were applicable not only to new laws which might tend to deny blacks their right to register and vote, but to "any state enactment which altered the election law of a covered state *in even a minor way*." [30] In *Allen*, the changes in state laws did not relate to the process by which voters were registered and had their ballots counted, but to such things as a change from single-member districts to at-large voting in the election of county supervisors, changing of a particular office from elective to appointive, and changes in qualification procedures of independent candidates.[31] Under the broad construction accorded section 5 by the *Allen* court, covered states must preclear all laws which may affect the electoral process in any way. As will be noted, the *Allen* decision effected a substantial transformation of the Voting Rights Act.[32] The breadth of the scope accorded the Act by *Allen* served as the catalyst for further expansion of Federal control over electoral changes in covered jurisdictions.

B. NEW OBJECTIVES

In the 1971 decision of *Perkins* v. *Matthews*,[33] a divided Supreme Court held that annexations were subject to preclearance and reiterated its *Allen* holding that a change to at-large elections was also covered. The Court further expanded the scope of preclearance requirements to include legislative reapportionments in *Georgia* v. *United States*.[34] All such actions were required to be submitted to the Justice Department for approval.

The far-ranging implications of this expansion were evidenced in two important cases which followed. In *City of Petersburg* v. *United States*,[35] the City of Petersburg, Virginia had annexed an area that had been under consideration for nearly 5 years. The annexation was supported by both black and white citizens and involved an area logically suitable for annexation for tax and other reasons. The effect of the annexation, however, was to reduce the black population from 55

[29] 393 U.S. 544 (1969).

[30] Id. at 566. (Emphasis supplied.)

[31] Id. at 560–62.

[32] In the *Allen* case, Justice Harlan, dissenting in part, observed:

> . . . the Court has now construed § 5 to require a revolutionary innovation in American government that goes far beyond that which was accomplished by § 4. The fourth section of the Act had the profoundly important purpose of permitting the Negro people to gain access to the voting booths of the South once and for all. But the action taken by Congress in § 4 proceeded on the premise that once Negroes had gained free access to the ballot box, state governments would then be suitably responsive to their voice, and federal intervention would not be justified. In moving against "tests and devices" in § 4, Congress moved only against those techniques that prevented Negroes from voting at all. Congress did not attempt to restructure state governments. The Court now reads § 5, however, as vastly increasing the sphere of federal intervention beyond that contemplated by § 4, despite the fact that the two provisions were designed simply to interlock. 393 U.S. at 585–6.

[33] 400 U.S. 379 (1971).

[34] 411 U.S. 526 (1973). In *Georgia*, the Court held that the Attorney General could object to a preclearance submission even though he could not determine that a change had the purpose or effect of denying or abridging the right to vote. In other words it held that the Attorney General could validly place the burden of proof on the submitting jurisdiction that a change did not have such a purpose or effect.

[35] 354 F.Supp. 1021 (D.D.C. 1973), affirmed *per curiam* (without opinion) 410 U.S. 962 (1973). See note 36 infra.

percent to 46 percent. When the annexation was submitted for preclearance, the District Court held that it was not racially inspired, but nevertheless found that the annexation would have the effect of decreasing minority voting influence. Because of this the Court approved the annexation only on condition that Petersburg change to ward elections so that blacks would be insured of representation "reasonably equivalent to their political strength in the enlarged community." [36] The Court specifically noted that the mere fact that blacks made up a smaller percentage of the city after the annexation did not amount to a violation of the Act, so long as the court-imposed system of ward elections insured blacks of safe districts. Thus, the ideal of proportionality in representation was introduced, although only in the context of covered jurisdictions.

This precursor to "proportional representation" was followed by the Supreme Court's 1975 decision in *City of Richmond* v. *United States*.[37] The annexation in *City of Richmond* reduced the black population in Richmond from 52 percent to 42 percent. The Court reversed the lower court's disapproval of Richmond's preclearance application and remanded the case for reconsideration in light of its explanation that the *City of Petersburg* decision was intended to "afford [blacks] representation reasonably equivalent to their political strength." [38]

The concept of proportional representation was again involved in *United Jewish Organizations* v. *Carey*,[39] which related to the Attorney General's rejection of a 1972 legislative redistricting by New York as it applied to Brooklyn, a covered jurisdiction under the Act. The Attorney General originally ruled that there were an insufficient number of election districts with minority populations large enough for minority candidates to likely prevail. The Attorney General indicated that a minority population of 65 percent was necessary to create a safe minority sent.[40] In a new plan adopted in 1974, the Legislature met the

[36] See *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975), wherein the Court, through a majority opinion by Justice White, explained its *per curium* affirmance in *City of Petersburg* v. *United States*, 410 U.S. 962 (1973).

[37] 422 U.S. 358 (1975).

[38] Id. at 370. For further illustrations of the proportional representation principle at work, see *Zimmer* v. *McKeithen*, 485 F.2d 1297 (5th Circuit) ("a court may in its discretion opt for a multi-member plan which enhances the opportunity for participation in the political processes"); and *Kirksey* v. *Board of Supervisors of Hinds County*, 528 F.2d 536 (5th Circuit) (a single member district plan was overturned until two safe seats out of five were created for the county's 40% black population). See also *City of Port Arthur* v. *United States*, 517 F.Supp. 987 (D.D.C. 1981) *infra* note 50 and accompanying text.

[39] 430 U.S. 144 (1977). Nathan Dershowitz of the American Jewish Congress has described the product of the *UJO* case as follows: "The Williamsburg section of Brooklyn has been tortuously gerrymandered in an attempt to ensure the election of minority group members." Dershowitz, "Tampering with the Voting Rights Act." Congress Monthly, May 1981, at 9. He describes the result further as "the institutionalization of ethnic representation."

[40] As Professor George C. Cochran of the University of Mississippi Law School testified:

> In interpreting the definitional parameters of districts which give blacks an opportunity to elect the candidate of their own choice, the District Court for the District of Columbia is implementing what seems to be 65 percent voting districts for covered jurisdictions; that is, a 65 percent level of minority population in a given district is viewed by that court as one which will "give blacks an opportunity to elect a candidate of their choice." . . . But the 65 percent rule, which is becoming more and more common in this section 5 business, is something that had its beginning stage in *United Jewish Organizations* and is now being carried over into a proper interpretation of section 5 as to whether or not a given political subdivision's voting scenario has the effect of denying minorities an opportunity to elect a candidate of their own choice . . . In the *UJO* case, the 65 percent rule came from a phone call from an unknown staff member at the Voting Rights section of the Department of Justice to attorneys representing the State of New York. Senate Hearings, February 25, 1982.

One witness referred to a case in which the Justice Department required that a 70 percent minority district be created before it would agree to preclear a single-member districting plan. Senate Hearings, February 4, 1982, E. Freeman Leverett, attorney, Elberton, Ga.

objections of the Attorney General, but in so doing, divided a community of Hasidic Jews which had previously resided in a single district. The Attorney General approved the plan, but members of the Hasidic community objected claiming that they themselves had been the victims of discrimination.

The Supreme Court rejected their claim. Although unable to agree on an opinion, seven members of the Court did agree that New York's use of racial criteria in revising the reapportionment plan in order to obtain the Attorney General's approval under the Voting Rights Act did not violate the Fourteenth and Fifteenth Amendment rights of the Hasidic Jews.

The preceding line of cases, all the progeny of *Allen* v. *State Board of Elections*,[41] constituted a major judicial expansion of the Act's original focus upon facilitating registration and securing the ballot.[42] As Professor Thernstrom has written:

> The traditional concern of civil rights advocates had been access to the ballot . . . [These expansions] assume a Federally guaranteed right to maximum political *effectiveness*. Nowadays local electoral arrangements are expected to conform to Federal executive and judicial guidelines established to maximize the political strength of racial and ethnic minorities, not merely to provide equal electoral opportunity.[43]

More recent expansion of section 5 occurred in two 1978 decisions. In *United States* v. *Board of Commissioners of Sheffield*,[44] the Court held that section 5 applied to political subdivisions within a covered jurisdiction which have any influence over any aspect of the electoral process, whether or not they conduct voter registration.[45] Sheffield was required to pre-clear its electoral change from a commissioner to a mayor-council form of government. *Sheffield* reaffirmed the drift away from the original focus of the Voting Rights Act of equal access to the registration and voting process to focus upon the electoral process itself. In *Dougherty County Board of Education* v. *White*,[46] the Court held that a school board rule requiring all employees to take unpaid leaves of absence while campaigning for elective office was subject to preclearance under section 5. Thus, the Court held that the Voting Rights Act reached changes made by political subdivisions that neither conducted voter registration nor even conducted elections.

C. SECTION 5 V. SECTION 2

The transformation which had taken place in section 5 was confirmed by the Court in *City of Rome* v. *United States*,[47] wherein the

[41] 393 U.S. 544 (1969).

[42] *Beer* v. *United States*, 425 U.S. 130 (1976) involved the rejection by the Attorney General and District Court of a reapportionment plan submitted by the city of New Orleans, because the plan would not have produced black representation on the city council proportional to black population in the city. The Supreme Court reversed, holding that section 5 prohibits only those voting changes which result in "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." Id. at 141.

[43] Thernstrom, "The Odd Evolution of the Voting Rights Act," 55 The Public Interest 49, 50 (1979). See generally this article for a discussion of the judicial evolution of the Voting Rights Act.

[44] 435 U.S. 110 (1978).

[45] Compare Section 14(c)(2) of the act, which provides:

> The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

[46] 429 U.S. 32 (1976).

[47] 446 U.S. 156 (1980).

Court held that although electoral changes in Rome, Georgia, were enacted without discriminatory purpose, they were nevertheless prohibited under section 5 of the Act because of their discriminatory effect. Thus, the Court affirmed that the standard of conduct in covered jurisdictions seeking preclearance pursuant to section 5 may be measured exclusively by the effects of a change.[48] The evolution of section 5 was fundamentally complete—having been largely transformed from a provision focused upon access to registration and the ballot to one focused upon the electoral process itself. In the narrow context of section 5, the "effects" test was constitutional.[49]

A recent and telling application of the "effects" standard by the District of Columbia District Court can be found in *City of Port Arthur* v. *United States*,[50] an annexation case in which the court stated:

> The conclusion reached by this Court is that none of the electoral systems proposed by plaintiff Port Arthur affords the black citizens of the City the requisite opportunity to achieve representation commensurate with their voting strength in the enlarged community. Blacks comprise 40.56 percent of the total post-expansion population, and we estimate that they constitute 35 percent of the voting-age population. [None of the proposed schemes] offer the black community a reasonable possibility of obtaining representation which would reflect political power of that magnitude.[51]

This transformation from a focus upon access to the ballot to a focus upon the electoral process itself, and proportional representation for covered jurisdictions under section 5 would also have occurred in the context of section 2 but for the case of *City of Mobile* v. *Bolden*.[52] In *Mobile*, however, the Court reaffirmed original understandings of section 2 and the Fifteenth Amendment. *Mobile* involved a class action on behalf of all black citizens of the Alabama city wherein plaintiffs alleged that the city's practice of electing commissioners through an at-large system unfairly "diluted" minority voting strength in violation of the Fourteenth and Fifteenth Amendments. The district court,[53] although finding that blacks in the city registered and voted without hinderance, nonetheless agreed with plaintiffs and held that Mobile's at-large elections operated unlawfully with respect to blacks. The Fifth Circuit affirmed,[54] but on appeal, the Supreme Court reversed and remanded. The plurality opinion stated:

> The Fifteenth Amendment does not entail the right to have Negro candidates elected . . . That Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote "on account of race, color, or previous condition of servitude." Having found that Negroes in Mobile "register and vote without hinderance," the District Court and Court of Appeals were in error in believing that the appellant invaded the protection of that Amendment in the present case.[55]

[48] Id. See generally, McClellan, "Fiddling with the Constitution While Rome Burns: The Case Against the Voting Rights Act of 1965," 42 La. Law Rev. 1 (1981); Keady & Cochran, "Section 5 of the Voting Rights Act: A Time for Revision," 69 Kentucky Law J. 4 (1980).
[49] The Court relied on *South Carolina* v. *Katzenbach* and recalled the determinations by Congress which undergirded the preclearance requirement. As with that case, *Rome's* upholding of the constitutionality of the "effects" test in Section 5 was a highly limited one in this regard. Id. at 174.
[50] 517 F.Supp. 987 (D.D.C. 1981).
[51] Id. at 1014, 1015.
[52] 446 U.S. 55 (1980).
[53] 423 F.Supp. 384 (S.D. Ala. 1976).
[54] 571 F.2d 238 (5th Cir. 1978).

Thus, the Court reaffirmed that purposeful discrimination is required for the Fifteenth Amendment to be violated and that, since section 2 of the Act was a codification of that Amendment, the "intent" test applied in all actions under that section.[56]

The proponents of the House amendment to section 2 would overturn the Court's decision in the *Mobile* case by eliminating the requirement of proof of intentional discrimination and simply require proof of discriminatory "results." The change would facilitate a transformation of section 2 from its original focus to new and disturbing objectives of proportionality in representation.

In summary, the subcommittee believes that section 5 of the Voting Rights Act of 1965 has undergone a significant judicial evolution. The original purpose was to provide racial minorities with access to the ballot. In the intervening years, the focus has changed to the entire electoral process. As Professor Erler testified:

> In more recent years . . . emphasis has shifted from the issue of equal access to the ballot for racial minorities to the issue of equal results. The issue is no longer typically conceived of in terms of "the right to vote," but in terms of "the right to an effective vote"; no longer in terms of "disfranchisement" but in terms of "dilution." The old assumption that equal access to the ballot would ineluctably lead to political power for minorities has given way to the proposition that the political process must produce something more than equal access. The new demand is that the political process, regardless of equal access, must be made to yield equal results.[57]

The proposal to change section 2 seeks to begin this same process for that section. Indeed, proponents of the House amendment rarely speak of "the right to vote" any more. Instead, such phrases as "equal political participation," "equal opportunity in the political process," "the fair right to vote," and "meaningful participation" are used.[58] This subcommittee views with concern any proposal to institute such a new focus in section 2 and to bring to this section concepts of proportional representation that have been developed in other sections on limited constitutional grounds.

[56] 446 U.S. at 65.
[57] Id. at 60–61. Justice Stewart noted: "It is apparent that the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." There was no apparent disagreement with this finding from any other member of the Court.
[58] Senate Hearings, January 28, 1982. Edward Erler, Professor, National Humanities Center. The hearings were unpublished at the time of this report and available only in transcript form.
[59] See e.g. Senate Hearings, February 12, 1982, Drew Days, Professor, Yale School of Law; January 28, 1982, Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union. See also H.R. Rep. No. 97–227, 31 (1981).

V. Action by House of Representatives

During the Senate hearings, great emphasis has been placed on the substantial vote in the House of Representatives in support of final passage of H.R. 3112, the House-version of the Voting Rights Act extension. As Senator Metzenbaum remarked on the opening day of hearings:

> I have difficulty understanding why the Administration is not on the side of the overwhelming majority of the House . . . Why in view of the fact that all of the civil rights groups now are on the side of the 389 members of the House? [49]

Final passage in the House of Representatives of H.R. 3112 was achieved on October 5, 1981 by a vote of 389–24 with substantial majorities of both parties in support of such passage.

It is only because of the continued emphasis upon the House action that this subcommittee believes that brief mention ought to be made of the circumstances of such action. While such scrutiny may not be a common part of Senate consideration, neither is the recurrent argument that the magnitude of the House vote somehow casts doubt upon the merits of the arguments of Senators who are in opposition to the House position.

H.R. 3112, as approved by the House of Representatives, would amend section 2 of the Voting Rights Act to establish a "results" test for identifying voting discrimination in place of the present "intent" standard. In addition, it would make permanent the pre-clearance provisions of section 5 for those jurisdictions subject to coverage under the coverage formula in section 4. It would, however, create a new and complex bail-out procedure for such jurisdictions which would become effective in 1984.

What this subcommittee finds particularly noteworthy in the legislative history of H.R. 3112 in the House is the virtually total lack of opportunity for individuals opposed to these changes in the law to testify before the House Judiciary Committee. On an issue of the magnitude of the Voting Rights Act, with the highly controversial changes proposed by the House measure, it is remarkable that so little opportunity to participate was afforded those individuals who questioned the House amendments.

During the 18 days of hearings that took place in the House on the extension of the Voting Rights Act, the Judiciary Committee heard 156 witnesses testify on this issue. Of these, only 13 expressed any reservations about the House measure and some of these were of a relatively trivial nature. It is the view of this subcommittee that such a gross imbalance on a measure of this importance cannot be attributed solely to an inability to identify individuals who possessed concerns about the House bill. There has been no shortage of interested individuals who have testified from this perspective during the Senate hearings.

Of the small handful of witnesses who did testify in the House with reservations about H.R. 3112, it is interesting to note the remarks

[49] Senate Hearings, January 27, 1982, U.S. Senator Howard Metzenbaum.

of Mr. Colom, a black attorney from Mississippi. In response to a question from Representative Hyde asking whether or not he had been subject to prassure not to testify, he observed:

> It stopped being pressure and started being intimidation at some point. Apparently someone called most of my colleagues in Mississippi and I found my friends, my black friends in the Republican Party, calling me up asking if I was coming up here to testify against the Voting Rights Act . . . my father who's co-chairman of the Democratic Party in one county said that he had never heard such vicious things about his son.[50]

Similar allegations have been made about other potential witnesses who might have opposed the House bill.[51]

What is perhaps most remarkable about the House legislative process on H.R. 3112 is that not one of the 156 witnesses who testified expressed any substantial difficulties with the proposed amendment to section 2 of the Voting Rights Act. Indeed, but a single day of the 18 days of hearings was even devoted to this issue with all three witnesses testifying on that date indicating full support for the proposed amendment.[52] Given (1) the attention devoted to this issue during the Senate hearings; (2) the agreement by both sides of the importance of the issue; [53] (3) the primary concern for this issue by the administration; and (4) the obvious importance of the section 2 change for civil rights law generally, it is surprising that the House amendment to section 2 could have been given such slight attention during 18 days of House hearings.

Serious concern about the character of House debate was later expressed before the subcommittee by members of the House itself. As Representative Butler observed in testimony before the subcommittee:

> The most significant change approved by the House [section 2] went through largely unnoticed . . . while the importance and potential impact of this basic change cannot be underestimated, the failure of the House to consider it carefully cannot be overstated.[54]

As Representative Hyde, a leading proponent of extension of the Voting Rights Act, also observed before this subcommittee:

> The Voting Rights Act is a very complex piece of legislation which has been merchandised in extraordinarily complex terms. By the time it reached the floor, suggestions that alternate views should be considered were quickly met with harsh charges that any deviation whatsoever from what was pushed through the full Judiciary Committee merely reflected "code

[50] Hearings on Extension of the Voting Rights Act by the House Judiciary Subcommittee on Constitutional and Civil Rights (Hereinafter "House Hearings"), June 25, 1981, Wilbur Colom, Esq., Part III, at 2102–08.

[51] See, e.g., Senate Hearings, January 28, 1982, U.S. Representative Henry Hyde; Bunzel, "Voting Rights Hardball" Wall St. Journal, March 19, 1982; Brimelow, "Uncivil Act" Barron's, January 25, 1982.

[52] House Hearings, June 24, 1981. Testifying in support of the amendment to Section 2 were James Blacksher, David Walbert, and Armand Derfner, Part III, at 2029–65.

[53] An example of a witness favoring the House amendments to Section 2 who nevertheless recognized the importance of the proposed change is Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund, January 27, 1982.

[54] Senate Hearings, February 1, 1982, U.S. Representative M. Caldwell Butler.

words for not extending the Act." This intimidating style of lobbying had the ironic effect, although clearly intended, of limiting serious debate and creating a wave of apprehension among those who might have sincerely questioned some of the bill's language. No one wishes to be the target of racist characterizations and the final House vote reflected more of an overwhelming statement of support for the principle represented by the Act than it did concurrence with each and every sentence or concept it contains.[58]

Given the environment of the House consideration of H.R. 3112, this subcommittee is not persuaded that special deference ought to be accorded the outcome of that consideration. This subcommittee has endeavored to provide a fair opportunity for all responsible views to be heard. It is the obligation of the United States Senate, the "world's most deliberative legislative body" to see that a different environment of debate occurs within its own chambers.

VI. Section 2 of the Act

Section 2 of the Voting Rights Act is a codification of the Fifteenth Amendment and, like that amendment, forbids discrimination with respect to voting rights. Section 2 states:

> No voting qualifications or prerequisites to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right to vote on account of race or color.

Section 2 is a permanent provision of the Voting Rights Act and does not expire this year, or any year. It applies to both changes in voting laws and procedures, as well as existing laws and procedures, and it applies in both covered jurisdictions and non-covered jurisdictions.[59] For the past seventeen years, section 2 has stood as a basic and non-controversial provision to ensure that any discriminatory voting law or procedure could be successfully challenged and voided.

A. Intent v. Results

Given the success of the Voting Rights Act and the fact that section 2 is a permanent provision of the law, what is the present controversy concerning section 2? The current issue concerning section 2 is the question of what must be shown in order to establish a violation of the section. In other words, the fundamental issue is the one of how civil rights violations will be identified. Inherent in this issue are the very definitions of "civil rights" and "discrimination."[60]

The Supreme Court addressed this critical issue in *City of Mobile* v. *Bolden*.[61] In this decision, the Court held that section 2 was intended

[58] Senate Hearings, January 28, 1982, U.S. Representative Henry Hyde.

[59] In covered jurisdictions under section 5, it is necessary to preclear only changes in voting qualifications, prerequisites to voting, or standards, practices, or procedures with respect to voting *different* from those in effect in the jurisdictions on the dates in which the trigger formulas were applicable.

[60] On the centrality of intent analysis to civil rights law generally, see Senate Hearings, February 2, 1982, Michael Levin, Professor, City College of New York.

[61] 446 U.S. 55 (1980).

to codify the Fifteenth Amendment [62] and then held that a claim under the Amendment required proof that the voting law or procedure in question must have been established or maintained [63] because of a discriminatory intent or purpose. As the Court observed:

> While other of the Court's Fifteenth Amendment decisions have dealt with different issues, none has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.[64]

It follows then that proof of a claim under section 2 entails the requirement of showing discriminatory intent or purpose.

The Court's equation of section 2 with the Fifteenth Amendment was based on a review and analysis of legislative history:

> Section 2 was an uncontroversial provision in the Voting Rights Act whose other provisions engendered protracted dispute. The House report on the bill simply recited that section 2 "grants a right to be free from enactment or enforcement of voting qualifications or practices which deny or abridge the right to vote on account of race or color." H.R. Report No. 89–439 at 23 (1965); S. Report No. 89–162, part 3, at 19–20 (1965). The view that this section simply restated the prohibitions already contained in the Fifteenth Amendment was expressed without contradiction during the Senate hearings. Senator Dirksen indicated at one point that all States, whether or not covered by the preclearance provisions of section 5 of the proposed legislation were prohibited from discriminating against Negro voters by section 2 which he termed "almost a rephrasing of the Fifteenth Amendment." Attorney General Katzenbach agreed. Senate Hearings, part 1, at 208 (1965).[72]

Until the present debate, there has been virtually no disagreement with the proposition that section 2 has always been intended to codify the Fifteenth Amendment.

Controversy concerning the *Mobile* decision, and the intent test required under *Mobile*, stems from the contentions that the decision was contrary to the original intention of Congress,[73] contrary to prior law,[74] and establishes a test for identifying discrimination which is difficult, if not impossible, to satisfy.[75] Since these arguments serve

[62] There was no disagreement on this point among the Justices. In addition, the Carter Administration Justice Department, in filing its brief for appellees in *Mobile*, described Section 2 as a "rearticulation" of the Fifteenth Amendment. Brief of the United States as Amicus Curiae at 84, *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[63] Much of the confusion regarding the intent controversy has, in part, been due to the failure by some to acknowledge that a discriminatory purpose may also be proven by a showing that a law has been "maintained" or "operated" for such a purpose, not simply that it was originally enacted for this purpose. See, e.g., *Whitcomb* v. *Chavis*, 403 U.S. 124 149 (1979); *White* v. *Regester*, 412 U.S. 755, 765 (1973).

[64] 446 U.S. at 62.

[72] Id. at 61.

[73] See e.g., Senate Hearings, February 4, 1982, U.S. Representative James Sensenbrenner; February 11, 1982, Frank Parker, Director, Voting Rights Project, Lawyers Committee for Civil Rights Under Law.

[74] See e.g., Senate Hearings, February 1, 1982, David Walbert, attorney and former Professor, Emory University School of Law; February 25, 1982, Archibald Cox, Professor, Harvard University Law School, representing Common Cause.

[75] See e.g., Senate Hearings, January 28, 1982, Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union; February 4, 1982, U.S. Representative James Sensenbrenner.

as the foundation for the case that *Mobile* ought to be overturned, they merit careful consideration.

Congressional intent

The first argument raised by proponents of a results test in section 2 in place of the existing intent test, is that such a test would be more consistent with the original intention of the Voting Rights Act.[76] This subcommittee strongly rejects this contention and believes that the Supreme Court properly interpreted the original intent of Congress with respect to section 2. The subcommittee notes, for example, that Congress chose specifically to use the concept of a results or effects test in other parts of the Act. In sections 4 and 5 of the Act, Congress established an explicit although highly limited use of this test. The fact that such language was *omitted* from section 2 is conspicuous and telling. If Congress had intended to use a results or effects test in section 2, they had already demonstrated that they were quite capable of drafting such a provision. Congress chose pointedly not to do this.

The unusual standard in sections 4 and 5 was a clear function of the extraordinary objectives of those sections.[77] In those provisions, Congress was addressing selected regions of the country with respect to which there had been identified histories of discrimination and histories of efforts to circumvent Federal anti-discrimination initiatives. It was only as a result of these findings that Congress was even constitutionally empowered to enact these sections.[78] Specifically, it was a function of the fact that the provisions in sections 4 and 5 were designed to be remedial and temporary in nature that the Court sustained their constitutional validity.[79]

Great emphasis has been placed upon a single remark of Attorney General Katzenbach during the course of Senate hearings to evidence that an effects test was originally intended by Congress in section 2. The Attorney General, according to the argument, made clear that a section 2 violation could be established "if [an action's] purpose or effect" was to deny or abridge the right to vote.[80] Quite apart from the fact that a single chance remark by an individual does not constitute a conclusive legislative history, the Katzenbach statement can be used with equal strength by proponents of maintaining the present intent test. In response to a question by Senator Fong about whether or not restricted registration hours by a jurisdiction would be the kind of "procedure" encompassed by section 2 that would permit a suit, the Attorney General responded, "I would suppose that you could *if it had that purpose*."[81] He subsequently proceeded to make another statement alluding to both purpose and effect in a context suggesting confusion between section 2 and section 5. The Attorney General's statement is a wholly isolated remark in the midst of thousands of pages of hearings and floor debate; to the extent that it is treated as dispositive of the issue, it can equally be relied upon by either side.[82]

The subcommittee considers the fact that Congress chose not to utilize language in section 2 that it expressly used in sections 4 and 5 (i.e., "effects") to be far more persuasive of original congressional intent, as well as the fact that the concept of an effects standard was discussed thoroughly in the context of sections 4 and 5 but not at all in the context of section 2.

Prior law

In response to the second argument of proponents of the results test that *Mobile* effected a significant change in prior law, the subcommittee would note again the remarks of the Supreme Court in *Mobile:*

> None of the Court's Fifteenth Amendment decisions has questioned the necessity of showing purposeful discrimination in order to show a Fifteenth Amendment violation.[83]

There is absolutely no Court decision that results proponents can point to that holds that proof of discriminatory purpose or intent is not required either in establishing a Fifteenth Amendment violation or a section 2 violation.

In this regard, proponents rely almost exclusively on a 1973 Supreme Court decision, *White* v. *Regester*.[84] In that case, the Court upheld a challenge to an at-large voting system for members of the Texas House of Representatives in several Texas counties.

White is a rather tenuous foundation for the far-reaching changes presently being proposed in section 2 for a number of reasons: First, *White* was neither a Fifteenth Amendment nor a section 2 case; it was a Fourteenth Amendment case. It is strange that proponents should rely upon it to suggest that the *Mobile* interpretation of the Fifteenth Amendment was mistaken. Second, if that is not enough to discredit the authority of *White* with respect to the *Mobile* issue, it should be noted that nowhere in *White* did the Court even use the term "results". If that is the case, it is difficult to understand how the term "results" in section 2 is expected to trigger the application of the *White* case. Third, even as a Fourteenth Amendment decision, the *White* case involved a requirement of intentional or purposeful discrimination.

As the Court in *Mobile* observed about the argument that *White* represented a different test for discrimination:

[76] See e.g., Senate Hearings, February 1, 1982, Steven Suitts, Executive Director, Southern Regional Council.

[77] *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966). The Court noted at 334, "The Act suspends new voting regulations pending scrutiny by federal authorities to determine whether their use would violate the Fifteenth Amendment. This power may have been an uncommon exercise of congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."

[78] See supra note 77. See also, *City of Rome* v. *United States*, 446 U.S. 156 (1980) in which it was again noted "that Congress had the authority to regulate state and local voting through the provisions of the Voting Rights Act," 179–180, and that the 1975 extension, "was plainly a constitutional method of enforcing the Fifteenth Amendment," Id. at 182.

[79] Id.

[80] Senate Hearings, February 12, 1982, discussion between U.S. Senator Charles Mathias and Drew Days, Professor, Yale School of Law, regarding Attorney General Katzenbach's testimony in the 1965 Hearings about the original intent of the Voting Rights Act.

[81] 1965 Senate hearings, Nicholas DeB. Katzenbach, Attorney General of the United States, March 20, 1965, at 101–2.

[82] See supra note 81. See also 1965 Senate Hearings at 208 in which Attorney General Katzenbach agreed with Senator Dirksen in his assessment of Section 2 as "almost a rephrasing of the 15th Amendment." It is also worth noting that Katzenbach was discussing the Act in terms of its original objectives—equal access to registration and the ballot. The judicial evolution that later occurred, see supra Section III., clearly transformed the Act into one focused upon the electoral process itself. Katzenbach did not allude to such issues as annexations, election systems, districting and apportionment issues, and the like. He could not have foreseen the marked metamorphosis of the Voting Rights Act in his 1965 testimony.

[83] 446 U.S. at 63.

[84] 412 U.S. 755 (1973).

> In *White*, the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white election officials . . . *White* v. *Regester* is thus consistent with the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.[85]

Finally, and perhaps even more compelling, is that Justice White who dissented in *Mobile* and who wrote the *White* opinion agreed that it was consistent with the intent or purpose requirement. Justice White disagreed with the Court's opinion because he believed that the plaintiffs had satisfied the intent or purpose standard in *Mobile*, not because he disagreed with the standard itself. He observed in dissent:

> The Court's decision cannot be understood to flow from our recognition in *Washington* v. *Davis* that the Equal Protection Clause forbids only purposeful discrimination . . . Even though Mobile's Negro community may register and vote without hindrance, the system of at-large election of City Commissioners may violate the Fourteenth and Fifteenth Amendments if it is used purposefully to exclude Negroes from the political process . . . Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent.[86]

Again, it is important to emphasize that even in dissent, Justice White, the author of the *White* opinion, agreed with the Court that the case was consistent with the intent or purpose requirement.

The subcommittee would add that, if the results test is nothing more than the standard set down by the Court in *White* v. *Regester*, it is unclear why it is necessary to change the present law since *Mobile* did not overrule *White* or any earlier Court decision. If the results test is consistent with *White*, then it should continue to be consistent even after *Mobile*. Both *White* and *Mobile* are in effect today.

If, despite all, proponents of the results test persist in their view that *Mobile* altered the *White* law, then, at the very least, it is incumbent upon them to demonstrate what precisely the *White* law was. It is not enough to suggest that we ought to rely for guidance upon a law that was interpreted by a clear majority of the Court in a totally contrary manner to the manner in which results proponents would like to interpret it. Until such proponents can explain the results test, this subcommittee can conclude nothing else than that adoption of the test will lead into totally uncharted judicial waters.

The history of Supreme Court decisions is totally consistent on the foundational requirement that constitutional civil rights violations require proof of discriminatory intent or purpose. However, the Court has sometimes been less than explicit on this point only because it was not until the growth of "affirmative action" concepts of civil rights in the late 1960's and early 1970's that anyone believed that "discrimination" meant anything *other* than wrongful treatment of an individual *because* of race or color. It has only been with the development of "affirmative action" that anyone has relied upon statistical and results-oriented evidence to conclusively satisfy constitutional and statutory civil rights provisions. In any event, there is absolutely no Court decision before or after *Mobile* in which anything less than purpose has been required to establish a violation of section 2, the Fifteenth Amendment, or any other Reconstruction amendment.[87]

Intent standard

The final criticism of the *Mobile* decision is that it establishes a requirement for identifying discrimination that is "impossible" or "extremely difficult" to satisfy.[88] This criticism greatly overstates the degree of difficulty of this test as well as the uniqueness of the test.

First, the subcommittee would observe that the intent or purpose standard has never proven "impossible" in a variety of other legal contexts. In the criminal law, for example, not only is there normally an intent requirement but such a state of mind must be proven "beyond a reasonable doubt". In the context of civil rights violations, it is only necessary that an inference of intent be raised "by a preponderance of the evidence", a vastly less stringent requirement.

In addition, the intent standard has traditionally been the standard for evidencing discrimination not only in the context of the Fifteenth Amendment, but also in the context of the Equal Protection Clause of the Fourteenth Amendment, the Thirteenth Amendment, and school busing cases. In *Washington* v. *Davis*, for example, the Supreme Court observed (in an opinion written by Justice White):

> The central purpose of the Equal Protection Clause of the Fourteenth Amendment is the prevention of official conduct discriminating on the basis of race . . . our cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional solely because it has a racially disproportionate impact . . . a law establishing a racially neutral qualification is not racially discriminatory and does not

[85] 446 U.S. at 69. See also *Graves* v. *Barnes*, 343 F.Supp. 704 (W.D. Tex. 1972) which discusses at some length the voting rights background in Dallas and Bexar counties (Texas) that was before the Court in *White* v. *Regester*. *Graves* was affirmed by the Supreme Court in *White* v. *Regester*. There can be little doubt that there was substantial discriminatory purpose at work in these counties on the basis of the District Court's findings in *Graves*. It is also interesting to note that in *Gaffney* v. *Cummings*, 412 U.S. 735 (1973), decided on the same day as *White*, the Court pointed out at 754 that multimember districts might be vulnerable "if racial or political groups have been *fenced out* of the political process and their voting strength *invidiously* minimized." (Emphasis supplied.)

[86] 446 U.S. at 102. (Justice White dissenting) The primary difference between Justice White's finding and that of Justice Stewart lay in the fact that Justice White found that the facts gave rise to an inference of discriminatory purpose, while Justice Steward did not. They did not disagree on the proper standard of proof itself—the intent standard.

Proponents of the results test are not only in conflict with the Court itself on the meaning of *White* but they are in conflict with several lower courts upon which they would like to rely for a definition of the results test. Proponents often rely upon a test articulated in the Fifth Circuit in *Zimmer* v. *McKeithen*, 485 F.2d 1297 (1973), *yet* at the same time are explicit in rejecting one of the major factors involved in this test: "responsiveness of elected officials to minority community" which the House Report rejects as too "highly subjective". H.R. Rep. No. 97-227 at 30.

[87] 446 U.S. at 63.

[88] See supra note 75.

> deny equal protection of the laws simply because a greater proportion of Negroes fail to qualify than members of other racial or ethnic groups.[89]

In a subsequent decision, the Court reaffirmed this standard (a standard which has never been contradicted in any decision of the Court under the civil rights amendments to the Constitution). In *Arlington Heights* v. *Metropolitan Housing Authority*, it observed:

> Proof of racially discriminatory intent is required to show a violation of the Equal Protection Clause . . . the holding in *Davis* reaffirmed a principle well established in a variety of contexts e.g. *Keyes* v. *School District No. 1* 413 U.S. 189, 208 (schools); *Wright* v. *Rockefeller* 376 U.S. 52, 56–7 (election districting); *Akins* v. *Texas* 325 U.S. 398, 403–04 (jury selection). . . . The finding that a decision carried a discriminatory "ultimate effect" is without independent constitutional significance.[90]

Still more recently, the Court again reviewed the meaning and purposes of the Fourteenth Amendment and the Equal Protection Clause in *Personnel Administrator of Massachusetts* v. *Feeney*.[91] In that decision, the Court stated:

> Even if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause only if that impact can be traced to a discriminatory purpose . . . the settled rule is that the Fourteenth Amendment requires equal laws not equal results . . .[92]

The Court has also stated expressly that the intent standard is the appropriate standard for identifying discrimination in the area of school segregation. In *Keyes* v. *School District No. 1*, the Court noted:

> De jure segregation requires a current condition of segregation resulting from intentional State action . . . the differentiating factor between de jure and so-called de facto segregation . . . is purpose or intent to discrimination.[93]

[89] 426 U.S. 229, 239, 245 (1976). A footnote in *Washington* disapproving several lower court decisions did not include any voting cases. *Id.* at note 12. The requirement of discriminatory purpose far antedated *Washington* v. *Davis*, however. See, e.g., *Yick Wo* v. *Hopkins*, 118 U.S. 356 (1886) ("Though the law itself be fair on its face and impartial in appearance, yet if it is applied and administered by public authority with an evil eye and an unequal hand, so as practicably to make unjust and illegal discrimination between persons in similar circumstances . . . the denial of equal justice is still within the prohibition of the Constitution."); *Snowden* v. *Hughes* 321 U.S. (1944) ("The unlawful administration by state officers of a state statute fair on its face resulting in its unequal application to those who are entitled to be treated alike is not a denial of equal protection unless there is shown to be present in it an element of intentional or purposeful discrimination.") The requirement of intent or purpose as a fundamental element of civil rights law is as old as the development of such law itself.

[90] *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 252, 265, 271 (1977). See also *Memphis* v. *Green*, 451 U.S. 100 (interpreting § 1981 of Title 42, a codification of the Thirteenth Amendment, to require purposeful discrimination.)

[91] 442 U.S. 256 (1979).

[92] 442 U.S. at 272, 273. The *Feeney* case is also important in elaborating upon the idea of "discriminatory purpose." As the Court observed:

> "Discriminatory purpose" implies more than intent as volition or intent as awareness of consequences . . . It implies that the decision-maker selected or reaffirmed a particular course of action at least in part "because of" not merely "in spite of" its adverse consequences upon an identifiable group.

See also 442 U.S. at 279, note 25 in which the Court rejects the notion of intent or purpose being synonymous with the notion of the foreseeability of the disparate impact of an action, while at the same time recognizing this factor as simple evidence which may have a relevant bearing on the issue; Senate Hearings, February 2, 1982, Michael Levin, Professor, City College of New York.

[93] 413 U.S. 189, 205, 211, 213 (1973).

In addition to the fact that intent or purpose is not an extraordinary test for discrimination, and the fact that it is proven every day of the week in thousands of courtrooms around the country in both criminal and civil litigation, it must also be observed that it has not proven an "impossible" test in the context of several major voting rights decisions that have been handed down under section 2 and the Fifteenth Amendment *since* the *Mobile* decision. In the recent cases of *McMillian* v. *Escambia County*[94] and *Lodge* v. *Buxton*,[95] the Fifth Circuit found no insurmountable difficulties in identifying voting discrimination under the intent standard.

In short, there is absolutely no need whatsoever under the intent test to find a "smoking gun" of evidence or to "mind read" or to discern the intentions of "long-dead legislators",[96] as is often alleged. It is this misunderstanding of the intent standard that is undoubtedly responsible for much of the suggestion that it is an unusually difficult test.

The subcommittee would like to note, moreover, that it is not persuaded that an appropriate standard should be fashioned on the basis of what best facilitates successful legal actions against states and municipalities. If that is the sole (or even the primary) objective of a legal system, then Congress might want equally to reconsider expediting criminal prosecutions by eliminating the "beyond a reasonable doubt" requirement in such cases. In developing an appropriate evidentiary and substantive standard, our society has chosen to consider values such as fairness and due process as well which, not infrequently, will conflict with the value of maximizing successful prosecution or litigation rates.

To describe the intent test as one requiring direct evidence of a "smoking gun" or admissions of racial prejudice and bigotry is to misconceive the test. In fact, as the Supreme Court observed in *Washington* v. *Davis*:

> Necessarily an invidious discriminatory purpose may often be inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another.[97]

In *Arlington Heights*, the Court stated:

> Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.[98]

[94] 688 F.2d 1289 (5th Cir. 1981).

[95] 639 F.2d 1358 (5th Cir. 1981).

[96] While several witnesses have emphasized the point that throughout our judicial history, the courts have generally refused to examine the motives of legislators, what they do not emphasize is that throughout this same history the courts have also refused to look beyond the face of a statute to identify discrimination. There are few, if any, cases prior to *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960) in which the Supreme Court struck down a statute which was not discriminatory on its face. It was in *Gomillion* and in dictum in *Lassiter County* v. *Northampton County Board of Elections*, 360 U.S. 45 (1959) that the Court first began to suggest that a statute could be struck down because of discriminatory intent even though there was no discrimination on the face of a statute. See also *Palmer* v. *Thompson*, 403 U.S. 217 (1971). This, then, represented a significant advance for civil rights plaintiffs. Practices that had earlier been beyond attack because courts could not inquire into legislative motives could now be declared unconstitutional if a discriminatory motive could be demonstrated. Proponents of the effects test now want to take this development one step further. They want to strike down statutes that are not discriminatory on their face even where no intent to discriminate has been demonstrated. This is not a reversion to the old standard of refusing to look at intent but rather a perversion of the new exception to that standard which permits motive to taint an otherwise acceptable practice.

[97] 426 U.S. 229, 242 (1976).

[98] 429 U.S. 252, 266 (1977).

Among the specific factors that may be looked to by the courts in evidencing discrimination, according to *Arlington Heights*, are the historical background of an action, departures from normal procedural sequence, legislative or administrative history, the disparate impact of an action upon a minority, and the like.[99] As the Court noted, these are only a few of the circumstances that could properly be the subject of an inquiry under the intent test.[100]

In short, it is expected that a judicial body will weigh the "totality of circumstances," whatever such circumstances may be, in evaluating whether or not an inference of purposeful discrimination has been raised. The same infinite array of circumstantial evidence commonly used by the courts to identify criminal violations, in the absence of confessions of guilt, has also always been available to prove civil rights violations.[101]

Professor Younger, one of the Nation's foremost authorities on the law of evidence, testified before this subcommittee and concluded:

> Opposition to the intent test has been practical. To enact it, the argument goes, is to make it difficult or even impossible to prove a violation. A practical objection to be sure but one which suggests to me that its makers lack practical experience in the conduct of litigation. Spend a few hours in any criminal court in the land. What is the stuff on trial? Almost always, a question of intent . . . In nearly all criminal litigation and in much civil litigation, a party must prove the other party's intent. So far as I know, except for the matter

[99] Id. at 266–68.

[100] See, e.g., Simon, "Racially Prejudiced Government Action: A Motivation Theory of the Constitutional Ban Against Racial Discrimination," 15 San Diego Law Rev. 5 (1978) at 10n8 where the author discusses additional types of evidence from which the circumstantial inference of institutional motivation may be drawn:

> (1) overtly racial rules or regulations that may (a) be symptomatic of prejudice, (b) single out a minority racial group or groups for clear disadvantage, or (c) have neither of these racial characteristics, or share one or the other to some incomplete extent; (2) evidence that the action significantly disadvantages a member or members of a minority racial group relative to others within the relevant population; (3) an explanation of the purportedly innocent goals of the challenged action that is sufficiently contextually peculiar to warrant disbelief, (4) evidence that the action's purportedly innocent goals could have been accomplished by reasonably available alternative means with a significantly less racially disproportionate effect; (5) judicial or administrative decisions that assign race as one of the grounds of decision; (6) an institutional admission, as for example a preamble of legislation racially neutral on its face that recites a racial purpose or an admission by counsel representing the institution that took the challenged action; (7) evidence of a contextual peculiarity in the process that led to the challenged actions, as, for example, the omission of a required or customary hearing; (8) evidence that the specific membership institution has previously been found to have engaged in racially prejudiced actions; (9) evidence of a social-political background or context suggestive of racial prejudice; (10) evidence of the data and arguments, whether by outsiders or members, presented to the institution during the information-gathering and deliberative processes that led to the action.

See also generally Ely, "Legislative and Administrative Motivation in Constitutional Law", 79 Yale L.J. 1205 (1970); Brest, "In Defense of the Anti-Discrimination Principle". 90 Harvard Law Rev. 1 (1976); Goodman, "De Facto School Desegregation: A Constitutional and Empirical Analysis". 60 California Law Rev. 275 (1972).

[101] See, e.g., Appellant's Reply Brief, Frank R. Parker, Lawyers' Committee for Civil Rights Under Law, *Kirksey v. City of Jackson*, No. 81-4058 (5th Cir. 1981) at 10:

> The absence of a 'smoking gun' in the 1908 legislative history does not, contrary to defendants' argument, negate the evidence of discriminatory purpose . . . and thus circumstantial evidence is highly probative.

Moreover, the brief cited as evidence of discriminatory purpose:

> (a) the extensive perception that blacks were a political threat throughout this period; (b) that at-large voting was viewed by at least one legislative leader who supported this legislation as a purposeful device to prevent black political participation; (c) the inevitable and foreseeable consequences of this legislation was to exclude black representation; (d) in fact, it has had this effect in Jackson; and (e) remarks by single legislators which, together with other supportive evidence of discriminatory intent, "have provided a firm basis for findings of invidious purpose in cases within this Circuit."

> before this subcommittee, there has been no serious contention that it is an unduly difficult or impossible thing to do. On the contrary, the courts have worked up several rules to guide juries in ferreting out intent. Intent may be inferred from what X said for example but what X said does not conclude the inquiry: a jury may find that X's intention was the opposite of what was said. Or X's intent may be inferred from all the circumstances of his behaviour . . . Nowhere does the law of evidence require a "smoking gun" in the form of someone's express acknowledgement of the offending intent; and nowhere has the administration of justice been impeded by the nearly universal absence of such a smoking gun . . . Lawyers and judges are familiar with the intent test and juries have no particular trouble applying it.[102]

The subcommittee concludes that proving intent is not "easy"—it should not be 'easy" for a Federal court judge to make findings that will result in the dismantlement of a structure of municipal self-government—but neither is it so difficult that it poses an insurmountable standard in section 2 cases. It is a standard that the Nation has always lived with in the area of civil rights, as well as other areas of the law, and it has often been satisfied in litigation. Most importantly, it is the *right* standard in the sense that neither an individual nor a community ought to be in violation of civil rights statutes, and ought not be considered guilty of discrimination, in the absence of intent or purpose to discriminate. To speak of "discrimination" in any other terms—to treat it as equivalent to a showing of disparate impact—is to transform the meaning of the concept beyond all recognition and to embark upon a course of conduct with consequences that may be at substantial variance with the traditional purposes of the Voting Rights Act and of the Constitution itself.

Rule of law

The subcommittee also believes that maintenance of the present intent test is critical if the law in section 2 is to provide any meaningful guidance to states and municipalities in the conduct of their affairs. As subcommittee Chairman Hatch remarked during the hearings:

> The more I think about it the more convinced that I am that the real distinction between the intent standard and the results standard is even greater than the issue of proportional representation. The real issue is whether or not we are going to define civil rights in this country by a clear, determinable standard—through the rule of law, as it were—or by a standard that literally no one can articulate.[103]

The fundamental observation is that the results test has absolutely no coherent or understandable meaning beyond the simple notion of proportional representation by race, however vehemently its proponents deny this. Ultimately, the results test brings to the law either an inflexible standard of proportional representation or, in the

[102] Senate Hearings, February 25, 1982, Irving Younger, Williams and Connolly, Former Professor, Cornell University School of Law.

[103] Senate Hearings, January 29, 1982, Opening Statement, U.S. Senator Orrin G. Hatch

words of Benjamin Hooks of the NAACP (in describing discrimination under the results test):

> Like the Supreme Court Justice said about pornography, "I may not be able to define it but I know it when I see it." [104]

In the final analysis, that is precisely what discrimination boils down to under the results test because there is no ultimate standard for identifying discrimination, short of proportional representation.

Under the intent test, for example, judges or juries evaluate the totality of circumstances on the basis of whether or not such circumstances raise an inference of intent to discriminate. In other words, once they have been exposed to the full array of relevant evidence relating to an allegedly discriminatory action, the ultimate or threshold question is, "Does this evidence add up to an inference of intent to discriminate?" That is the standard by which evidence is evaluated in order to determine whether or not such evidence rises to a level sufficient to establish a violation.

Under the results test, however, there is no comparable question. Once the evidence is before the court—whether it be the totality of the circumstances or any other defined class of evidence—there is no logical threshold question by which the court can assess such evidence, short of whether or not there is proportional representation for minorities. As Professor Blumstein observed on this matter:

> The thing you must do under the intent standard is to draw a bottom line . . . Basically, is the rationale ultimately a sham or a pretext or is it a legitimate neutral rationale? That is under the intent standard and that is a fact finding decision in the judge or the jury . . . Under the results standard it seems to me that you do not have to draw the bottom line. You just have to aggregate out a series of factors and the problem is, once you have aggregated out those factors: what do you have? Where are you? You know, it is the old thing we do in law school: you balance and you balance but ultimately how do you balance? What is the core value? [105]

There is no "core value" under the results test except for the value of equal electoral results for defined minority groups, or proportional representation. There is no other ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it.

While there have been a number of attempts to define such an ultimate, evaluative standard, more probing inquiry into the meaning of these standards during subcommittee hearings invariably degenerated into either increasingly explicit references to the numerical and statistical comparisons that are the tools of proportional representation/quota analysis or else the wholly uninstructive statements of the sort that "you know discrimination when you see it." [106]

---

[104] Senate Hearings, January 27, 1982, Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People.

[105] Senate Hearings, February 12, 1982, James F. Blumstein, Professor, Vanderbilt University School of Law.

[106] See supra note 104. With respect to the Section 5 "effects" test there is at least an objective standard by which to judge the impact of changes upon minorities, i.e. the status quo ante. Thus the "retrogression" standard established in *Beer* has at least some meaning independent of proportional representation, whatever other difficulties there may be with this standard. 425 U.S. 130 (1976). When existing laws are evaluated, however—as opposed solely to changes in the law—as they would be under the Section 2 results test, there

The implications of this are not merely academic. In the absence of such standards, the results test affords virtually no guidance whatsoever to communities in evaluating the legality and constitutionality of their governmental arrangements (if they lack proportional representation) and it affords no guidance to courts in deciding suits (if there is a lack of proportional representation).[107]

Given the lack of proportional representation, as well as the existence of a single one of the countless "objective factors of discrimination," [108] the subcommittee believes not only that a prima facie case of discrimination would be established under the results test but that an irrebuttable case would be established. What response could a community that is being sued raise to overcome this evidence? Neither the fact that there was an absence of discriminatory purpose nor the fact that there were legitimate, non-discriminatory reasons for particular governmental structures or institutions, would seem to be satisfactory. These were certainly not satisfactory to either plaintiffs or the lower courts in the *Mobile* case. What other evidence or what other response would be appropriate to rebut the evidence described here? So long as there is no standard for evaluating evidence, there can be no standard for introducing evidence. The standard that would be fashioned would necessarily be fashioned on a case-by-case basis. By necessity the results test would substitute the arbitrary discretion of judges in place of the relatively certain rule of law established under the intent test.

The confusion introduced by the results test is illustrated somewhat by the near-total disagreement as far as one of the most basic questions involved in the analysis: Does the "results" test proposed in section 2 mean the same thing as the "effects" test in section 5? Despite the fundamental importance of this matter, there has been disagreement among witness after witness on this. Representative Sensenbrenner, one of the architects of the results test in the House, testified before this subcommittee and stated:

> I think that we are splitting hairs in attempting to see a significant difference in a results test or an effects test.[109]

Mr. Chambers, representing the NAACP Legal Defense Fund, on the other hand, totally disclaimed this meaning:

> Question: What is the relationship between the results test in section 2 and the effects test in section 5?

---

is no possibility of a similar standard to that suggested in *Beer*. In short, there is no standard short of comparing actual representation of minorities with the representation to which they would be "entitled" under a proportional representation requirement. See Senate Hearings, March 1, 1982, Assistant Attorney General of the United States for Civil Rights William Bradford Reynolds.

Professor O'Rourke has further observed:

> A challenge to an at-large system of necessity must be predicated on a comparison between electoral opportunity under the existing plan and the opportunity that would or might prevail under one or more alternatives. If the alternatives need not be limited to those which fit within the existing structure of government or the current size of the local governing body, then there is little to prevent the consideration of proportional representation as the model against which the current system could be evaluated. Statement submitted to the Subcommittee on the Constitution by Timothy O'Rourke, Professor, University of Virginia, March 3, 1982.

[107] As the Supreme Court in *Mobile* said in rejecting the results test proposed by Justice Marshall for the Fifteenth Amendment and Section 2.

> Mr. Justice Marshall's dissenting opinion would discard these fixed principles [of law] in favor of a judicial inventiveness that would go far toward making this Court a super-legislature. . . . We are not free to do so. 446 U.S. 55, 76.

[108] See note 180 infra.

[109] Senate Hearings, February 4, 1982, U.S. Representative James Sensenbrenner.

Chambers: They are not the same test...
Question: In other words, the experience of the courts with section 5 would not be relevant in determining how section 2 is likely to be interpreted?
Chambers: That is correct.[110]

Ms. Martinez, representing the Mexican-American Legal Defense and Education Fund, however, stated:

> The continuing vitality of section 2 depends upon an amendment passed by the House that would permit judicial findings of section 2 violations upon proof of the discriminatory effects *or* results of voting practices.[111]

Professor Cox found himself in disagreement on this point when he observed:

> If you mean the effects test as intepreted by the courts with regard to section 5, I think that is considerably different from the results test in section 2.[112]

During the course of both the House and Senate hearings on the Voting Rights Act, approximately half of the witnesses who discussed this issue claimed that the results test in section 2 was similar or identical to the effects test in section 5, and hence that the judicial history of interpretation under section 5 was relevant; the other half argued that it meant something substantially or totally dissimilar.[113] Given the inherent uncertainty about the results test in the first place, it is highly instructive to the subcommittee that so much continuing confusion could exist on a question as basic as the relationship between the section 2 results test and the section 5 effects test.

In summary, the subcommittee believes that it would be a grave mistake for Congress to overturn the decision of the Supreme Court in *City of Mobile* v. *Bolden*. Such an action would effect a major transformation in the law of section 2 and would overturn a workable and settled test for identifying discrimination. The results test in section 2 would bring to the Voting Rights Act an entirely new concept of civil rights that would create confusion in the law and, likely, leave thousands of communities across the country vulnerable to judicial restructuring.

B. PROPORTIONAL REPRESENTATION BY RACE

Perhaps the most important and disturbing issue brought to the attention of the subcommittee during the hearings was the issue of whether the proposed change in section 2 of the Voting Rights Act would lead to widespread court-ordered "proportional representation." Put simply, proportional representation refers to a plan of government which adopts the racial or ethnic group as the primary unit of political representation and apportions seats in electoral bodies according to the comparative numerical strength of these groups.[114] The concept of proportional representation has been experimented with—often accompanied by substantial social division and turmoil—in a handful of nations around the world.[115] There seems to be general agreement that the framers of our Federal Government rejected official recognition of interest groups as a basis for representation and instead chose the individual as the primary unit of government.[116] Hence, the subcommittee is deeply concerned with this issue since the proposed change in section 2 could have the consequence of bringing about a substantial change in the fundamental organization of American political society.

Results and proportionality

The analysis of this issue begins with the language of the proposed change in section 2. Existing section 2 provides that:

> No voting qualification or prerequisitive to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 4(f)(2).[117]

The House amendment eliminates the words "to deny or abridge" and substitutes the words "in a manner which results in a denial or abridgement of." The House Committee report explains that:

> H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under the provision.[118]

Under the current language, as construed by the Supreme Court in the *Mobile* case, a violation of section 2 requires proof of discriminatory purpose or intent. The House bill changes the gravamen of the claim to proof of a disparate electoral result. This change in the very essence of the claim filed under section 2 necessarily changes the remedial options of courts upon proof of a section 2 violation. In the present situation, a court can provide an adequate remedy merely by

[110] Senate Hearings, February 12, 1982, Julius L. Chambers, President, NAACP Legal Defense Fund, Inc.
[111] Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican American Legal Defense and Educational Fund.
[112] Senate Hearings, February 25, 1982, Archibald Cox, Professor, Harvard University School of Law, representing Common Cause.
[113] On occasion, there were even differences of opinion among the same witness in their testimony before the House and the Senate. See, e.g., testimony of Drew Days, Professor, Yale School of Law, Senate Hearings, February 12, 1982; House Hearings, June 25, 1981; Henry Marsh, Mayor, Richmond, Virginia, Senate Hearings, January 28, 1982, House Hearings, May 20, 1981.

[114] It is worth noting that there seems to be at least some semantical differences as to what "proportional representation" means. See, e.g., Senate Hearings, January 27, 1982, Benjamin Hooks, Executive Director, NAACP ("I think there is a big difference between proportional representation and representation in proportion to minority population."); Senate Hearings, February 12, 1982, Drew Days, Professor, Yale School of Law (denying that a Justice Department requirement amounted to proportional representation that required at least one district in a four district community, with a 25% minority population, be structured to elect a minority representative.) See also Senate Hearings, January 28, 1982, Henry Marsh, Mayor, Richmond, Virginia; February 11, 1982, Frank Parker, Director, Voting Rights Project, Lawyers' Committee for Civil Rights Under Law; in which fundamental disagreement was expressed on whether or not the *Richmond and Petersburg* cases involved proportional representation.
[115] Senate Hearings, February 12, 1982, Henry Abraham, Professor, University of Virginia.
[116] See, e.g., Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute; Berns, "Voting Rights and Wrongs", Commentary, March 1982 at 31; See also The Federalist No. 10 in which James Madison discusses the concern of the drafters of the Constitution about the development of "factions" in the new Nation.
[117] Section 4(f)(2) includes within the category of groups protected under the Voting Rights Act, "language minority" groups. Such "language minorities" are defined to include American Indians, Alaskan Natives, Asian Americans, and those of Spanish heritage. Section 14(c)(2).
[118] H.R. Rep. No. 97-227 at 29 (1981).

declaring the purposefully discriminatory action void since the essence of the statutory claim is a right to freedom from wrongfully motivated official action. However, under the proposed change in section 2, the right established is to a particular result and so, inevitably, much more will be required to provide an adequate remedy. The obligations of judges will require use of their equity powers to structure electoral systems to provide a result that will be responsive to the new right.[119] Otherwise, the new right would be without an effective remedy, a state of affairs which is logically and legally unacceptable.

Thus launched in search of a remedy involving results, the subcommittee believes that courts would have to solve the problem of measuring that remedy by distributional concepts of equity which are indistinguishable from the concept of proportionality. The numerical contribution of the group to the age-eligible voter group will almost certainly dictate an entitlement to office in similar proportion.[120] It is the opinion of the subcommittee that if the substantive nature of a section 2 claim is changed to proof of a particular electoral result, the obligation of judges to furnish adequate remedies according to basic principles of equity will lead to widespread establishment of proportional representation.

Virtually the same conclusion was stated by numerous witnesses who appeared before the subcommittee. Attorney General Smith told the subcommittee:

> [Under the new test] any voting law or procedure in the country which produces election results that fail to mirror the population's make-up in a particular community would be vulnerable to legal challenge . . . if carried to its logical conclusion, proportional representation or quotas would be the end result.[121]

Assistant Attorney General Reynolds testified:

> A very real prospect is that this amendment could well lead on to the use of quotas in the electoral process . . . We are deeply concerned that this language will be construed to require governmental units to present compelling justification for any voting system which does not lead to proportional representation.[122]

Professor Horowitz testified that under the results test:

> What the courts are going to have to do is to look at the proportion of minority voters in a given locality and look at

[119] The significance of this distinction was noted by Mr. Rios who described "two stages of litigation, that is, the proving your case part and then the remedy part." He testified further that "once the factors delineated in *Zimmer* and *White* have been established then the courts do require that you go to single-member districts but that is at the remedy stage." Senate Hearings, February 4, 1982, Rolando Rios, Legal Director, Southwest Voter Registration Education Project.

[120] For further discussion of the concept of racial "entitlements", see Senate Hearings, February 12, 1982, James Blumstein, Professor, Vanderbilt University School of Law. Professor Blumstein testified that the proposed change in Section 2, if theoretically based at all implies "an underlying theory of some affirmative, race-based entitlements." Later in his testimony, he characterized this theory as follows: "Basically, it changes the notion from a fair share to a fair share, a piece of the action, based upon racial entitlements, and that is what I find objectionable."

[121] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.

[122] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

> the proportion of minority representatives in a given locality. That is where they will begin their inquiry; that is very likely where they will end their inquiry, and when they do that, we will have ethnic or racial proportionality.[123]

Professor Bishop has written the subcommittee:

> It seems to me that the intent of the amendment is to ensure that blacks or members of other minority groups are ensured proportional representation. If, for example, blacks are 20 per cent of the population of a state, Hispanics 15 per cent, and Indians 2 per cent, then at least 20 per cent of the members of the legislature must be black, 15 per cent Hispanic, and 2 per cent Indian.[124]

Professor Abraham has stated:

> Only those who live in a dream world can fail to perceive the basic purpose and thrust and inevitable result of the new section 2: It is to establish a pattern of proportional representation, now based upon race—but who is to say, sir?—perhaps at a later moment in time upon gender, or religion, or nationality, or even age.[125]

A similar conclusion—that the concept of proportional representation of race is the inevitable result of the change in section 2—was reached by a large number of additional witnesses and observers. (See Attachment B.)

The disclaimer provision

Proponents of the House change in section 2 have argued that the amendment would not result in proportional representation, and generally relied on the "disclaimer" sentence which was added to section 2 as a part of the House bill.[126] Since this is the chief argument contrary to the conclusion of the subcommittee, the likely effect of this provision merits careful attention. Again, the analysis begins with the language of the provision:

> The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, *in and of itself*, constitute a violation of this section. (Emphasis added.)

The House report comments on this change as follows:

> The proposed amendment does not create a right of proportional representation. Thus, the fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population does not, in itself constitute a violation of the section

[123] Senate Hearings, February 12, 1982, Donald Horowitz, Professor, Duke University School of Law.

[124] Letter from Joseph Bishop, Jr., Professor, Yale School of Law, to Senator Orrin G. Hatch, Chairman, Senate Judiciary Subcommittee on the Constitution, January 21, 1982.

[125] Senate Hearings, February 12, 1982, Henry Abraham, Professor, University of Virginia. For other selected quotes on Section 2 and proportional representation, see Attachment B.

[126] See, e.g., Senate Hearings, February 25, 1982, Archibald Cox, Professor, Harvard University Law School, representing Common Cause; February 25, 1982, David Brink, President, American Bar Association; February 4, 1982, U.S. Representative James Sensenbrenner.

although such proof, along with the objective factors, would be highly relevant. Neither does it create a right to proportional representation as a remedy.[127]

This report language is frequently cited as explaining the protection afforded by the disclaimer language of the House amendment.[128] Analysis of the House report language shows that it is a misleading and irrelevant comment on the likely effect of the statutory reference to proportionality. Moreover, the subcommittee notes that courts would look first to the language of section 2 itself in resolving concerns about proportional representation and would only consult legislative history if the statutory language were found to be ambiguous.

The House Report reference to no "right of proportional representation" is highly misleading because, as explained above, the change in section 2 actually creates a new claim to non-disparate election results among racial groups.[129] The inevitability of proportional representation is introduced by the necessity of fashioning an adequate remedy, to respond to the new claim. The statement in the House Report, "Neither does it create a right to proportional representation as a remedy" is basically irrelevant to the predicted remedial consequence of proportional representation since there is no suggestion that this consequence is prohibited by the disclaimer. In other words, though proportional representation may not be a mandatory remedy, even under this theory nothing suggests that it is a prohibited remedy.

The subcommittee believes that the second sentence of the report language on the disclaimer may be an accurate observation, but is essentially an irrelevant one. The disclaimer provision will have virtually no practical significance in preventing the ultimate imposition of proportional representation. In short, the disclaimer merely adds the necessity of proving, as an element of the new section 2 claim, one or more "objective factors of discrimination" that purport to explain or illuminate the failure to elect in numbers equal to the group's proportion of the population. The subcommittee finds this addition totally illusory as a bar to proportional representation since the courts and the Justice Department in the context of section 5 and elsewhere have already identified so many such factors that one or more would be available to fully establish a section 2 claim in virtually any political subdivision having an identifiable minority group.

---

[127] H.R. Rep. No. 97-227 at 30 (1981).

[128] The Supreme Court in *Mobile* was confronted with a similar disclaimer of proportional representation by Justice Marshall in his dissent. In response, the Court observed,

> The dissenting opinion seeks to disclaim this description of its theory [results test] by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of "historical and social" factors indicating that the group in question is without political influence . . . Putting to the side the evident fact these gauzy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete political group that happens for whatever reason to elect fewer of its candidates than arithmetic indicates it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the inequitable distribution of political influence. 446 U.S. at fn. 22.

[129] As Professor Gross observed:

> The Constitution speaks only of individuals. There are many theories of political representation . . . but only one of these is enacted in the Constitution. Senate Hearings, January 28, 1982, Barry Gross, Professor, City College of New York.

The concept of a "diluted" vote, a concept much admired among proponents of the results test, is one that has meaning only in the context of interest groups. The Equal Protection clause of the Fourteenth Amendment as well as the Fifteenth Amendment extend their protections expressly to individuals, not to groups.

A partial list of these "objective factors,"[130] gleaned from various sources, includes (1) some history of discrimination;[131] (2) at-large voting systems or multi-member districts;[132] (3) some history of "dual" school systems;[133] (4) cancellation of registration for failure to vote;[134] (5) residency requirements for voters;[135] (6) special requirements for independent or third-party candidates;[136] (7) off-year elections;[137] (8) substantial candidate cost requirements;[138] (9) staggered terms of office;[139] (10) high economic costs associated with registration;[140] (11) disparity in voter registration by race;[141] (12) history of lack of proportional representation;[142] (13) disparity

---

[130] From the perspective of the proponents of the results test, an "objective factor of discrimination" is an electoral practice or procedure which constitutes a barrier to effective minority participation in the political process. These factors are derived generally from decisions of federal courts, objections of the Department of Justice to proposed changes submitted by covered jurisdictions for preclearance under Section 5, the House Report, H.R. Rep. No. 97-227 at 30 (1981), testimony presented at the Senate hearings, and other miscellaneous sources.

[131] See, e.g., H.R. Rep. No. 97-227, 97th Cong., 1st Sess. 30-31 (1981), (hereinafter in this section "House Report"); Senate Hearings, January 27, 1982, Benjamin L. Hooks, Executive Director N.A.A.C.P.; See also, *Gaston County* v. *United States*, 395 U.S. 285, 289-*f* (1969). Discrimination against blacks (and perhaps other minorities) has been prevalent throughout the United States and the existence of such discrimination, although going back many generations before, will nevertheless be used as the predicate for broad, far-reaching relief under any law using disparate or discriminatory impact as a test." Senate Hearings, February 4, 1982, E. Freeman Leverett, Attorney, Elberton, Georgia.

[132] See, e.g., House Report at 30-31. This was the argument of the plaintiffs in *City of Mobile* v. *Bolden*, 446 U.S. 55, 65-70 (1980).

The Justice Department has routinely objected to at-large voting systems contained in Section 5 preclearance submissions: e.g. Twiggs County, Georgia (8-7-72); State of Mississippi (6-21-69); Dixie County, Alabama (4-28-76); Lexington, Mississippi (2-25-77); Robeson County (N.C.) Board of Education (12-29-75); Horry County, South Carolina (11-12-76) Senate Hearings, March 1, 1982, William Bradford Reynolds, Assistant Attorney General of the United States (Attachments D-1 and D-2); see also, Senate Hearings, January 27, 1982, Benjamin L. Hooks. It is interesting to note that such "objective factors of discrimination" as the at-large system of voting have been attacked even in the context of situations in which "minorities" represent population majorities within a community, e.g. San Antonio, Texas. See Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund.

[133] See, e.g., *Commonwealth of Virginia* v. *United States*, 386 F. Supp. 1219 (D.D.C. 1974) *affirmed*, 420 U.S. 90 (1975).

[134] See, e.g., House Report at 21 n. 105; Senate Hearings, January 27, 1982, Benjamin L. Hooks; "Barriers to Effective Participation in Electoral Politics", Voter Education Project Report, at 2 (March 1981). The Justice Department has objected to voter purging provisions in Section 5 submissions; e.g. State of Mississippi (4-6-81); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachment D-2).

[135] See, e.g., House Report at 30-31: The Justice Department has often objected to residency requirements contained in Section 5 preclearance submissions: e.g. Bogalusa, Louisiana (10-29-73); Walterboro, South Carolina (5-24-74); Pike County, Alabama (8-12-74); Sharon, Georgia (2-10-76); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D-1 and D-2).

[136] See, e.g., *Allen* v. *State Board of Elections*, 393 U.S. 544, 570 (1969).

[137] The Justice Department has objected, for example, to special elections in preclearance submissions on six occasions, Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachment D-2). It might similarly be argued that "off-year" elections tend to result in disproportionately low voter turn-out among minorities.

[138] See, e.g., Senate Hearings January 27, 1982, Benjamin L. Hooks; Voter Education Project Report "Barriers" at 3 (March 1981). The Justice Department has objected to filing fees in Section 5 submissions; e.g. Ocilla, Georgia filing fees for aldermen or mayor (10-7-75); Albany, Georgia filing fee (12-7-73); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D-1 and D-2).

[139] See, e.g., Senate Hearings, January 27, 1982, Benjamin L. Hooks. The Justice Department has objected to staggered terms in Section 5 preclearance submissions on numerous occasions: e.g., Phenix City, Alabama (12-12-75); St. Helena Parish, Louisiana (3-7-72); Newnan, Georgia (6-10-75); Reidsville, North Carolina (5-2-79); Gretna, Virginia (6-27-78); Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments D-1 and D-2).

[140] See, e.g., Senate Hearings, January 27, 1982, Benjamin Hooks—"Whether the polling places are accessible to the communities where the minorities reside, and times convenient for the voters". The Justice Department has objected to polling place changes contained in Section 5 preclearance submissions: e.g., Sumter County, Alabama (10-17-80); Newport News, Virginia (6-17-74); New York City, New York (9-3-74); Senate Hearings, March 1, 1982. William Bradford Reynolds (Attachments D-1 and D-2).

[141] See, e.g., Voting Rights Act of 1965, § 4(b), 42 U.S.C. § 1973b(b). See *South Carolina* v. *Katzenbach*, 383 U.S. 301 (1966).

[142] See, e.g., House Report at 30-31: *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

in literacy rates by race;[143] (14) evidence of racial bloc voting;[144] (15) history of English-only ballots;[145] (16) history of poll taxes;[146] (17) disparity in distribution of services by race;[147] (18) numbered electoral posts;[148] (19) prohibitions on single-shot voting;[149] and (20) majority vote requirements.[150]

Such "objective factors of discrimination" largely consist of electoral procedures or mechanisms that purportedly pose barriers to full participation by minorities in the electoral process. Given the existence of one or more of these factors with the lack of proportional representation, the new test in section 2 operates on the premise that the existence of the "objective factor" *explains* the lack of proportional representation. Thus, in a technical sense, the disclaimer would be satisfied. It would not be the absence of proportional representation *in and of itself* that would constitute the dispositive element of the violation but rather the "objective factor". The existence of both the absence of proportional representation and any "objective factor" would consummate a section 2 violation. Because of the limitless number of "objective factors of discrimination," the disclaimer provision would essentially be nullified. Effectively, any jurisdiction with a significant minority population that lacked proportional representation would run afoul of the results test. Identifying a further "objective factor of discrimination" would be largely mechanical and perfunctory.

The analysis of the subcommittee of the likely significance of the disclaimer sentence, in fact, accords it more weight than suggested by several opponents of the change who appeared before the subcommittee. Their views are not rejected, but are recognized as lending important support to the conclusion of the subcommittee.

Assistant Attorney General Reynolds testified, for example, that the disclaimer would only operate to prevent a violation of section 2 where an electoral system had, in fact, been tailored to achieve pro-

[143] See, e.g., Voting Rights Act of 1965, § 4(a), 42 U.S.C. § 1973b(a); *Gaston County* v. *United States*, 395 U.S. 285 (1969).

[144] See, e.g., House Report at 30–31; *City of Mobile* v. *Bolden*, 446 U.S. 55 (1980); *City of Rome* v. *United States*, 446 U.S. 156 (1980). Senate Hearings, Jan. 27, 1982, Benjamin L. Hooks; Voter Education Project Report, "Barriers" at 5 (March, 1981).

[145] See, e.g., Voting Rights Act of 1965, § 203, 42 U.S.C. § 1973aa-1a. The Justice Department has objected to "English-only ballots" in Yuba County (5–24–76) and Monterey County, California (3–4–77). Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachment D–2).

[146] See, e.g., Voting Rights Act of 1965, § 10, 42 U.S.C. § 1973h.

[147] See, e.g., *City of Rome* v. *United States*, 446 U.S. 156 (1980); *Lodge* v. *Buxton*, 639 F.2d 1358 (5th Cir. 1981); Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

[148] See, e.g., House Report at 30–31. The Justice Department has consistently objected to "numbered electoral posts" in Section 5 preclearance submissions; e.g., Birmingham, Alabama (7–9–71); the States of Georgia (7–6–81), Louisiana (4–20–71), Mississippi (8–10–71), North Carolina (9–27–71), South Carolina (6–30–72); and Texas City, Texas (3–10–76). Senate Hearings, March 1, 1982, William Bradford Reynolds (Attachments, D–1 and D–2); Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

[149] See, e.g., House Report at 30–31. The Justice Department has on occasion objected to "single-shot prohibitions" in Section 5 preclearance submissions; e.g., Talladega, Alabama (7–23–71); Sumter Cnty. (Ala.) Democratic Executive Committee (10–29–74). Senate Hearings, March 1, 1982, William Bradford Reynolds. (Attachments D–1); *City of Rome* v. *United States*, 446 U.S. 156, 184 (1980); U.S. Commission on Civil Rights, "The Voting Rights Act; Ten Years After" pp. 205–207 (1975); Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

[150] See, e.g., House Report at 30–31. The Justice Department has routinely objected to "majority vote requirements" in Section 5 preclearance submissions; e.g., Pike County, Alabama (8–12–74); Athens, Ga. (10–28–75), Augusta, Ga. (3–2–81); Orleans Parish, La. (8–15–75); State of Mississippi (6–11–71); Greenville, N.C. (4–7–80); Rock Hill, S.C. (12–12–78); Dumas (TX) Independent School District (3–12–76). Senate Hearings March 1, 1982, William Bradford Reynolds (Attachments, D–1 and D–2). See Senate Hearings, Jan. 27, 1982, Benjamin Hooks.

portional representation and the intended result was not achieved *solely* because the right was not exercised as, for example, where no minority candidate sought office.[151] This reasoning led Assistant Attorney General Reynolds to conclude that in most situations a failure to achieve proportional representation by itself would be sufficient proof of a section 2 violation:

> In the archetypal case—where minority-backed candidates unsuccessfully seek office under electoral systems, such as at-large systems, that have not been neatly designed to produce proportional representation—disproportionate electoral results would lead to invalidation of the system under section 2, and, in turn, to a Federal court order restructuring the challenged government system.[152]

Professor Younger testified that the disclaimer is likely to be wholly ineffective because it is "simply incoherent."[153] He observed:

> If the draftsmen of proposed section 2 wished to see to it that the racial makeup of an elected body would not be taken as evidence of a violation, they have failed to say so in their moving sentence. If enacted, that saving sentence will either be rewritten by the courts or ignored, in either event dishonoring Congress' responsibility to write the Nation's laws.[154]

Professor Berns testified that the disclaimer might simply be ignored and stated:

> Whatever Congress' intention in making this disclaimer, the courts are likely to treat it the way they treated a similar disclaimer in the Civil Rights Act of 1964. There Congress said specifically that nothing in Title VII of that Act should be interpreted to require employers "to grant preferential treatment" to any person or group because of race, color, sex, or national origin, not even to correct "an imbalance which may exist with respect to the total number of percentage of persons of any race etc. employed by any employer. Clear enough, one would think, but the Supreme Court paid it no heed. To read this as written, said Justice Brennan in the *Weber* case, would bring about an end completely at variance with the statute, by which he meant the purpose of the Court. Congress' disclaimer should be taken with a grain of salt.[155]

By whatever theory one prefers, the disclaimer is little more than a rhetorical smokescreen that poses utterly no barrier to the develop-

[151] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[152] Id.

[153] Senate Hearings, February 25, 1982, Irving Younger, Williams and Connally, Former Professor, Cornell University School of Law.

[154] Id.

[155] Berns, "Voting Rights and Wrongs," Commentary, March 1982 at 35. "*Weber*" refers to *United Steelworkers of America* v. *Weber*, 443 U.S. 193 (1979). The disclaimer is illusory in yet another sense in that it does nothing more than restate what is already present law. *Whitcomb* v. *Chavis*, 403 U.S. 124, 149, (1971); *White* v. *Regester*, 412 U.S. 755, 765 (1973); *City of Mobile* v. *Bolden* 446 U.S. 55, 66 (1980); *Lodge* v. *Buxton*, 639 F. 2d 1358, 1362 (5th Cir. 1981), stay granted sub nom *Rogers* v. *Lodge*, 439 U.S. 948 (1978). In that sense, it does not address at all the impact and implications of that part of Section 2 that is being changed—the results test. The very fact that Congress will have changed the standard of Section 2 evidences an obvious intent on the part of Congress to change current law.

ment of proportional representation mandated by the preceding language in the new results test.

To summarize once more, the disclaimer provision is meaningless as a barrier to proportional representation because: (a) it is absolutely silent in addressing the remedies, as opposed to the substantive violation, required by the results test; (b) even with respect to the substantive violation, the language taken at its face value simply requires the identification of an additional "objective factor of discrimination," one or more of which will exist in most jurisdictions throughout the country; (c) the provision can equally be interpreted to place an absolute obligation upon a jurisdiction to establish governmental structures consistent with proportional representation, offering protection to such jurisdictions only to the extent that minority groups themselves have been derelict in taking advantage of such a structure as, for example, when they fail to offer a candidate; (d) the provision from a purely technical point of view is inherently illogical and internally inconsistent since by the terms of section 2 only "voting practices or procedures" can be violations not, by definition, the *racial make-up* of an elected body; and (e) the provision, even if it meant what its proponents argue it means, is uncomfortably close in language to disclaimers in earlier legislation that has been effectively ignored by the courts.

Proportional representation as public policy

The conclusion of the subcommittee that proportional representation is the inevitable result of the proposed change in section 2, notwithstanding the disclaimer, leads the inquiry to whether the adoption of such a system would be advisable policy. On this point, the testimony was virtually unanimous in conclusion: Proportional representation is contrary to our political tradition and ought not to be accepted as a general part of our system of government at any level.[156] Professor Berns, for example, indicated that the Framers considered the very question the subcommittee has addressed and rejected any system of representation based on interest groups. He testified:

> Representative government does not imply proportional representation, or any version of it that is likely to enhance bloc voting by discrete groups. The Framers of the Constitution referred to such groups as "factions," and they did their best to minimize their influence." . . .
>
> Whereas the Anti-Federalists called for small districts and, therefore, many representatives, the Framers called for (and got) larger districts and fewer representatives. They did so as a means of encompassing within each district "a greater variety of parties and interests," thus freeing the elected representatives from an excessive dependence on the unrefined and narrow views that are likely to be expressed by particular groups of their constituents.[157]

[156] See e.g., Senate Hearings, February 4, 1982, Norman Dorsen, Professor, New York University School of Law, representing the American Civil Liberties Union: "I would be against proportional representation. I think that people are entitled to vote under a fair and constitutional system and that proportional representation has not been our system."; Senate Hearings, February 12, 1982, Julius Chambers, President, NAACP Legal Defense Fund, Inc.

[157] Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute.

The testimony of Professor Erler sounded the same theme:

> Nothing could be more alien to the American political tradition than the idea of proportional representation. Proportional representation makes it impossible for the representative process to find a common ground that transcends factionalized interests. Every modern government based on the proportional system is highly fragmented and unstable. The genius of the American system is that it requires factions and interests to take an enlarged view of their own welfare, to see, as it were, their own interests through the filter of the common good. In the American system, because of its fluid electoral alignments, a representative must represent not only interests that elect him, but those who vote against him as well. That is to say, he must represent the common interest rather than any particular or narrow interest. This is the genius of a diverse country whose very electoral institutions—particularly the political party structure—militate against the idea of proportional representation. Proportional representation brings narrow, particularized interests to the fore and undermines the necessity of compromise in the interest of the common good.[158]

The subcommittee adopts these views and believes that proportional representation ought to be rejected as undesirable public policy totally apart from the constitutional difficulties that it raises, and the racial consciousness that it fosters. Since it has concluded that the proposed change in section 2 will inevitably lead to the proportional representation and that the disclaimer language will not prevent this result, the subcommittee necessarily and firmly concludes that the House amendment to section 2 should be rejected by this body.

C. RACIAL IMPLICATIONS

In addition to the serious questions inherent in adopting any legislation which recognizes interest groups as a primary unit of political representation, it must be taken into account that the particular group immediately involved is defined solely on racial grounds. The subcommittee believes special caution is appropriate when the enactment of any race-based classification is contemplated and rigorous analysis of potential undesirable social consequences must be undertaken.

The first problem encountered is simply one of definition. Legislation which tends to establish representation based on racial group necessarily poses the question of how persons shall be assigned to or excluded from that group for political purposes. Recent history in this and other nations suggests that the resolution of such a question can be demeaning and ultimately dehumanizing for those involved. All too often the task of racial classification in and of itself has resulted in social turmoil. At a minimum, the issue of classification would heighten race-consciousness and contribute to race-polarization. As Professor Van Alstyne put it, the proposed change in section 2 will inevitably: "compel the worst tendencies toward race-based allegiances and divi-

[158] Senate Hearings, January 28, 1982, Edward Erler, Professor, National Humanities Center.

sions."[159] This predicted result is in sharp conflict with the admonitions of the elder Justice Harlan who wrote in *Plessy:*

> There is no caste here. Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. . . . The law regards man as man, and takes no account of his surroundings or of his color when his civil rights are guaranteed by the supreme law of the land are involved.[160]

More recently Justice Stevens called the very attempt to define qualifying racial characteristics:

> repugnant to our constitutional ideals . . . If the national government is to make a serious effort to define racial classes by criteria that can be administered objectively, it must study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935.[161]

Thus the subcommittee finds that the race-based assignment of citizens to political groups is a potentially disruptive task which appears to be contrary to the Nation's most enlightened concepts of individual dignity and civil rights.

The second problem involves doubtful assumptions which are necessary to support a race-based system of representation. The acceptance of a racial group as a political unit implies, for one thing, that race is the predominant determinant of political preference. Yet, there is considerable evidence that black political figures can win substantial support from white voters, and, similarly, that white candidates can win the votes of black citizens. Attorney General Smith described the evidence. He referred to the implication that blacks will only vote for black candidates and whites only for white candidates and said:

> That, of course, is not true. One of the best examples of that is the City of Los Angeles, where a black mayor of course was elected with many white votes.[162]

Similarly, a race-based system implies that the decisions of elected officials are predominantly determined by racial classification. Professor Berns questioned this assumption in his testimony:

> I question whether a black can be fairly represented only by a black and not, for example, by a Peter Rodino or that a white can be fairly represented only by a white and not, for example, Edward Brooke.[163]

In other words, there is no evidence that racial bloc voting is inevitable and reason to doubt that fair representation depends on racial identity. Legislation which assumes the contrary may itself have the detrimental consequence of establishing racial polarity in voting where

[158] Letter from William Van Alstyne, Professor, Duke University School of Law, Visiting Professor, University of California School of Law; to George Cochran, Professor, University of Mississippi School of Law, February 16, 1982; submitted to the Senate Subcommittee on the Constitution, February 23, 1982.

[159] *Plessy* v. *Ferguson*, 163 U.S. 537, 559 (1897) (dissenting opinion by Harlan, J.).

[160] *Fullilove* v. *Klutznick*, 448 U.S. 448, 534 n. 5 (1980) (dissenting opinion by Stevens, J.).

[161] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.

[162] Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute.

none existed, or was merely episodic, and of establishing race as an accepted factor in the decision-making of elected officials.

Finally, any assumption that a race-based system will enhance the political influence of minorities is open to considerable debate. Professor Erler testified that it is not always clear that the interests of racial minorities will be best served by a proportional system:

> It may only allow the racial minority to become isolated. The interests of minorities are best served when narrow racial issues are subsumed within a larger political context where race does not define political interests. The overwhelming purpose of the Voting Rights Act was to create these conditions, and probably no finer example of legislation serving the common interest can be found. But transforming the Voting Rights Act into a vehicle of proportional representatation based upon race will undermine the ground of the common good upon which it rests. Such a transformation will go far towards precluding the possibility of ever creating a common interest or common ground that transcends racial class considerations.[164]

Professor McManus recalled an instance where politically articulate blacks argued strongly against proportional representation:

> One faction of blacks, led by several state representatives, the three black Houston City Council members, argued for spreading influence among three commissioners rather than having a single black 'figurehead' commissioner. State Representative Craig Washington, spokesperson for the group, pointed out that three votes are needed to accomplish anything substantive. "As long as we have 25 percent of the vote in any one district we are going to be the balance of power. For that reason it is better for the black community to have voting impact on three commissioners than to be lumped together in one precinct and elect a black to sit at the table and watch the papers fly up and down," he said. Washington argued that packing all the blacks in one district was "not in the best long-term interests of the community."[165]

The City Attorney for Rome, Georgia, Mr. Brinson similarly observed:

> While the proposed amendment to section 2 may be perceived as an effort to achieve proportional representation aimed at aiding a group's participation in the political proc-

[164] Senate Hearings, February 12, 1982, Edward Erler, Professor, National Humanities Center. Even Justice Brennan, certainly no opponent of affirmative action notions of civil rights, has remarked that efforts to achieve proportional representation could be used as a "contrivance to segregate the group . . . thereby frustrating its potentially successful efforts at coalition building along racial lines." *United Jewish Organization* v. *Carey*, 430 U.S. at 172–3.

[165] Senate Hearings, February 1, 1982, Susan McManus, Professor, University of Houston. The subcommittee draws a sharp distinction between aggregate influence of the minority community generally and the influence of individual minority representatives. While the influence of an individual minority representative may wel lbe enhanced by an overwhelmingly concentrated minority district, it is questionable whether or not minority influence generally is enhanced by such districts as opposed, for example, to greater dispersal of significant minority populations among a greater number of districts. A distinction, thus, must be drawn between minority influence and minority representation.

esses, in reality it may very well frustrate the group's potentially successful efforts at coalition building across racial lines. The requirement of a quota of racial political success would tend strongly to stigmatize minorities, departmentalize the electorate, reinforce any arguable bloc voting syndrome, and prevent minority members from exercising influence on the political system beyond the bounds of their quota.[166]

A third problem relates to the perpetuation of segregated residential patterns. Since our electoral system is established within geographic parameters, the prescription of race-based proportional representation means that minority group members will indirectly be encouraged to reside in the same areas in order to remain in the race-based political group. A political premium would be put on segregated neighborhoods. Professor Berns used the term "ghettoization" to describe this process. "If we are going to ghetto-ize, which in a sense is what we are doing, with respect to some groups, why not do it for all groups?" [167] Professor McManus emphasized in her testimony that administrative practices in the context of section 5 seemed to encourage such segregation:

> A premium is put on identifying racially homogeneous precincts and using that as the test, and it seems to me the bottom-line inference is that racial polarization, or having people in racially-segregated precincts, is the optimal solution or the ideal, which I find very hard to accept as a citizen.[168]

The subcommittee rejects the premise that proportional representation systems in fact enhance minority influence (as opposed to minority representation). Even, however, to the extent that this were a valid premise, it would be valid only with respect to highly segregated minority groups. Indeed, proportional representation systems would place a premium upon the maintenance of such segregation. For to the extent that a minority group succeeded in integrating itself on a geographical basis, it would concomitantly lose the "benefits" of a ward-system of voting. Such a system would "benefit" minorities only insofar as residential segregation were maintained for such groups.

Thus, analysis suggests that the proposed change in section 2 involves a distasteful question of racial classification, involves several doubtful assumptions about the relationship between race and political behavior, and may encourage patterns of segregation that are contrary to prudent public policy. These likely undesirable social consequences argue strongly against the proposed change in section 2.

D. IMPACT OF RESULTS TEST

Assistant Attorney General Reynolds emphasized in his testimony before the subcommittee that the proposed change in section 2 would

[166] Senate Hearings, February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia.
[167] Senate Hearings, January 27, 1982, Walter Berns, Resident Scholar, American Enterprise Institute.
[168] Senate Hearings, February 1, 1982, Susan McManus, Professor, University of Houston.

apply *nationwide*, would apply to *existing* laws and would be a *permanent* provision of the Act. These observations cogently establish the parameters for assessing the practical impact of the proposed change in section 2.[169]

Every political subdivision in the United States would be liable to have its electoral practices and procedures evaluated by the proposed results test of section 2. It is important to emphasize at the outset that for purposes of section 2, the term "political subdivision" encompasses *all* governmental units, including city and county councils, school boards, utility districts, as well as state legislatures. All practices and procedures in use on the effective date of the change in the law would be subject to the new test, as well as any subsequently adopted changes in practices or procedures. Furthermore, since the provision would be permanent, a political subdivision which was not in violation of section 2 on the effective date of the proposed amendment, and which made no changes in its electoral system, could at some subsequent date find itself in violation of section 2 because of new local conditions which may not now be contemplated and which may be beyond the effective control of the subdivision.[170]

Within these general and far reaching parameters,[171] it appears that any political subdivision which has a significant racial or language minority population and which has not achieved proportional representation by race or language group would be in jeopardy of a section 2 violation under the proposed results test. If any one or more of a number of additional "objective factors of discrimination" [172] were present, a violation is likely and court-ordered restructuring of the electoral system almost certain to follow.

[169] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.
[170] Section 5 of the Voting Rights Act, of course, applies only to proposed changes in voting practices and procedures. It does not apply to practices and procedures in effect at the time a jurisdiction becomes covered. Hence, the implications of the proposed change in section 2 are of critical importance for covered jurisdictions as well as non-covered jurisdictions.
[171] One witness' remarks are eloquent in capturing a sense of the potential breadth of the amendments to Section 2:

> It is no overstatement to say that the effect of the amendment is revolutionary, and will place in doubt the validity of political bodies and the election codes of many states in all parts of the Union . . . The amendment to Section 2 will likely have these consequences: (1) It will preclude any meaningful annexation by municipalities, government consolidations, county consolidations, or other similar governmental reorganizations in areas having a minority population . . . (2) It will outlaw at-large voting in any area where any racial, color, or language minority is found . . . (3) It will place in doubt state laws governing qualifications and educational requirements for public office . . . (4) It will dramatically affect State laws establishing congressional districts, state legislative districts, and local governing body apportionment or districting schemes; and (5) It will place in doubt provisions of many election codes throughout the United States. Senate Hearings, February 4, 1982, E. Freeman Leverett, Attorney, Elberton, Georgia.

These observations are not at significant variance with the observations of a large number of additional witnesses concerned about the change in section 2. To capture further a sense of the potential breadth of the section 2 change, imagine the implications of a State legislature's decision *not* to reduce the minimum voting age in state elections to 16, for example, or to *increase* such age after having voted a reduction. In each case, there would be a clear disparate impact upon racial minorities because of the substantially lower, average age of this population. In each case, a substantially higher proportion of minorities would be effectively "disenfranchised." See Senate Hearings, February 4, 1982, Norman Dorsen, Professor, New York University School of Law, representing the American Civil Liberties Union February 12, 1982, Julius Chambers, President, NAACP Legal Defense Fund, Inc.
[172] The House Report on H.R. 3112 refers to these as being "objective factors of discrimination". H.R. Rep. No. 97-227. The Voter Education Project describes these as "barriers to minority participation." Hudlin and Brimah, The Voter Education Report: Barriers to Effective Participation in Electoral Politics (March 1981).

The probable nature of such an order is illustrated by the action of the District Court in the *Mobile* case.[173] At the time the action was brought, the City of Mobile, Alabama had a City Commission form of government which had been established in 1911. Three Commissioners elected at large exercised legislative, executive and administrative power in the city. One of the Commissioners was designated mayor, although no particular duties were specified. The judgment of the District Court disestablished the City Commission and a new form of municipal government was substituted consisting of a Mayor and a nine member City Council with members elected from nine single member wards or districts. The fact that Mobile had not established its system for discriminatory purposes, as well as the fact that clear, non-racial justification existed for the at-large system was considered largely irrelevant by the lower court. Thus, virtually none of the original governmental system remained after dismantling by the District Court. The conflict between the District Court's *Mobile* decision and fundamental notions of democratic self-government is obvious. Particularly noteworthy is the District Court's finding that blacks registered and voted in the city without hindrance. Notwithstanding this finding, however, the Federal court disestablished the governmental system chosen by the citizens of Mobile, thereby substituting its own judgment for that of the people.

The purpose of this section is to explore the far-reaching implications of overturning the *Mobile* decision. Research conducted by the subcommittee suggests that in a large number of states there exists some combination of a lack of proportional representation in the state legislature or other governmental bodies and at least one additional "objective factor of discrimination" which might well trigger, under the results test, Federal court-ordered restructuring of those electoral systems where the critical combination occurs.

> *The subcommittee has endeavored to consult the best available sources. It should be noted that information of this kind is subject to change. The objective of the subcommittee in presenting this information is only to illustrate the potential impact of a results test.*

State legislatures

There appears to be a lack of proportional representation in one or both houses of the state legislatures in the following states with significant minority populations:[174] Alabama, Alaska, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Kansas, Kentucky, Illinois, Indiana, Louisiana, Maryland, Massachusetts, Mississippi, Missouri, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Texas, Utah, and Virginia.

In addition, there appear to be additional "objective factors of discrimination" present in virtually every one of these states. For example, according to the United States Commission on Civil Rights, every state listed has some definite history of discrimination.[175] This often has been exemplified in the existence of segregated or "dual" school systems.[176] In addition, the Council of State Governments has reported that Alaska, Arizona, Arkansas, Colorado, Delaware, Florida, Georgia, Illinois, Indiana, Kentucky, Louisiana, Maryland, New Jersey, New Mexico, New York, North Carolina, Oklahoma, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee and Virginia provide for the cancellation of registration for failure to vote, a typical "objective factor of discrimination."[177]

The Council has also reported that Alabama, Alaska, Arizona, California, Colorado, Illinois, Indiana, Mississippi, New Jersey, New York. North Carolina, Pennsylvania, Rhode Island, Tennessee, Texas, and Utah establish a minimum residence requirement before elections, another typical "objective factor of discrimination."[178] Further, according to the Council such states as Alaska, Arkansas, California, Colorado, Delaware, Florida, Illinois, Indiana, Kentucky, Missouri, New Mexico, Oklahoma, Pennsylvania, Tennessee, Texas, and Utah have established staggered electoral terms for members of the State Senate, still another "objective factor of discrimination."[179]

From the foregoing, the subcommittee concludes that there is a distinct possibility of court-ordered restructuring with regard to the system of electing members to at least thirty-two state legislatures if the results test is adopted for section 2.[180] (See chart A.)

The subcommittee emphasizes that the three or four "objective factors of discrimination" discussed above are by no means exhaustive of the possibilities. Additional factors which might serve as a basis for court-ordered changes of systems for electing members of state legislatures which have not achieved proportional representation include: disparity in literacy rates by race, evidence of racial bloc voting, a history of English-only ballots, disparity in distribution of services by race, numbered electoral posts, prohibitions on single-shot voting, majority vote requirements, significant candidate cost requirements, special requirements for independent or third party candidates, off-year elections, and the like.

---

[173] 423 F. Supp. 384 (S.D. Alabama, 1976), affirmed 571 F.2d 238 (5th Cir. 1978), reversed, 446 U.S. 55 (1980).

[174] This determination was made by reference to: United States Bureau of the Census, 1980 Census of Population and Housing. Advance Reports, Publication Nos. 80-V-1-50 (current as of April, 1980); Joint Center for Political Studies, "National Roster of Black Elected Officials," Vol. 4 (1972)—Vol. 10 (1980); United States Commission on Civil Rights, The Voting Rights Act: Unfulfilled Goals (Sept. 1981), and telephonic inquiries to appropriate state officials.

[175] United States Commission on Civil Rights, The Unfinished Business, Twenty Years Later . . . A Report to the U.S. Commission on Civil Rights by its Fifty-one State Advisory Committees (Sept. 1977). See supra note 131.

[176] Id. See also, The National Institute of Education, School Desegregation: A Report of State and Federal Judicial and Administrative Activity and Supplement (Dec. 1975); U.S. Commission on Civil Rights, Desegregation of the Nation's Public Schools: A Status Report (1979); U.S. Commission on Civil Rights, Racial Isolation in the Public Schools (1967). See supra note 133.

[177] The Council of State Governments, The Book of the States (1980–81). The number of days required varies from state to state. States which simply require that a voter be a "resident" were not included in this list. See supra note 135.

[178] Id. States have been included above which have any such provision. Some states provide for cancellation for failure to vote in the last general election, while others provide for cancellation for failure to vote within a specified number of years or in a specified number of elections. See supra note 134.

[179] Council of State Governments, Reapportionment Information Service, State Profiles (Mar. 1981). See supra note 139.

[180] Some witnesses have suggested that the subcommittee exaggerates the impact of the amendments to section 2 because "There are very few of us who have the resources and those of us who can only do so many cases. I do not think that people ought to be that fearful that every jurisdiction is going to be challenged about everything overnight." Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund. Even if this is true, it is less than comforting to some that, in place of a rule of law precluding legal action against countless municipalities throughout the Nation, the results test would substitute a rule in which actions were limited on the basis of the legal resources of various "public interest" litigating organizations.

CHART A—STATES LACKING PROPORTIONAL REPRESENTATION IN ONE OR BOTH HOUSES OF THE STATE LEGISLATURE AND PRESENCE OF "OBJECTIVE FACTORS OF DISCRIMINATION"

States lacking proportional representation in one or both houses of the State legislature	Some history of discrimination	Cancellation of registration for failure to vote	Minimum residence requirement before election	Staggered terms for members of state senate
Alabama	X		X	
Alaska	X	X	X	X
Arizona	X	X	X	
Arkansas	X	X		
California	X		X	X
Colorado	X	X	X	
Connecticut	X		X	X
Delaware	X			
Florida	X	X		X
Georgia	X	X		X
Illinois	X	X		
Indiana	X	X	X	X
Kansas	X	X		X
Kentucky	X			
Louisiana	X	X		X
Maryland	X	X		
Massachusetts	X			
Mississippi	X			
Missouri	X		X	
New Jersey	X			X
New Mexico	X	X	X	
New York	X	X		X
North Carolina	X	X	X	
Oklahoma	X	X		
Pennsylvania	X	X		X
Rhode Island	X	X	X	X
South Carolina	X	X		
South Dakota	X	X		
Tennessee	X	X		
Texas	X	X	X	X
Utah	X		X	X
Virginia	X	X		

Note: The presence in a State of a particular "objective factor of discrimination" is indicated by an "X" in the column on the same line as the name of the State. The information presented in the chart is the same as presented above in the text and the sources are the same as noted above. The chart should be viewed as merely another way of depicting this information, and should be considered in light of the text and related notes. In particular it should be kept in mind that only a sampling of the "objective factors of discrimination" are set forth in the chart.

Municipalities

Illustrative of the municipalities in jeopardy of court-ordered change under the new results test are the following:

Anchorage, Alaska

The city of Anchorage has an assembly composed of eleven members, all of whom are elected at-large. There are no minority members in the assembly, but minorities comprise approximately 15 percent of the population of Anchorage. This lack of proportional representation, when combined with the at-large voting practice, as well as evidence of segregation in the local schools (according to the U.S. Commission on Civil Rights) might well result in extensive judicial restructuring of the Anchorage system.

Baltimore, Md.

The City Council of Baltimore is composed of 18 members, three elected from each of six districts. There are six minority members of the 18 members on the Council, or 33.3 percent of the membership. However, minorities comprise 56.2 percent of the Baltimore population. Other factors in Baltimore include a history of discrimination

and dual school systems (according to the U.S. Commission on Civil Rights), and the existence of filing fees for some city offices. The combination of factors in Baltimore would likely result in restructuring the Baltimore City electoral process by court order.[181]

Birmingham, Ala.

The Birmingham City Council has nine at-large seats, two of which are occupied by members of a minority group (22.2 percent). Minorities comprise 56 percent of Birmingham's population. This lack of proportionality, when assessed in light of the history of discrimination and segregated schools (according to the U.S. Commission on Civil Rights and the courts), as well as the at-large voting practice leads to the conclusion that the Birmingham City Council would likely be restructured by court-order.

Boston, Mass.

The Boston City Council is composed of nine members elected at-large. One council member is a member of a minority group (11.1 percent). Minorities comprise 30 percent of the population of Boston. This lack of proportional representation, when assessed in light of the at-large voting practice, a history of dual school systems as well as a history of discrimination in Boston (according to the U.S. Commission on Civil Rights) would likely result in judicially ordered reorganization of the system for electing the Boston City Council.

Cincinnati, Ohio

The Cincinnati City Council is composed of nine members elected at-large. One member of the council is a member of a minority group (11.1 percent). The minority population of Cincinnati is at least 33 percent. This lack of proportionality and the at-large electoral practice, when weighed in light of the history of segregated schools in Cincinnati, (according to the U.S. Commission on Civil Rights), will likely result in restructuring of the system for electing members of the City Council.

Dover, Del.

The City Council of Dover is comprised of eight members elected at-large. One is a member of a minority group (12.5 percent). Minorities comprise 31.5 percent of Dover's population. This lack of proportional representation, when combined with the at-large voting practice, might well result in extensive judicial restructuring of Dover's system.

Fort Lauderdale, Fla.

Fort Lauderdale has a City Council composed of four members, all of whom are elected at-large. There are no minorities on the council.

[181] Delegate John Douglass of Baltimore, Chairman of the Maryland Black Caucus' redistricting efforts indicated in a recent newspaper article that there is a legal basis to challenge the state redistricting plan in Maryland because Baltimore which is 55% black will have only four out of nine districts or 44% with majority black populations. Washington Post, January 14, 1982, at B1.

whereas the minority population of Fort Lauderdale is 22.4 percent. This lack of proportionality in the City Council coupled with the at-large system would likely result in court-ordered restructuring of the electoral system of the City Council.

New York, N.Y.

The City Council of New York City has 43 members. Thirty-three members are elected from single-member districts, and two members are elected at-large from each of five boroughs. Of the 43 members of the Council, eight are members of a minority group. All minority members are elected from single-member districts, and all borough at-large representatives are white. Thus, the percentage of minorities on the City Council is 18.6 percent whereas the percentage of minorities in New York City is approximately 40 percent. The lack of proportional representation by race on the New York City Council, when combined with the at-large voting practice, and the history of discrimination in New York City including the history of dual school systems (according to the U.S. Commission on Civil Rights) would render the New York City Council election system subject to court-ordered restructuring.

Norfolk, Va.

The Norfolk City Council is composed of seven members elected at-large. One is a member of a minority group (14 percent), whereas approximately 39 percent of the population is comprised of minorities. This lack of proportional representation by race on the City Council, when viewed in conjunction with the at-large voting practice, leads to the conclusion that the electoral system for the City Council of Norfolk would undergo reconstruction by court-order.

Pittsburgh, Pa.

The Pittsburgh City Council has nine at-large seats, one of which is occupied by a member of a minority group (11.1 percent). Minorities comprise 25.3 percent of the Pittsburgh population. This lack of proportional representation, when combined with the at-large voting practice and history of segregated schools (according to the U.S. Commission on Civil Rights, and the courts), might well result in extensive judicial restructuring of Pittsburgh's system.

San Diego, Calif.

Members of the City Council of San Diego are elected at-large. One of the eight Council members is a member of a minority group (12.5 percent) whereas minorities comprise approximately 24 percent of the population of San Diego. This lack of proportional representation when combined with the at-large voting practice as well as history of segregated schools (according to the U.S. Commission on Civil Rights) might, well result in extensive judicial restructuring of San Diego's system of electing members of the City Council.

Savannah, Ga.

The City Council of Savannah has eight members, two elected at-large and six by district. Two are members of a minority group, whereas 50 percent of the population of Savannah is comprised of minorities. When combined with the other factors in Savannah such as the history of segregated schools (according to the courts), it becomes apparent the system for electing the City Council of Savannah will likely be changed by court-order if the results test is established in section 2.

Waterbury, Conn.

The City of Waterbury, Connecticut is governed by a Board of Aldermen. The Board consists of 15 members, all of whom are elected on an at-large basis. There is one minority on the Board, whereas there is a minority population of 16.5 percent in Waterbury. This lack of proportional representation by race, when combined with the at-large voting practice and history of segregated schools (according to the courts), would likely result in a court-ordered restructuring of the system for selecting the Board of Aldermen of Waterbury.

These examples are but a few illustrations of literally thousands of electoral systems across the country which may undergo massive judicial restructuring should the proposed results test be adopted. The information presented has dealt with state legislatures and municipalities, but other political subdivisions such as school boards and utility districts would be subject to the same judicial scrutiny should the new standard be adopted.

The subcommittee is well aware that proponents of the results test consider this discussion of the impact of section 2 to exaggerate the situation considerably. In response, the subcommittee would make the following general observations: First, the burden of proof in this case rests with those who would seek to alter the law, not those who would defend it. Second, the subcommittee does not believe that proponents of the results test have been convincing in explaining how the test would work in a manner *other* than that described in this section. In short, where in the text of H.R. 3112 or elsewhere is there *anything* which precludes a section 2 violation in the circumstances described in states and municipalities in this section? Indeed, the results test would seem to demand a violation in these circumstances. Finally, the subcommittee is utterly confounded as to what kind of evidence could be submitted to a court by a defendant-jurisdiction in order to overcome the lack of proportional representation. What evidence would rebut evidence of lack of proportional representation (and the existence of an additional "objective" factor of discrimination)? The subcommittee has yet to hear a convincing response. In *Mobile*, for example, the absence of discriminatory purpose on the part of the city, as well as the existence of legitimate, non-discriminatory reasons behind their challenged electoral structure (at-large system) was considered insufficient to overcome the lack of proportional representation. Repeatedly, the subcommittee has been "reassured" that such concerns are not well founded because a court would

consider the "totality of circumstances". As noted in section VI(a), this begs the basic question: What is the standard for evaluating *any* evidence, including the "totality of circumstances", under the results test? What is the ultimate standard by which the court assesses whatever evidence is before it? Apart from the standard of proportional representation, this subcommittee sees no such standard.

VII. Section 5 of the Act

On April 22, 1980, the Supreme Court revisited the issue of the constitutionality of the Voting Rights Act and reached the same conclusion that it had some fourteen years earlier in *South Carolina* v. *Katzenbach*.[182] In *City of Rome* v. *United States*,[183] the Court addressed the question, as it had been posited by the City of Rome, Georgia, in an attempt to seek release from the section 5 preclearance requirements of the Act.

In finding that the Act was indeed a constitutional and an appropriate congressional activity pursuant to the dictates of section 2 of the Fifteenth Amendment, the Court, through Justice Marshall, specifically examined the applicability of section 5 *since* the 1975 amendments to the Act. Citing extensively from House and Senate reports, it was noted that although gains had been made by blacks in the covered jurisdictions:

> Congress found that a seven-year extension of the Act was necessary to preserve the "limited and fragile" achievements of the Act and to promote further amelioration of voting discrimination.[184]

Accordingly, the Court concluded that, predicated upon congressional findings of fact, its legislative actions had a sound constitutional basis. The Court stated:

> When viewed in this light, Congress' considered determination that at least another seven years of statutory remedies were necessary to counter the perpetuation of 95 years of voting discrimination is both unsurprising and unassailable. The extension of the Act, then, was plainly a constitutional method of enforcing the Fifteenth Amendment.[185]

It is well-settled, then, that Congress can, through its powers derived from section 2 of the Fifteenth Amendment, enact legislation to remedy identifiable voting discrimination when founded upon sufficient factual findings.

A. Operation of Preclearance

In addition to an examination of the constitutionality of preclearance, the subcommittee believes that a review of the operation of preclearance as it presently applies is necessary in order to assess the Act.

A jurisdiction seeking to preclear a voting change under section 5 has the burden of showing the United States District Court for the District of Columbia or the Attorney General that the voting change

[182] 383 U.S. 301 (1966).
[183] 446 U.S. 156 (1980).
[184] 446 U.S. at 182.
[185] Id.

submitted for review "does not have the purpose and will not have the effect" of denying or abridging "the voting rights of a covered minority." Since few of the covered jurisdictions have used judicial preclearance, most experience has involved the Department of Justice, which, for example, received 7,300 submission in 1980.[186]

Although the Department of Justice has issued no guidelines or regulations regarding the "effects" test of section 5,[187] an apparent pattern of the application of the standard has emerged from the experience of jurisdictions covered by the preclearance mechanism of the Act. No longer is the objective equal access in registration and voting, but rather a structuring of election systems that translates into methods of maximizing the representation of minorities by members of their own group. The policy of the Department ostensibly is founded upon the language in section 5, which applies to "any voting qualification or prerequisite to voting, or standard practice, or procedure with respect to voting" that is different from that in effect on the date used to determine coverage pursuant to section 4(b).[188]

In evaluating certain submissions, such as reapportionment or redistricting plans, as well as annexations, the Department "applies the legal standards that have been developed by the courts."[189] Yet, there have been few suits for judicial preclearance—a total of 25 since 1975.[190] The pertinent cases have created a system of law which has not always provided clear guidance.[191]

B. Continued Coverage and Bail-Out

The subcommittee also concerned itself, with an inquiry aimed at a determination of the continuing nature of the "exceptional conditions" within the covered jurisdictions.[192] The subcommittee finds that such a determination is necessary in order to insure that any further continuation of coverage comports with constitutional principles. However, nearly every witness acknowledged some need for the continuance of section 5 coverage.[193] Still, there was an acknowledgment by many witnesses that progress has been made and that the conditions existent in 1982 are not those of 1965, 1970, or 1975.[194]

[186] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds Attachment at 10.
[187] Letter of Assistant Attorney General of the United States William Bradford Reynolds to U.S. Senator Orrin G. Hatch, January 8, 1982. (Hereinafter referred to as Reynolds' January letter.)
[188] Those dates are November 1, 1964; November 1, 1968; and November 1, 1972, or else the Presidential election dates in those years.
[189] Letter of Assistant Attorney General William Bradford Reynolds to U.S. Senator Orrin G. Hatch, February 23, 1982. (Hereinafter referred to as Reynolds February letter.) See also Reynolds' January letter supra note 187.
[190] See supra note 156 at 145–6.
[191] See generally supra Section IV
[192] *South Carolina* v. *Katzenbach*, 383 U.S. 301, at 334. Regarding preclearance, the Court noted, "This may have been an uncommon exercise of Congressional power, as South Carolina contends, but the Court has recognized that exceptional conditions can justify legislative measures not otherwise appropriate."
[193] See e.g., Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith; Benjamin L. Hooks, Executive Director, National Association for the Advancement of Colored People; January 28, 1982, Laughlin McDonald, Director, Southern Regional Office, American Civil Liberties Union; U.S. Representative Henry R. Hyde; February 1, 1982, U.S. Representative M. Caldwell Butler; February 2, 1982, Abigail Turner, Attorney, Mobile, Alabama; February 4, 1982, William P. Clements, Governor of Texas; February 11, 1982, Dr. Arthur Flemming, Chairman, United States Commission on Civil Rights; February 12, 1982, Drew Days, Professor, Yale School of Law.
[194] See e.g., Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith; Ruth J. Hinerfeld, President, League of Women Voters of the United States; January 28, 1982, U.S. Representative Henry R. Hyde; U.S. Representative Thomas J. Billey; February 4, 1982, R. Freeman Leverett, Attorney, Elberton, Georgia; February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia.

Accordingly, the subcommittee recognizes that although the need for coverage may continue, it notes that great strides have been made by minorities in the electoral process in the covered jurisdictions. Moreover, it appears that the historic abuses of 1965 are clearly not as widespread as they were found to be by previous Congresses. An examination of minority registration figures illustrates an example of increased participation.[195]

C. BAIL-OUT CRITERIA IN HOUSE LEGISLATION

Of the various proposals dealing with a release mechanism from the act, all generally tend to establish criteria which must be met before a covered jurisdiction can escape or bailout from section 5 coverage. During the course of the hearings, many witnesses cited the need for a bailout, noting that such a goal is not only desirable but appropriate.[196]

Historically, the test for bail-out has always been that for a specified number of years, the petitioning jurisdiction had not used a test or device "for the purpose or with the effect of denying or abridging the right to vote on account of race or color." Although the original period of coverage was for five years past 1965, voting rights legislation in 1970 and 1975 aggregated this period to seventeen years. Accordingly, absent congressional action, those jurisdictions originally covered in 1965 would have an opportunity after August 6, 1982, to petition the U.S. District Court for the District of Columbia for release from section 5 coverage. Successful petitions, however, would remain within the jurisdiction of the District Court for a period of five additional years.[197]

The subcommittee chose to begin its analysis of bail-out criteria with the provisions of H.R. 3112. This bill extends the present Act until 1984, and thereafter utilizes a ten-year period for assessing the proposed new bail-out criteria:

> A declaratory judgment under this section shall issue only if such court determines that during the ten years preceding the filing of the action, and during the pendency of such action [the following elements have been satisfied]:

Thereafter, the bill sets out a series of elements, each of which is necessary in order to accomplish a successful release.

[195] The Voting Rights Act: Unfulfilled Goals, United States Commission on Civil Rights, at 40–44 (1981). See also chart B *infra*.

[196] See *e.g.*, Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith; January 28, 1982, U.S. Representative Henry Hyde; February 1, 1982, Susan McManus, Professor, University of Houston; February 11, 1982, Robert Brinson, City Attorney, Rome, Georgia; March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[197] Section 4(a) [42 U.S.C. Sec. 1973b(a)]. Technically speaking, there is currently a bail-out provision of sorts in the present Act apart from the requirement that a "test or device" be avoided for a period of years. This provision in section 4(a) permits bail-out if the jurisdiction can demonstrate that the "test or device" was never utilized for a discriminatory purpose. In the 17 years of the Act, nine political subdivisions (primarily outside the South) have been released from coverage under this provision, in each case the Attorney General consenting to judgement. No bail-out petition has ever prevailed as a result of full-fledged litigation. Political subdivisions which could not demonstrate that a "test or device" was never utilized for a discriminatory manner prior to 1965 have not been able to bail-out since then. Cf. *Commonwealth of Virginia* v. *United States*, 386 F. Supp. 1316 (1974), affirmed 420 U.S. 901 (1975) (State of Virginia could not bail-out despite showing that "test or device" never used for discriminatory purpose because history of dual school system must have affected voting practices of black citizens.)

> *Element 1.*—No such test or device has been used within such State or political subdivision for the purpose or with the effect of denying or abridging the right to vote on account of race or color or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) in contravention of the guarantees of subsection (f)(2).

The use of "no test or device" has been the sole element for the duration of the Act, and as was noted by Assistant Attorney General Reynolds a ". . . large number of jurisdictions would be able to meet that test at this stage." [198]

> *Element 2.*—No final judgment of any court of the United States, other than the denial of declaratory judgment under this section, has determined that denials or abridgements of the right to vote on account of race or color have occurred anywhere in the territory of such State or political subdivision or (in the case of a State or subdivision seeking a declaratory judgment under the second sentence of this subsection) that denials or abridgements of the right to vote in contravention of the guarantees of subsection (f)(2) have occurred anywhere in the territory of such State or subdivision and no consent decree, settlement, or agreement has been entered into resulting in any abandonment of a voting practice challenged on such grounds; and no declaratory judgment under this section shall be entered during the pendency of an action commenced before the filing of an action under this section and alleging such denials or abridgements of the right to vote.

This section basically establishes three types of bars to bail-out: judicial findings of discrimination concerning the right to vote; consent decrees entered into by which voting practices have been abandoned; and pending actions alleging denials of the right to vote.

A violation of the "final judgment" aspect would obviously constitute strong evidence that the jurisdiction has not abided by the principles upon which the act is founded and has not acted in good faith. According to Assistant Attorney General Reynolds, some 17 jurisdictions would be precluded from bail-out solely as a result of this factor, although he does not view it as being "an onerous requirement." [199]

With regard to the "consent decree" ban, the subcommittee believes that to preclude bail-out for a jurisdiction, solely because it has entered into a consent decree, settlement, or agreement resulting in any abandonment of a challenged voting practice *without more* is inconsistent with established practices and prudent legal principles. It is sound public policy that litigation should be avoided where possible; yet, the inclusion of consent decrees as a bar to bail-out can only engender prolonged litigation that will only detract from the long-term goals of the act. As Assistant Attorney General Reynolds stated,

[198] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.

[199] Id.

. . . clearly the preference is to settle cases and to try to obtain consent decrees and that is a way to resolve these litigations if we can. [Element 2] seems to me to sound like it might be a disincentive to jurisdictions to enter that kind of arrangement. [200]

The bar relating to pendency of actions alleging denials of the right to vote is also of concern to the subcommittee. Clearly, litigious parties could preclude a jurisdiction from a bail-out without any local control whatsoever. Moreover, this provision ignores the existing "probationary" period after bail-out.

Element 3.—No Federal examiners under this Act have been assigned to such State or political subdivision.

This element would preclude bail-out if, during the previous ten-year period, either the Attorney General or a Court, had ordered the appointment of Federal examiners. Inasmuch as the use of Federal examiners entails, "displacing the discretionary functions of local voter registration officials," [201] it is by its very nature an extraordinary use of power beyond local control. There is no appeal nor review of the decision of the Attorney General. Moreover, the subcommittee must agree with Assistant Attorney General Reynolds in his assessment that it is unclear what this requirement is designed to address.[202]

The subcommittee acknowledges that in the years immediately after the 1965 Act, the use of examiners for registration purposes was successful. However, since 1975, examiners certified by the Attorney General have been utilized to list voters in only two counties.[203]

It should be noted that since August 1975, the Attorney General, however, has certified 32 counties as "examiner counties," [204] but this has been necessary in order simply to provide Federal observers, for observers may be directed only to counties in which there are examiners serving.[205]

The subcommittee believes that this element is totally beyond the control of the covered jurisdictions and could serve to frustrate any incentive to bail-out. This is especially true when, as noted, the assignment of examiners could be made only to further another administrative goal—the appointment of observers to monitor elections—which does not even imply voting irregularities.

Element 4.—Such State or political subdivision and all governmental units within its territory have complied with section 5 of this Act, including compliance with the requirement that no change covered by section 5 has been enforced without preclearance under section 5, and have repealed all

[200] Id.
[201] Id.
[202] Id. Reynolds observed: "Federal examiners are assigned to jurisdictions, in connection with the registration process and listing eligible voters. If that is all it pertains to. I think there are a limited number of counties that would be affected. But, on the other hand, also Federal examiners are assigned to different countries in conjunction with sending in several of the Federal observers on request to observe different elections. If the assignment of Federal examiners for that purpose were to be included as an element which would prevent bail out, there would be a large number of counties under that particular requirement and it is not clear from the language or the House report exactly what is intended there."
[203] Id.
[204] Id.
[205] Id.

changes covered by section 5 to which the Attorney General has successfully objected or as to which the United States District Court for the District of Columbia has denied a declaratory judgment.

This requirement would bar bail-out if any voting law, practices, or procedure were implemented in the ten-year period without preclearance. Needless to say, the subcommittee recognizes the necessity of covered jurisdictions' complying with preclearance. Yet, it is conceivable that, inasmuch as the bail-out of the greater jurisdiction is tied to the lesser, some minor change could well have been instituted without preclearance. Moving the office of the county registrar from one floor to another might be an example. Nevertheless, such an omission would preclude the county as well as the state from bail-out. As an attorney with the Voting Section of the Justice Department has noted:

> Complete compliance with the preclearance requirement is practically impossible in two respects.
>
> First, no matter how many changes an official submits to the Attorney General, a student of section 5 can always find another change that has not been submitted. For example, a probate judge always submits changes in the location of polling places, but he neglects to submit the rearrangement of tables and booths at one polling place.
>
> Second, no matter how well an election administrator plans in advance of an election, there will always be changes that must be implemened before they can be precleared. For example, a polling place burns down the night before the election.[206]

The subcommittee feels that such an action should not absolutely preclude bail-out and, this requirement should not be so stringent as to foreclose bail-out for inadvertence.

Element 5. The Attorney General has not interposed any objection (that has not been overturned by a final judgment of a court) and no declaratory judgment has been denied under section 5, with respect to any submission by or on behalf of the plaintiff or any governmental unit within its territory under section 5; and no such submissions or declaratory judgment actions are pending.

This element would bar bail-out if there has been any objection to a submission for preclearance. In the practice of section 5 preclearance, it is common for the Attorney General to interpose an objection to a voting change simply because there is not enough information on hand for the affirmative decision to be made that the proposal "does not have the purpose and will not have the effect" of discrimination in voting. Accordingly, an objection by the Attorney General does not per se indicate bad faith on the part of the submitting jurisdiction. Moreover, it is not uncommon for an objection

[206] David H. Hunter, "Section 5 of the Voting Rights Act of 1965: Problems and Possibilities," prepared remarks for delivery at the Annual Meeting of the American Political Science Association (1980).

to be withdrawn.[207] Assistant Attorney General Reynolds noted that of the 695 objections that had been interposed:

> Some are far more important but this [section] does not differentiate.[208]

The subcommittee acknowledges that the "no objection" specification is founded upon a general basis of assuring compliance but notes that the inability to examine the history of a covered jurisdiction's submissions might preclude bail-out due to a trivial proposed change or one that was abandoned.

> *Element 6.*—Such State or political subdivision and all governmental units within its territory—
>
> (i) have eliminated voting procedures and methods of election which inhibit or dilute equal access to the electoral process;
>
> (ii) have engaged in constructive efforts to eliminate intimidation and harassment of persons exercising rights protected under this Act; and
>
> (iii) have engaged in other constructive efforts, such as expanded opportunity for convenient registration and voting for every person of voting age and the appointment of minority persons as election officials throughout the jurisdiction and at all stages of the election and registration process.

The criteria of this section would require a jurisdiction seeking bail-out to prove that it and all of its political subdivisions have eliminated methods which "dilute equal access" to the electoral process, have engaged in "constructive efforts" to end intimidation and harassment of persons "exercising rights protected" under the Act, and have engaged in "other constructive efforts" in registration and voting for "every" voting age person and in appointing minorities to election posts. It is totally unclear what a "constructive effort" would be in any of these regards although it is difficult for this subcommittee to believe that this term is intended to be employed as anything other than a vehicle to promote "affirmative action" principles of civil rights to the voting process.

As Assistant Attorney General Reynolds noted, this element, "would introduce a whole new feature that had not been in the Act at the time these jurisdictions were covered and require an additional element of proof other than simply requiring a 10-year period of compliance with the Act." [209] This section, indeed, raises new questions regarding bail-out criteria not only as to the substantive requirements but also as to proof.

The Assistant Attorney General indicated his concern when he suggested that "what one means by inhibit or dilute . . . would be subject to a great deal of litigation." [210] He further expressed his apprehension as to the constructive efforts requirements:

[207] See, e.g., Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.
[208] See supra note 198.
[209] Id.
[210] Id.

> This is a requirement which does go well beyond existing law. It is also well to remember in terms of the bail-out that the House bill calls for counties to show not only that *they* can meet these requirements but also *all* political sub-units within the counties and therefore you are talking, for bail-out purposes, about mammoth litigation that will demonstrate that "constructive efforts" have been made by all of these political subdivisions within the county as well as the county and that they have done whatever is necessary to insure there is no inhibition or dilution of minority vote.[211]

The subcommittee believes that the introduction of these new elements will not aid in overcoming past discrimination even if they can be interpreted. The subcommittee does believe that they will generate considerable litigation of an uncertain outcome. A reasonable bail-out is the goal of the subcommittee, and when this element is weighed with that goal, the subcommittee must resolve that such reasonableness is lost. It agrees with Assistant Attorney General Reynolds' comment on the obvious results of such an enactment:

> It goes beyond determining a violation of the Act or the Constitution and would require in each bail-out suit full-blown litigation as to whether or not the conduct of the methods of election had either a purpose or effect of . . . discouraging minority participation. That is a very complex kind of litigation to go through in a bail-out.[212]

The process of bail-out may become largely irrelevant if the proposed change in section 2 is adopted. Jurisdictions that may be successful in seeking bail-out would be subject to suits under section 2 by local plaintiffs dissatisfied with bail-out and would be required to relitigate the issue under the similar standard incorporated in the House version of section 2.

VIII. Constitutionality of House Legislation

Completely apart from the public policy merits of the House-proposed amendments to the Voting Rights Act, the subcommittee believes that there are serious constitutional concerns about those changes. It is conceivable that the House-amendments could render substantial parts of the Voting Rights Act constitutionally invalid.

A. Section 5

The first concern relates to the "in perpetuity" extension of the preclearance obligations in section 5 of the Voting Rights Act. Unlike earlier "extensions" of the preclearance obligation which have been for limited periods, the House legislation would make this obligation permanent. Rather than only having to maintain "clean-hands" for a five-year period or a seven-year period (i.e. avoided the use of a prohibited "test or device" for that time), H.R. 3112 would impose a permanent obligation upon a covered state to secure the permission

[211] Id.
[212] Id

of the Justice Department for proposed changes in election laws and procedures.

The constitutional foundation of the Voting Rights Act rested in large part upon its temporary and remedial nature. While recognizing that the Act was an "uncommon exercise of congressional power", the Supreme Court in *South Carolina* v. *Katzenbach* nevertheless concluded that:

> exceptional circumstances can justify legislative measures not otherwise appropriate.[213]

While recognizing the intrusions upon traditional concepts of federalism by the Voting Rights Act, the Court upheld the pre-clearance procedure as a purely remedial measure premised upon the enforcement authority of Congress under section 2 of the Fifteenth Amendment.[214]

It is difficult for this subcommittee to understand how such circumscribed authority in Congress can justify a permanent extension of this "uncommon exercise" of legislative power. If the justification for the Voting Rights Act is the existence of "exceptional" circumstances in the covered jurisdictions (primarily in the South) as stated by the Court in *Katzenbach*, and reiterated more recently in *City of Rome* v. *United States*,[215] by what authority is Congress able to enact legislation requiring permanent pre-clearance? "Exceptional" circumstances, by very definition, cannot exist in perpetuity. The proposed House bill attempts to institutionalize an extraordinary relationship between the states and Congress—one upheld by the Court only to the extent that Congress concluded that that "exceptional" circumstances obtained in certain parts of the country. As Attorney General William French Smith remarked:

> The Supreme Court in sustaining the Act took special care to note the temporary nature of the special provisions.[216]

In the view of the subcommittee, reasonable individuals can differ with respect to whether or not "exceptional" conditions continue to exist within covered jurisdictions with regard to the status of voting rights and, hence, whether or not a further temporary extension of the preclearance obligation can be justified. It is extremely difficult, however, for the subcommittee to conclude that such conditions require a permanent re-ordering of the federal structure of our government.

Ms. Hinerfeld, representing the League of Women Voters, for example, testified that:

> The extraordinary conditions that existed at the time of *Katzenbach*, of course, are not the conditions that exist today and I think that we are all grateful for that fact.[217]

[213] 383 U.S. 301, 334 (1966).
[214] Id.
[215] 446 U.S. 156 (1980).
[216] Senate Hearings, January 27, 1982, Attorney General of the United States William French Smith.
[217] Senate Hearings, January 27, 1982. Ruth Hinerfeld, President, League of Women Voters.

While such figures are not conclusive, it is interesting to note that registration rates for minority voters in such covered states as Alabama, Louisiana, Mississippi, and South Carolina exceed the average national minority registration rate.

CHART B—REPORTED REGISTRATION FOR STATES, BY RACE

[In percent]

State	White registration	Black registration
Alabama	73.3	62.2
Alaska	69.7	
Arizona	59.4	
Arkansas	67.4	62.6
California	62.1	61.5
Colorado	69.9	
Connecticut	73.2	65.4
Delaware	67.8	
District of Columbia	67.0	52.4
Florida	64.1	58.2
Georgia	67.0	59.5
Hawaii	65.5	
Idaho	73.6	
Illinois	74.0	72.1
Indiana	69.7	64.2
Iowa	76.4	
Kansas	71.0	40.3
Kentucky	67.7	49.9
Louisiana	74.5	69.0
Maine	81.4	
Maryland	68.3	61.3
Massachusetts	73.4	43.6
Michigan	73.9	68.4
Minnesota	83.8	
Mississippi	85.2	72.2
Missouri	75.5	77.0
Montana	74.7	
Nebraska	72.4	
Nevada	55.2	
New Hampshire	74.1	
New Jersey	69.8	48.9
New Mexico	68.3	
New York	62.4	46.5
North Carolina	63.7	49.2
North Dakota	92.1	
Ohio	66.5	68.3
Oklahoma	67.7	51.9
Oregon	73.7	
Pennsylvania	61.9	66.6
Rhode Island	74.2	
South Carolina	57.2	61.4
South Dakota	81.9	
Tennessee	66.9	69.4
Texas	61.4	56.4
Utah	77.4	
Vermont	73.6	
Virginia	65.4	49.7
Washington	67.8	70.0
West Virginia	69.5	
Wisconsin	87.8	70.4
Wyoming	64.1	

Note: Numbers represent census estimates.

Source: Bureau of the Census, Department of Commerce, November 1980.

Minority registration, since the passage of the Voting Rights Act has risen substantially in every covered state. (chart C) In Mississippi, for example, it has risen from 6.7 percent in 1964 to 72.2 percent in 1980, significantly surpassing minority registration rates in such non-covered jurisdictions as New York (46.5 percent), New Jersey (48.9 percent), and Kansas (40.3 percent).

CHART O—VOTER REGISTRATION IN 11 SOUTHERN STATES, BY RACE: 1960 TO 1976

[In thousands, except percent]

Year and race	Total	Ala.	Ark.	Fla.	Ga.	La.	Miss.	N.C.	S.C.	Tenn.	Tex.	Va.
1960:												
White	12,276	860	518	1,819	1,020	993	478	1,961	481	1,300	2,079	867
Black	1,463	66	73	183	180	159	22	210	58	185	227	100
Percent white	81.1	63.6	60.8	69.3	56.8	76.9	63.9	92.1	57.1	73.0	42.5	46.1
Percent black	29.1	13.7	38.0	39.4	22.3	31.1	5.2	39.1	13.7	59.1	35.5	23.1
1976:												
White	21,880	1,544	817	3,480	1,703	1,445	866	2,137	828	1,846	5,191	1,786
Black	4,149	321	204	410	598	421	286	396	285	271	640	317
Percent white	67.9	78.3	62.6	61.3	65.9	72.4	80.0	69.2	58.4	73.7	69.1	51.7
Percent black	63.1	58.4	94.0	81.1	74.8	63.0	60.7	54.8	56.5	66.4	65.0	54.4

Source: Voter Education Project, Inc., Atlanta, Ga., "Voter Registration in the South," issued irregularly.

Again, it is important to emphasize that such data is not presented to suggest that no extension of the preclearance obligation is warranted. Few would argue that all traces of the discriminatory history that existed in some of these covered jurisdictions has been eradicated by the passage of years since the original Voting Rights Act. What they do suggest, however—quite clearly to the Subcommittee—is that substantial progress has been made in these jurisdictions in the past 17 years with regard to voting rights. However many more years of pre-clearance are necessary, there should properly come a time when this "exceptional" remedy will no longer be necessary.

Mr. Leverett testified that the extension of section 5 in perpetuity would raise serious constitutional questions:

> Making it permanent, as H.R. 3112 purports to do, subject only to a bailout procedure that is so stringent that I think hardly any political subdivision could ever satisfy it, does raise serious questions because the Act was justified on the basis of the emergency that existed and the fact that there was such a great disparity in the number of minorities that were registered. Well, the predicate of that no longer exists. Minority registration has become quite substantial since that time.[218]

The subcommittee agrees that indeed serious constitutional questions are presented by the proposal to extend section 5 in perpetuity.

To proponents of H.R. 3112 who would argue that new bail-out provisions mitigate the permanent nature of the new preclearance obligation, the subcommittee responds that this would be the case only if the bail-out were reasonably designed to afford an opportunity for release from preclearance by those jurisdictions within which "exceptional" circumstances no longer existed. The subcommittee believes strongly that such is not the case. As discussed in more detail above,[219] it is our view that the bail-out in H.R. 3112 is wholly unreasonable and affords merely an illusory opportunity to be released from coverage.

[218] Senate Hearings, February 4, 1982, E. Freeman Leverett, Attorney, Elberton, Georgia.
[219] See generally supra Section VII.

In this respect, the subcommittee notes the observation of Assistant Attorney General Reynolds in response to a question about the likelihood of jurisdictions bailing-out under the House measure:

> Our assessment is that there are very few, if any, jurisdictions that would be able to bail-out of coverage for a considerable period of time.[220]

No evidence of any kind has been shared with the subcommittee that would contradict this assessment of the "reasonableness" of the House bail-out. This is a critical matter since the very constitutionality of the proposed amendments—and indeed of the preclearance provision itself—rests upon such an affirmative finding.

B. SECTION 2

The other major constitutional problem arising from the House measure relates to the proposed change in section 2 which substitutes a results test for the present intent standard for identifying voting discrimination.

The subcommittee notes as a preliminary consideration that this would overturn the ruling of the Supreme Court in the *City of Mobile* v. *Bolden* decision [221] interpreting both section 2 and the Fifteenth Amendment (upon which section 2 is predicated) to require a finding of purposeful or intentional discrimination. It is a serious matter for Congress to attempt to over-rule the Supreme Court, particularly when that action relates to a constitutional interpretation by the Court. As former Attorney General Bell has observed, for example:

> My view, based on long experience in government and out is that the Supreme Court should not be overruled by Congress except for the most compelling and extraordinary circumstances . . . To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government.[222]

Completely apart from the public policy implications of overturning a Supreme Court decision, there are important questions relating to whether or not Congress has the Constitutional *authority* to undertake such an action. Although section 2 of the Voting Rights Act has always been considered a restatement of the Fifteenth Amendment to the Constitution, it is, of course, true that Congress may choose to amend section 2 to achieve some other purpose. In other words, the subcommittee recognizes that section 2 need not be maintained indefinitely as the statutory embodiment of the Fifteenth Amendment.

To the extent, however, that the Supreme Court has construed the Fifteenth Amendment to require some demonstration of purposeful discrimination in order to establish a constitutional violation, and to the extent that section 2 is enacted by Congress under the

[220] Senate Hearings, March 1, 1982, Assistant Attorney General of the United States William Bradford Reynolds.
[221] 446 U.S. 55 (1980). "No reader of the House report can fail to grasp that Section 2 was written to make winners o·t of the losers in *Mobile*," Eastland, "Affirmative Voting Rights," The American Spectator, April 1982, p. 25.
[222] Statement submitted to the Senate Subcommittee on the Constitution by Griffin Bell, former Attorney General of the United States, March 4, 1982.

constitutional authority of the Fifteenth Amendment, the subcommittee does not believe that Congress is empowered to legislate outside the parameters set by the Court, indeed by the Constitution.

Section 2 of the Fifteenth Amendment provides:

> Congress shall enforce the provisions of this Article by appropriate legislation.

Congress, however, is not empowered here or anywhere else in the Constitution to "define" or to "interpret" the provisions of the Fifteenth Amendment, but simply to "enforce" those substantive constitutional guarantees already in existence. To allow Congress to interpret the substantive limits of the Fifteenth Amendment in a more expansive manner (or indeed in a disparate manner) than the Court is to sharply alter the apportionment of powers under our constitutional system of separated powers.

It is also to enlarge substantially the authority of the Federal Government at the expense of the state governments since it must be recognized that the Fifteenth Amendment fundamentally involves a restraint upon the authority of state governments and a conferral of authority upon the Federal Government. To permit Congress itself to define the nature of this authority, in contravention of the Supreme Court, is to involve Congress in a judicial function totally outside its proper purview.[223]

The enactment of a results test in section 2 would be equally improper to the extent that its proponents purported to employ the Fourteenth Amendment as its constitutional predicate. As with the Fifteenth Amendment, the Supreme Court has repeatedly made clear that it is necessary to prove some discriminatory motive or purpose in order to establish a constitutional violation under the Equal Protection Clause.[224]

While proponents of the new results test argue that selected Supreme Court decisions exist to justify the expansive exercise of Congressional authority proposed here [225] this subcommittee rejects these arguments. No Court decision approaches the proposition being advocated here that Congress may strike down on a nationwide basis an entire class of laws that are not unconstitutional and that involve so fundamentally the rights of republican self-government guaranteed to each state under Article IV, section 4 of the Constitution.

It must be emphasized again that what Congress is purporting to do in section 2 is vastly different than what it did in the original Voting Rights Act in 1965. In *South Carolina* v. *Katzenbach*, the Court recognized extraordinary *remedial* powers in Congress under section 2 of the Fifteenth Amendment.[226] *Katzenbach* did not authorize Congress to revise the nation's election laws as it saw fit. Rather, the Court there made clear that the remedial power being employed by Congress in

[223] If the "on account of" race or color language in the Fifteenth Amendment is broad enough to permit the development of the statutory results test under its authority, this subcommittee wonders about the implications for the proposed Equal Rights Amendment to the Constitution ("Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.") Compare also the Nineteenth and Twenty-Sixth amendments.

[224] See, e.g., *Washington* v. *Davis*, 426 U.S. 229 (1976); *Village of Arlington Heights* v. *Metropolitan Housing Development Authority*, 429 U.S. 525 (1977); *Massachusetts* v. *Feeney*, 442 U.S. 256 (1979); *Mobile* v. *Bolden*, 446 U.S. 55 (1980).

[225] See, e.g., *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966); *Oregon* v. *Mitchell*, 400 U.S. 112 (1970); *City of Rome* v. *United States*, 446 U.S. 156 (1980).

[226] 383 U.S. at 334.

the original Act was founded upon the actual existence of a substantive constitutional violation requiring some remedy. In *Katzenbach*, following a detailed description of a history of constitutional violations in the covered jurisdictions, Chief Justice Warren concluded that:

> *Under these circumstances*, the Fifteenth Amendment has clearly been violated.[227] (emphasis added)

While *Katzenbach* and later *City of Rome* held that the extraordinary powers employed by Congress in section 5 were of a clearly remedial character, and therefore justified the extraordinary procedures established in section 5, there is absolutely no record to suggest that the proposed change in section 2 involves a similar remedial exercise. Because section 2 applies in scope to the entire Nation, there is the necessity of demonstrating that the "exceptional" circumstances found by the *Katzenbach* court to exist in the covered jurisdictions in fact permeated the entire Nation (although again by its very definition the concept of "exceptionality" would seem to preclude such a finding).

There has been no such evidence offered during either the House or Senate hearings. Indeed, the subject of voting discrimination outside the covered jurisdictions has been virtually ignored during hearings in each chamber. Indeed as the strongest advocates of the House measure themselves argued, a proposed floor amendment to extend preclearance nationally was "ill-advised" because no factual record existed to justify this stringent constitutional requirement.[228]

During one exchange, Dr. Flemming, the Director of the U.S. Civil Rights Commission acknowledged that the 420-page, 1981 Report of the Commission on voting rights violations [229] contained no information whatsoever about conditions outside the covered jurisdictions.[230] In the total absence of such evidence, it is impossible for Congress to seriously contend that the permanent, nationwide change proposed in the standard for identifying civil rights violations is a "remedial" effort. As a result, there can be little doubt that such a change is outside the legislative authority of Congress. In short, it is the view of this subcommittee that the proposed change in section 2 is clearly unconstitutional, as well as imprudent public policy.[231]

Moreover, a retroactive results test of the sort contemplated in the House amendments to section 2 (the test would apply to existing electoral structures as well as changes in those structures) has never been approved by the Court even with regard to jurisdictions with a

[227] Id.

[228] See, e.g., remarks of U.S. Representative James Sensenbrenner, at H6970; U.S. Representative Peter Rodino, at H6976; U.S. Representative Mickey Leland, at H6978; October 5, 1981, Congressional Record.

[229] The Voting Rights Act: Unfulfilled Goals, United States Commission on Civil Rights (1981)

[230] Senate Hearings, February 25, 1982, Dr. Arthur Fleming, Chairman, United States Civil Rights Commission.

[231] The Subcommittee would also observe that many of the same constitutional issues raised in the context of Section 2 have also been raised in the context of legislation to overturn the Supreme Court's abortion decision in *Roe* v. *Wade*. In both instances, Congress is purporting to reinterpret a constitutional provision in contravention of the Supreme Court through a simple statute. See, e.g., testimony by Robert Bork, Hearings Before the Separation of Powers Subcommittee on S. 158, June 1, 1981; Additional views of U.S. Senator Orrin G. Hatch. Committee Print of the Subcommittee on the Separation of Powers on S. 158, 97th Congress, 1st Session.

pervasive history of constitutional violations. In *South Carolina* v. *Katzenbach*, the prospective nature of the section 5 process (applicable only to *changes* in voting laws and procedures) was essential to the Court's determination of constitutionality.[282] This was closely related to findings by Congress that governments in certain areas of the country were erecting *new* barriers to minority participation in the electoral process even faster than they could be dismantled by the courts. Thus, even with regard to covered jurisdictions, the Court has never upheld a legislative enactment that would apply the extraordinary test of section 5 to existing state and local laws and procedures.

One other general observation must not be overlooked. In its efforts to enact changes in the Voting Rights Act that would lead to an effective reversal of *Mobile*, the House invites the Federal judiciary to strike down an unidentified (and unidentifiable) number of election laws, some of recent vintage and some reaching back over centuries. The connection which any of these laws may have with actual violations of the Fifteenth Amendment, past, present, or future, is left entirely to speculation. Without a far more clearly demonstrated connection, it can only be concluded that the proposed amendment exceeds the power of Congress under section 2 of the Fifteenth Amendment, whatever one's constitutional theories are about the enforcement role of Congress under the Reconstruction Amendments and however innovative and creative one is in justifying exercises of Congressional legislative authority.

Finally, there is a strong feeling among some of the members of the subcommittee that the proposed change in section 2 is unconstitutional for one further reason. In short, the results test by focusing legislative and judicial scrutiny so intensely upon considerations of race and color, completely apart from acts of purposeful discrimination, is offensive to the basic color-blind objectives of the Constitution generally and of the Fourteenth and Fifteenth Amendments specifically. As Professor Van Alstyne has observed:

> The amendment must invariably operate . . . to create racially defined wards throughout much of the nation and to compel the worst tendencies toward race-based allegiances and divisions.[283]

The kinds of racial calculations required, for example, by the Justice Department in the events leading up to the case of *United Jewish Organizations* v. *Carey* [284] is but an illustration of the depth of the racial consciousness injected into legislative decision-making by a results or effects test for discrimination.[285] Under the proposed change in section 2, this kind of racially-preoccupied decisionmaking process would become the norm. Rather than pointing our nation in the direction of a

[282] 383 U.S. at 334.
[283] See supra note 159.
[284] 430 U.S. 144 (1970).
[285] Illustrative of this heightened racial consciousness is the rather remarkable observation of former Assistant Attorney General Days that minority identifiable neighborhoods alone would be immune to gerrymandering even if such gerrymandering were indisputably and incontrovertibly related to partisan or ideological factors. Apparently with respect to such neighborhoods, the results test in section 2 would impose a constitutional obligation upon state legislatures to maximize the impact and influence of such neighborhoods, a remarkably privileged status accorded no other geographical neighborhood. See Senate Hearings, February 12, 1982. Drew Days, Professor, Yale School of Law. See also remarks of Julius Chambers, President, NAACP Legal Defense Fund, Inc. on the same day, in which a similar conclusion was reached. Cf. *Mobile* v. *Bolden*, 446 U.S. 55, 83 (concurring opinion by Justice Stevens).

"color-blind" society in which racial considerations become irrelevant—as was the purpose of the original Voting Rights Act—the proposed amendment to section 2 would move this nation in precisely the opposite direction. Considerations of race and color would become omnipresent and dominant. In the view of the subcommittee, this is inconsistent with either the purpose or the spirit of the Fourteenth and Fifteenth Amendments to the Constitution.

In conclusion, the subcommittee believes that the House-proposed amendments to the Voting Rights Act run substantially afoul of the provisions of the Constitution. On those grounds alone, they should be rejected.

IX. Recommendations and Section-by-Section Analysis

The Subcommittee on the Constitution recommends to the full Committee on the Judiciary a ten-year extension of the temporary provisions of the Voting Rights Act without amendment. This would represent the longest extension of these provisions in the history of the Voting Rights Act. In particular, the subcommittee would recommend the retention of the intent standard in place of the new results standard adopted in the House-approved measure, and the extension of the preclearance procedure to covered jurisdictions for a period of ten years, rather than the permanent extension of these provisions adopted in the House-approved measure.[286] While there is substantial sentiment on the subcommittee in favor of the development of a "reasonable" bail-out mechanism for jurisdictions that have comported themselves in a non-discriminatory manner for a sustained period of time, the subcommittee has not proposed a bail-out provision at this time because of the substantial disagreement existing as to the constitution of a "reasonable" bail-out provision. Apart from its conclusion that the House-approved measure contains a wholly unreasonable bail-out, the subcommittee is not opposed to the development of a fair bail-out mechanism at some subsequent stage of the legislative process. Under no circumstances, however, does it believe that the preclearance procedure should be made permanent.

Apart from the section 2 issue and the bail-out issue, several other matters of controversy were raised before the subcommittee. While there is sympathy among a number of members of the subcommittee for changes in law in these areas, it has nevertheless recommended that present law be maintained intact in order not to upset the consensus in behalf of that law.

One of these matters is the question of the continuing requirement under section 203(b) of the Act that certain jurisdictions be required

[286] This recommendation comports with the recommendations made by many leaders in the civil rights community during the House hearings. Benjamin Hooks, Executive Director of the NAACP, testified for example.

> We support the extension of the Voting Rights Act as it is now written . . . . The Voting Rights Act is the single most effective legislation drafted in the last two decades . . . . I have not seen any changes that were anything but changes for changes sake . . . . It would be best to extend it in its present form. House Hearings, May 6, 1981, at 58, 60, 65.

Cf. also, remarks during House Hearings e.g. by Ralph Abernathy, Former Executive Director, Southern Christian Leadership Conference; Ruben Bonilla, National President, League of United Latin American Citizens; Vernon Jordan, Executive Director, Urban League ("if it ain't broke don't fix it"); Coretta Scott King; Lane Kirkland, President, AFL–CIO.

to provide bilingual registration and election materials.[227] Senator Hayakawa testified against retaining this section. He cited various instances of the costs mandated by this provision noting that, in 1980, for example, the State of California spent $1.2 million on bilingual election materials.[228] Other witnesses urged the retention of this provision, as did the Administration.[229]

Another matter raised by several witnesses related to venue in preclearance and bail-out suits. Venue in such cases is currently restricted to the U.S. District Court for the District of Columbia. Former Attorney General Griffin Bell noted, for example, with respect to such restricted venue:

> It is a departure from the equal protection of the law and a disparagement which stigmatizes judges in the regions covered by the Act to require that relief be sought only from judges in the District of Columbia.[230]

Other witnesses, however, argued in behalf of retention of the present venue provisions.[231]

The final matter raised by some witnesses during the hearings related to whether or not a political subdivision of a state should be permitted to bail-out as a separate unit, apart from a covered state itself. In a recent Supreme Court decision,[232] section 4 of the Act was construed to require that a political jurisdiction within a state be permitted to bail-out only as part of a general state bail-out. Again, the subcommittee chose to retain current law.

Changes in existing law made by the bill, as reported, are shown as follows: existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italics, and existing law with respect to which no change is proposed is shown in roman.

VOTING RIGHTS ACT OF 1965

PUBLIC LAW 89-110, 79 STAT 437

AN ACT To enforce the Fifteenth Amendment to the Constitution of the United States, and for other purposes

* * * * * * *

[227] See supra note 117.

[228] Senator Hayakawa also observed that the Bureau of the Census identifies minority population groups by surname.

> Now that does not necessarily mean that the individual with a Spanish surname or a Japanese surname cannot read, write, and speak English. Some have been rooted here for generations and know only English. . . . Nowhere in the triggering mechanism is a person's ability to speak English addressed. Nowhere does the Act require that a bilingual ballot be furnished only if the voter cannot use the English language, whatever his surname may be. Senate Hearings, February 4, 1982, U.S. Senator S. I. Hayakawa.

See also House Hearings, June 23, 1981, Mary Estill Buchanan, Secretary of State, Colorado.

[229] See, e.g., Senate Hearings, January 27, 1982, Vilma Martinez, Executive Director, Mexican-American Legal Defense and Education Fund; February 23, 1982, Arnoldo Torres, Executive Director, League of United Latin American Citizens; February 4, 1982, William Clements, Governor of Texas.

[230] Letter to the Senate Subcommittee on the Constitution from Griffin Bell, former Attorney General of the United States, March 4, 1982. See also Senate Hearings, January 28, 1982, U.S. Senator Thad Cochran.

[231] See, e.g., Senate Hearings, January 27, 1982, Benjamin Hooks, Executive Director, NAACP; February 11, 1982, Dr. Arthur Fleming, Chairman, U.S. Commission on Civil Rights ("I think that Congress was wise in the beginning to decide that there were certain issues that could be more appropriately decided by a court here in the District of Columbia.")

[232] *City of Rome* v. *United States*, 446 U.S. 156, 167 (1980). A related question is, of course, whether or not a state can bail-out independently of any political jurisdictions within it. The proposed House measure would bar a state from bail-out unless all of its counties were also able to meet the bail-out standards. The logic here is difficult to understand since, by the same line of reasoning, those states in which only a handful of counties are covered, e.g. California, New York, Massachusetts, should be covered as states by virtue of that fact.

SEC. 4. (a) To assure that the right of citizens of the United States to vote is not denied or abridged on account of race or color, no citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the first two sentences of subsection (b) or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [seventeen] *twenty-seven* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color: *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [seventeen] *twenty-seven* years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this Act, determining that denials or abridgments of the right to vote on account of race or color through the use of such tests or devices have occurred anywhere in the territory of such plaintiff. No citizen shall be denied the right to vote in any Federal, State, or local election because of his failure to comply with any test or device in any State with respect to which the determinations have been made under the third sentence of subsection (b) of this section or in any political subdivision with respect to which such determinations have been made as a separate unit, unless the United States District Court for the District of Columbia in an action for a declaratory judgment brought by such State or subdivision against the United States has determined that no such test or device has been used during the [ten] *seventeen* years preceding the filing of the action for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2): *Provided*, That no such declaratory judgment shall issue with respect to any plaintiff for a period of [ten] *seventeen* years after the entry of a final judgment of any court of the United States, other than the denial of a declaratory judgment under this section, whether entered prior to or after the enactment of this paragraph, determining that denials or abridgments of the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) through the use of tests or devices have occurred anywhere in the territory of such plaintiff.

An action pursuant to this subsection shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of title 28 of the United States Code and any appeal shall lie to the Supreme Court. The court shall retain jurisdiction of any action pursuant to this subsection for five years after judgment and shall reopen the action upon motion of the Attorney General alleging that a test or device has been used for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2).

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the [seventeen]

twenty-seven years preceding the filing of an action under the first sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, he shall consent to the entry of such judgment.

If the Attorney General determines that he has no reason to believe that any such test or device has been used during the [ten] *seventeen* years preceding the filing of an action under the second sentence of this subsection for the purpose or with the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2) he shall be consent to the entry of such judgment.

* * * * * * *

SEC. 203. (a) The Congress finds that, through the use of various practices and procedures, citizens of language minorities have been effectively excluded from participation in the electoral process. Among other factors, the denial of the right to vote of such minority group citizens is ordinarily directly related to the unequal educational opportunities afforded them, resulting in high illiteracy and low voting participation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting these practices and by prescribing other remedial devices.

(b) Prior to August 6 [1985] *1992*, no State or political subdivision shall provide registration or voting notices, forms, instruction, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language if the Director of the Census determines (i) that more than 5 percent of the citizens of voting age of such State or political subdivision are members of a single language minority and (ii) that the illiteracy rate of such persons as a group is higher than the national illiteracy rate: *Provided*, That the prohibitions of this subsection shall not apply in any political subdivision which has less than five percent voting age citizens of each language minority which comprises over five percent of the statewide population of voting age citizens. For purposes of this subsection, illiteracy means the failure to complete the fifth primary grade. The determinations of the Director of the Census under this subsection shall be effective upon publication in the Federal Register and shall not be subject to review in any court.

* * * * * * *

X. CONCLUSION

For the foregoing reasons, the Committee on the Judiciary's Subcommittee on the Constitution recommends the enactment of the subject bill extending intact the Voting Rights Act of 1965.

XI. COST ESTIMATE

Pursuant to section 252(a) of the Legislative Reorganization Act of 1970 (Public Law 91–510), the subcommittee estimates that there will be minimal costs to the Federal Government resulting from the passage of this legislation.

ATTACHMENT A

QUESTIONS AND ANSWERS: INTENT V. RESULT

The Voting Rights Act debate will focus upon a proposed change in the Act that involves one of the most important constitutional issues to come before Congress in many years. Involved in this debate are fundamental issues involving the nature of American representative democracy, federalism, civil rights, and the separation of powers. The following are questions and answers pertaining to this proposed change. It is not a simple issue.

What is the major issue involved in the present Voting Rights Act debate?

The most controversial issue is whether or not to change the standard in section 2 by which violations of voting rights are identified from the present "intent" standard to a "results" standard. There is virtually no opposition to extending the provisions of the Act or maintaining intact the basic protections and guarantees of the Act.

Who is proposing to change the section 2 standard?

Although the popular perception of the issue involved in the Voting Rights Act debate is whether or not civil rights advocates are going to be able to preserve the present Voting Rights Act, the section 2 issue involves a major change in the law proposed by some in the civil rights community. Few are urging any retrenchment of existing protections in the Voting Rights Act. The issue rather is whether or not expanded notions of civil rights will be incorporated into the law.

What is section 2?

Section 2 is the statutory codification of the 15th Amendment to the Constitution. The 15th Amendment provides that the right of citizens to vote shall not be denied or abridged "on account of" race or color. There has been virtually no debate over section 2 in the past because of its noncontroversial objectives.

Does section 2 apply only to "covered" jurisdictions?

No. Because it is a codification of the 15th Amendment, it applies to all jurisdictions across the country, whether or not they are a "covered" jurisdiction that is required to "pre-clear" changes in voting laws and procedures with the Justice Department under section 5 of the Act.

What is the relationsip between section 2 and section 5?

Virtually none. Section 5 requires jurisdiction with a history of discrimination to "preclear" all proposed changes in their voting laws and procedures with the Justice Department. Section 2 restates the 15th Amendment and applies to all jurisdictions; it is not limited either, as is section 5, to *changes* in voting laws or procedures. Existing

laws and procedures would be subject to section 2 scrutiny as well as changes in these laws and procedures.

What is the present law with respect to section 2?

The law with respect to the standard for identifying section 2 (or 15th Amendment) violations has always been an intent standard. As the Supreme Court reaffirmed in a decision in 1980, "That Amendment prohibits only purposefully discriminatory denial or abridgement by government of the freedom to vote on account of race or color." *Mobile* v. *Bolden* 446 U.S. 55.

Did the Mobile case enact any changes in existing laws?

No. The language in both the 15th Amendment and section 2 proscribes the denial of voting rights "on account of" race or color. This has always been interpreted to require purposeful discrimination. Indeed, there is no other kind of discrimination as the term has traditionally been understood. Until the *Mobile* case, it was simply not at issue that the 15th Amendment and section 2 required some demonstration of discriminatory purpose. There is no decision of the Court either prior to or since *Mobile* that has ever required anything other than an "intent" standard for the 15th Amendment or section 2.

Hasn't the Supreme Court utilized a results test prior to the Mobile decision?

No. The Supreme Court has never utilized a results (or an "effects" test) for identifying 15th Amendment violations. While proponents often refer to the decision of the Court in *White* v. *Regester* 412 U.S. 755 to argue the contrary, this is simply not the case. *White* was not a section 2 case and it was not a 15th Amendment case—it was a 14th Amendment case. Further, *White* required discriminatory purpose even under the 14th Amendment. That *White* required purpose was reiterated by the Court in *Mobile* and, indeed, it was reiterated by Justice White in dissent in *Mobile*. Justice White was the author of the *White* v. *Regester* opinion. The term results appears nowhere in *White* v. *Regester*. There is no other court decision either utilizing a results test under section 2 or the Fifteenth Amendment.

What is the standard for the 14th amendment's equal protection clause?

The intent standard has always applied to the 14th amendment as well. In *Arlington Heights* v. *Metropolitan Authority*, the Supreme Court stated, "Proof of a racially discriminatory intent or purpose is required to show a violation of the equal protection clause of the 14th amendment." 429 U.S. 253 (1977). This has been reiterated in a number of other decisions, *Washington* v. *Davis*, 426 U.S. 229 (1976); *Massachusetts* v. *Feeney*, 442 U.S. 256 (1979). In addition, the Court has always been careful to emphasize the distinction between de facto and de jure discrimination in the area of school busing. Only de jure (or purposeful) discrimination has ever been a basis for school busing orders. *Keyes* v. *Denver*, 413 U.S. 189 (1973).

What precisely is the "intent" standard?

The intent standard simply requires that a judicial fact-finder evaluate all the evidence available to himself on the basis of whether

or not it demonstrates some intent or purpose or motivation on the part of the defendant to act in a discriminatory manner. It is the traditional test for identifying discrimination.

Does it require express confessions of intent to discriminate?

No more than a criminal trial requires express confessions of guilt. It simply requires that a judge or jury be able to conclude on the basis of all the evidence available to it, including circumstantial evidence of whatever kind, that some discriminatory intent or purpose existed on the part of the defendant. Several major cases since *Mobile* have had no difficulty finding purposeful discrimination without a "smoking gun" or express confessions of intent.

Then it does not require "mind-reading" as some opponents of the "intent" standard have suggested?

Absolutely not. "Intent" is proven without "mind-reading" thousands of times every day of the week in criminal and civil trials across the country. Indeed, in criminal trials the existence of intent must be proven "beyond a reasonable doubt." In the civil rights area, the normal test is that intent be proven merely "by a preponderance of the evidence."

How can the intent of long-dead legislators be determined under the present test?

This has never been necessary under the 15th amendment. It is irrelevant what the intent may have been of "long-dead" legislators if the alleged discriminatory action is being maintained wrongfully by present legislators.

What kind of evidence can be used to demonstrate "intent"?

Again, literally any kind of evidence can be used to satisfy this requirement. As the Supreme Court noted in the *Arlington Heights* case, "Determining whether invidious discriminatory purposes was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence as may be available. 429 U.S. 253, 266. Among the specific considerations that it mentions are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedures, legislative history, the impact of a decision upon minority groups, etc.

Do you mean that the actual impact or effects of an action upon minority groups can be considered under the intent test?

Yes. Unlike a results or effects-oriented test, however, it is not dispositive of a voting rights violation in and of itself, and it cannot effectively shift burdens of proof in and of itself. It is simply evidence of whatever force it communicates to the factfinder.

Why are some proposing to substitute a new "results" test in section 2?

Ostensibly, it is argued that voting rights violations are more difficult to prove under an intent standard than they would be under a results standard.

How important should that consideration be?

Completely apart from the fact that the Voting Rights Act has been an effective tool for combating voting discrimination under

the present standard, it is debatable whether or not an appropriate standard should be fashioned on the basis of what facilitates successful prosecutions. Elimination of the "beyond a reasonable doubt" standard in criminal cases, for example, would certainly facilitate criminal convictions. The Nation has chosen not to do this because there are competing values, e.g. fairness and due process.

What is wrong with the results standard?

First of all, it is totally unclear what the "results" standard is supposed to represent. It is a standard totally unknown to present law. To the extent that its legislative history is relevant, and to the extent that it is designed to resemble an effects test, the main objection is that it would establish as a standard for identifying section 2 violations a "proportional representation by race" standard.

What is meant by "proportional representation by race"?

The "proportional representation by race" standard is one that evaluates electoral actions on the basis of whether or not they contribute to representation in a State legislature or a City Council or a County Commission or a School Board for racial and ethnic groups in proportion to their numbers in the population.

What is wrong with "proportional representation by race"?

It is a concept totally inconsistent with the traditional notion of American representative government wherein elected officials represent individual citizens not racial or ethnic groups or blocs. In addition, as the Court observed in *Mobile*, the Constitution "does not require proportional representation as an imperative of political organization." As Madison observed in the Federalist No. 10, a major objective of the drafters of the Constitution was to limit the influence of "factions" in the electoral process.

Compare then the intent and the results tests?

The intent test allows courts to consider the totality of evidence surrounding an alleged discriminatory action and then requires such evidence to be evaluated on the basis of whether or not it raises an inference of purpose or motivation to discriminate. The results test, however, would focus analysis upon whether or not minority groups were represented proportionately or whether or not some change in voting law or procedure would contribute toward that result.

What does the term "discriminatory results" mean?

It means nothing more than is meant by the concept of racial balance or racial quotas. Under the results standard, actions would be judged, pure and simple, on color-conscious grounds. This is totally at odds with everything that the Constitution has been directed towards since the Reconstruction Amendments, *Brown v. Board of Education*, and the Civil Rights Act of 1964. The term "discriminatory results" is Orwellian in the sense that it radically transforms the concept of discrimination from a process or a means to an end into a result or end in itself. The results test would outlaw actions with a "disparate impact"; this has virtually nothing to do with the notion of discrimination as traditionally understood.

Isn't the "proportional representation by race" description an extreme description?

Yes, but the results test is an extreme test. It is based upon Justice Thurgood Marshall's dissent in the *Mobile* case which was described by the Court as follows: "The theory of this dissenting opinion . . . appears to be that every 'political group' or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its numbers." The House Report, in discussing the proposed new "results" test, admits that proof of the absence of proportional representation "would be highly relevant".

But doesn't the proposed new section 2 language expressly state that proportional representation is not its objective?

There is, in fact, a disclaimer provision of sorts. It is clever, but it is a smokescreen. It states, "The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section."

Why is this language a "smokescreen"?

The key, of course, is the "in and of itself" language. In *Mobile*, Justice Marshall sought to deflect the "proportional representation by race" description of his results theory with a similar disclaimer. Consider the response of the Court, "The dissenting opinion seeks to disclaim this description of its theory by suggesting that a claim of vote dilution may require, in addition to proof of electoral defeat, some evidence of 'historical and social factors' indicating that the group in question is without political influence. Putting to the side the evident fact that these quazy sociological considerations have no constitutional basis, it remains far from certain that they could, in any principled manner, exclude the claims of any discrete group that happens for whatever reason, to elect fewer of its candidates than arithmetic indicates that it might. Indeed, the putative limits are bound to prove illusory if the express purpose informing their application would be, as the dissent assumes, to redress the 'inequitable distribution of political influence'."

Explain further?

In short, the point is that there will always be an additional scintilla of evidence to satisfy the "in and of itself" language. This is particularly true since there is no standard by which to judge any evidence except for the results standard.

What additional evidence, along with evidence of the lack of proportional representation, would suffice to complete a section 2 violation under the results test?

Among the additional bits of "objective" evidence to which the House Report refers are a "history of discrimination", "racially polarity voting" (sic), at-large elections, majority vote requirements, prohibitions on single-shot voting, and numbered posts. Among other factors that have been considered relevant in the past in evaluating submissions by "covered" jurisdictions under section 5 of the Voting Rights Act are disparate racial registration figures, history of English-

only ballots, maldistribution of services in racially definable neighborhoods, staggered electoral terms, some history of discrimination, the existence of dual school systems in the past, impediments to third party voting, residency requirements, redistricting plans which fail to "maximize" minority influence, numbers of minority registration officials, re-registration or registration purging requirements, economic costs associated with registration, etc., etc.

These factors have been used before?

Yes. In virtually every case, they have been used by the Justice Department (or by the courts) to ascertain the existence of discrimination in "covered" jurisdictions. It is a matter of one's imagination to come up with additional factors that could be used by creative or innovative courts or bureaucrats to satisfy the "objective" factor requirement of the "results" test (in addition to the absence of proportional representation). Bear in mind again that the purpose or motivation behind such voting devices or arrangements would be irrelevant.

Summarize again the significance of these "objective" factors?

The significance is simple—where there is a State legislature or a city council or a county commission or a school board which does not reflect racial proportions within the relevant population, that jurisdiction will be vulnerable to prosecution under section 2. It is virtually inconceivable that the "in and of itself" language will not be satisfied by one or more "objective" factors existing in nearly any jurisdiction in the country. The existence of these factors, in conjunction with the absence of proportional representation, would represent an automatic trigger in evidencing a section 2 violation. As the *Mobile* court observed, the disclaimer is "illusory".

But wouldn't you look to the totality of the circumstances?

Even if you did, there would be no judicial standard for evaluation other than proportional representation. The notion of looking to the totality of circumstances is meaningful only in the context of some larger state-of-mind standard, such as intent. It is a meaningless notion in the context of a result-oriented standard. After surveying the evidence under the present standard, the courts ask themselves, "Does this evidence raise an inference of intent?" Under the proposed new standard, given the absence of proportional representation and the existence of some "objective" factor, a prima facie (if not an irrebuttable) case has been established. There is no need for further inquiries by the court. There is no ultimate, threshold question for the courts.

Where would the burden of proof lie under the "results" test?

Given the absence of proportional representation and the existence of some "objective" factor, the effective burden of proof would be upon the defendant community. Indeed, it is unclear what kind of evidence, if any, would suffice to overcome such evidence. In *Mobile*, for example, the absence of discriminatory purpose and the existence of legitimate, non-discriminatory reasons for the at-large system of municipal elections was not considered relevant evidence by either the plaintiffs or the lower Federal courts.

Putting aside the abstract principle for the moment, what is the major objective of those attempting to over-rule "Mobile" and substitute a "results" test in section 2?

The immediate purpose is to allow a direct assault upon the majority of municipalities in the country which have adopted at-large systems of elections for city councils and county commissions. This was the precise issue in *Mobile*, as a matter of fact. Proponents of the results test argue that at-large elections tend to discriminate against minorities who would be more capable of electing "their" representatives to office on a district or ward voting system. In *Mobile*, the Court refused to dismantle the at-large municipal form of government adopted by the city.

Do at-large systems of voting discriminate against minorities?

Completely apart from the fact that at-large voting for municipal governments was instituted by many communities in the 1910's and 1920's in response to unusual instances of corruption within ward systems of government, there is absolutely no evidence that at-large voting tends to discriminate against minorities. That is, unless the premise is adopted that only blacks can represent blacks, only whites can represent whites, and only hispanics can represent hispanics. Indeed, many political scientists believe that thec reation of black wards or hispanic wards, by tending to create political "ghettoes", minimize the influence of minorities. It is highly debatable that black influence, for example, is enhanced by the creation of a single 90-percent black ward (that may elect a black person) than by three 30-percent black wards (that may each elect white persons all of whom will be influenced significantly by the black community).

What else is wrong with the proposition that at-large elections are constitutionally invalid?

First, it turns the traditional objective of the Voting Rights Act—equal access to the electoral process—on its head. As the Court said in *Mobile*, "this right to equal participation in the electoral process does not protect any political group, however defined, from electoral defeat." Second, it encourages political isolation among minority groups; rather than having to enter into electoral coalitions in order to elect candidates favorable to their interests, ward-only elections tend to allow minorities the more comfortable, but less ultimately influential, state of affairs of safe, racially identifiable districts. Third, it tends to place a premium upon minorities remaining geographically segregated. To the extent that integration occurs, ward-only voting would tend not to result in proportional representation. To summarize again by referring to *Mobile*, "political groups do not have an independent constitutional claim to representation."

What would be the impact of a constitutional or statutory rule proscribing at-large municipal elections?

The impact would be profound. In *Mobile*, the plaintiffs sought to strike down the entire form of municipal government adopted by the city on the basis of the at-large form of city council election. The Court stated, "Despite repeated attacks upon multi-member (at-large) legis-

lative districts, the Court has consistently held that they are not unconstitutional." If *Mobile* were over-ruled, the at-large electoral structures of the more than two-thirds of the 18,000+ municipalities in the country that have adopted this form of government, would be placed in serious jeopardy.

What will be the impact of the results test upon redistricting and reapportionment?

Redistricting and reapportionment actions also will be judged on the basis of proportional representation analysis. As Dr. W. F. Gibson, the President of the South Carolina NAACP, recently observed about proposed legislative redistricting in that State, "Unless we see a redistricting plan that has the possibility of blacks having the probability of being elected in proportion to this population, we will push hard for a new plan." Similarly, the Reverend Jesse Jackson has stated, "Blacks comprise one-third of South Carolina's population and they deserve one-third of its representation." Former Assistant Attorney General for Civil Rights Drew Days has conceded that minority groups alone will be largely immune to partisan or ideological gerrymandering on the grounds of "vote dilution".

What is "vote dilution"?

The concept of "vote dilution" is one that has been responsible for transforming other provisions of the Voting Rights Act (esp. section 5) from those designed to ensure equal access by minorities to the registration and voting processes into those designed to ensure equal electoral outcome. The right to register and vote has been significantly transformed in recent years into the right to cast an "effective" vote and the right of racial or ethnic groups not to have their collective vote "diluted". See, e.g., Thernstrom, "The Odd Evolution of the Voting Rights Act", 55 *The Public Interest* 49. Determining whether or not a vote is "effective" or "diluted" is generally determined simply by proportional representation analysis.

Are there other constitutional issues involved with section 2?

Yes. Given that the Supreme Court has interpreted the 15th Amendment to require a demonstration of purposeful discrimination in order to establish a constitutional violation, and given that the Voting Rights Act is predicated upon the 15th Amendment, there are serious constitutional questions involved as to whether or not Congress in section 2 can re-interpret the parameters of the 15th Amendment by simple statute. Similar constitutional questions are involved in pending efforts by the Congress to statutorily overturn the Supreme Court's abortion decision in *Roe* v. *Wade*. As former Attorney General Griffin Bell has observed, "To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government."

What is the position of the administration on the section 2 issue?

The administration and the Justice Department are strongly on record as favoring retention of the intent standard in section 2. President Reagan has expressed his concern that the results standard may lead to the establishment of racial quotas in the electoral process.

Press Conference, December 17, 1981. Attorney General William French Smith has expressed similar concerns.

Summarize the section 2 issue?

The debate over whether or not to overturn the Supreme Court's decision in *Mobile* v. *Bolden*, and establish a results test for identifying voting discrimination in place of the present intent test, is probably the single most important constitutional issue that will be considered by the 97th Congress. Involved in this controversy are fundamental issues involving the nature of American representative democracy, federalism, the division of powers, and civil rights. By redefining the notion of "civil rights" and "discrimination" in the context of voting rights, the proposed "results" amendment would transform the objective of the Act from equal access to the ballot-box into equal results in the electoral process. A results test for discrimination can lead nowhere but to a standard of proportional representation by race.

ATTACHMENT B

Selected Quotes on Section 2 and Proportional Representation

"The theory of the dissenting opinion ["results" test] . . . appears to be that every political group or at least every such group that is in the minority has a federal constitutional right to elect candidates in proportion to its members . . . The Equal Protection Clause does not require proportional representation as an imperative of political organization."—U.S. Supreme Court, *Mobile* v. *Bolden* (1980)

"The fact that members of a racial or language minority group have not been elected in numbers equal to the group's proportion of the population . . . would be highly relevant [under the proposed amendment.]"—House Report 97-227 (Voting Rights Act)

"[Under the new test] any voting law or procedure in the country which produces election results that fail to mirror the population's make-up in a particular community would be vulnerable to legal challenge . . . if carried to its logical conclusion, proportional representation or quotas would be the end result."—U.S. Attorney General William French Smith

"To overrule the *Mobile* decision by statute would be an extremely dangerous course of action under our form of government."—Former U.S. Attorney General Griffin Bell

"A very real prospect is that this amendment could well lead us to the use of quotas in the electoral process . . . We are deeply concerned that this language will be construed to require governmental units to present compelling justification for any voting system which does not lead to proportional representation."—Asst. Attorney General (Civil Rights) William Bradford Reynolds.

"Blacks comprise one-third of South Carolina's population and they deserve one-third of its representation."—Rev. Jesse Jackson, Columbia State, October 25, 1981

"The amendment must invariably operate . . . to create racially defined wards throughout much of the nation and to compel the worst tendencies toward race-based allegiances and divisions."—Prof. William Van Alstyne, Univ. of Calif. School of Law.

"The logical terminal point of those challenges [to *Mobile*] is that election districts must be drawn to give proportional representation to minorities."—Washington Post, April 28, 1980

"It seems to me that the intent of the amendment is to ensure that blacks or members of other minority groups are ensured proportional representation. If, for example, blacks are 20 percent of the population of a State, Hispanics 15 percent, and Indians 2 percent, then at least 20 percent of the members of the legislature must be black, 15 percent Hispanic and 2 percent Indian."—Prof. Joseph Bishop, Yale Law School

"The amendment is intended to reverse the Supreme Court's decision in *Mobile* . . . if adopted, this authorizes Federal courts to require States to change their laws to ensure that minorities will be elected in proportion to their numbers . . . Representative government does not imply proportional representation."—Dr. Walter Berns, American Enterprise Institute

"Unless we see a redistricting plan that has the possibility of blacks having the probability of being elected in proportion to this population in South Carolina, we will push hard for a new plan."—Dr. W. F. Gibson, President, South Carolina NAACP

"Only those who live in a dream world can fail to perceive the basic thrust and purpose and inevitable result of the new section 2: it is to establish a pattern of proportional representation, now based upon race—perhaps at a later moment in time upon gender or religion or nationality."—Prof. Henry Abraham, University of Virginia

"I may state unequivocally for the NAACP and for the Leadership Conference on Civil Rights that we are not seeking proportional representation . . . I think there is a big difference between proportional representation and representation in the population in proportion to [minority] population."—Benjamin Hooks, Executive Director, NAACP

"What the courts are going to have to do under the new test is to look at the proportion of minority voters in a given locality and look at the proportion of minority representatives. That is where they will begin their inquiry and that is very likely where they will end their inquiry. We will have ethnic or racial proportionality."—Prof. Donald Horowitz, Duke University Law School

"It would be difficult to imagine a political entity containing a significant minority population that was not represented proportionately that would not be in violation of the new section."—Prof. Edward Erler, National Humanities Center

"[The results test would require] dividing the community into the various races and ethnic groups the law happens to cover and trying to provide each with a representative."—Wall Street Journal, January 15, 1982

"Equal access does not mean equal results . . . [Under the amendment] proportionate results have become the test of discrimination."—Dr. John Bunzel, Hoover Institution (Stanford University)

"The very language of the amendment proposed for Section 2 imports proportional representation into the Act where it did not exist before."—Prof. Barry Gross, City College of New York

"By making sheer numerical outcome 'highly relevant' as to the legality of a procedure, the House bill moves to replace the outcome of the voting as the final arbiter by another standard—proportionality. This is not consistent with democracy."—Prof. Michael Levin, City College of New York

"The proof [of discrimination under the amended section 2] is the number of people who get elected."—U.S. Rep. Robert Garcia (New York)

ADDITIONAL VIEWS OF SENATOR DECONCINI AND SENATOR LEAHY ON S. 1992, THE VOTING RIGHTS ACT

The Constitution Subcommittee majority offered at the markup of S. 1992, on March 24, 1982, a draft report styled in the name of the full Judiciary Committee and supporting the views of the Subcommittee majority.

We believe that the most orderly procedure is for the bill to proceed promptly to the full Committee and for the supporters of S. 1992 in its original version (the bill adopted by the House of Representatives) to file either a majority or minority Report, depending on the outcome of the full Committee vote.

It serves no purpose to delay the transmission of the bill to the full Committee. The views of the undersigned are therefore filed in very summary form, with the caveat that we do not purport to speak finally on behalf of those Senators on the full Committee who may support S. 1992 in its original form and who will want the opportunity to file a complete and well documented Report after markup.

SECTION 2 COMMENTS

On March 24, the Subcommittee on the Constitution voted unanimously to report S. 1992 favorably to the full Committee. However, an amendment to S. 1992, which we opposed, was adopted prior to the bill's being reported by the Subcommittee.

The amendment changed the language of S. 1992 relating to Section 2 of the Voting Rights Act of 1965. It also deleted from S. 1992, the provisions which created the opportunity for covered jurisdictions to "bail out" from under the preclearance obligations of Section 5 of the Act, in August of 1984.

As the Report notes, the central issue before the Committee is how the Congress will clarify the reach of Section 2 of the Voting Rights Act. There are five main points on which we fundamentally differ with the analysis of this issue in the Report:

1. THE HOUSE WOULD RESTORE THE PRIOR LEGAL STANDARD

The proposed amendment to Section 2 in the House-passed bill would restore the results test to election discrimination cases. The Report claims that this "results" test is a new, unprecedented standard which would be a radical departure from the law that had governed challenges to electoral systems in the past. That is demonstrably untrue. The new language would clarify the current confusion by restoring the legal standard for such cases which was in effect for almost a decade.

2. THE HOUSE BILL WOULD RESTORE A STANDARD WITH A WELL DEVELOPED BODY OF PRECEDENTS

The Report claims that a "results test" under Section 2 would create great doubt and uncertainty about the appropriate legal standard. In fact, the proposed amendment to Section 2 would codify a test applied with no suggestion of difficulty in over two dozen Courts of Appeals decisions across the country. The touchstone would be straightforward: whether minorities had a fair opportunity to participate in the political process?

3. THE RESULTS STANDARD WOULD FOCUS ATTENTION ON WHETHER AN ELECTION SYSTEM WAS FAIR, AND AWAY FROM ANY INQUIRY INTO RACIST MOTIVES

The Report suggests that the Results Standard would exacerbate racial tension in local politics. On the contrary, it is the "intent test" which, *by definition*, would require the courts to determine whether a public official or official governing body had *acted* out of racist motives. Long trials would focus on that divisive inquiry. By contrast, the "results test" would avoid that problem by focusing on whether minorities are unfairly excluded from equal access to the process under the particular system in question.

4. THE "RESULTS TEST" WOULD NOT TURN ON THE OUTCOME OF LOCAL ELECTIONS OR REQUIRE PROPORTIONAL REPRESENTATION

The Report claims that the "results test would make local electoral systems unlawful if the election result did not mirror the percentage of minorities in the electorate." The Report suggests that plaintiffs could win by such a statistical showing, and that they could thereby raise the specter of racial quotas in electoral politics.

The Report studiously avoids the clear record under the "results standard" which S. 1992 would adopt. As discussed more fully below, two Supreme Court decisions and some two dozen Courts of Appeals cases make absolutely clear that there is no right to proportional representation under this standard, either as a measurement of the violation or as the required remedy if a violation is found. The minority joins the majority in rejecting proportional representation as either an appropriate standard for complying with the Act or as a proper method of remedying adjudicated violations. No witness who testified before the Subcommittee advocated proportional representation. And we must point out that the "results test" of S. 1992 would not lead to or require proportional representation.

5. THE AMENDED LANGUAGE OF SECTION 2 IS A CONSTITUTIONAL EXERCISE OF CONGRESSIONAL POWER

The Report questions the constitutionality of S. 1992 on the grounds that Congress cannot overturn the Supreme Court's reading of the 14th and 15th Amendments in the *Mobile* v. *Bolden* case.

We agree that Congress cannot and should not overturn the Supreme Court's interpretation of the Constitution.

But it is absolutely clear that Congress can pass legislation at the statute level to enforce the rights protected by those Amendments and that such statutes may reach beyond the direct prohibitions of the constitutional provisions themselves. That is now hornbook law, as recently reviewed in an opinion of Chief Justice Warren Burger.

The heart of the issue is sharply focused by one crucial paragraph in the Subcommittee Report. In section VI (c), the Report claims that the "results test" assumes that "race is the predominant determinant of political preference." The Report notes that in some cases racial bloc voting by the majority is not monolithic and minority candidates receive substantial support from white voters. Mayor Tom Bradley of Los Angeles being an obvious example cited by Attorney General Smith.

That is precisely the point. In most communities, that is true, and in such communities it would be virtually impossible for plaintiffs to show they were effectively excluded from a fair access to the political process under the results test. Unfortunately, there still are some communities in our nation where racial politics do dominate the electoral process—at least with respect to the ability of the minority voters to exercise meaningful influence on the selection of candidates of their choice.

The results test *makes no assumptions one way or the other* about the role of racial political considerations in a particular community. If plaintiffs assert that they are denied fair access to the political process in part because of the racial bloc voting within which the system works, they would have to prove it.

Proponents of the "intent standard" however, do presume that such racial politics no longer impact minority voters in America. The presumption ignores an unfortunate reality established by overwhelming evidence at the Senate and House hearings.

Bailout

Although the Subcommittee reported a straight extension of the Act, without any changes in the bailout procedures, the Report urges the full Committee to weaken the new bailout procedure afforded by S. 1992. This, too, is a critical issue.

There is now virtual unanimity that Section 5 preclearance does not expire. Only the limitation on when jurisdictions may bail out "expires" in any sense. Minority voters are extremely concerned that the majority's extension could prove a hollow victory if an excessively easy bailout provision is enacted. Should the new bailout provision prove a sieve, it would constitute a back-door repeal of Section 5, since many communities where preclearance is still needed would be able to escape coverage. Yet, that is precisely where the recommendations of the Report would take us.

In order to understand the bailout issue, it is necessary to know the evolution of the bailout provision presently in S. 1992. Existing law permits jurisdictions to end their preclearance obligaton upon showing they have not used a test or device discriminatorily for the designated number of years. In effect, it amounts to a calendar measurement of duration of Section 5 coverage from 1965. During the House hearings, Congressman Hyde noted that nothing that jurisdictions had done since 1965 would count under the existing bailout mechanism. He suggested a bailout should be provided that (1) would take account of the good behavior which some jurisdictions might be able to demonstrate and (2) would give an incentive to others to fully accept minority political participation. He proposed a bailout scheme similar to the one now in S. 1992, under which jurisdictions would have to demonstrate they had fully complied with the law for the past ten years and also would have to show they had made constructive efforts to permit full participation by minorities in the political process.

The witnesses representing minority voters opposed such an addtion to the present law on the grounds that no real need for it had been established and that jurisdictions should not require any additional incentive to obey the law or to accept political participation by minorities.

Ultimately, however, in order to expedite passage of this vital measure and to ensure extension of the Voting Rights Act, proponents of the legislation agreed to support a compromise bailout provision which was developed by Representatives James Sensenbrenner, Hamilton Fish and Donald Edwards. It was based on, and substantially followed the framework of, Representative Hyde's proposal although it differed in some important particulars from his final version. This was a major and very difficult concession for the civil rights organizations representing the interests of millions of minority voters, as anyone famliar with the House proceedings is well aware.

The "Sensenbrenner compromise bailout" was adopted by the Committee and enacted by the House. Several amendments to weaken it were defeated on the House floor by overwhelming margins after substantial debate. The House accepted the arguments of the architects of the Committee bill that the bailout provision was a fair and reasonable one, and that to loosen the standards further would be to risk crippling the continued effectiveness of Section 5.

The House bill also modified the bailout procedure of the Voting Rights Act in another major respect. Under present law, if a county is under Section 5 obligations because the entire State is under Section 5, then that county must remain under Section 5 until the entire State has bailout. Individual jurisdictions may not bail out, regardless of how good their own record is. The new bailout provision of S. 1992 permits any county to bailout individually, even if the State as a whole is not yet eligible to bail out.

Against this background, the Subcommittee Report accepts the arguments of Assistant Attorney General William Reynolds that the bailout passed by the House and which is included in S. 1992 is too strict. Indeed, the Report suggests it is an illusory bailout because it is impossible to meet its terms.

After citing Mr. Reynolds' assertion that in the foreseeable future no jurisdiction would be eligible to bail out under S. 1992, the Report goes on to state that: "No evidence of any kind has been shared with this Subcommittee that would contradict this assessment of the 'reasonableness of the House bail-out'."

That statement is flatly untrue. In fact, several witnesses presented expert testimony that a very substantial number of the counties pres-

ently covered by Section 5 would be eligible to apply for bailout in the first year permitted by the statute, namely, 1984, and that additional numbers would become eligible in succeeding years—*all prior to the 1992 expiration date imposed under the straight 10-year extension of Section 5 as reported by the Subcommittee.*

Since the bailout provision in S. 1992 clearly is an achieveable standard, the suggestion in the Report that it would permanently impose Section 5 on the covered jurisdiction is without foundation, as are the constitutional arguments premised on that assertion.

Indeed, the net effect of this change is to make it possible for those jurisdictions which have obeyed the law and accepted minority participation to remove themselves from Section 5 coverage well ahead of the 1992 date imposed by the Subcommittee bill.

O

Herman LODGE et al., Plaintiffs-Appellees,

v.

J. F. BUXTON et al., Defendants,

Ray DeLaigle et al., Defendants-Appellants.

No. 78-3241.

United States Court of Appeals, Fifth Circuit. Unit B

March 20, 1981.

In an action to have a county's system of at-large elections declared invalid as violative of the First, Fourteenth and Fifteenth Amendments to the United States Constitution and certain statutes, the United States District Court for the Southern District of Georgia at Augusta, Anthony A. Alaimo, Chief Judge, held for the plaintiffs and ordered a change of the system. On appeal by the defendants, the Court of Appeals, Fay, Circuit Judge, held that: (1) District Court's conclusion that historical and present discrimination operated in conjunction with officially sanctioned electoral system to unfairly limit access of Blacks to political process was not clearly erroneous, and same was true of District Court's finding that state policy behind at-large election system, although neutral in origin, had been subverted to invidious purposes, and (2) District Court acted properly in its provision for relief.

Affirmed.

Henderson, Circuit Judge, dissented and filed opinion.

1. Elections ⇐12

At-large voting is not per se unconstitutional. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

2. Elections ⇐12

No group, whether racially or ethnically identifiable, has a right to elect representatives proportionate to its voting power in community. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

3. Elections ⇐12

Even consistent defeat at polls by racial minority does not alone give rise to constitutional claims. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

4. Elections ⇐12

To secure finding that election law, racially neutral on its face, is unconstitutional, plaintiff must prove that it was conceived or maintained with intent or purpose of promoting invidious discrimination. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

5. Elections ⇐12

In voting dilution case, plaintiff was required to establish that racially neutral at-large system was created or maintained for purpose of preventing minority groups from effectively participating in the electoral process. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. §§ 1971, 1971(a)(1); Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

6. Elections ⇐12

Second section of Voting Rights Act does not provide remedy for conduct not covered by Fifteenth Amendment. U.S.C.A.Const. Amend. 15; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

7. Constitutional Law ⇐215.3
Elections ⇐12

Plaintiff bringing voting dilution case attacking electoral system that is racially neutral on its face may challenge such sys-

tem on grounds that it violates either Fourteenth or Fifteenth Amendment. U.S.C.A. Const. Amends. 14, 15.

8. Elections ⇐12

Plaintiff challenging at-large voting system must prove that system was created or maintained for purpose of limiting access of or excluding Blacks from effective participation in that system. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

9. Elections ⇐12

Racially definable group may challenge electoral system on dilution grounds only if it can be shown that system invidiously operates to detriment of their interests, and unresponsiveness may be necessary element to maintenance of action, but although proof of unresponsiveness alone does not give rise to inference that system is maintained for discriminatory purposes, and conclusion must be reached only in light of totality of circumstances presented, direct evidence of intent is not required. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

10. Constitutional Law ⇐215.3
Elections ⇐12

Essential element of prima facie case under Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through maintenance of at-large electoral system is proof of unresponsiveness by public body in question to group claiming injury, but responsiveness is determinative factor only in its absence, and proof of unresponsiveness does not establish prima facie case sufficient to shift burden of proof to party defending constitutionality. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

11. Elections ⇐12

Criteria of *Zimmer* case, i. e., lack of access to process of slating candidates, unresponsiveness of legislators to minority's particular interests, tenuous state policy underlying preference for multimember or at-large districting, existence of past discrimination in general precluding effective participation in election system, existence of large districts, majority vote requirements, antisingle shot voting provisions, and lack of provisions for at-large candidates running from particular geographical subdistricts may be indicative but are not dispositive on question of intent, and are relevant only to extent that they allow trial court to draw inference of intent and, being not exclusive indicia of discriminatory purpose, may in given case be replaced or supplemented by more meaningful factors. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

12. Federal Courts ⇐855

In vote dissolution case, Court of Appeals will give great deference to judgment of trial court which is in far better position to evaluate local political, social and economic realities than is Court of Appeals. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

13. Elections ⇐12

Bloc voting is not illegal, but inquiry into voting patterns is relevant, and plaintiff would be hard pressed to prove that system was being maintained for invidious purposes, without proof of bloc voting. U.S.C.A.Const. Amends. 1, 14, 15; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

14. Counties ⇐38

In suit to have county's system of at-large elections declared invalid, district court's conclusion that effect of historical discrimination was to restrict opportunity of Blacks to participate in electoral process in the present was not clearly erroneous, and same was true of district court's finding of unresponsiveness and insensitivity to legitimate rights of county's Black residents

and of conclusion that Blacks in county suffered from severe socioeconomic depression which was caused at least in part by past discrimination and which had a direct negative impact on opportunity for Blacks to effectively participate in electoral process. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

15. Counties ⇐38

In suit to have county's system of at-large elections declared invalid, district court's conclusion that historical and present discrimination operated in conjunction with officially sanctioned electoral system to unfairly limit access of Blacks to political process was not clearly erroneous, and same was true of court's finding that state policy behind at-large election system, although neutral in origin, had been subverted to invidious purposes. U.S.C.A. Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973.

16. Counties ⇐38

In action to have county's system of at-large elections declared invalid, well-supported or not clearly erroneous conclusions of district court properly permitted district court to draw inference that at-large electoral system had been maintained for purpose of restricting access of county's Black residents to that system and was being maintained for invidious purposes. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; Ga.Code, §§ 34-501, 34-605, 34-1310(b), 34A-903.

17. Counties ⇐38

On finding that county's system of at-large elections was being maintained for invidious purposes, district court properly ordered that five county commissioners for county be elected in single-member districts in all future elections and properly adopted original plan submitted by plaintiff, plan having substantially smaller population deviations among districts than plan submitted by defendants. U.S.C.A.Const. Amends. 1, 14, 15; 42 U.S.C.A. § 1971; Voting Rights Act of 1965, § 2, 42 U.S.C.A. § 1973; Ga.Code, §§ 34-501, 34-605, 34-1310(b), 34A-903.

E. Freeman Leverett, Elberton, Ga., Preston B. Lewis, Jr., Waynesboro, Ga., for defendants-appellants.

David F. Walbert, Atlanta, Ga., Robert W. Cullen, Augusta, Ga., Laughlin McDonald, Neil Bradley, H. Christopher Coates, Atlanta, Ga., for plaintiffs-appellees.

Thomas M. Keeling, J. Gerald Hebert, Attys., Dept. of Justice, Washington, D. C., for amicus curiae U. S. A.

Appeal from the United States District Court for the Southern District of Georgia.

Before JONES, FAY and HENDERSON, Circuit Judges.

FAY, Circuit Judge:

Plaintiff class, consisting of all Black residents of Burke County, Georgia, brought this action to have that county's system of at-large elections declared invalid as violative of the First, Fourteenth and Fifteenth Amendments to the United States Constitution and Title 42 U.S.C. §§ 1971 and 1973. The District Court for the Southern District of Georgia held for the plaintiffs, on the grounds that the at-large election process was maintained for the purpose of limiting Black access to the political system in violation of their Fourteenth and Fifteenth Amendment rights. Accordingly, the District Court ordered that the existing system of at-large elections be abandoned and that the county be divided into five districts with each district electing one county commissioner. We affirm the judgment of the District Court in all respects.

FACTS

This case arose in Burke County, a large and predominantly rural county in southern

Georgia. In fact Burke County is the second largest of Georgia's 159 counties in terms of the area it encompasses.[1] Burke is similar to many rural counties in Georgia in that its economic base is predominantly agricultural. The county's population is somewhat over 10,000 people, a slight majority of whom are Black.[2] No Black has ever been elected to the county commission in Burke County.

This suit was filed in 1976 by various named plaintiffs as representatives of the class of all Black residents of Burke County.[3] It alleged that the county's system of at-large elections violated plaintiff's First, Fourteenth and Fifteenth Amendment rights, as well as their rights under Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and the Reconstruction Act, 42 U.S.C. § 1971, by diluting the significance of the Black vote, thereby unconstitutionally restricting their right to meaningful access to and participation in the electoral process.

After a trial, during which both parties offered voluminous evidence in support of their respective positions, the District Court held for plaintiff. The court concluded that the at-large system had been maintained for the purpose of limiting Black participation in the electoral process. The court entered an order, setting forth the findings of fact and conclusions of law, requiring Burke County to elect five county commissioners, one from each of five districts into which the county was to be divided.[4] The court's order of October 26, 1978 was to be effectuated by the time of the general elec-

1. Burke County is 832 square miles in area, making it approximately the size of two-thirds of the State of Rhode Island.

2. The following population table is taken from the District Court's findings of fact and conclusions of law:

YEAR [c]	TOTAL POPULATION	PERCENTAGE WHITE [b]	BLACK [a]
1975	18,700	42%	58%
1970	18,248	40%	60%
1960	20,596	34%	66%
1950	23,458	29%	71%
1940	26,520	25%	75%
1930	29,224	22%	78%

[a] Percentage is to the nearest whole percent.

[b] The "percentage white" figure includes a category labelled "foreign born white"; the greatest number in this group was 42, in 1930. After 1930, this statistic apparently was not kept.

[c] The 1975 figures are a mid-census estimate taken from plaintiffs' exhibit 191.

In addition, the record indicates that the disparity in size between the White and Black residents of Burke County has continued to decrease since 1975, so that the current Black majority is very slight.

3. The class was actually certified by Judge Alaimo on May 12, 1977, some eleven months after suit was filed.

4. The following table shows a breakdown of the population of the districts in the plan selected by the District Court as to race and voting age and percentage deviation by district:

District	Total Population	Black Population (%)	White Population (%)	% Deviation
1	3,736	2,899 (77.6)	837 (22.4)	+2.3
2	3,673	2,753 (74.9)	920 (25.1)	+0.5
3	3,595	1,914 (53.2)	1,681 (46.8)	-1.6
4	3,590	1,852 (51.6)	1,738 (48.4)	-1.7
5	3,661	1,570 (42.9)	2,091 (57.1)	+0.3

tion on November 8, 1978. The District Court denied defendant's motion for a stay of that order pending the outcome on appeal. On October 27, 1978, this Court also denied defendant's motion for a stay pending appeal. On November 3, 1978, Justice Powell granted defendant's motion for a stay pending final disposition of the appeal by this Court.

ISSUES PRESENTED

Appellant asserts that the District Court erred by applying an incorrect legal standard in assessing appellee's constitutional rights. Appellant contends that the District Court did not and could not find that the at-large electoral system was created or maintained for the purpose of limiting Black participation in that system, as required by the Supreme Court in the recent decision of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Appellant contends that, while the operation of the system may have had the affect of limiting Black participation, the system was not designed or maintained to so operate.

In response, appellee offers various bases for affirming the District Court's judgment. They contend that the trial court correctly found the requisite degree of purposeful or intentional maintenance of a discriminatory system within the meaning of the Supreme Court's decision in *Bolden* and *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1972). They assert, alternatively, that inability to meaningfully participate in the electoral system violates a fundamental liberty interest within the meaning of the First Amendment. They contend that Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973 and the Reconstruction Act, 42 U.S.C. § 1971(a)(1) proscribe at-large voting systems having a discriminatory effect, without regard to the purpose or intent of that system.

BACKGROUND

[1-5] We believe this case turns on the interpretation of the proscriptions of the Fourteenth and Fifteenth Amendments. Therefore, we begin with a review of the application of those constitutional principles to voting dilution cases.[5] There are certain truisms that can be set out from the beginning. At-large voting is not *per se* unconstitutional. *Burns v. Richardson*, 384 U.S. 73, 86 S.Ct. 1286, 16 L.Ed.2d 376 (1966); *Fortson v. Dorsey*, 379 U.S. 433, 85 S.Ct. 498, 13 L.Ed.2d 401 (1965). No group, whether racially or ethnically identifiable has a right to elect representatives proportionate to its voting power in the community. *White v. Regester*, 412 U.S. 755, 765-66, 93 S.Ct. 2332, 2339 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 149-50, 91 S.Ct. 1858, 1872, 29 L.Ed.2d 363 (1971). Even consistent defeat at the polls by a racial minority does not, in and of itself, give rise to constitutional claims. *Whitcomb*, 403 U.S., at

District	Voting Age Population	Black Voting Age Population (%)	White Voting Age Population (%)
1	2,048	1,482 (72.4)	556 (27.6)
2	2,029	1,407 (69.3)	622 (30.7)
3	2,115	978 (46.2)	1,137 (53.8)
4	2,112	947 (44.6)	1,175 (55.4)
5	2,217	803 (36.2)	1,414 (63.8)

5. The Fourteenth Amendment provides in pertinent part, the following: "No State shall ... deny to any person within its jurisdiction the equal protection of the laws."

The Fifteenth Amendment provides, in pertinent part, the following: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any

152–53, 91 S.Ct. 1874. In order to find a law, racially neutral on its face, unconstitutional, the plaintiff must prove that it was conceived or maintained with the intent or purpose of promoting invidious discrimination. *Id.*, at 149, 91 S.Ct. 1872. As this applies to voting dilution cases such as this, plaintiff must establish that the racially neutral at-large system was created or maintained for the purpose of preventing minority groups from effectively participating in the electoral process.[6]

It is one thing to say that the plaintiff must establish proof that the purpose for creating or maintaining a system was to unconstitutionally restrict the access of a group to the political process, it is quite another to say what evidence will suffice to establish that discriminatory purpose or intent. Cases involving literacy tests or poll taxes, or property ownership requirements are, by comparison, easy to decide. The most obvious purpose for the creation or maintenance of such systems is clearly discrimination.

In a voting dilution case in which the challenged system was created at a time when discrimination may or may not have been its purpose,[7] it is unlikely that plaintiffs could ever uncover direct proof that such system was being maintained for the purpose of discrimination.[8] Neither the Supreme Court nor this Court, however, has denied relief when the weight of the evidence proved a plan to intentionally discriminate, even when its true purpose was cleverly cloaked in the guise of propriety. The existence of a right to redress does not turn on the degree of subtlety with which a discriminatory plan is effectuated. Circumstantial evidence, of necessity, must suffice, so long as the inference of discriminatory intent is clear.

The question then becomes, from what type of circumstantial evidence may an inference of intent be drawn, and how much of it is required? The answer to that question may be contained in the Supreme Court's recent decision in *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

[6] Appellant contends that *Bolden* represents a radical shift from and rejection of the law of this Circuit rendered prior to that decision. Appellee, as might be expected, denies that *Bolden* represents any such radical change. We believe it fair to say that *Bolden* contains certain ambiguities,[9] requiring this Court to attempt to construe it in a manner consistent with

State on account of race, color, or previous condition of servitude."

6. One of the conceptual reasons for allowing voting dilution cases to be maintained was well expressed by this Court in *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980). The Court said,

> An invidious at-large scheme merely achieves the same end [as gerrymandering], denial of effective participation, by submerging an interest group in a constituency large enough and polarized enough to place that group in the [electoral] minority consistently.

Id. at 219.

7. The general election laws in many jurisdictions were originally adopted at a time when Blacks had not receive their franchise. No one disputes that such laws were not adopted to achieve an end, the exclusion of Black voting, that was the status quo. Other states' election laws, though adopted shortly after the enactment of the Fifteenth Amendment, are so old that whatever evidence of discriminatory intent may have existed, has long since disappeared. This case falls within that category. The focus then becomes the existence of a discriminatory purpose for the *maintenance* of such a system.

8. We think it can be stated unequivocally that, assuming an electoral system is being maintained for the purpose of restricting minority access thereto, there will be no memorandum between the defendants, or legislative history, in which it is said, "We've got a good thing going with this system; let's keep it this way so those Blacks won't get to participate." Even those who might otherwise be inclined to create such documentation have become sufficiently sensitive to the operation of our judicial system that they would not do so. Quite simply, there will be no "smoking gun."

9. *See United States v. Uvalde Consolidated Independent School District*, 625 F.2d 547 (5th Cir., 1980). "The ambiguity of the plurality opinion [in *Bolden, supra*] is alleviated by the various dissents and concurring opinions...." *Uvalde* at 582.

other precedents of the Supreme Court, with the expressed and implied intent of that Court and with decisions of this Court. To that end, we will begin with a review of the Supreme Court decisions and decisions of this Court prior to the Supreme Court's ruling in *Bolden*.[10] Next, we will set out in detail the positions taken by the Justices in their various opinions in *Bolden*. At that point we will attempt to reconcile *Bolden* with prior decisions, and establish a workable rule to follow.[11] Only at that point will we consider the facts of this case and the various legal theories of each party.

THE LAW BEFORE BOLDEN[12]

In *Whitcomb v. Chavis*, 403 U.S. 124, 91 S.Ct. 1858, 29 L.Ed.2d 363 (1971), the Supreme Court held, among other things, that the Equal Protection Clause of the Fourteenth Amendment was not violated, although the challenged multi-member district electoral system used in Marion County, Indiana resulted in the election of disproportionately few of that county's Black ghetto citizens. The Court concluded that the results were an inevitable political reality, because the Blacks, voting solidly as Democrats, were outvoted by the Republicans in most elections. In rejecting plaintiff's claim for relief, however, the Court noted several areas which, if factually proven, could have strengthened plaintiff's case. At one point the Court said,

> But we have deemed the validity of multi-member districts justifiable, recognizing also that they may be subject to challenge where the circumstances of a particular case may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.' *Fortson*, 779 U.S. at 439 [85 S.Ct. at 501], & *Burns*, 384 U.S. at 88 [86 S.Ct. at 1294]. Such a tendency, we have said, is enhanced when the district is large and elects a substantial portion of the seats in either house of a bicameral legislature, ... or if it lacks provision for at-large candidates running from particular geographical subdistricts, as in *Fortson*.... 403 U.S., at 143–44, 91 S.Ct. at 1869.

The Court later went into greater detail, saying, "[b]ut there is no suggestion here that Marion County's multi-member district or similar districts throughout the state, were conceived or operated as purposeful devices to further racial or economic discrimination....

> We have discovered nothing in the record or in the Court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when the legislative candidates were chosen." *Id.* at 149, 91 S.Ct. at 1872.

Two terms after *Whitcomb*, the Supreme Court decided *White v. Regester*, 412 U.S. 755, 93 S.Ct. 2332, 37 L.Ed.2d 314 (1972). In that case the Court affirmed the District

10. We do not attempt herein to provide an exhaustive review of all the decisions of this Court or the Supreme Court that lead up to the current state of the law. For an excellent historical survey, see Judge Tjoflat's opinion for this Court in *Nevett v. Sides*, *supra*, note 6. Our purpose is simply to state the law prior to *Bolden*, and to determine the impact of that ruling on this case.

11. The rule we establish is for dilution claims brought under the Fourteenth and Fifteenth Amendments. We do not reach appellees First Amendment or statutory bases for affirming the District Court's judgment. With respect to the assertion that section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides a remedy for conduct not covered by the Fifteenth Amendment, we are bound by the expression of five Justices of the Supreme Court (see the opinions of Stuart, J. and Marshall, J., *dissenting*) that such is not the case. We do not express any opinion as to the application of the First Amendment or 42 U.S.C. § 1971 to this case. We believe such new courses should be charted by the Supreme Court which, as of yet, has not chosen to do so. We believe our restraint in this area is particularly appropriate given the fact that the District Court did not consider those grounds in its evaluation of the case.

12. We refer here to the law prior to the Supreme Court's decision in *Bolden*. Included in this section is an analysis of this Court's decision in *Bolden*.

Court's judgment that the multi-member districts in Dallas and Bexar County, Texas unconstitutionally diluted the voting rights of certain racial and ethnic minority groups within those counties. The Court began with the proposition enunciated in *Whitcomb*, that "[t]he plaintiff's burden is to produce evidence to support findings that the political process leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice." 412 U.S., at 766, 93 S.Ct. at 2339. The Court held that this standard had been met by plaintiffs in Dallas County, with proof that (1) the history of official racial discrimination affected the rights of Blacks to register, vote, and participate in the political process, (2) the requirements of a majority vote in primary elections coupled with the requirement that candidates run from a "place",[13] though not improper in themselves, enhanced the opportunity for racial discrimination, (3) extremely few Blacks had been slated or elected in Dallas County since the days of Reconstruction, (4) the slating organization and its candidates who were elected were unresponsive to the needs and aspirations of the Black population because the Blacks' votes were not needed, and (5) the slating organization recently had relied on racial campaign tactics to defeat those candidates expressing concern for the needs and rights of the Black community.[14] In the case of Bexar County, the Court found the requisite exclusion from the political process with the same type, although a lesser quantity, of evidence. The Court based its decision on the finding that (1) there was a long history in Bexar County of invidious discrimination in the fields of "education, employment, economics, health, politics and others," (2) "the typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult...," (3) Mexican-Americans were vastly underrepresented in elective positions, (4) Mexican-Americans were hindered in their efforts to register to vote until recently by a restrictive registration procedure and (5) the Bexar County

13. Running from a "place" is the same as running from a numbered post. A candidate selects the area whose seat he wishes to run for, although he need not live in that area.

14. With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. 343 F.Supp., at 725. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought.[10] More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County.[11] That organization, the District Court found, did not need the support of the Negro community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support of the black community." *Id.*, at 727. Based on the evidence before it, the District Court concluded that "the black community has been effectively excluded from participation in the Democratic primary selection process," *id.*, at 726, and was therefore generally not permitted to enter into the political process in a reliable and meaningful manner. These findings and conclusions are sufficient to sustain the District Court's judgment with respect to the Dallas multimember district and, on this record, we have no reason to disturb them.

412 U.S., at 766–67, 93 S.Ct. at 2339–40.

state legislative delegation was insufficiently responsive to the interests of the Mexican-American community, when considered in the aggregate, supported plaintiff's position that they were effectively removed from the political process in Bexar County.

Following *White*, this Court decided the case of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (*en banc*), *aff'd on other grounds, sub nom., East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 296 (1975).[15] In *Zimmer*, we held a multi-member system of elections in East Carroll Parish, Louisiana violative of plaintiff's constitutional rights in that it diluted the impact of the votes of minority residents of that community. This Court, taking guidance from the decisions of the Supreme Court in *White v. Regester*, and *Whitcomb v. Chavis*, set out a list of factors that courts should consider in evaluating the constitutional permissibility of voting practices alleged to discriminate against racial minorities. We said,

> ... where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provisions for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors. The Supreme Court's recent pronouncement in *White v. Regester, supra*, demonstrates, however, that all these factors need not be proved in order to obtain relief.

Zimmer at 1305.[16]

Finding that all the primary factors, except unresponsiveness,[17] were established, and that many of the "enhancing" factors were present, this Court concluded that a constitutional violation had been established.

Five years later, this Court was called on to reconsider its *Zimmer* analysis, in light of the Supreme Court's decisions in *Washington v. Davis*, 426 U.S. 229, 96 S.Ct. 2040, 48 L.Ed.2d 597 (1976), and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).[18] It did so in a series of cases decided the same day: *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980); *Mobile v. Bolden*, 571 F.2d 238 (5th Cir. 1978), *rev'd.*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980); *Blacks United for Lasting Leadership v. Shreveport*, 571 F.2d 248 (5th Cir. 1978); *Thomas-*

15. The Supreme Court expressly said that it affirmed the judgment "without approval of the constitutional views expressed by the Court of Appeals." 424 U.S., at 638, 96 S.Ct., at 1084.

16. In *Zimmer*, the proof of these criteria was an end unto itself. This Court did not make the next inquiry, as is now required, as to the extent to which the proof of those factors would allow an inference of intentional discrimination to be drawn.

17. As will be discussed, *infra*, *Zimmer* was constitutionally infirm to the extent relief was granted without proof of unresponsiveness. We believe this is one of the significant reasons that *Zimmer* was criticized so strongly in *Bolden*.

18. These were not voting dilution cases. They simply reaffirmed "the basic equal protection principle that the invidious quality of law [neutral on its face] claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose." 426 U.S., at 240, 96 S.Ct., at 2048. The Court indicated its intent to have the rule broadly applied to cases such as this, by referring approvingly to *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964), a congressional apportionment case, in which proof of discriminatory purpose was required.

ville Branch of the NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978).[19]

In the first case in that series, *Nevett v. Sides*, *supra*, Judge Tjoflat, writing for this Court, extensively reviewed the status of the law with regard to claims that certain voting practices violate the Fourteenth and Fifteenth Amendment rights of racial minorities. On the basis of *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, the Court concluded that such a claim could not to be established without proof that the allegedly discriminatory system was conceived or maintained for the purpose of restricting the access of minorities to the political process. 571 F.2d at 219–21.[20]

As was the case in decisions discussed previously, the question became what type and how much evidence is required to establish proof of intent. Particularly, the Court was attempting to set forth the evidence that would allow an inference to be drawn that the electoral system was being maintained, rather than implemented, for a discriminatory purpose.[21] After detailed analysis the Court concluded that the presence of the factors set out in *Zimmer could* allow the inference of purposeful discrimination to be drawn. The Court reasoned that if the electoral system was not being maintained for the purpose of achieving the constitutionally proscribed end, i.e., official perpetuation of discriminatory distribution of political and economic power, it was highly unlikely that the criteria set out in *Zimmer* could be established. The Court was quick to indicate on the other hand, that the finding of purpose or intent should not be a mathematical process by which the party proving or refuting the greatest number of criteria is declared the winner. We said,

> [t]hat the finder of fact determines the plaintiff has prevailed under one or even several of the *Zimmer* criteria may not establish the existence of intentional discrimination. *See, e. g., McGill v. Gadsden County Commission*, 535 F.2d 277 (5th Cir. 1976). The evidence under the other criteria may weigh so heavily in favor of the defendant that the evidence as a whole will not bear an inference of invidious discrimination. Of course, the plaintiff need not prevail under all of the criteria, *Zimmer*, 485 F.2d at 1305, nor is he limited to them. The task before the fact finder is to determine, under all the relevant facts, in whose favor the "aggregate" of the evidence preponderates. This determination is peculiarly dependent upon the facts of each case. It comprehends "a blend of history and an intensely local appraisal of the design and impact of the [at-large] district in the light of past and present reality, political and otherwise." *White v. Regester*, 412 U.S., at 769–70, 93 S.Ct., at 2341. It is the obligation, therefore, of the finder of fact carefully to examine and weigh the competing factors to determine whether the coincidence of those probative of intentional discrimination is sufficient.

19. We discuss herein only the first two of the four cases. The first case, *Nevett v. Sides*, is important to this analysis because this Court used that case to set forth the principles of law to be applied in all such cases. The second decision, *Mobile v. Bolden*, is significant here because it was the Supreme Court's rejection of our analysis in that case that gives rise to appellant's contention that this Court has been employing an erroneous legal standard.

20. So that there can be no doubt that the Court thought purpose or intent to be essential elements of a Fourteenth or Fifteenth Amendment claim, we quote some of the language in that opinion. With respect to a claim founded on the Fourteenth Amendment, the Court said,

> "... we hold that a showing of racially motivated discrimination is a necessary element in an equal protection voting dilution claim such as the one presented in this case." 571 F.2d at 219. Similarly, the Court said, "A showing of improper motivation or purpose is necessary to establish a valid cause of action under the Fifteenth amendment." *Id.* at 221.

21. There was no contention that the system was created for discriminatory purposes because, at the time of its creation, Blacks had been effectively disenfranchised by an amendment to the Alabama Constitution.

> "Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266, 97 S.Ct. at 564.

571 F.2d at 224–25.

The Court went to great lengths to explain how each of the *Zimmer* criteria, if established, could be evidence allowing an inference of intent. Of particular significance to our resolution of this case is our discussion of the un-responsiveness factor. The Court said

> Consider a plan neutral in its enactment that is used as a vehicle for intentionally ignoring black interests. The existence of such discrimination presupposes racially polarized voting in the electorate. Polarized or bloc voting, although in itself constitutionally unobjectionable, allows representatives to ignore minority interests without fear of reprisal at the polls. When bloc voting has been demonstrated, a showing under *Zimmer* that the governing body is unresponsive to minority needs is strongly corroborative of an electorate's bias. The likelihood of intentional exploitation is "enhanced" by the existence of systemic devices such as a majority vote requirement, an anti-single shot provision, and the lack of a requirement that representatives reside in subdistricts.

571 F.2d at 223.

Having established the standard by which to evaluate evidence of intent, the Court considered the facts of the case then at bar. Finding the factual determinations of the trial court, that plaintiffs had failed to establish evidence of the *Zimmer* criteria, not to be clearly erroneous, this Court affirmed the District Court's judgment for defendants.

Mobile v. Bolden, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980) was the second of the four voting dilution cases decided by this Court. In that case, this Court affirmed the District Court's judgment that plaintiff-appellee's Fourteenth and Fifteenth Amendment rights had been violated, and reinstated the District Court's order requiring that city commissioners be elected from single-member districts in the future.

Rather than repeat the lengthy historical analysis by which the Court in *Nevett*, *supra*, concluded that proof of intentional or purposeful maintenance of a discriminatory system was a requisite to proving a dilution case, the Court simply incorporated by reference that portion of the *Nevett* decision.[22] At only one place in the decision did the Court explicitly refer to the intent requirement. The Court said,

> Under our holding of today in *Nevett* II, these findings also compel the inference that the system has been maintained with the purpose of diluting the black vote, thus supplying the element of intent necessary to establish a violation of the fourteenth amendment, *Village of Arlington Heights*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 597 (1976), and the fifteenth amendment, *Wright v. Rockefeller*, 376 U.S. 52, 84 S.Ct. 603, 11 L.Ed.2d 512 (1964).

571 F.2d at 245. Despite the brevity of this comment, a careful reading of the decision confirms our conclusion that the Court was following the purpose or intent standard set out in *Washington v. Davis*, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*

In attempting to evaluate the existence of discriminatory intent in the maintenance of a racially neutral electoral system, the

22. "We also incorporate the portions of our opinion of today in *Nevett II* [*Nevett v. Sides*] that explicate the legal principles applicable to voting dilution cases." 571 F.2d at 241. We believe the Court's decision to incorporate by reference the legal standard, with respect to the necessity of establishing proof of purpose or intent, may have given rise to the erroneous conclusion that this Court did not recognize the need for such proof in that case. A careful reading of our opinion in *Bolden*, however, leads inextricably to the conclusion that proof of discriminatory intent was required.

Court was required to consider circumstantial evidence from which an inference of intent could be drawn. Accordingly, the Court applied the *Zimmer* criteria and, holding the District Court's finding of intentional maintenance of a discriminatory system not to be clearly erroneous,[23] entered judgment for the plaintiffs. The remedy afforded, however, was considerably different than in the traditional dilution case. Mobile had operated under a three-person commission form of government. The commission was responsible for all executive and administrative functions of the city. The three commissioners elected one of their members to serve as Mayor. The District Court concluded that the discriminatory system could not be remedied, as in the normal case, by dividing the city into districts along preexisting ward or precinct lines. Accordingly, the District Court ordered the commission form of government abolished and replaced it with a mayor-commission system under which the executive and legislative functions were separated, the former being allocated to the mayor, the latter to the council. Additionally, the District Court changed the commission size from three members to a council with nine members, each member being elected from a single-member district.

BOLDEN

We come now to the Supreme Court's recent decision, *Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980). Depending on which party to this litigation one listens to, this decision is either revolutionary, definitive, and absolute or evolutionary, ambiguous, and flexible in its impact on the state of the law. As will be discussed, we do not agree with either of those positions. We do agree, however, that it is a complex ruling; the Court's opinion commanding only a plurality, with a total of six separate opinions being published. In order to shed the most light on the implications of the decision, we will begin by reviewing the positions taken by the Justices in their separate opinions.

(a) *The Plurality*—Justice Stewart, writing for the plurality,[24] begins with an analysis of this Court's opinions with respect to the Fifteenth Amendment. He details the case law development of the Fifteenth Amendment and concludes, as did this Court, that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose." 100 S.Ct. at 1497. The plurality then concludes that only purposeful conduct which *directly* interferes with the rights of Blacks to register or vote is proscribed by the Fifteenth Amendment.[25] The Court said, "That Amendment prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race, color, or previous condition of servitude.' Having found that Negroes in Mobile, 'register and vote without hindrance,' the District Court and Court of Appeals were in error in believing that the appellants invaded the protection of that Amendment in the present case." 100 S.Ct., at 1499.

The plurality next focused its attention on this Court's conclusion that Mobile's electoral system violated plaintiff-appellee's Fourteenth Amendment equal protection rights. The opinion begins with the proposition taken from *Whitcomb v. Chavis*, and

23. In reaching its conclusion, that the electoral system was maintained for discriminatory purposes, the District Court found all of the *Zimmer* criteria present except that going to the weight of the state policy behind at-large elections. With respect to that factor, the District Court concluded that it was neutral.

24. Justice Stewart was joined in the opinion by Chief Justice Burger, Justice Powell, and Justice Rehnquist.

25. This restrictive view of the role of the Fifteenth Amendment in cases such as this did not command a majority of the Court. In fact, five Justices explicitly stated that, with the proper proof, the Fifteenth Amendment would support a voting dilution claim.

White v. Regester, and adhered to by this Court in its opinion in *Bolden*, 571 F.2d 238 (5th Cir. 1980), that to prove a constitutional violation in a dilution case "it is not enough to show that the group allegedly discriminated against has not elected representatives in proportion to its numbers. (citations omitted). A plaintiff must prove that the disputed plan was 'conceived or operated as [a] purposeful device to further racial discrimination.'" 100 S.Ct., at 1499.

Looking at the record in the case at bar the Court held, "... it is clear that the evidence in the present case fell far short of showing that the appellants 'conceived or operated [a] purposeful device to further racial discrimination.' (citation omitted)." 100 S.Ct., at 1502. The Court compared *White v. Regester*, the "only [ ] case [ ] in which the Court sustained a claim that multimember legislative districts unconstitutionally diluted the voting strength of a discrete group." 100 S.Ct. at 1500, with the facts of the case before it. Though recognizing that courts attempting to evaluate the constitutionality of racially neutral legislation "... must look to other evidence to support a finding of discriminatory purpose." 100 S.Ct. at 1501, the Court held that, "[t]he so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case." 100 S.Ct., at 1503. The plurality was of the opinion that, while "the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose," 100 S.Ct., at 1503, neither the quality nor the quantity of the evidence presented supported a finding of purposeful conduct.

(b) *Justice Blackmun's concurrence*

In the first of two concurring opinions, Justice Blackmun states that he is joining in the result reached by the plurality "because I believe the relief afforded appellees by the District Court was not commensurate with the sound exercise of judicial discretion." 100 S.Ct., at 1507. Justice Blackmun was unable to accept the District Court's decision to force Mobile to abandon its seventy year old commission form of government for a mayor-council system, without first attempting to fashion a remedy that would be compatible with the existing system. Justice Blackmun said, "... I do not believe that, in order to remedy the unconstitutional vote dilution [ ] found, it was necessary to convert Mobile's city government to a mayor-council system. In my view, the District Court at least should have maintained some of the basic elements of the commission system Mobile long ago had selected—joint exercise of legislative and executive power, and citywide representation." 100 S.Ct., at 1508.

Despite his concurrence in the result, Justice Blackmun was clear in his view that he agreed with Justice White's dissent as to the substantive questions of constitutional law presented. At the outset of his opinion, Justice Blackmun said, "Assuming that proof of intent is a prerequisite to appellees' prevailing on their constitutional claim of vote dilution, I am inclined to agree with Mr. Justice White that, in this case, 'the findings of the District Court amply support an inference of purposeful discrimination,' *post*, at 1518." 100 S.Ct., at 1507. It is particularly significant that Justice Blackmun agreed with that portion of Justice White's dissent that said the District Court was correct as to its determination that both the Fourteenth and Fifteenth Amendments had been violated.

(c) *Justice Stevens concurrence*

Though Justice Stevens concurred in the result, he would have the Court apply a test which appears diametrically opposite that employed by the plurality. He said,

> In my view, the proper standard is suggested by three characteristics of the ger-

rymander condemned in *Gomillion*:[26] (1) the 28-sided configuration was, in the Court's word, "uncouth," that is to say, it was manifestly not the product of a routine or a traditional political decision; (2) it had significant adverse impact on a minority group; and (3) it was unsupported by any neutral justification and thus was either totally irrational or entirely motivated by a desire to curtail the political strength of the minority. *These characteristics suggest that a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decision maker.* (emphasis added)

100 S.Ct., at 1512. Justice Stevens then goes on to say that, not only does he reject the purpose or intent test of the plurality, but also that "... I am persuaded that a political decision that affects group voting rights may be valid even if it can be proved that irrational or invidious factors have played some part in its enactment or retention." *Id.*

Though it is clear that Justice Stevens rejects the plurality opinion in all respects other than the result achieved, his opinion leaves this and other courts in a somewhat precarious position as to the rule to be applied in future cases. For example, it is unclear what standard Justice Stevens would apply were he to attempt to find the purposeful or intentional conduct that five other Justices would require. In that regard, he rejects the *Zimmer* criteria, not because they are inappropriate when attempting to draw an inference of intent, but rather because he is not concerned with such proof of subjective intent. It is entirely possible, and in fact likely, that he would employ the *Zimmer* criteria were he required to evaluate the existence of discriminatory intent.[27]

(d) *Justice White's dissent*

Justice White would reach a result different than that reached by the plurality, although apparently agreeing that purposeful discrimination is a necessary element of a Fourteenth or Fifteenth Amendment dilution claim. His position is quite simply that *Bolden* is controlled by *White v. Regester*, and that the plurality incorrectly applied the rule established in that case, that courts should consider the totality of historical, cultural, and socio-economic factors in evaluating the existence of a purposefully discriminatory electoral system. He begins by demonstrating how the factors considered in *White* were similar, if not identical, to those which the District Court and Court of Appeals applied in finding for the plaintiffs in *Bolden*. He then points out that the District Court and Court of Appeals, addressing "the effect of *Washington v. Davis*, (citations omitted), on the *White v. Regester* standards.... concluded that the requirement that a facially neutral statute involved purposeful discrimination before a violation of the Equal Protection Clause can be established was not inconsistent with *White v. Regester* in light of the recognition in *Washington v. Davis* that the dis-

26. *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S.Ct. 125, 5 L.Ed.2d 110 (1960).

27. Justice Stevens said,

"... a proper test should focus on the objective effects of the political decision rather than the subjective motivation of the decisionmaker. (citation omitted). In this case, if the commission form of government in Mobile were extraordinary, or if it were no more than a vestige of history, with no greater justification than the grotesque figure in *Gomillion*, it would surely violate the Constitution. That conclusion would follow simply from its adverse impact on black voters plus the absence of any legitimate justification for the system, without reference to the subjective intent of the political body that has refused to alter it."

446 U.S., at 86, 100 S.Ct., at 1512. Justice Stevens looks only to the effects of an electoral system. The *Zimmer* approach looks at those same effects, but only to the extent that they allow an inference of intent. It is reasonable to assume, therefore, that, were he required to draw an inference of intent, Justice Stevens would employ the same factors that he thinks are relevant independent of the intent inquiry.

criminatory purpose may often be inferred from the totality of the relevant facts...." 100 S.Ct., at 1516. Justice White thought this approach to be consistent with that of the Court in *Washington v. Davis*, in which it said, "an invidious discriminatory purpose may often be inferred from the totality of the relevant facts including the fact, if it is true, that the law bears more heavily on one race than another." 426 U.S., at 242, 96 S.Ct., at 2048–49. Ultimately, Justice White concludes that the plurality opinion is simply inconsistent with those of the Court in *White, Whitcomb, Village of Arlington Heights*, and *Washington*, although it expresses an intent to affirm the positions taken in and be consistent with those decisions.

(e) *Justice Brennan's dissent*

Justice Brennan's position is concise and unequivocal. He agrees with Justice Marshall "that proof of discriminatory impact is sufficient in these cases." 100 S.Ct., at 1520. He also states that "... even accepting the plurality's premise that discriminatory purpose must be shown, I agree with Mr. Justice Marshall and Mr. Justice White that appellees have clearly met that burden." *Id.*

(f) *Justice Marshall's dissent*

Justice Marshall's analysis was substantively similar to the bifurcated position of Justice Brennan, although he went into far greater depth to explain the jurisprudential underpinning of his opinion. We do not here review Justice Marshall's exposition as to why proof of intent is unnecessary in cases such as this. This is not because his opinion is lacking in philosophical appeal, but rather because, given the opinions of at least six members of the Court, it is quite clearly not the law by which the present case must be governed. With respect to the question of the proof necessary to establish the requisite intent to discriminate, Justice Marshall would impose a substantially different burden of proof on the plaintiffs than would the plurality. Justice Marshall rejects the plurality's position that the plaintiff must prove that "the decision maker ... selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 279, 99 S.Ct. 2282, 2296, 60 L.Ed.2d 870 (1979). Rather, Justice Marshall "would apply the common-law foreseeability presumption" 100 S.Ct., at 1538, to cases such as this. Applying his standard, "[t]he defendants would carry their burden of proof only if they showed that they considered submergence of the Negro vote a detriment, not a benefit, of the multimember systems, that they accorded minority citizens the same respect given to whites, and that they nevertheless decided to maintain the systems for legitimate reasons." *Id.*

RECONCILING BOLDEN

[7] There are certain principles that can be stated definitively after *Bolden*. A plaintiff bringing a voting dilution case attacking an electoral system that is racially neutral on its face, may challenge such system on the grounds that it violates either the Fourteenth or Fifteenth Amendment. Though the plurality would limit the scope of the Fifteenth Amendment to those situations in which there was official action directly impinging the rights of Blacks to register or vote, that position did not command a majority. Three dissenting Justices specifically said the parameters of the Fifteenth Amendment encompasses voting dilution cases in which it is asserted that the system purposefully limits the access of Blacks to the political process. In his concurrence, Justice Blackmun agrees with the position taken by Justice White in his dissent, as to the substantive questions presented, and thereby becomes the fourth member of the Court to approve of an expansive reading of the Fifteenth Amendment. In his concurrence, Justice Stevens explicitly states, "... I disagree with Mr. Justice Stewart's conclusion for the plurali-

ty that the Fifteenth Amendment applies only to practices that directly affect access to the ballot and hence is totally inapplicable to the case at bar."[28] 100 S.Ct., at 1509 n. 3. He also said, "... I am satisfied that such a structure [at-large systems] may be challenged under the Fifteenth Amendment as well as under the Equal Protection Clause of the Fourteenth Amendment...." 100 S.Ct., at 1509. We conclude, therefore, that five Justices believe the Fifteenth Amendment creates a right of action in voting dilution cases.

[8] An even less disputable principle, after *Bolden*, is that a plaintiff challenging an at-large voting system must prove that the system was created or maintained for the purpose of limiting the access of or excluding Blacks from effective participation in that system.

The question we return to is what type and how much evidence is required to establish proof of a discriminatory purpose. It seems to us that there are three possibilities.

[9] The first possibility is that *Bolden* requires direct evidence of intent. We think this is incorrect. Not only does the plurality opinion say that the circumstantial evidence in *Zimmer* "may afford some evidence of a discriminatory purpose" 100 S.Ct., at 1503, common sense tells us that in a case such as this, in which it can not be asserted that the system was created for discriminatory purposes, it is likely that no plaintiff could ever find direct evidence that the system was maintained for discriminatory purposes. Clearly, the right to relief cannot depend on whether or not public officials have created inculpatory documents.[29] We must reject this first possibility.

The second possibility is that, while circumstantial evidence may suffice, the type of circumstantial evidence called for in *Zimmer* is inadequate to prove discriminatory purpose. We think this is the elusive area post-*Bolden*. Though four Justices were satisfied with the *Zimmer* criteria,[30] five Justices clearly rejected the *exclusive* use of those criteria as the means of inferring purpose or intent.[31] We conclude that they rejected the use of the *Zimmer* criteria to the extent that this Court, in *Bolden*, *presumed* the existence of a discriminatory purpose from the proof of some of those factors. We believe the Court rejected the use of such a quantitative weighing approach, requiring instead an independent inquiry into intent. Additionally, we think the Supreme Court was directing all courts making the inquiry to apply the *Zimmer* criteria only to the extent that they are relevant to the factual context at hand and, to the extent they are not so relevant, to employ other criteria. Finally, it appears that the Supreme Court has somewhat increased the burden of proof on plaintiffs in such cases. In *Zimmer*, this Court granted relief despite the factual conclusion that the police juries and school board in question were not unresponsive to the needs of the Black community. The Supreme Court implicitly concluded in *Bolden*, as we explicitly do today, that absent such proof of unresponsiveness a *prima facie* case can not be

28. In that same footnote, Justice Stevens points out that it is "... difficult to understand why, given this position [that the Fifteenth Amendment is inapplicable to cases such as the one at-bar], he [Justice Stewart] reaches out to decide that discriminatory purpose must be demonstrated in a proper Fifteenth Amendment case." 100 S.Ct., at 1509, n. 3.

29. *See* note 8, *supra* and accompanying text.

30. Justice Blackmun agreed with the three dissenting Justices that the evidence adduced at trial was sufficient to prove discriminatory intent.

31. The plurality was joined in this position by Justice Stevens. It is essential to understand, however, that he rejects the use of the *Zimmer* criteria to draw an inference of intent, not because he believes such proof cannot establish discriminatory intent, but rather because he thinks the question of intent is irrelevant to the disposition of cases such as this.

established. *Zimmer* has been rejected to the extent it holds otherwise. Thus, we make one exception to our earlier statement that proof of the *Zimmer* criteria is required only to the extent that they are relevant to the facts of a particular case. We believe, however, that this exception is well grounded in the conceptual framework that recognizes the Constitutional rights here involved. As has been stated before, the Fourteenth and Fifteenth Amendments protect the right to effective participation in the electoral process. Effective participation does not mean the right to have members of one's race, sex, or group elected to political office. What it does mean is that the system of government that serves the interests of the people must serve the interests of all the people; at least to the extent that one group's interests are not invidiously discriminated against. Therefore, a racially definable group may challenge an electoral system on dilution grounds only if it can be shown that the system invidiously operates to the detriment of their interests. Unresponsiveness is a necessary element to plaintiff's maintenance of an action such as this. Proof of unresponsiveness, alone, does not give rise to an inference that the system is maintained for discriminatory purposes. That conclusion must be reached only in light of the totality of the circumstances presented.

Appellant contends that, in light of *Bolden*, the use of the *Zimmer* criteria to draw an inference of intent is erroneous. Such a broad absolute reading of *Bolden* seems unwarranted and incorrect.[32] In *Bolden*, the Supreme Court specifically refers with approval to its decisions in *White v. Regester* and *Whitcomb v. Chavis*. The Court points out that, in *White*

> the Court relied upon evidence in the record that included a long history of official discrimination against minorities as well as indifference to their needs and interests on the part of white elected officials. The Court also found in each county additional factors that restricted the access of minority groups to the political process. In one county, Negroes effectively were excluded from the process of slating candidates for the Democratic Party, while the plaintiffs in the other county were Mexican-Americans who "suffer[ed] a cultural and language barrier" that made "participation in community processes extremely difficult, particularly ... with respect to the political life" of the county. 412 U.S. at 768, 93 S.Ct. at 2340–41 (footnote omitted).

100 S.Ct., at 1501. Moreover, it is clear that the *Zimmer* criteria were gleaned from the Supreme Court's guidance in *White* and *Whitcomb*.[33] Finally, the plurality itself recognized that "the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose...." In our opinion, therefore, the use of the *Zimmer* criteria is sound to the extent that the inquiry focuses on the primary question of *discriminatory purpose*.

The third possible explanation for the Supreme Court's decision in *Bolden* is simply that the evidence adduced was insufficient to allow an inference of discriminatory purpose. We believe this was the most significant factor behind the Court's rul-

32. *See United States v. Uvalde Consolidated Independent School District, supra*, note 9, in which this Court said, "We are convinced that the fundamental reasoning of our decision in *Bolden*, and its companion, *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), survives the Supreme Court's decision [in *Bolden*] intact." *Uvalde* at 582.

33. In his dissenting opinion in *Bolden*, Justice White points out that

> "... *Zimmer* articulated the very factors deemed relevant by *White v. Regester* and *Whitcomb v. Chavis*—a lack of minority access to the candidate selection process, unresponsiveness of elected officials to minority interests, a history of discrimination, majority vote requirements, provisions that candidates run for positions by place or number, the lack of any provision for at-large candidates to run from particular geographical subdistricts.

100 S.Ct., at 1518.

ing.[34] After indicating that the factors enunciated in *Zimmer* could be indicative though not conclusive of discriminatory purpose, the Court said, "[t]he so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insufficient to prove an unconstitutionally discriminatory purpose *in the present case*." (emphasis added) 100 S.Ct., at 1503. The fact that such a weighing of the evidence was difficult and extremely close is reflected by the division of the Court.

THE RULE ESTABLISHED

[10–12] A cause of action under the Fourteenth or Fifteenth Amendment asserting unconstitutional vote dilution through the maintenance of an at-large electoral system is legally cognizable only if the allegedly injured group establishes that such system was created or maintained for *discriminatory purposes*. A discriminatory purpose may be inferred from the totality of circumstantial evidence. An essential element of a *prima facie* case is proof of unresponsiveness by the public body in question to the group claiming injury. Proof of unresponsiveness, alone, does not establish a *prima facie* case sufficient to shift the burden of proof to the party defending the constitutionality of the system; responsiveness is a determinative factor only in its absence. The *Zimmer* criteria may be indicative but not dispositive on the question of intent. Those factors are relevant only to the extent that they allow the trial court to draw an inference of intent. The *Zimmer* criteria are not the exclusive indicia of discriminatory purpose and, to the extent they are not factually relevant in a given case, they may be replaced or supplemented by more meaningful factors.[35] Even if all of the *Zimmer* and other factors are established, an inference of discriminatory purpose is not *necessarily* to be drawn. The trial court must consider the totality of the circumstances and ultimately rule on the precise issue of discriminatory purpose. Finally, given the reality that each case represents an extremely unique factual context for decision, this Court will give great deference to the judgment of the trial court, which is in a far better position to evaluate the local political, social, and economic realities than is this Court.

THE PRESENT CASE

The complaint in this action was originally filed in April, 1976. District Judge Alaimo's final order, including findings of fact and conclusions of law, was entered over two and one-half years later. The length of the pendency of the case was largely attributable to the extensive discovery conducted by both parties. At the conclusion of the non-jury trial, Judge Alaimo held for the plaintiff class, concluding that Burke County's system of electing county commissioners on an at-large basis had been maintained for the purpose of limiting the access of that county's Black residents to the electoral process.

Much ado has been made by appellants in this action about the fact that the District Court's order preceded the Supreme Court's decision in *Mobile v. Bolden*. Though this could make a difference in some cases, we do not find such timing controlling here. As we indicated earlier, the "new rule" established in *Bolden* appears to be an expansion of the principles earlier established in *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* A court that correctly anticipated how the intent requirement in

34. In *Uvalde*, *supra* note 9, Judge Rubin points out that "... the plurality's rejection of the fifteenth amendment and section 2 claims in *Bolden* may rest entirely upon the conclusion that no discriminatory motivation was shown." *Uvalde* at 582.

35. As we have indicated, the unresponsiveness criteria may not be replaced. Proof of unresponsiveness is an essential element to the maintenance of a claim such as this. It should be supplemented, of course, with such other criteria as may be relevant to the analysis of a given case.

those cases would be applied to voting dilution cases, as in *Bolden*, could correctly interpret and apply the law, without the benefit of the Supreme Court's recent opinion. This is precisely the type of foresight demonstrated by Judge Alaimo in the present case. At the outset of his order, Judge Alaimo refers to this Court's treatment of *Washington v. Davis* and *Village of Arlington Heights v. Metropolitan Housing Development Corp.* in *Nevett v. Sides*, 571 F.2d 209, 221 (5th Cir. 1978), *cert. denied*, 446 U.S. 951, 100 S.Ct. 2916, 64 L.Ed.2d 807 (1980), and concludes that '... [a] demonstration of intention is necessary under both fourteenth and fifteenth amendments,' as a requisite to a finding of unconstitutional vote dilution. *Herman Lodge v. Buxton*, No. 78-3241, Findings of Fact and Conclusions of Law at 4 (S.D.Ga., Oct. 26, 1978) (hereinafter *Order*). It is clear, therefore, that Judge Alaimo employed the constitutionally required standard in his evaluation of the present case. We cannot affirm his judgment, however, unless and until we conclude that his analysis satisfies the rule we have established today.

To begin with, we note that the District Court's order was not defective for exclusive and unwarranted reliance on the *Zimmer* criteria. Though the court did consider those criteria it also evaluated the case in light of "other factors" set out by this Court in *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d 139 (5th Cir.) (*en banc*), *cert. denied*, 434 U.S. 968, 98 S.Ct. 512, 54 L.Ed.2d 454 (1977). In its order the District Court said, "It must be remembered that the Court is not limited in its determination to the *Zimmer* factors, rather the Court may consider the *Zimmer* factors, 'or similar ones.' *Kirksey v. Board of Supervisors of Hinds County*, 554 F.2d at 148. One 'similar factor' considered in *Kirksey* which did not seem to be an explicit primary factor in the *Zimmer* formula, is a depressed socio-economic status, 'which makes participation in community processes difficult.' *Id.*[36] This is an important factor and must be considered here." *Order* at 6. On the basis of these statements, as well as the District Court's detailed analysis of the *Kirksey* factors, we conclude that the District Court did not treat the *Zimmer* criteria as absolute, but rather considered them only to the extent they were relevant to the question of discriminatory intent.

The next step in our analysis is to determine whether the District Court properly made a finding of unresponsiveness. As we indicated earlier, failure to find unresponsiveness precludes the maintenance of a voting dilution case. For the reasons set out below, we conclude that the District Court's finding of unresponsiveness was quite correct in the present case.

After considering exhaustive evidence on the subject, the Court found that the county commissioners demonstrated their unresponsiveness to the particularized needs of the Black community by: (1) allowing some Blacks to continue to be educated in largely segregated and clearly inferior schools; (2) failing to hire more than a token number of Blacks for county jobs, and paying those Blacks hired lower salaries than their White counterparts; (3) appointing extremely few Blacks to the numerous boards and committees that oversee the execution of the county government, particularly those groups, such as the committee overseeing the Department of Family and Childrens Services, whose function is to monitor agencies of the county government that work primarily with Blacks; (4) failing to appoint any Blacks to the judge selection committee, with respect to the appointment of a Judge for the Burke County Small Claims Court, despite the fact that most of the defendants in that court are Black; (5) making road

36. We think the District Court's consideration of this factor, in addition to those established in *Zimmer*, is particularly significant given how important the presence of a depressed socio-economic condition was to the Supreme Court's determination in *White v. Regester* that the at-large electoral system in Bexar County, Texas violated plaintiffs Fourteenth Amendment rights.

paving decisions in a manner so as to ignore the legitimate interests of the county's Black residents;[37] (6) forcing Black residents to take legal action to protect their rights to integrated schools and grand juries, and to register and vote without interference;[38] and (7) participating in the formation of, and in fact contributing public funds to the operation of, a private school established to circumvent the requirements of integration. We hold, not only was the District Court's finding of unresponsiveness not clearly erroneous, but that the county commissioners, acting in their official capacity, have demonstrated such insensitivity to the legitimate rights of the county's Black residents that it can only be explained as a conscious and willful effort on their part to maintain the invidious vestiges of discrimination. To find otherwise would be to fly in the face of overwhelming and shocking evidence.

A second factor going to the question of discriminatory intent is the extent to which historical discrimination impacts on a minority group's *present* opportunity for effective participation in the electoral process.[39] On the basis of substantial evidence, the District Court concluded that previous acts of official discrimination had a significant negative impact on the opportunity of Blacks in Burke County to exercise their right to so participate. We agree.

The District Court began by assessing the present impact on voter registration of the prior absence of Black suffrage. The Court said that until 1965, when the Voting Rights Act was adopted, Black suffrage was "virtually non-existent." At present, Black voter registration is approximately

37. As a typical example of the lack of concern that White county commissioners have for the interest of Burke's Black residents, the District Court pointed to the facts that

> (1) The Mamie Jo Rhodes Subdivision, inhabited by Blacks is unpaved. It is directly across from a subdivision inhabited by Whites. The latter has paved roads. (2) Millers Pond Road is paved up to the pond, used by Whites; but from that point the road is unpaved, although that portion is inhabited by Blacks. (3) Paving on Hatchett Road ends at the residence of a White; yet Blacks live on the remainder of the unpaved road. (4) The streets of Alexander are paved in the section of town inhabited by Whites; but the roads in the black section are not paved. And (5) county road road 284 is paved to the point where the last white lives, but beyond, where the road is inhabited by Blacks, the road is unpaved. It is of interest to note that the road to the dog trial field is paved even though trials are held but once a year. By contrast, there is still an unpaved road to a school. Although the last unpaved road to a white school was paved in 1930, it seems as if the road to the Palmer Elementary School, formerly an all-black school, and still predominately black, remains unpaved.

Order at 13–14. Our review of the evidence in this case leads us to the conclusion that these patent examples of discriminatory treatment by Burke's county commission typify the treatment received by Blacks in Burke County in every interaction they have with the White controlled bureaucracy.

38. Of particular significance, given the plurality position in *Bolden* that a Fifteenth Amendment violation occurs only when there is proof that the right to register and vote was *directly* impinged, is the District Court's finding that such overt conduct was taking place even at the time the present lawsuit was filed. The court said

> The county did, indeed, establish additional registration sites. But only after a pre-trial conference before and "friendly persuasion" by this Court. The defendants' tepidity was further demonstrated by the fact that a period of four months was required to get the registration cards to the new sites; and that the new sites were operative only a short while before the registration period ended. Admittedly, the County Commissioners recently approved a transportation system that should help solve access problems for some; but only after being prodded by the prosecution of this lawsuit. The Commissioners' sluggishness in this respect is another example of their unresponsiveness to the black members of the community.

Order at 14–15.

39. The focus of the District Court properly was on the *present* effects of discrimination. As the Supreme Court said in *Bolden*, "... past discrimination cannot, in the manner of original sin, condemn government action that is not in itself unlawful." 100 S.Ct., at 1503.

38% of those eligible.[40] On that basis, the Court thought it reasonable to infer that "[t]he marked increase in the registration of Blacks following the enactment of the 1965 Voting Rights Act clearly indicates that past discrimination has had an adverse effect on Black voter registration which lingers to this date." *Order* at 7.

[13] The Court considered next the fact of past and present bloc voting as it impacts the present ability of Blacks to participate in the electoral system. The evidence of such bloc voting was clear and overwhelming.[41] Of particular significance was the fact that in the one city election in which city councilmen were elected from single-member districts,[42] a Black was elected.

Inadequate and unequal educational opportunities, both in the past and present, as the result of official discriminatory acts, was another consideration important to the court. The evidence was clear that the relative percentage of Blacks who had attended high school, finished high school, or attended college was substantially less than the White residents of Burke County. On the basis of that evidence, as well as expert testimony, the Court concluded that "... one reason Blacks, as a group, have been ineffective in the political process, is the fact that they have completed less formal education." *Order* at 9.

Further evidence of the effective preclusion from participation in the electoral process, based on official conduct, was found in the past and present operation of the county's Democratic primary system and in the Georgia law making it more difficult for Blacks to serve as chief registrar in a county. The history of the Democratic Party Primary ranges from the "white primary", struck down in 1946, *Chapman v. King*, 154 F.2d 460 (5th Cir.), *cert. denied*, 327 U.S. 800, 66 S.Ct. 905, 90 L.Ed. 1025 (1946), to the present twenty-four member Burke County Democratic Executive Committee, of whom only one is Black. This present lack of participation was found to be the direct result of historical discrimination. Equally significant evidence of official present discrimination was found in Ga. Code Ann. § 34-605, which states in pertinent part, "[n]o person shall be eligible to serve as chief registrar unless such person owns interest in real property...." Given the testimony that significantly fewer Blacks than Whites are freeholders, the Court concluded that the statute operated to restrict Black participation in the electoral process.

[14] On the basis of the evidence set out herein, as well as that of official discrimination in employment, paving, etc., as discussed earlier, the District Court concluded that the effect of historical discrimination was to restrict the opportunity of Blacks to participate in the electoral process in the present. That finding is not clearly erroneous, and, as with the unresponsiveness factor, we completely agree.

The third factor considered by the District Court was depressed socio-economic participation in the electoral process. The evidence on this point was both clear and disconcerting. Blacks suffer at the poverty level to a far greater proportionate degree

40. There was some conflict in the evidence as to the percentage of eligible Blacks who were registered to vote. Defendants asserted that the correct figure was 44%, while plaintiffs asserted that it was 38%. The District Court resolved the issue for plaintiffs, but indicated that either figure supported the conclusion it reached.

41. Of course, bloc voting is not illegal. Nonetheless, the Supreme Court and this Court have repeatedly recognized that voting along racial lines enhances the likelihood that those seeking to manipulate the electoral system for discriminatory purposes will succeed. It is for that reason that the inquiry into voting patterns is relevant. Like unresponsiveness, it is a factor of greater significance in its absence. A plaintiff would be hard pressed to prove that a system was being maintained for invidious purposes, without proof of bloc voting.

42. The election was from single-members districts, rather than at-large, pursuant to a court order. *See Sullivan v. DeLoach*, Civ.No. 176-238 (S.D.Ga., Sept. 11, 1977).

than the White residents of Burke County. Over one-half of the Black residents have incomes equaling three-fourths, or less, of a poverty level income. Seventy-three percent of all Black households lacked some, or all, plumbing facilities, as opposed to sixteen percent of the White households. Blacks in Burke County tend to be employed to a far greater degree in menial positions and, to the extent they have nonmenial occupations, they are compensated at a level below their White counterparts. Finally, the court considered the blatantly inferior quality and quantity of education received by Blacks from the past to the present. On the basis of this evidence the Court concluded that Blacks in Burke County suffered from severe socio-economic depression, that such depression was caused, at least in part, by past discrimination, and that such depression has a direct negative impact on the opportunity for Blacks to effectively participate in the electoral process. That finding is not clearly erroneous.

[15] The next factor considered by the District Court was lack of access to the political process.[43] On the basis of (1) the inability of Blacks to participate in the operation of the local Democratic party, and the effects thereof, (2) the County Commissioners' failure to appoint Blacks to local governmental committees, in meaningful numbers, and (3) the social reality that person-to-person relations, necessary to effective campaigning in a rural county, was virtually impossible on an interracial basis because of the deep-rooted discrimination by Whites against Blacks, the District Court concluded that historical and present discrimination operated in conjunction with the officially sanctioned electoral system to unfairly limit the access of Blacks to the political process. That finding is not clearly erroneous. Of particular significance to the District Court and to this Court is the manner in which the local Democratic party is operated, and the effects thereof. As the District Court correctly pointed out, "[e]lection in the [Democratic] primary is 'tantamount' to election to the office." *Order* at 19. Moreover, the local Democratic Executive Committee is empowered by state law to provide poll watchers, *Ga.Code Ann.* § 34–1310(b), poll officers, *Ga.Code Ann.*, § 34–501, and substituted nomination, *Ga. Code Ann.* § 34A–903. The committee also elects delegates to be sent to the various political conventions. We think it clear that the ability to operate successfully in the framework of the existing Democratic party structure is one of the keys to electoral victory. Given the fact that only one of the committee's twenty-four members is Black, it becomes painfully clear that the existing electoral system could be purposefully used in conjunction with what must be viewed as the political reality in Burke County to continue the official and unofficial policy of excluding Blacks from participation in that system.

The last of the so-called primary factors considered by the District Court was the state policy behind the at-large election system. The Court stated that

> while [the policy is] neutral in origin, *it has been subverted to invidious purposes.* (emphasis added). Since it is a statute of local application, its enactment, maintenance or alteration is determined by the desire of representatives in the state legislature of the county affected. Burke's representatives have always been Whites. Accordingly, they have retained a system which has minimized the ability of Burke County Blacks to participate in the political system.

Order at 22. We hold that this finding of the District Court, based as it must be on his unique opportunity to assess the local political and social environment, is not clearly erroneous.

In addition to the primary criteria, the District Court considered a number of fac-

43. The District Court considered evidence of actions by public officials and actions by private individuals or groups that could be manipulated by public officials to perpetuate a system whose purpose was the exclusion of Blacks.

tors which this Court, as well as the Supreme Court, have indicated enhance the opportunity to use an electoral system for invidious purposes. The first factor is that the size of the questioned district is large. In that regard, the District Court pointed to the fact that "Burke County is nearly two-thirds the size of Rhode Island, comprising an area of approximately 832 square miles." *Order* at 22. The Court goes on to say that it "finds as a matter of law, that the size of the county tends to impair the access of Blacks in Burke County to the political process." *Id.* at 23. This being a conclusion of law, we are not restricted by a clearly erroneous standard. Nonetheless, our independent analysis of this factor leads us to agree with the District Court's conclusion.

The second enhancing factor considered by the District Court was the majority vote requirement. The Court points out that, by the terms of the statute, "county commissioners are to run at-large, that the victor must be elected by a majority vote, *Ga.Code Ann.* § 34–1513, and that candidates run for specific seats, *Ga.Code Ann.* § 34-1015." *Order* at 23. The Court also noted that, though there is no anti-single shot provision, the requirement that candidates run for numbered posts has potential effects that are equally adverse. The District Court concluded that the presence of these factors enhanced the likelihood that the electoral system could be used for discriminatory purposes. This conclusion is sound and well supported.

The final factor considered by the District Court is the presence or absence of a residency requirement. Burke County has no residency requirement, despite the fact that candidates must run for numbered posts. As the District Court said, "[a]ll candidates could reside in Waynesboro, or in "lilly-white" neighborhoods. To that extent, the denial of access becomes enhanced." *Order* at 24.

[16] Having concluded that all the relevant primary and enhancing factors were established in plaintiff's favor, the only question that remains is whether the District Court properly could have drawn an inference therefrom that the at-large electoral system in Burke County has been maintained for the purpose of restricting the access of the county's Black residents to that system. As we indicated earlier, the trial court is to make its conclusion on the basis of the totality of the circumstances, not merely by measuring which party proved the presence or absence of the greatest number of factors. In making his judgment, Judge Alaimo did not have the benefit of the Supreme Court's decision in *Mobile v. Bolden*, nor, obviously, of our discussion of that case here. Nonetheless, a careful reading of Judge Alaimo's order leads us inescapably to the conclusion that he made the type of independent inquiry into intent that we have said is necessary. Moreover, his order leaves no doubt as to his conclusion that the at-large electoral system in Burke County was maintained for the specific purpose of limiting the opportunity of the county's Black residents to meaningfully participate therein. At one point, for example, Judge Alaimo makes the unequivocal statement that, "[m]oreover, it is evident that the present scheme of electing county commissioners, although racially neutral when adopted, is being *maintained* for invidious purposes." (emphasis in original) *Order* at 7.

Judge Alaimo's evaluation of all the relevant evidence was thorough and even-handed. His conclusion that the electoral system was maintained for invidious purposes was reasonable, and in fact virtually mandated by the overwhelming proof. We affirm the District Court's judgment.[44]

THE RELIEF GRANTED

[17] The District Court ordered that the five county commissioners for Burke Coun-

44. One question left unresolved by the various opinions in *Bolden* is whether the plaintiff must demonstrate that the system was maintained "because of not merely in spite of" its adverse effects, or simply establish that the adverse effects were the foreseeable consequences of maintaining the system. The plurality would require the former, whereas Justice Marshall,

ty be elected from single-member districts in all future elections. The Court adopted the original plan submitted by the plaintiff, because it had substantially smaller population deviations among the districts than the plan submitted by the defendants. Such relief was proper.

At the outset, we note, as did the District Court, that there were no "special circumstances" that would justify an exception to the general rule that at-large districts are not favored.[45] Moreover, this is not a case like *Mobile v. Bolden*, in which an entire form of government was abandoned without consideration of the valid local interests in the maintenance of the existing system. In this case, unlike *Bolden*, the Court's order does not affect the existing allocation of executive and administrative responsibilities among the Burke County commissioners. Nor does the relief ordered require any other alteration in the operation of that governmental unit. In fact, the Court's order does not even change the number of county commissioners that are to be elected. This is another factor that distinguishes the remedy in *Bolden* from that ordered here.

We conclude that the remedy ordered is not only permitted, but, under the facts presented, it may be required. The picture that plaintiffs paint is all too clear. The vestiges of racism encompass the totality of life in Burke County. The discriminatory acts of public officials enjoy a symbiotic relationship with those of the private sector. The situation is not susceptible to isolated remedy.[46] While this Court is aware of its inability to alter private conduct, we are equally aware of our duty to prevent public officials from manipulating that conduct within the context of public elections for constitutionally proscribed purposes. For all the reasons set forth herein, the judgment of the District Court is AFFIRMED.

HENDERSON, Circuit Judge, dissenting:

Although I can appreciate the monumental task of the district court in its articulation of findings of fact and conclusions of law, I am of the opinion that this case should be remanded for reconsideration in light of *City of Mobile v. Bolden*, 446 U.S. 55, 100 S.Ct. 1490, 64 L.Ed.2d 47 (1980).

The constitutionality of the at-large voting system for county commissioners in Burke County, Georgia, has not been tested by the *Mobile* criteria. The majority opin-

in dissent, indicated that the latter would suffice. We conclude that Judge Alaimo's order would satisfy either standard and, therefore, we specifically do not attempt to resolve that dispute. Moreover, we have a difficult time understanding the substance of the conflict. It seems to us that if a plaintiff establishes that a system was maintained for discriminatory purposes, he had *a fortiori* proven that it was maintained "because of" its discriminatory effects.

45. "We have made clear, however, that a court in formulating an apportionment plan as an exercise of its equity powers should, as a general rule, not permit multimember legislative districts. "[S]ingle-member districts are to be preferred in court-ordered legislative reapportionment plans unless the court can articulate a 'singular combination of unique factors' that justifies a different result. *Mahan v. Howell*, 410 U.S. 315, 333, 93 S.Ct. 979, 989, 35 L.Ed. 320." *Connor v. Finch*, 431 U.S. 407, 415, 97 S.Ct. 1828, 1834, 52 L.Ed.2d 465."
100 S.Ct., at 1499.

46. The problems of Blacks in Burke County should not be viewed in a vacuum. The present treatment of Blacks in the South is directly traceable to their historical positions as slaves. While many individual political leaders have attempted to bring meaningful reforms to fruition, it is equally true that the White communities, for the most part, have fought the implementation of programs aimed at integration with every device available. A District Court ordering relief in a case such as this must take cognizance of that fact. As a learned member of this Court recently recognized, "... if we, as judges, have learned anything from *Brown v. Board of Education*, it is that prohibitory relief alone affords but hollow protection from continuing abuse by recalcitrant governments. Facing this situation, judges have the option of either declaring that litigants have rights without remedies, or fashioning relief to fit the case." F. Johnson, *In Defense of Judicial Activism*, 28 *Emory L.J.* 901, 910 (1979).

ion recognizes that the district court's decision was made without the guidance of *Mobile*, but it states that the inquiry into discriminatory intent actually undertaken by the trial court satisfies that standard.

Mobile does more than reaffirm the necessity for a showing of discriminatory intent, however. *Mobile* also abolishes the simple "aggregate of factors" approach of *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) aff'd. sub nom. *East Carroll Parish School Board v. Marshall*, 424 U.S. 636, 96 S.Ct. 1083, 47 L.Ed.2d 196 (1976), heretofore followed in this circuit. In its place, *Mobile* institutes a "totality of the circumstances" test in which the *Zimmer* factors still possess relevance but to varying degrees. Thus, past official discrimination is not to be treated as an "original sin" and unresponsiveness by elected officials is "relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices." *City of Mobile v. Bolden*, 100 S.Ct. at 1503, 64 L.Ed.2d at 63.

Zimmer was not the sole measure by which the findings of fact of the district court were tailored. That order was gauged by a hybrid standard referred to as the *Zimmer-Kirksey* test. *Kirksey v. Board of Supervisors*, 554 F.2d 139 (5th Cir. 1977) instructs that depressed socio-economic status which hinders participation in community affairs signals a denial of access to the political process. *Kirksey v. Board of Supervisors*, 554 F.2d at 143. In the findings of fact of the district judge, depressed socio-economic status was accorded consideration equal to that given the *Zimmer* factors. Yet, the *Mobile* plurality considers historical and social factors, apart from the discrimination generated by official state action, to be "gauzy sociological considerations [which] have no constitutional basis." *City of Mobile v. Bolden*, 100 S.Ct. at 1504 n. 22, 64 L.Ed.2d at 64 n. 22.

Mr. Justice Stevens joined the *Mobile* plurality decision to retain Mobile's commission form of government as constitutionally permissible. I find two policy considerations raised in his concurrence to be persuasive. Each notion counsels the judiciary to exercise restraint in voting dilution cases. First, at-large systems will always disadvantage one or more minority groups struggling for political power. Yet, the essence of democracy is majority rule and a voting structure must be judged by a standard that "allows the political process to function effectively." *City of Mobile v. Bolden*, 100 S.Ct. at 1509, 64 L.Ed.2d at 70. Second, the standard chosen cannot hold reprehensible all detrimental effects on an identifiable political group because such a test would invite a host of voting dilution cases sure to plunge the judiciary into a "voracious political thicket." *City of Mobile v. Bolden*, 100 S.Ct. at 1514, 64 L.Ed.2d at 75. Reading Mr. Justice Stevens' concurrence together with the plurality opinion leads me to conclude that before a court may intrude into local political processes, it must possess stronger evidence of invidious motivation than past social discrimination and economic deprivation.

An exposition of evidence more detailed than that made by the district judge in the *Mobile* case is seldom seen. *Bolden v. City of Mobile*, 422 F.Supp. 384 (S.D.Ala.1976). Most of the evidence here is of a similar character. Yet in the eyes of the Supreme Court, the findings set forth in *Mobile* were insufficient to prove unconstitutional voting dilution because the data was not viewed in the proper perspective. The conclusions drawn from the evidence gathered below may suffer from the same infirmity. As I read *Mobile*, it demands emphasis on evidence of official state denial of equal participation in the slating and election process and eschews heavy reliance on socio-economic data. A remand for reassessment of the record evidence, together with additional evidence, if necessary, seems to be the appropriate course of action. For these reasons, I respectfully dissent.