University of Richmond Law Review

Volume 17 | Issue 1 Article 3

1982

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Timothy G. O'Rourke, *Constitutional and Statutory Challenges to Local At-Large Elections*, 17 U. Rich. L. Rev. 39 (1982).
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CONSTITUTIONAL AND STATUTORY CHALLENGES TO LOCAL AT-LARGE ELECTIONS

*Timothy G. O'Rourke**

I. Introduction

On April 22, 1980, in *City of Mobile v. Bolden*[1] the United States Supreme Court upheld the constitutionality of at-large elections for the three-member city commission in Mobile, Alabama. In so doing, the Court reversed the judgment of the Fifth Circuit Court of Appeals that Mobile's at-large plan impermissibly diluted the electoral influence of black voters in violation of the fourteenth and fifteenth amendments to the Constitution. The Supreme Court's decision in *Bolden [I]* emerged from a sharply divided court. A six-person majority in the case consisted of four justices—Stewart, Burger, Powell, and Rehnquist—who joined in a plurality opinion; Justice Stevens, who concurred in the judgment; and Justice Blackmun, who concurred only in the result. Three justices—White, Brennan, and Marshall—filed dissenting opinions. Although the substantive differences among the three opinions produced by the Court's majority left room for considerable uncertainty regarding the standards for assessing the constitutionality of local at-large systems, the implications of the *Bolden [I]* decision were fairly obvious. Racial or language minority voters alleging that at-large systems unconstitutionally diluted their electoral influence faced a more significant evidentiary burden than had previously existed; one element of this burden was a showing that an at-large format was created or maintained with racially discriminatory intent by public officials.[2]

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The author wishes to thank the Carter G. Woodson Institute for Afro-American and African Affairs at the University of Virginia for their generous support of this research. The Woodson institute is in no way responsible for the conclusions expressed herein. Portions of this paper originally appeared in the author's The Legal Status of Local At-Large Elections: Racial Discrimination and the Remedy of 'Affirmative Representation' (paper delivered at the 1982 Annual Meeting of the American Political Science Association, Denver, Colorado, September 2-5, 1982).

1. 446 U.S. 55 (1980) [hereinafter referred to as *Bolden [I]*].
2. *Id.* at 65.

As the guiding precedent for adjudication of legal challenges to at-large elections, the *Bolden [I]* ruling proved to be remarkably short-lived, as a series of judicial and legislative developments in the spring and early summer of 1982 seriously undercut the Court's holding. On April 15, 1982, almost two years to the day after the Supreme Court's decision in *Bolden [I]*, Judge Virgil Pittman of the Federal District Court for the Southern District of Alabama for a second time ruled that at-large elections for the city commission in Mobile and for the school board in Mobile County diluted the political power of black voters in violation of the fourteenth and fifteenth amendments of the Constitution and section 2 of the Voting Rights Act.[3]

Six years earlier, Judge Pittman's rulings against at-large elections in suits against the city commission and county school board had set in motion the trail of litigation leading to the Supreme Court's *Bolden [I]*, ruling.[4] Now, in this new round of opinions, which followed a second round of trials, Judge Pittman ruled that at-large elections for the city commission and county school board had been established with a racially discriminatory purpose, thus meeting the intent test previously set out by the Supreme Court.[5]

A little more than two months after Judge Pittman's new rulings in the Mobile cases, Congress completed final action on the Voting Rights Act Amendments of 1982;[6] and on June 29, 1982, President Reagan signed this legislation into law. A major provision in this legislation was a modification of section 2 of the Voting Rights Act; the new language of section 2 provides that a legal challenge to an at-large system need not prove intent under the *Bolden [I]* standard, but must show only that the system has a discriminatory impact.[7]

On July 1, three days after the Voting Rights Act extension became law, the United States Supreme Court for the first time since *Bolden [I]*, ruled on the merits of a challenge to the constitutionality of a local at-large electoral system, this time involving the elec-

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3. Bolden v. City of Mobile, 542 F. Supp. 1050 (S.D. Ala. 1982) [hereinafter referred to as *Bolden [II]*]; Brown v. Board of School Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982), *appeal docketed*, No. 82-7130 (11th Cir. Apr. 26, 1982). Judge Pittman also found the at-large systems to be in violation of 42 U.S.C. § 1983. *Bolden [II]*, 542 F. Supp. at 1077; *Brown*, 542 F. Supp. at 1107.

4. *Bolden [I]*, 446 U.S. 55 (1980).

5. *Bolden [II]*, 542 F. Supp. at 1077.

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

7. *Id.*

tion of the Board of Commissioners in Burke County, Georgia. In *Rogers v. Lodge*,[8] the Court affirmed the holding of the Fifth Circuit Court of Appeals that the at-large system in question diluted the voting strength of blacks in Burke County in violation of the fourteenth amendment guarantee of equal protection. Although blacks comprise a majority of Burke County's population, no black had ever been elected to the county commission. Justice White's opinion for the Court in *Lodge* implicitly cast doubt on the continuing validity of the *Bolden [I]* ruling; and, in fact, three members of the *Bolden [I]* plurality (Justices Powell, Rehnquist, and Stevens) comprised the dissenters in the six-to-three decision in *Lodge*.[9]

The holding in *Lodge*, when coupled with the recent action of Congress in amending section 2 of the Voting Rights Act, appeared to signal a new era in the heretofore sporadically successful litigation against local at-large electoral systems. Indeed, Justice Stevens' dissent gave special attention to the Court's landmark decision in *Baker v. Carr*,[10] as if to suggest that a second reapportionment revolution were in the offing.[11]

Whether the next several years will witness an avalanche of litigation against at-large systems must remain an open question, but it is clear that the Voting Rights Act Amendments of 1982 and *Lodge* have recast the legal foundation of suits against at-large elections. This article, after presenting a brief overview of the types of legal challenges to at-large systems, undertakes a review of the evolution of case law relating to constitutional claims against at-large systems and of the relationship of the revised section 2 to that case law. Drawing on this history of case law, the fourth section of this article advances a critical view of both the results and the intent tests as standards against which at-large systems can be evaluated. Consideration is then given to the theoretical and practical issues of law raised by the litigation against at-large systems, with a view toward developing an alternative approach for assessing and remedying the constitutional and statutory infirmities attributed to at-large electoral systems. The final section summarizes

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8. ___ U.S. ___, 102 S. Ct. 3272 (1982).

9. *Lodge*, 102 S. Ct. at 3281 (Powell, J., joined by Rehnquist, J., dissenting). Justice Stevens also filed a dissenting opinion. *Id.* at 3283 (Stevens, J., dissenting).

10. 369 U.S. 186 (1962).

11. *Lodge*, 102 S. Ct. at 3284 (Stevens J., dissenting) (citing Baker v. Carr, 369 U.S. 186 (1962)).

the article's major findings and conclusions.

II. Legal Challenges to At-Large Elections: An Overview

A. *The Discriminatory Effects of At-Large Elections*

Legal activity regarding at-large elections has concentrated on individual cases—in particular, the unique aspects of a locality's politics which, in combination with an at-large system, may foreclose effective minority participation and representation. For example, regular bloc voting by white citizens against minority candidates (or minority-supported candidates) can minimize the influence of minority voters under an at-large format. In this regard, variations in the basic at-large scheme may strongly influence the relative effectiveness of bloc voting by either white or minority voters.

In the simplest version of at-large elections, all candidates compete for open seats on the council. If six seats are vacant, the six candidates receiving the largest number of votes are elected. In cities using the simple at-large plan, racial minorities often resort to the tactic of "single-shot" or "bullet ballot" voting in order to win representation on municipal councils. Single-shot voting refers to the practice of voting for only one candidate rather than voting, say, for six candidates for six open seats. The candidate benefiting from the single-shot tactic is doubly advantaged: he receives a vote while other candidates are denied a vote. The effectiveness of the single-shot tactic may be nullified by modifications of the basic at-large format, such as a requirement that winning candidates must receive a majority of the ballots cast or a stipulation that a voter must vote for as many candidates as there are vacancies to be filled—a "full-slate requirement." A rule providing that candidates must run for a specific seat or "numbered post" on an at-large council and staggered terms of office also will reduce the effectiveness of single-shot voting by minority voters. Alternatively, such devices enhance the impact of bloc voting by white voters against minority candidates and, thus, reduce the likelihood of minority representation. Since the effect of such rules is to increase the minimum winning percentage that would otherwise be necessary in a simple plurality vote, at-large system, one commentator has labeled these requirements as "percentage-determining."[12]

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12. Butler, *Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851, 864-68 (1982) [hereinafter cited as Butler, *Election Structures*].

While provisions requiring majority vote, full-slate voting, numbered posts, or staggered terms diminish the possibility of minority representation in an at-large setting, district residency requirements may enhance the responsiveness of at-large systems to minority interests. A stipulation that a candidate for a specific seat reside in a particular ward, even though the election is at-large, may raise the likelihood of minority representation. Viewed from another angle, a ward residency requirement might be seen as nothing more than a numbered post requirement in disguise.[13]

While at-large schemes clearly vary in their potential for diluting the political influence of racial or language minorities, a clear presumption favoring ward-based elections over any form of at-large system underlies much of the legal activity directed against at-large systems. This presumption proceeds from the likelihood that in a given locality a residentially concentrated minority will be able to control the election of one or more representatives to a local governing body under a ward-based plan.

B. *Routes of Attack: The Voting Rights Act and the Constitution*

Legal challenges to at-large systems fall into two separate, but related categories: (1) judicial and administrative actions pursuant to section 5 of the Voting Rights Act of 1965, as severally amended, and (2) civil suits alleging that at-large elections violate constitutional guarantees set out in the fourteenth and fifteenth amendments and/or the statutory protection against vote denial or abridgment under section 2 of the Voting Rights Act.[14] The first category involves legal actions that are essentially prophylatic: sec-

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13. In evaluating at-large electoral systems, federal courts have tended to view district residency requirements as mitigating the dilutive impact of at-large elections on minority interests. *See infra* text accompanying notes 45, 77-78, 86, 172 and 238. The United States Department of Justice, within the context of section 5 preclearance, has viewed a residency rule as a dilutive device and has objected to the adoption of such a requirement in existing at-large systems. *See* U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 209-10 (1975) [hereinafter cited as TEN YEARS AFTER]; U.S. COMM'N ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 5, 97-100 (1982) [hereinafter cited as UNFULFILLED GOALS].

14. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437, 437 (amended version, prior to 1982 amendments, at 42 U.S.C. § 1973 (1981)). A concise history of the Act is set out in J. HANUS, P. DOWNING & D. GAY, THE VOTING RIGHTS ACT OF 1976, AS AMENDED: HISTORY, EFFECTS AND ALTERNATIVES (Cong. Research Serv., Rep. No. 75-243 GGR, rev. Nov. 19, 1975). *See generally* Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523 (1973).

tion 5 provides a mechanism, described in greater detail below, whereby the United States Attorney General or the federal courts may block the implementation of potentially discriminatory changes in electoral laws, such as at-large elections, in state and local jurisdictions subject to the coverage of section 5. In contrast, the second category of actions embraces challenges to existing at-large systems in jurisdictions both within and outside the coverage of section 5. While constitutional and statutory issues related to the second category are the principal focus of the present analysis, appreciation of the application of section 5 to at-large electoral systems provides a necessary backdrop for the discussion of the fourteenth and fifteenth amendment cases.

Enacted to guarantee black citizens full rights of suffrage, the Voting Rights Act of 1965 applied to states and localities, principally southern, (a) employing voter qualification devices such as the literacy test and (b) recording voter registration or voter turnout under 50 percent of voting age residents in November, 1964.[15] The Act suspended voter qualification devices in covered jurisdictions and authorized the appointment of federal examiners to oversee voter registration in covered areas. Section 5 of the Act required covered jurisdictions to submit changes in voting laws to the Attorney General or to the United States District Court for the District of Columbia for approval.[16] Congress extended the Act in 1970 and brought under its coverage a few more jurisdictions.[17] The 1975 renewal significantly expanded the scope of the Act to ensure the voting rights of language minorities (Spanish-heritage, Indians, Asian-Americans, Alaskan Natives).[18] A triggering formula similar to the one contained in the original 1965 Act subjected ar-

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15. 42 U.S.C. § 1973b(b) (1981).
16. 42 U.S.C. § 1973b(a) (1981).
17. Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, 84 Stat. 314 (codified at 42 U.S.C. § 1973 *et seq.* (1981)). An addition to the formula for determining covered jurisdictions provided that after August 6, 1970, a state or locality would be covered if it maintained a test or device on November 1, 1968, and if voter registration or turnout for the presidential election of 1968 was less than 50 percent. *Id.* The 1970 amendments also added section 201 (codified at 42 U.S.C. § 1973b(a) (1981)) which imposed a nationwide ban on the use of literacy tests. *Id.* This provision was upheld as a valid exercise of congressional enforcement powers under the fifteenth amendment. Oregon v. Mitchell, 400 U.S. 112 (1970).
18. Voting Rights Acts Amendments of 1975, Pub. L. No. 94-73, 89 Stat. 400. The coverage formula was amended to bring in jurisdictions applying a test or device and having registration or voting rates below 50 percent for the 1972 presidential election. 42 U.S.C. § 1973b(b) (1981). The meaning of test or device was broadened to include English-only election materials in jurisdictions where more than 5 percent of the population is of a single language minority. 42 U.S.C. § 1973b(f)(3) (1981).

eas with a sizable language minority to coverage. These jurisdictions, too, now have to clear changes in voting laws under the provisions of section 5.[19] The Voting Rights Act Amendments of 1982[20] left the existing geographic reach of section 5 intact, but made substantial modifications in the "bailout" provisions relating to the conditions under which covered jurisdictions could sue to escape coverage and thus the requirement of preclearance.[21] The 1982 amendments, as noted, also modified the language of section 2, a broad prohibition against the denial or abridgment of the right to vote that applies uniformly across the nation.[22]

At present, all jurisdictions in nine states (Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia) and some jurisdictions in another thirteen states fall under the preclearance provisions of section 5.[23] Having sustained the constitutionality of the Voting Rights Act in a 1966 decision, the United States Supreme Court, in subsequent rulings, has interpreted section 5 permissively to encompass virtually any change in state or local laws bearing on the conduct of elections.[24] Among the covered changes, requiring either the approval of the Attorney General or judgment of the District Court for the District of Columbia, are at-large elections, majority vote provision, full-slate requirement, numbered post provision, staggered terms, redistricting of wards, and annexation. Any of these changes may encounter the disapproval of the Attorney General because of their tendency to dilute the voting strength of a racial or language minority.[25]

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19. 42 U.S.C. § 1973b (1981).

20. Voting Rights Act Amendments of 1982.

21. The revised bailout provisions are discussed in S. REP. No. 97-417, 97th Cong., 2d Sess. 43-62, 69-75 (1982). *See also* H.R. REP. No. 97-227, 97th Cong., 1st Sess. 32-33, 39-42 (1981). *See generally Extension of the Voting Rights Act: Hearings Before the Subcomm. on Civil and Constitutional Rights*, 97th Cong., 1st Sess. (1981) [hereinafter cited as *House Hearings*].

22. *See infra* part IV for discussion of section 2.

23. 28 C.F.R. Part 51 app. and Part 55 app. (1982).

24. The Court upheld the constitutionality of the Act in South Carolina v. Katzenbach, 383 U.S. 301 (1966). In Allen v. State Board of Elections, 393 U.S. 544 (1969), the Court held that section 5 covered virtually all changes in electoral laws. Perkins v. Matthews, 400 U.S. 379 (1971) made municipal annexations subject to preclearance. Georgia v. United States, 411 U.S. 526 (1972) held that section 5 covered reapportionment. *See generally* Thernstrom, *The Odd Evolution of the Voting Rights Act*, PUB. INTEREST, Spring, 1979, at 49.

25. *See, e.g.*, S. REP. No. 97-417, *supra* note 21, at 10-14. *See also Unfulfilled Goals*, *supra* note 13, at 64-75. A jurisdiction subject to section 5 preclearance bears the burden of proving that a change in its electoral laws or practices " 'does not have the purpose and will not have the effect' " of discriminating against minority voters. Beer v. United States, 425

Challenges to at-large elections under the Voting Rights Act are limited to jurisdictions covered by the Act and, more narrowly, to those jurisdictions seeking to make changes in election procedures. A proposed shift from ward to at-large elections or an attempt to impose a majority vote requirement on an existing at-large format probably would fail preclearance by the Justice Department. For example, the Justice Department denied approval to a 1968 Louisiana statute allowing parish police juries to utilize at-large elections in place of ward elections formerly required by state law. A review of section 5 objections to changes relating to the operation of at-large elections in covered jurisdictions suggests that the Voting Rights Act has directly affected electoral practices in a number of localities. Since 1965, the Justice Department has objected to more than sixty submissions relating to plans of city, county, or special district governments to change from ward-based to at-large elections; several of these objections applied to state laws affecting local electoral systems generally. In addition, the department interposed objections to well over one hundred submissions relating to efforts of local governments with at-large election systems in place to adopt such procedures as numbered posts and majority vote requirements.[26] Undoubtedly, the impact of an objection extends beyond the jurisdiction directly affected, exercising a "chilling effect" on other jurisdictions contemplating a similar change.

Although section 5 does not reach at-large systems already in existence, the application of section 5 preclearance to municipal boundary changes provides an indirect means of assault on at-large elections. When a municipality covered by section 5 undertakes an otherwise valid annexation that has the effect of reducing the minority proportion of the population in the enlarged community, as compared to the pre-annexation community, the municipality may be required, as a condition of preclearance, to alter its electoral system so as to ensure minority voters a reasonable opportunity to elect city councilors in proportion to their political strength in the newly expanded community. In practice, this approach, which

U.S. 130, 133 (1976) (quoting section 5 of the Voting Rights Act of 1965). Section 5, however, does not necessarily permit the United States Attorney General to block changes which, though dilutive of minority strength in an absolute sense, improve minority access over pre-existing levels. 425 U.S. 130.

26. The data here were drawn from the United States Dep't of Justice, Civil Rights Division, Complete Listing of Objections pursuant to Section 5 of the Voting Rights Act of 1965 (Nov. 30, 1982) (mimeograph). The figures refer to submissions; one submission might, in fact, include several changes.

evolved out of litigation involving annexations in Petersburg and Richmond, Virginia, means this: municipalities with at-large elections may have to convert to a ward-based or mixed ward/at-large electoral plan in order to gain Justice Department approval for a proposed annexation.[27] San Antonio, for example, converted from at-large to ward elections in 1977 after the Justice Department objected that a recent annexation diluted the voting strength of Mexican-Americans and blacks.[28]

The application of section 5 to prohibit changes from ward to at-large elections or, in certain annexation cases, to prohibit the maintenance of at-large systems has affected the development of dilution suits in at least three important ways. First, the Voting Rights Act has created a curious legal dichotomy among covered jurisdictions. While section 5 prevents local governments with ward plans from switching to at-large elections, localities with at-large plans established prior to the effective date of section 5 are free to maintain them in the absence of a challenge to their constitutionality. Second, the fact that a jurisdiction is under section 5 coverage may influence the judicial determination of the constitutionality of a local at-large plan (a point considered in the following sections). In this regard, it should be noted that Congress originally enacted section 5 in response to a common problem arising out of voting rights litigation of the late 1950's and early 1960's. If a civil rights suit successfully challenged one impediment to the exercise of the right to vote, a jurisdiction might preserve the discriminatory impact of the invalidated device by adopting a new device. Section 5 was intended to break the chain of noncompliance[29] to prevent a locality, for instance, from responding to black enfranchisement after the literacy test was eliminated by adopting at-large elections that minimize the impact of black voters in local electoral contests. In this respect, many civil rights leaders plainly regard at-large electoral systems in certain jurisdictions (even those adopted long before effective black enfranchisement) as the last refuge of a white majority bent on discrimination against minority voters.

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27. City of Richmond v. United States, 422 U.S. 358 (1975); City of Petersburg v. United States, 410 U.S. 962 (1973), *aff'g mem.* 354 F. Supp. 1021 (D.D.C. 1973). *See also* City of Port Arthur v. United States, 517 F. Supp. 987 (D.D.C. 1981), *aff'd*, 51 U.S.L.W. 4033 (U.S. Dec. 13, 1982).

28. *See* Cotrell & Stevens, *The 1975 Voting Rights Act and San Antonio, Texas: Toward a Federal Guarantee of a Republican Form of Government*, PUBLIUS, Winter, 1978, at 79.

29. *See* H.R. REP. No. 97-227, *supra* note 21, at 3-4.

Finally, attacks on the constitutionality of local at-large schemes, on occasion, may revert to section 5 disputes. Houston, Texas, for example, defeated a federal court action challenging the constitutionality of its at-large system for electing city councilors,[30] only to be forced to abandon the plan in the face of Justice Department objections to the city's annexation proceedings.[31]

Although suits asserting the unconstitutionality of at-large elections can be brought against localities anywhere in the country, nearly all significant cases have arisen in what until recently was the Fifth Circuit.[32] On October 1, 1981, the Fifth Circuit was split into a reduced Fifth Circuit consisting of the states of Louisiana, Mississippi, and Texas, and a new Eleventh Circuit composed of Alabama, Florida, and Georgia. The six states that comprised the old Fifth Circuit are presently covered in whole or in part by the Voting Rights Act. The old Fifth Circuit emerged as the focal point for constitutional challenges to at-large elections for two ma-

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30. Greater Houston Civic Council v. Mann, 440 F. Supp. 696 (S.D. Tex. 1977).

31. The section 5 action relating to the city's annexations is described in *Unfulfilled Goals, supra* note 13, at 54. For the discussion of a similar case involving Shreveport, Louisiana, see *infra* text accompanying notes 198-200.

32. In Perkins v. City of West Helena, 675 F.2d 201 (8th Cir. 1981), *aff'd*, 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982), the court held an at-large election plan for aldermen in West Helena, Arkansas, violative of the fourteenth and fifteenth amendments and section 2 of the Voting Rights Act. While the city's population was 40 percent black, only three blacks had won election to the eight-member council since 1920. The at-large plan had both a residency and numbered post requirement, which the court viewed as significant impediments to black success in election contests marked by racial bloc voting. *Id.* at 212-13. The court found discriminatory intent in the refusal of city council to reconsider a proposed change to a ward system and in the refusal of the city to reapportion residency wards. *Id.* at 215. However, in other dilution cases litigated in the Eighth Circuit, courts have held in favor of the challenged plans. *See* Leadership Roundtable v. City of Little Rock, 661 F.2d 701 (8th Cir. 1981) (per curiam), *aff'g* 499 F. Supp. 579 (E.D. Ark. 1980), in which a district court dismissed a challenge to a seven-member city board of directors, elected at-large to numbered positions. In a 30 percent black city, at least one black and at times two had served on the board in ten of the last twelve years. 499 F. Supp. at 590. *See also* Dove v. Moore, 539 F.2d 1152 (8th Cir. 1976) (rejecting a claim against an at-large councilman plan in Pine Bluff, Arkansas).

The Fourth Circuit Court of Appeals rejected a challenge to at-large elections with a majority vote stipulation for city council in Columbia, South Carolina, even though the city is 35 percent black, and no black had been elected to city council within memory. Washington v. Finlay, 664 F.2d 913 (4th Cir. 1981). *See also* Aranda v. Van Sickle, 600 F.2d 1267 (9th Cir. 1979), *cert. denied*, 446 U.S. 951 (1980); Black Voters v. McDonough, 565 F.2d 1 (1st Cir. 1977); Vollin v. Kimbel, 519 F.2d 790 (4th Cir. 1975).

Aside from *Perkins*, apparently the only successful dilution suits outside the Fifth and Eleventh Circuits have been those actions resolved by consent decrees. *E.g.*, United States v. Thurston County, No. 78-0-380 (D. Neb. May 9, 1979); United States v. County of San Juan, No. 79-507 JB (D.N.M. Apr. 8, 1980). *See generally House Hearings, supra* note 21, at 2531, 2544-45.

jor reasons: (1) the presumption that jurisdictions subject to the Voting Rights Act may use electoral devices, including at-large elections, for discriminatory purposes since they have done so in the past; and (2) the receptiveness of the United States Court of Appeals for the Fifth Circuit (and more recently the Fifth and Eleventh Circuits) to claims that local at-large elections, under specific circumstances, are unconstitutional. Federal district and appellate courts in other circuits have shown a much greater reluctance to entertain claims of dilution.

To date, the number of successful dilution suits remains quite modest, especially in relation to the hundreds of local governments within and outside section 5 coverage that employ at-large elections. It is clear, however, that the cases reported in the *Federal Supplement* or *Federal Reporter* seriously understate the number of successful actions, since many cases are not published or do not proceed to trial. A passage from the 1981 House testimony of Frank R. Parker of the Lawyers' Committee for Civil Rights Under Law is revealing in this regard; his written testimony summarized litigation against at-large elections in Mississippi.

> Since 1965, twelve lawsuits have been filed challenging the constitutionality of Mississippi at-large voting systems. In *Stewart v. Waller*, the most successful case to date, black voters challenged the constitutionality of a 1962 Mississippi statute which required all cities with a mayor-alderman form of government—the most popular form of government in Mississippi—to elect their aldermen on an at-large basis. . . .
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> A three-judge District Court in 1975, holding that the Act's provisions were "indicative of an intent to thwart the election of minority candidates to the office of aldermen" declared the statute unconstitutional "as a purposeful device conceived and operated to further racial discrimination in the voting process." The District Court, however, limited its injunction only to those cities and towns which switched to at-large voting pursuant to the 1962 statute, and refused to enjoin at-large election systems in effect before 1962, holding that the constitutionality of these systems would have to be "left for case-by-case examination."
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> In the 1977 municipal elections following the District Court's judgment, 19 black aldermen were elected in ward voting to previously all-white boards of aldermen in cities and towns covered by the court's decree.
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> Individual lawsuits challenging all-at-large systems have been filed against the cities of Aberdeen, Canton, Columbus, Greenwood, Greenville, Hattiesburg, Hazelhurst, Jackson, Picayune, West Point,

> and Yazoo City. Plaintiffs were successful in obtaining injunctions against at-large voting in the Canton and West Point cases, and Aberdeen, Columbus, Hazelhurst, Picayune, and Yazoo City settled the cases against them prior to trial and instituted ward voting systems. In each of the cities which have held city council elections since the ward voting systems went into effect, black candidates have been elected. The cities of Jackson, Hattiesburg, Greenwood, and Greenville, however, refuse to abolish their at-large voting systems, and those cases are still in litigation.[33]

Regardless of the past effects of litigation against at-large systems in Mississippi and elsewhere, it is apparent that the future impact of such litigation will depend upon ongoing judicial exposition of legal principles governing dilution suits. The following section reviews the evolution of these principles within the old Fifth Circuit, the decisions of the Supreme Court in *Bolden [I]*,[34] and *Lodge*,[35] and congressional efforts to amend section 2 of the Voting Rights Act[36] to create a statutory basis for challenging at-large

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33. *House Hearings*, *supra* note 21, at 514 (citing Stewart v. Waller, 404 F. Supp. 206 (N.D. Miss. 1975)) (footnotes omitted).

The Greenwood case noted in the quote is discussed *infra* at note 141. For a similar review of litigation against at-large systems in Alabama, Georgia, and North Carolina, see Testimony of Laughlin MacDonald, *House Hearings*, *supra* note 21, at 596, 599-607, 610-23, 637-41, 657-83, 695-702, 707-16, 720-34.

Of related interest is a recent survey that sought to determine the extent of efforts to reform or eliminate at-large systems in southern cities during the 1970's. R.J. Mundt and P. Heilig, *District Representation: Demands and Effects in the Urban South*, 44 J. POL. 1035-48 (1982). Mundt and Heilig gathered data for 209 of 254 southern cities "with populations over 10,000 which are at least 15 percent black." *Id.* at 1037. The study found that 175 of the 209 cities used at-large elections for city council in 1970 and that reform attempts had occurred in 96 (55 percent) of the 175 cities. Fifty-five cities changed an at-large system to a ward or mixed ward/at-large plan. The authors of the study go on to note the role of litigation, presumably based on section 5 of the Voting Rights Act or on the fourteenth and fifteenth amendments.

> Sixty-five cities in states within the Fifth Circuit (Alabama, Florida, Georgia, Louisiana, Mississippi and Texas) established or attempted to establish districts during the 1970s; 45 percent of these efforts utilized the federal courts. On the other hand, 30 cities in the five southern states not covered by the Fifth Circuit (Arkansas, North Carolina, South Carolina, Tennessee, and Virginia) experienced pro-district movements in the last ten years; of these, only 17 percent involved litigation. However, even in the Fifth Circuit, referenda have been used more frequently than litigation; and only half of the suits brought in the Fifth Circuit were successful, compared to over 78 percent of the referenda.

Id. at 1039-40.

34. 446 U.S. 55 (1980).

35. Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982).

36. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437 (amended version, prior to 1982 amendments, at 42 U.S.C. § 1973 (1981)).

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III. The Evolution of Case Law on At-Large Elections

A. *Zimmer and Its Progeny*

From 1973 until 1980, when the Supreme Court ruled on *Bolden [I]*, the 1973 decision of the Fifth Circuit in *Zimmer v. McKeithen*[37] constituted the principal foundation for suits attacking the constitutionality of local at-large elections. While *Bolden [I]*, cast grave doubt on the logic and evidentiary criteria of *Zimmer*, the Supreme Court's decision in *Lodge* and congressional action in modifying section 2 of the Voting Rights Act have effectively reinstated most of the key elements of the *Zimmer* ruling.

In *Zimmer*, black plaintiffs alleged that at-large elections for police jurors and school board members in a Louisiana parish of under 13,000 population impermissibly diluted the voting strength of black residents. The facts of *Zimmer* make it an odd precedent for subsequent dilution cases. First, blacks actually constituted a majority (59 percent) of the parish population, although they accounted for only 46 percent of the registered voters. Second, the at-large plan under attack had been imposed originally by a district court order in 1968 as the remedy for population disparities among the districts in the ward plan then in use. After the 1970 census, the East Carroll Parish Police Jury resubmitted the at-large plan to the district court, which approved it. Interestingly, the 1968 Louisiana statute permitting at-large elections for police juries and school boards was blocked by the United States Attorney General, acting pursuant to section 5 of the Voting Rights Act.[38]

Sidestepping questions about the application of section 5 to the instant case and the appropriateness of a judicially-created at-large apportionment plan, the Fifth Circuit took on the issue of unconstitutional dilution. In establishing the standards according to which dilution might be judged, the court relied upon the opinions reached by the United States Supreme Court in *Whitcomb v. Chavis*[39] and *White v. Regester*.[40] Both *Whitcomb* and *White* in-

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37. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd*, 424 U.S. 636 (1976). The case is analyzed in Comment, 26 ALA. L. REV. 163 (1973). *See also* Recent Cases, 87 HARV. L. REV. 1851 (1974).

38. 485 F.2d at 1297.

39. 403 U.S. 124 (1971).

volved claims that multimember districts employed in state legislative apportionment plans resulted in impermissible dilution of minority voting strength.[41] *Whitcomb* rejected the contention that ghetto blacks in Marion County (Indianapolis) suffered a denial of equal protection because "the number of ghetto residents who were legislators was not in proportion to ghetto population . . . ."[42] Both the Democratic and Republican parties regularly slated black candidates for the legislature, and black underrepresentation, in the view of the *Whitcomb* majority, was attributable to the "defeat at the polls" of the Democratic slate favored by ghetto voters. The Court thus treated dilution in terms of unequal access to the political process, which was not demonstrated by the facts in *Whitcomb*, and not in terms of minority underrepresentation which had been shown.[43] In *White*, the Supreme

40. 412 U.S. 755 (1973). The development of the doctrine of unconstitutional dilution has proceeded, with some exceptions to be considered later, primarily within the legal framework established by Reynolds v. Sims, 377 U.S. 533 (1964), and subsequent reapportionment cases, including *Whitcomb* and *White.*

Reynolds held that the guarantee of equal protection in the fourteenth amendment prohibited state legislative apportionment schemes which diluted or debased the votes of individual citizens by creating districts of substantially unequal population. Avery v. Midland County, 390 U.S. 474 (1968), extended the "one person, one vote" principle to apportionment plans of local governing bodies.

Local at-large elections, of course, satisfy the "quantitative" requirements of *Reynolds* and *Avery* but may be infirm under "qualitative" standards of equal representation that come into play after the equal-population mandate has been met. Specifically, federal courts have considered at-large elections in light of Supreme Court rulings on the use of multimember districts in state legislative apportionment schemes. The *Reynolds* court sanctioned the use of multimember districts. 377 U.S. at 577, 579. Furthermore, in Burns v. Richardson, 384 U.S. 73 (1966), and Fortson v. Dorsey, 379 U.S. 433 (1965), the Court approved the use of multimember districts in specific state legislative apportionment plans. Although *Fortson* and *Burns* recognized the potentially adverse impact of multimember districts on minority voting strength, the Court found it unnecessary to reach the constitutional questions posed by such dilution since in neither case had the invidious effects been demonstrated by the evidence presented. *Whitcomb*, 403 U.S. at 124, and *White*, 412 U.S. at 755, considered and ruled on the dilution issue with respect to state legislative multimember districts in Indiana and Texas, respectively.

Good histories of reapportionment litigation are provided by Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1; Engstrom, *Post-Census Representational Districting; The Supreme Court, "One Person, One Vote," and the Gerrymandering Issue*, 7 S.U.L. REV. 173 (1981); Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277; Padilla & Gross, *Judicial Power and Reapportionment*, 15 IDAHO L. REV. 263 (1979); Comment, 5 N. KY. L. REV. 241 (1978); Annot., 27 A.L.R. FED. 29 (1976 & Supp. 1982).

41. *White*, 412 U.S. at 756; *Whitcomb*, 403 U.S. at 127.

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

43. *Id.* at 141-63.

Court upheld a district court's findings of dilution in two multimember districts created by a Texas legislative apportionment plan. The practices of a white-dominated slating organization within the Democratic party largely precluded black participation in the nomination and election of legislative candidates in Dallas County. A protracted history of discrimination, particularly with respect to the franchise, and the unresponsiveness of the legislators to minority interests combined to deny Mexican-Americans in Bexar County (San Antonio) equal access to the political process.[44]

The Fifth Circuit read *Whitcomb* and *White* to mean that unconstitutional dilution exists

> where a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system . . . . 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 provision for at-large candidates running from particular geographical subdistricts.[45]

Having set out four primary criteria plus a list of enhancing factors, the *Zimmer* court went on to explain that all criteria need not be satisfied in a successful dilution claim.[46] As noted in *White*, the "totality of circumstances" confirms the existence of dilution.[47] Indeed, while the court in *Zimmer* found unconstitutional dilution, the facts in evidence clearly fulfilled only two of the four primary criteria, namely the existence of a tenuous state policy and the persistent effects of past discrimination. The record showed no pattern of unresponsiveness by parish officials, nor were blacks unequivocably denied political access. Three black candidates for school board and police jury won election in 1971 and 1972.

The *Zimmer* case reached the United States Supreme Court in 1976 and, in a per curiam opinion, the Court affirmed *Zimmer* in *East Carroll Parish School Board v. Marshall*.[48] However, the Court relied upon the procedural rule that federal courts, in devis-

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44. *White*, 412 U.S. at 766-69.
45. Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973).
46. 485 F.2d at 1297.
47. *White*, 412 U.S. at 755.
48. 424 U.S. 636 (1976).

ing apportionment plans, should employ single-member districts, absent special circumstances which would justify the use of multimember districts. In so doing, the Court specifically dissociated itself from the constitutional views expressed in *Zimmer*.[49]

Although *East Carroll Parish* cast some doubt on the value of *Zimmer* as precedent, the *Zimmer* criteria continued to govern the adjudication of dilution challenges in the Fifth Circuit. However, a dilution case involving at-large elections for city commissioners in Albany, Georgia, produced a different constitutional foundation for dilution claims. No black candidate had won a seat on the city commission over the period 1947 to 1975, despite the fact that blacks accounted for 39 percent of Albany's population of 76,000. The creation of the at-large scheme dated to a 1947 Georgia law which was enacted shortly after the demise of all-white primaries and the 1946 election in one ward of a white candidate who enjoyed black support. State legislation enacted in 1959 added a majority vote requirement.[50] Relying on *Gomillion v. Lightfoot*,[51] the federal district court, in *Paige v. Gray*[52] judged the 1947 act establishing the at-large system to be an unconstitutional abridgment of the right to vote under the fifteenth amendment; the court substituted a mixed plan calling for five commissioners elected by wards and a mayor and mayor pro tem elected at large.[53]

The Fifth Circuit Court of Appeals reversed the decision of the district court in light of its reliance on *Gomillion* and its adoption of a mixed plan.[54] The Fifth Circuit panel chastized the district court for its failure to apply "more recent Fourteenth Amendment precedents,"[55] specifically *White* and *Zimmer*; further, the panel noted that in cases of dilution, "*Zimmer* sets the basic standard in this circuit."[56] On remand, the district court made the appropriate

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49. *Id.* at 638.

50. Paige v. Gray, 399 F. Supp. 459 (M.D. Ga. 1975), *vacated and remanded*, 538 F.2d 1108 (5th Cir. 1976).

51. 364 U.S. 339 (1960). *Gomillion* dealt with the gerrymandering of the boundaries of Tuskegee, Alabama, in order to fence out black voters; the Court recognized the challenge to the plan as a valid fifteenth amendment claim. *Id.*

52. 399 F. Supp. 459.

53. *Id.* For an analysis of *Paige* and the *Gomillion* precedent, see Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 362-65 (1976).

54. *Paige*, 538 F.2d 1108 (5th Cir. 1976).

55. *Id.* at 1110.

56. *Id.* at 1111. The Supreme Court had previously stated that "there is no decision in this Court holding a legislative apportionment or reapportionment violative of the Fifteenth Amendment." Beer v. United Sates, 425 U.S. 130, 142 n.14 (1976).

findings of fact required by *Zimmer* but refused to recognize the validity of *Zimmer* as precedent. Instead, the court specifically followed *Whitcomb* and *White* in finding unconstitutional dilution under the fourteenth amendment and reiterated the finding of a fifteenth amendment violation in the 1947 act.[57]

The reluctance of the court of appeals in *Paige* to rely on fifteenth amendment precedents in deciding the Albany case apparently derived from its view that such a rationale would require a showing of "racial motivation" in the enactment of the plan.[58] The Fifth Circuit regarded the fourteenth amendment reapportionment cases, from which *Zimmer* descended, as sounder precedent.[59] The court's view implicitly underlined the reading that reapportionment cases in general, and dilution cases in particular, required only a demonstration of discriminatory effect in the operation of the challenged plan.

Paige in two respects foreshadowed subsequent developments in the law regarding at-large elections. First, the Fifth Circuit, in light of the Supreme Court's subsequent ruling in *Bolden [I]*, correctly assessed the tenuous fifteenth amendment foundation of dilution suits. Second, the Fifth Circuit's concern with the intent question pointed to what in future dilution cases would become a dominant issue, but the circuit court's avoidance of an intent standard in

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57. Paige v. Gray, 437 F. Supp. 137, 145-46 n.5 (M.D. Ga. 1977) (remedy of six ward councilors and a mayor elected at-large).

58. 538 F.2d at 1111. *See also* Bonapfel, *supra* note 53, at 364.

59. *See infra* note 64. Among the successful challenges to at-large elections predicated on *Zimmer* (apart from those discussed in the text) are several which merit summary. In Ausberry v. City of Monroe, 456 F. Supp. 460 (W.D. La. 1978), Judge Dawkins struck down the at-large election of a three-member commission in a city of over 56,000 people, roughly 38 percent of whom were black. The at-large election of county commissioners in Montgomery County, Alabama, fell in Hendrix v. McKinney, 460 F. Supp. 626 (M.D. Ala. 1978). The county's population of nearly 168,000 is 36 percent black. The at-large plan in effect dated to 1957 when the state legislature, anticipating the potential impact of the Civil Rights Act of 1957, abandoned a district format in place for fifty years.

In at least three reported dilution cases, defendant public officials conceded the unconstitutionality of the contested at-large plans at some point in the litigation. Two cases concerned Louisiana municipalities in which blacks constituted a majority in the population and a minority of registered voters; in neither city had a black been elected to the governing council under the existing at-large format. *See* Wallace v. House, 515 F.2d 619 (5th Cir. 1975) (involving the town of Ferriday); Perry v. City of Opelousas, 515 F.2d 639 (5th Cir. 1975) (the companion case). For later action in *Wallace*, with regard to the remedy, see Wallace v. House, 538 F.2d 1138 (5th Cir. 1976). The third suit attacked the at-large election of trustees for the Waco, Texas, Independent School District, the population of which was 19.4 percent black and 8.7 percent Mexican-American. Calderon v. McGee, 584 F.2d 66 (5th Cir. 1978).

Paige failed to anticipate the impending shift in the principles governing dilution actions.

Indeed, the Fifth Circuit Court of Appeals itself undertook a major reinterpretation of this position on March 29, 1978, when a panel of the court decided four dilution cases, including the Mobile case. In the lead case, *Nevett v. Sides*,[60] the panel applied *Washington v. Davis*,[61] a 1976 Supreme Court decision dealing with discrimination in employment, and *Village of Arlington Heights v. Metropolitan Housing Development Corp.*,[62] a 1977 Supreme Court ruling on exclusionary zoning, to dilution claims based on the fourteenth amendment. Such claims, according to the panel, require a demonstration of "racial intent" in the creation or maintenance of the challenged plan.[63]

The addition of a required showing of intent to the *Zimmer* criteria might have transformed the nature of dilution claims,[64] for *Zimmer* had disavowed a concern for intent, emphasizing instead an interest in the effects of a challenged apportionment plan on the voting strength of a minority element.[65] Intent could be easily discerned in a case such as that involving Albany, where the adoption of at-large elections had occurred fairly recently and in response to rising levels of black voter participation. In other cases, however, a showing of intent would require a demonstration that an at-large plan adopted under race-neutral circumstances was maintained by legislative inaction for discriminatory purposes.[66] The panel in *Nevett II* overcame the potential for chaos in a standard of intent by holding that "the *Zimmer* criteria provide a factual basis from which the necessary intent may be inferred."[67] It proceeded to affirm a district court's rejection of a suit alleging di-

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60. 571 F.2d 209 (5th Cir. 1978) [hereinafter cited as *Nevett II*]. In an earlier version of this case, the court of appeals reversed a judgment for the plaintiffs because the district court had failed to apply the *Zimmer* criteria. 533 F.2d 1361 (5th Cir. 1976). *See* Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After Washington v. Davis*, 76 MICH. L. REV. 694 (1978); Comment, 30 ALA. L. REV. 396 (1979).

61. 426 U.S. 229 (1976).

62. 429 U.S. 252 (1977).

63. *Nevett II*, 571 F.2d at 209.

64. Judge Wisdom opined that neither *Washington* nor *Arlington Heights* imposed an intent standard in dilution cases because voting rights disputes are distinguishable from other equal protection cases. *Nevett II*, 571 F.2d at 231 (Wisdom, J., concurring).

65. Zimmer v. McKeithen, 485 F.2d 1297, 1304 n.16 (5th Cir. 1973). *See also* Comment, 26 ALA. L. REV. 163 (1973).

66. *Nevett II*, 571 F.2d at 209, 232 (Wisdom, J., concurring). *See also* Comment, 9 CUM. L. REV. 443, 451-52 (1978).

67. *Nevett II*, 571 F.2d at 223.

lution in the at-large election of aldermen in Fairfield, Alabama. The *Nevett II* panel found the record ambiguous on virtually all counts of the primary criteria of *Zimmer*. Blacks made up 50 percent of the registered voters in Fairfield (a city of just over 14,000 population). In 1968, blacks won six of twelve aldermanic seats and none in 1972, the latter result attributable to the failure of black voters to turn out in that election.[68]

On the same day that the Fifth Circuit court ruled on the Fairfield case, it decided three other dilution cases on the basis of the evidentiary standards set out in *Nevett II*. In *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*,[69] the court reversed and remanded for further findings of fact a district court ruling that the at-large election of a five-member city commission impermissibly diluted minority voting strength. In a second case, *Thomasville Branch of NAACP v. Thomas County*,[70] the court overturned a district court's dismissal of a suit against an at-large electoral system for the commission of Thomas County, Georgia, and remanded the case for trial. The district court had dismissed the complaint on the grounds that minority plaintiffs had not shown that the at-large system had been established with discriminatory intent; the Fifth Circuit court held that plaintiffs needed to show only that the system was maintained with invidious motive in order to prove their claim of dilution.[71]

The third case decided along with *Nevett II* was *Bolden v. City of Mobile* (*Bolden [I]*);[72] the Fifth Circuit's affirmance of the district court's finding of unconstitutional dilution in the at-large election of Mobile's city commission led to the Supreme Court's 1980 ruling in *Bolden [I]*.[73] In view of the importance attached to this litigation by virtue of the Supreme Court's consideration of the case, the holdings of the district court and Fifth Circuit merit more than cursory discussion.

B. *The Mobile Cases*

The district court's opinion in *Bolden [I]*[74] noted in particular

68. *Id.* at 226-27.
69. 571 F.2d 248 (5th Cir. 1978).
70. 571 F.2d 257 (5th Cir. 1978) (per curiam).
71. Regarding further action in this case, see *infra* note 141.
72. 571 F.2d 238 (5th Cir. 1978), *rev'd and remanded*, 446 U.S. 55 (1980).
73. 446 U.S. 55 (1980).
74. *Bolden [I]*, 423 F. Supp. 384 (S.D. Ala. 1976).

the inability of blacks to participate fully in the political process—the first criterion under *Zimmer*.[75] While blacks made up 35.4 percent of the city's population of 190,026, no blacks had ever been elected to the three-member commission; and few had run. The district court noted a pattern of racially polarized voting and a climate in which seeking the support of black voters could be politically hazardous.

> One city commissioner, Joseph N. Langan, who served from 1953 to 1969, had been elected and reelected with black support until the 1965 Voting Rights Act enfranchised large numbers of blacks. His reelection campaign in 1969 foundered mainly because of the fact of the backlash from the black support. . . . He was again defeated in an at-large county commission race in 1972. Again the backlash because of the black support substantially contributed to his defeat.[76]

The district court found the city commissioners unresponsive to the interests of the black minority. For example, blacks held only 47 of the 482 positions on 46 city committees; and of the 435 employees in the fire department, only 15 were black. The court found street maintenance in black neighborhoods to be inferior to that in white neighborhoods. Under the third of the *Zimmer* criteria, tenuous state policy, the district court noted the longstanding commitment of the city to at-large elections, dating back to 1911. Despite the removal of barriers to registration and voting, blacks still suffered from the effects of past discrimination, one bit of evidence in this regard being the persistence of white bloc voting. Enhancing factors noted under the *Zimmer* criteria included not only a majority vote and a place requirement, but also the absence of a subdistrict residency requirement and the large size of the city. The district court, declaring the existing at-large scheme unconstitutional, ordered the establishment of a strong mayor-council plan, with nine councilors to be elected from wards, in place of the commission plan.[77]

In its treatment of the case on appeal, a panel of the Fifth Circuit Court of Appeals gave special attention to the city's claim that the enactment of the at-large plan in 1911 insulated it from attack as racially motivated.[78] The panel, following *Nevett II*, reiterated

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75. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973).
76. *Bolden [I]*, 423 F. Supp. at 388.
77. 423 F. Supp. 384.
78. *Bolden [I]*, 571 F.2d 238, 245-46 (5th Cir. 1978).

that intent could be inferred from the *Zimmer* criteria and, in addition, cited some direct evidence of intent in the maintenance of the at-large plan. In particular, the panel noted a 1965 act of the Alabama legislature that assigned specific duties to each position on the commission. The city sought preclearance for the act under section 5 of the Voting Rights Act ten years later—after the dilution litigation began. The Attorney General, seeing the modification as an effort to enhance the impact of the at-large system in diluting minority voting strength, rejected the change in 1976.[79] Finally, the panel approved the district court's unusual remedy and, in doing so, observed the city's refusal to offer a plan of its own.[80]

While the suit against Mobile's city commission worked its way through the district and appellate courts, black voters brought a parallel action against at-large elections of county and school commissioners.[81] The suit against the county was tried several weeks after the one against the city, by the same judge. The district court in separate opinions found the at-large election of the three-member county commission[82] and the five-member school commission[83] to be unconstitutional, and in each instance ordered the implementation of a plan for single-member districts. The county commission did not appeal the ruling against its at-large system, whereas the school commissioners appealed to the Fifth Circuit, which affirmed the district court's decision without issuing a formal opinion.[84]

The findings in the district court's opinion in the Mobile County School Board case[85] closely resembled those in the case against the city. The five-member board was elected at-large to numbered positions; a majority vote rule applied to the primary election only, and no district residency rule existed. The judge also observed that the large size of the county—its population exceeded 317,000—was a barrier to minority candidacies.[86] Although blacks comprised

79. *Id.*

80. *Id.* at 246-47.

81. Brown v. Moore, 428 F. Supp. 1123 (S.D. Ala. 1976), *aff'd*, 582 F.2d 927 (5th Cir. 1978), *vacated and remanded, sub nom.* Williams v. Brown, 446 U.S. 236 (1980) (per curiam).

82. Brown v. Board of School Comm'rs, No. 75-298 P (S.D. Ala. Mar. 2, 1977).

83. Brown v. Moore, 428 F. Supp. 1123.

84. Brown v. Moore, 582 F.2d 927 (5th Cir. 1978).

85. 428 F. Supp. 1123.

86. This finding was made by the district court in *Bolden [I]*, 423 F. Supp. 384 (S.D. Ala. 1976), and was adopted by the court in Brown v. Moore, 428 F. Supp. at 1126.

one-third of the county's population, no black had been elected to the board and voting patterns were strongly polarized along racial lines. The board's discriminatory employment policies and resistance to court ordered desegregation of the school system demonstrated unresponsiveness and also illustrated the continuing effects of past discrimination. The school board's at-large plan originated in 1826, and the court found no tenuous state policy behind the at-large elections.[87]

The school board case was then appealed to the United States Supreme Court, under the name *Williams v. Brown*,[88] and consolidated for oral argument with the city's appeal of *Bolden [I]*.[89] On the same day that the Supreme Court issued its controversial ruling in *Bolden [I]*, it vacated the lower court's holding in *Brown* and remanded the school board suit for reconsideration in light of its decision in the city's case.[90]

In *Bolden [I]*, Justice Stewart's plurality opinion assessed the grounds on which a dilution claim could be made out. Appellees claimed that Mobile's election system violated the fourteenth and fifteenth amendments and section 2 of the Voting Rights Act. The plurality view held that under a claim of dilution—whether predicated on the equal protection clause of the fourteenth amendment or on the fifteenth amendment's prohibition against racial discrimination against the exercise of the right to vote[91]—"an illicit purpose must be proved before a constitutional violation can be found."[92] The plurality dismissed the fifteenth amendment and section 2 claims, first finding that section 2 of the Voting Rights Act had "an effect no different from that of the fifteenth amend-

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87. 428 F. Supp. at 1126-32.

88. 446 U.S. 236 (1980) (per curiam).

89. City of Mobile v. Bolden [I], 446 U.S. 55 (1979).

90. 446 U.S. 236. Justices Brennan, White, and Marshall dissented; Justice Blackmun concurred in the vacation of the judgment but noted that he would have affirmed the judgment of the court of appeals had the case been decided on its merits. Even though the judgment against the school board had been vacated, the district court's order for single-member districts continued to be implemented, at least through the 1980 elections. (The election of members for ward seats was to be phased in so that two persons would be elected in 1978, one in 1980, and two more in 1982.) In Moore v. Brown, 448 U.S. 1335 (Powell, Circuit Justice, 1980), Justice Powell denied an application for a stay of the district court's preliminary injunction mandating that the 1980 election be held under the ward plan as scheduled. He was, however, openly critical of the district court's action.

91. *Bolden [I]*, 446 U.S. at 62.

92. *Id.* at 67 (citing Washington v. Davis, 426 U.S. 229 (1976), and Wright v. Rockefeller, 376 U.S. 52 (1964)).

ment itself"[93] and therefore "add[ed] nothing to appellees' fifteenth amendment claim."[94] But, because the district court found that "Negroes in Mobile 'register and vote without hindrance,' "[95] there was no proof of "purposefully discriminatory denial or abridgment by government of the *freedom to vote* 'on account of race, color, or previous condition of servitude' "[96] and thus no fifteenth amendment violation.

Having restricted the dilution issue to fourteenth amendment grounds, the plurality proceeded to launch a frontal assault on the *Zimmer* factors that had governed the lower courts' consideration of the case. These factors might "afford some evidence of a discriminatory purpose, [but] were most assuredly insufficient to prove an unconstitutionally discriminatory purpose in the present case."[97] Justice Stewart's opinion noted with regard to the first *Zimmer* factor—access to the political process—that there were no official barriers to black candidates running for election to the city commission.[98] On the factor of responsiveness to the interests of the black minority,[99] the plurality view suggested that discrimination in municipal employment and services constituted only "the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which [the commissioners] attained their offices."[100] The plurality also minimized the significance of Mobile's record of past discrimination in evaluating the impact of the current at-large system.[101]

The principal weakness in the district court's opinion, according to the plurality, was its failure to undertake a systematic investigation of official discriminatory intent in the creation or maintenance of the at-large system. Indeed, the district court did not "identify the state officials whose intent it considered relevant";[102] and Justice Stewart wondered whether "the inquiry should properly focus on the state legislature."[103] Relying on *Personnel Administrator v.*

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93. 446 U.S. at 61.
94. *Id.*
95. *Id.* at 65.
96. *Id.* (emphasis added).
97. *Id.* at 73.
98. *Id.* at 74.
99. *See supra* text accompanying note 77.
100. *Bolden [I]*, 446 U.S. at 74.
101. *Id.*
102. *Id.* at 74 n.20.
103. *Id.* at 74 nn.20 & 21.

Feeney,[104] the plurality maintained that intent amounted to more than "awareness of consequences"; a showing of intent would require that the at-large system was chosen "because of" its adverse impact on blacks.[105] Thus, they specifically rejected the district court's contention that the state legislature, in creating the at-large system in 1911 when most blacks were prevented from voting, could have anticipated that blacks would one day be enfrancised and that at-large elections would limit their influence.[106]

Justice Stevens' concurring opinion in *Bolden [I]*[107] rejected both the *Zimmer* standards of the lower courts and the intent test of the plurality. In his view, virtually all districting arrangements advantaged some segments of the population and disadvantaged others. All groups of voters, whether classified according to racial or political characteristics, are entitled to the same degree of protection under the fourteenth and fifteenth amendments. Therefore, defining dilution in terms of impact or intent would involve the courts in the supervision of countless electoral systems because differential effect or invidious motive will almost always be present.[108] Justice Stevens, therefore, proposed to limit judicial intervention to those instances in which a gerrymander or at-large election was clearly not the result of a "routine" political decision, but "had a significant adverse impact on a minority group . . . [and] was unsupported by any neutral justification."[109] While he believed that Mobile's at-large system received support "from members of the white majority who are motivated by a desire to make it more difficult for members of the black minority to serve in positions of responsibility in city government,"[110] he asserted that such an invidious motive could not invalidate a system which represented "otherwise legitimate political choices."[111] Justice Stevens noted that "Mobile's basic election system is the same as that followed by literally thousands"[112] of local governments.

Joining Justice Stevens and the four-member plurality to form the six-man majority in *Bolden [I]*, Justice Blackmun concurred

104. 442 U.S. 256 (1979).
105. *Bolden [I]*, 446 U.S. at 71-72 n.17.
106. *Id. See Bolden [I]*, 423 F. Supp. 384, 397 (S.D. Ala. 1976).
107. 446 U.S. at 83 (Stevens, J., concurring).
108. *Id.* at 90.
109. *Id.*
110. *Id.* at 92.
111. *Id.*
112. *Id.*

only in the result of the case.[113] Agreeing with Justice White that Mobile's at-large system invidiously discriminated against black voters, Justice Blackmun voted to reverse the lower court's judgment because of what he regarded as an extraordinary abuse of remedial discretion by the district court in disestablishing Mobile's city commission.[114]

Justice White's dissenting opinion in *Bolden [I]*, in contrast to the opinions of the plurality and Justice Stevens, found the lower court's findings of fact and conclusions of law to be wholly consistent with previous Supreme Court rulings.[115] The so-called *Zimmer* criteria, in Justice White's view, accurately catalog the evidentiary findings set out in *White*[116] and *Whitcomb.*[117] Moreover, the court of appeals, following *Washington*[118] and *Arlington Heights*,[119] had correctly observed that successful dilution claims require a showing of intent.[120] Such intent could be properly inferred from the totality of circumstances revealed through the *Zimmer* analysis.[121] The evidence of purposeful discrimination in *Bolden [I]* was "even more compelling" than in *White*, and more than sufficient to establish a violation of the fourteenth and fifteenth amendments.[122]

Both Justices Brennan and Marshall, who filed separate dissenting opinions, agreed with Justice White that discriminatory intent had been adequately demonstrated in *Bolden [I]*.[123] Neither Justice Brennan nor Justice Marshall, however, believed that a showing of intent was necessary; for each, proof of discriminatory impact was sufficient to render an at-large system unconstitutional.[124]

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113. *Id.* at 80 (Blackmun, J., concurring).

114. *Id.* at 82.

115. *Id.* at 94 (White, J., dissenting).

116. White v. Regester, 412 U.S. 755 (1973). In *White*, the Court unanimously held that the use of multimember districts for the election of state legislators in two Texas counties violated the equal protection clause because they excluded Negroes and Mexican-Americans from effective political participation. *Id.*

117. Whitcomb v. Chavis, 403 U.S. 124 (1971), recognized that multimember districting schemes could constitute invidious discrimination "where the circumstances . . . may 'operate to minimize or cancel out the voting strength of racial or political elements of the voting population.'" *Id.* at 143 (quoting Fortson v. Dorsey, 379 U.S. 433, 439 (1965)).

118. Washington v. Davis, 426 U.S. 229 (1976).

119. Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

120. *Bolden [I]*, 446 U.S. 55, 100 (1979).

121. *Id.* at 101-02 (White, J., dissenting).

122. *Id.* at 103.

123. *Id.* at 94 (Brennan, J., dissenting); *id.* at 94 (White, J., dissenting); *id.* at 103 (Marshall, J., dissenting).

124. *Id.* at 94 (Brennan, J., dissenting); *id.* at 104 (Marshall, J., dissenting).

Justice Marshall's lengthy dissent tied vote dilution cases to the branch of equal protection law dealing with fundamental rights—in *Bolden [I]*, the "right to equal electoral participation."[125] In such fundamental rights cases, only discriminatory impact is required in order to show a constitutional violation. In contrast, a showing of intent would be required under the suspect classification branch of equal protection cases, of which *Washington* was an example. Thus, according to Justice Marshall, the plurality had applied the wrong standard to the evaluation of Mobile's at-large system and in the process had misinterpreted *White*,[126] threatening to convert the right of minority group members to vote into "the right to cast meaningless ballots."[127] Dismissing the contention of the plurality that his views amounted to an endorsement of proportional representation, Justice Marshall proposed a test of dilution applicable to discrimination against racial or political groups—but circumstantially more likely to apply to racial minorities. "The vote-dilution doctrine can logically apply only to groups whose electoral discreteness and insularity allow dominant political factions to ignore them."[128] Thus, he noted:

> Unconstitutional vote dilution occurs only when a discrete political minority whose voting strength is diminished by a districting scheme proves that historical and social factors render it largely incapable of effectively utilizing alternative avenues of influencing public policy . . . . In these circumstances, the only means of breaking down the barriers encasing the political arena is to structure the electoral districting so that the minority has a fair opportunity to elect candidates of its choice.
>
> The test for unconstitutional vote dilution, then, looks only to the discriminatory effects of the combination of an electoral structure and historical and social factors. At the same time, it requires electoral minorities to prove far more than mere lack of success at the polls.[129]

Although only Justice Brennan clearly embraced Justice Marshall's argument for an effects analysis of dilution cases, the remaining justices hardly offered crystal clear support for an intent test. Justice Blackmun hedged on the question of whether a show-

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125. *Id.* at 113-14 (Marshall, J., dissenting).
126. *Id.* at 114.
127. *Id.* at 104.
128. *Id.* at 122.
129. *Id.* at 111-12 n.7.

ing of intent was required, while Justice Stevens, as noted, expressed dissatisfaction with both the intent and effects tests. Justice White accepted the plurality's view that intent was a necessary element in successful dilution cases, but rejected the plurality's evidentiary requirements for intent.

The *Bolden [I]* decision also spawned some confusion regarding the legal foundation of dilution claims. While the plurality opined that *Bolden [I]* did not raise a fifteenth amendment claim, three justices (Stevens, White, and Marshall) asserted that the case properly raised a fifteenth amendment claim.[130] Justices Blackmun and Brennan failed to address the issue of the application of the fifteenth amendment. The plurality, along with Justice Marshall, read section 2 of the Voting Rights Act as coterminous with the fifteenth amendment but, of course, differed over what relevance either section 2 or the fifteenth amendment might have for dilution cases;[131] the other three justices did not speak to the section 2 issue.

Although the Supreme Court's split decision in *Bolden [I]* left several important issues unresolved, on balance the Court's holding seemed to call for a showing of intentional discrimination in the creation or maintenance of an at-large system amounting to more than an inference from the aggregate of *Zimmer* factors. The precise impact of *Bolden [I]* on the course of dilution suits cannot be assessed solely by scanning the legal opinions of cases decided after the Supreme Court's decision. According to the Senate Judiciary Committee's Report on the 1982 Voting Rights Act Extension, "after *Bolden [I]* litigators virtually stopped filing new voting dilution cases. Moreover, the decision had a direct impact on voting dilution cases that were making their way through the federal judicial system."[132] As evidence of the drastic change worked by *Bolden [I]*, the Committee cited *McCain v. Lybrand*,[133] a case involving a challenge to at-large election of a five-member council in Edgefield County, South Carolina. Although blacks comprised a slight majority of Edgefield County's population and nearly 40 per-

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130. *Id.* at 129 n.26.

131. *Id.* at 105 n.2. *See* Washington v. Finlay, 664 F.2d 913, 919 n.3 (4th Cir. 1981). *See also* Comment, *The Standard of Proof in At-Large Vote Dilution Discrimination Cases After City of Mobile v. Bolden*, 10 FORDHAM URB. L.J. 103, 113-14 nn.38-41 (1981).

132. S. REP. No. 97-417, *supra* note 21, at 26.

133. No. 74-281 (D.S.C. Apr. 17, 1980), *reprinted in House Hearings*, *supra* note 21, at 302.

cent of registered voters, no black had ever been elected to the council and the district court, applying the criteria of *White* and *Zimmer*, found the at-large form unconstitutional. Less than one week after the district court's decision, the Supreme Court ruled in *Bolden [I]*; and the district court subsequently reversed its earlier opinion, finding that the at-large plan in Edgefield County was not rooted in intentional discrimination.[134]

Beyond *McCain*, the effects of *Bolden [I]* on ongoing litigation against at-large systems are more difficult to sort out. Minority plaintiffs, for instance, have succeeded in so-called "smoking gun"[135] cases, where specific evidence of racially discriminatory motive was at hand. In *McMillan v. Escambia County*,[136] a suit in Florida against at-large elections for Pensacola city council and for Escambia County commissioners and school board members, the facts followed the pattern of the Albany, Georgia, litigation described earlier,[137] where the adoption of at-large elections followed closely in time a significant expansion of black voting strength. In another case, *Perkins v. City of West Helena*,[138] the Eighth Circuit Court of Appeals adduced direct evidence of discriminatory intent in the circumstances surrounding the failure of city council to proceed with a referendum on a ward electoral system.

In still another case, *Lodge v. Buxton*,[139] the Fifth Circuit Court of Appeals affirmed the district court's ruling against an at-large electoral system in Burke County, Georgia. Unlike the *McMillan* and *Perkins* cases, *Lodge* presented no direct evidence of intent; instead, the district court, following *Nevett II*,[140] had inferred intent from factual findings relating to the *Zimmer* criteria. The *Lodge* ruling, however, seemed to be an exception to the rule that specific evidence of intent had to be provided in a successful dilu-

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134. McCain v. Lybrand, No. 74-281 (D.S.C. Aug. 11, 1980), *reprinted in House Hearings, supra* note 21, at 302. In the August 11, 1980, order, the district court simply vacated its April 17, 1980, ruling; however, the last page of the April 17, 1980, ruling was inadvertently printed in the *House Hearings. See House Hearings, supra* note 21, at 325-26.

135. For specific reference to "smoking gun"—a legacy of the Watergate era, see Lodge v. Buxton, 639 F.2d 1358, 1363 n.8 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982); S. REP. No. 97-417, *supra* note 21, at 38.

136. 638 F.2d 1239, *appeal dismissed under Rule 53, sub nom.* City of Pensacola v. Jenkins, 453 U.S. 946, *vacated*, 688 F.2d 960 (5th Cir. 1981).

137. *See supra* text accompanying note 50.

138. 675 F.2d 201 (8th Cir. 1982). *See supra* note 32.

139. 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982).

140. Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978).

tion case.[141]

C. *Congress and Section 2*

While *Bolden [I]* did not foreclose vote dilution suits altogether, the ruling undoubtedly made success in such actions much less likely and, equally important, as Judge Goldberg of the Fifth Circuit rather bitterly suggested, "[cast] aside the ten years of thought, experience, and struggle embodied within [the *Zimmer* test]."[142] What Judge Goldberg called the "jurisprudence produced by ten years of struggle and compromise,"[143] however, was resurrected when the Ninety-seventh Congress, in enacting the Voting Rights Act Amendments of 1982, modified section 2 of the Act in order "to restore the pre-*Bolden [I]* understanding of the proper

141. On the same day (March 20, 1981) that the Fifth Circuit Court of Appeals decided Lodge v. Buxton, 639 F.2d 1358, it decided two other dilution cases. In Cross v. Baxter, 639 F.2d 1383 (1981), *aff'd on rehearing,* 688 F.2d 279 (5th Cir. 1982), the court affirmed a district court's rejection of a dilution claim against the at-large election of the city council in Moultrie, Georgia. (Blacks made up about 35 percent of the city's population and 26 percent of its registered voters). In the late 1970's one seat on the six-member council had been won by two different blacks in consecutive elections. *See* Cross v. Baxter, 604 F.2d 875 (1979), *aff'd,* 639 F.2d 1383 (1981), *aff'd on rehearing,* 688 F.2d 279 (5th Cir. 1982), in which the court in 1979 reversed and remanded the district court's original dismissal of this suit. A majority vote requirement applicable to city elections was eliminated by a three-judge district court in 1977. *Id.* at 878 n.1. In Thomasville Branch of NAACP v. Thomas County, 639 F.2d 1384 (5th Cir. 1981), the court reversed and remanded for reconsideration in light of *Lodge* a district court judgment for the defendant county. *See supra* text accompanying notes 70-71.

In Corder v. Kirksey, 639 F.2d 1191 (5th Cir. 1981), decided four days before *Lodge,* the court affirmed a lower court ruling in favor of the county commission in Pickens County, Alabama.

In Bailey v. Vining, 514 F. Supp. 452 (M.D. Ga. 1981), a district court relied heavily on the Fifth Circuit's ruling in *Lodge* in striking down at-large elections for the county commission and the board of education in Putnam County, Georgia. The court also invalidated a mixed ward/at-large system in the city of Eatonton, located within Putnam County; the mixed plan had been adopted in order to forestall the dilution suit. A numbered post and majority vote requirement applied to commission and school board elections, while a majority vote requirement applied to city elections (a post requirement covered the city's at-large seats). *Id.* at 457-58. Blacks comprised about 56 percent of the city's population and about half of the county's population. *Id.* at 454. However, "blacks have lost every opposed at-large election in this century." *Id.* at 455. *See also* Jordan v. City of Greenwood, 534 F. Supp. 1351 (N.D. Miss. 1982), in which the district court, following the Supreme Court's holding in *Bolden [I],* rejected a challenge to a three-member commission elected at-large with a number post requirement and a majority vote rule in the primary. Although the city's population was 52 percent black in 1980, no black had ever been elected to the commission since its creation in 1914.

142. Jones v. City of Lubbock, 640 F.2d 777, 777 (1981) (per curiam) (Goldberg, J., specially concurring), *aff'd on rehearing,* 682 F.2d 504 (5th Cir. 1982). For further action in this case, *see infra* note 230.

143. 640 F.2d at 777.

legal standard"[144] for assessing dilution claims.

Although the Subcommittee on Civil and Constitutional Rights of the House Judiciary Committee in seven weeks of hearings on the Voting Rights Act extension devoted only one day of testimony to the question of amending section 2,[145] the parent Judiciary Committee on September 15, 1981, reported out a bill that, among other provisions, inserted a so-called "results test" in the language of section 2. The text of that section, with new language proposed by the House Judiciary Committee in italics and proposed deletions in brackets, is as follows:

> Sec. 2. No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision [to deny or abridge] *in a manner which results in a denial or abridgment of* the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). *The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.*[146]

The House of Representatives approved the revised language of section 2 on October 5, 1982, when it passed H.R. 3112, amending and extending the Voting Rights Act. While revision of section 2 occasioned little debate either in committee or on the floor in the House, the question of whether to amend section 2 dominated hearings in the upper chamber on the Voting Rights Act held during the first two months of 1982 by the Subcommittee on the Constitution of the Senate Judiciary Committee. The Subcommittee reported out a version of the Voting Rights Act extension that retained the existing language of section 2.[147] In so doing, the Sub-

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144. H.R. REP. No. 97-227, *supra* note 21, at 29. Comparable language appears in S. REP. No. 97-417, *supra* note 21, at 27.

145. H.R. REP. No. 97-227, *supra* note 21, at 71 (dissenting views of the Hon. Caldwell Butler). This portrayal is disputed in S. REP. No. 97-417, *supra* note 21, at 27 n.107, which states that "some 30 witnesses" addressed the section 2 issue during the House Hearings.

146. H.R. REP. No. 97-227, *supra* note 21, at 48. Section 4(f)(2) defines the protection accorded language minorities. Voting Rights Act Amendments of 1975, Pub. L. No. 94-73, §4(f)(2), 89 Stat. 400, 401 (amended version, prior to 1982 amendments at 42 U.S.C. § 1973b(f)(2) (1981).

147. SUBCOMM. ON THE CONSTITUTION OF THE SENATE JUDICIARY COMM., THE VOTING RIGHTS ACT., *reprinted in* S. REP. No. 97-417, *supra* note 21, at 107. The Honorable Orrin Hatch, Rep., Utah, chaired the Subcommittee. Subsequent citations are to the Senate Report.

committee expressly embraced the *Bolden [I]* view that a successful vote dilution claim required a showing of racial intent. Moreover, the Subcommittee in its lengthy report, raised the specter of hundreds of suits against at-large systems and other electoral practices across the country if the House language were adopted. Discounting the proviso that the mere absence of proportional representation would be insufficient to sustain a dilution claim, the Subcommittee contended:

> [I]t 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" were present, a violation is likely and court-ordered restructuring of the electoral system almost certain to follow.[148]

The Subcommittee went on to delineate the potential objective factors referred to in the preceding passage.

> A partial list of these "objective factors," gleaned from various sources, includes (1) some history of discrimination; (2) at-large voting systems or multi-member districts; (3) some history of "dual" school systems; (4) cancellation of registration for failure to vote; (5) residency requirements for voters; (6) special requirements for independent or third-party candidates; (7) off-year elections; (8) substantial candidate cost requirements; (9) staggered terms of office; (10) high economic costs associated with registration; (11) disparity in voter registration by race; (12) history of lack of proportional representation; (13) disparity in literacy rates by race; (14) evidence of racial bloc voting; (15) history of English-only ballots; (16) history of poll taxes; (17) disparity in distribution of services by race; (18) numbered electoral posts; (19) prohibitions on single-shot voting; and (20) majority vote requirements.[149]

Notwithstanding the Subcommittee's acerbic rejection of the House revision of section 2, a majority of the parent Judiciary Committee plainly supported the House language. In a well-publicized compromise, however, the full committee adopted a modification of the House version that was designed ostensibly to clarify the House language and ground section 2 on the Supreme Court's

148. S. REP. No. 97-417, *supra* note 21, at 151-52 (footnotes omitted).
149. *Id.* at 143-44 (footnotes omitted).

holding in *White v. Regester*.[150] The Committee's draft of section 2 won the approval of the full Senate when it passed the Voting Rights Act extension on June 18, 1982. Five days later, the House accepted the Senate's language for section 2; and thus the Senate Judiciary Committee's recasting of section 2 became law. Section 2 now reads:

> Section 2. (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.[151]

As noted above, the Senate Judiciary Committee asserted that its revision of section 2 was consistent with *White*, which, in the Committee's view, required no proof of racial motivation in a successful dilution claim. The Committee report contended that the new language of section 2 was designed to guarantee that minority voters have an equal opportunity to participate in the same political process that other citizens enjoy.[152] Proof of a violation of section 2 might include " a variety" of the following factors, according to the Committee report:

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

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150. *Id.* at 27-28.

151. Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, § 2(a)-(b), 96 Stat. 131, 134.

152. *See* S. Rep. No. 97-417, *supra* note 21, at 28.

democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

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

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

whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[153]

The Committee report observed "that there is no requirement that any particular number of factors be proved, or that a majority of them point one way or another."[154] While the report indicated that the Judiciary Committee intended to ease the burden of proof facing minority plaintiffs in dilution cases, it took issue with the Subcommittee's general and specific predictions regarding the outcome of dilution actions. The report concluded that the revised section 2 would not lead to the "wholesale invalidation of electoral structures."[155]

It is important to recognize that in rewriting section 2 both the Senate and House Judiciary Committees invoked the enforcement power of Congress under the fourteenth amendment, as well as the fifteenth amendment.[156] Tying the revised language of section 2 to the fourteenth amendment presumably eliminates any doubt re-

153. *Id.* at 28-29 (footnotes omitted).
154. *Id.* at 29.
155. *Id.* at 31-35.
156. S. REP. No. 97-417, *supra* note 21, at 40; H.R. REP. No. 97-227, *supra* note 21, at 31.

garding the application of section 2 to vote dilution controversies: recall that the plurality in *Bolden [I]* had asserted that the fifteenth amendment did not reach questions of vote dilution (as opposed to denial or abridgment of the individual right to vote) and that section 2 merely restated the fifteenth amendment.[157] Moreover, the grounding of section 2 in the fourteenth amendment makes clear the power of the United States Attorney General to initiate or intervene in litigation involving vote dilution claims, since section 12 of the Voting Rights Act empowers the Attorney General to undertake legal actions to enforce section 2. Prior to the enactment of the Voting Rights Act Amendments of 1982, the authority of the Attorney General to bring such actions had been a matter of some dispute.[158]

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157. *Bolden [I]*, 446 U.S. 55, 60-61 (1980).

158. In United States v. Uvalde Indep. School Dist., 625 F.2d 547 (5th Cir. 1980), *cert. denied*, 451 U.S. 1002 (1981), the court held that the Attorney General could challenge the at-large election of a school board in Uvalde, Texas. The court noted that Congress had invoked its fourteenth amendment enforcement powers in bringing language minority groups under the coverage of the Voting Rights Act in 1975 and in particular to section 2. 625 F.2d 547. Thus, section 2, as amended in 1975, clearly encompassed actions against at-large systems in the view of the Fifth Circuit. *Id.* Since the court saw a clear link between section 2 and the fourteenth amendment, there was no need to resolve the question of whether the fifteenth amendment provided an independent basis for challenging at-large elctions. However, two of the three judges believed that the fifteenth amendment did establish such a basis. *Id.* at 552. *Contra id.* at 556 (Hill, J., specially concurring). The defendant school board appealed, but the Supreme Court denied certiorari. 451 U.S. 1002. Dissenting, Justice Rehnquist asserted that the Attorney General could not bring a dilution action, in part because "Congress based the addition to § 2 on its power to enforce the guarantees of the Fourteenth Amendment in order to ensure the constitutionality of the change, not to allow language minorities to challenge at-large voting districts on grounds of vote dilution." *Id.* at 1005 (Rhenquist, J., dissenting). *See also House Hearings, supra* note 21, at 2034-35 (statement of David F. Walbert); S. Rep. No. 97-417, *supra* note 21, at 17-19; Note, *The Voting Rights Act and Local At-Large Elections*, 67 Va. L. Rev. 1011 (1981).

Aside from *Uvalde*, a number of other cases have addressed the question of whether a dilution claim could be predicated on the fifteenth amendment. An affirmative answer is provided by Perkins v. City of West Helena, 675 F.2d 201, 206 n.5 (8th Cir. 1981), *aff'd*, 51 U.S.L.W. 3252 (U.S. Oct. 4, 1982); Lodge v. Buxton, 639 F.2d 1358, 1372 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, __ U.S. __, 102 S. Ct. 3572 (1982). *Contra* McMillan v. Escambia County, 638 F.2d 1239, 1243 n.9, *appeal dismissed under Rule 53, sub nom.* City of Pensacola v. Jenkins, 453 U.S. 946, *vacated*, 688 F.2d 960 (5th Cir. 1981). *See also* Kirksey v. City of Jackson, 506 F. Supp. 491, 504-06 (S.D. Miss.), *aff'd*, 663 F.2d 659, 664-65 (5th Cir. 1981).

In Rogers v. Lodge, 102 S. Ct. 3272, 3276 n.6 (1982), the Supreme Court "express[ed] no view on the application of the Fifteenth Amendment" to the vote dilution claim against an at-large system presented in that case.

D. Rogers v. Lodge[159]

The alteration of section 2 already has exerted some influence on the Supreme Court's perception of the status of at-large elections. On July 1, 1982, in a six-to-three decision the Supreme Court affirmed the judgment of the Fifth Circuit Court of Appeals that Burke County, Georgia's at-large system for electing its five-member Board of Commissioners violated the fourteenth amendment.[160] Oral arguments for this Supreme Court case had occurred while hearings on the Voting Rights Act were underway in the Senate. Justice Powell, joined by Justice Rehnquist in dissent, argued that the holding with respect to Burke County could not "be reconciled persuasively" with the Court's decision in *Bolden [I]*.[161] Justice Stevens, also dissenting, referred somewhat obliquely to the impact that congressional debate over section 2 may have had on the Court.

> Nor, in my opinion, could there be any doubt about the constitutionality of an amendment to the Voting Rights Act that would require Burke County and other covered jurisdictions to abandon specific kinds of at-large voting schemes that perpetuate the effects of past discrimination. "As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting." . . . It might indeed be wise policy to accelerate the transition of minority groups to a position of political power commensurate with their voting strength by amending the Act to prohibit the use of multi-member districts in all covered jurisdictions.[162]

The six-person majority in *Lodge* included Chief Justice Burger, a convert from the *Bolden [I]* plurality, Justice Blackmun, who had concurred in the result in *Bolden [I]*, and Justice O'Connor, who had replaced Justice Stewart, the author of the plurality opinion in *Bolden [I]*. The other three justices in the *Lodge* majority were Brennan, Marshall, and White, who wrote the Court's opinion; all three had dissented in *Bolden [I]*.

The facts in *Lodge* did not present sharply discernible differences from those in *Bolden [I]*. Blacks constituted about 54 percent of the 19,349 people in Burke County in 1980 and about 38

159. Rogers v. Lodge, __ U.S. __, 102 S. Ct. 3272 (1982).
160. *Id.*
161. *Id.* at 3282 (Powell, J., dissenting).
162. *Id.* at 3283 (Stevens, J., dissenting) (citations omitted).

percent of the county's registered voters in 1978. The at-large electoral plan for the Burke County Board of Commissioners dated back to 1911; the plan imposed a majority vote requirement on both the primary and general elections and required candidates to run for a specific seat on the Board. In the seven decades of the plan's operation, no black had ever been elected to the Board.[163]

As in *Bolden [I]*, the district court in *Lodge*[164] had relied primarily on the *Zimmer*[165] factors in analyzing the evidence before it, although the district court in *Lodge* was able also to draw upon the Fifth Circuit's holdings in *Nevett II*[166] and *Kirksey v. Board of Supervisors*.[167] The district court, thus, found that blacks were denied equal access to the political process by such factors as "the virtual 'lilly-white' Democratic Executive Committee. . . . [and the exclusion of blacks from] the normal course of personal contact politics in Burke County."[168] Evidence of unresponsiveness encompassed the failure of Burke County commissioners to appoint blacks to boards or committees in other than token numbers and the discriminatory delivery of public services, illustrated by the district court's discussion of road paving.

> (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 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

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163. *Id.* at 3274.

164. Lodge v. Buxton, No. 176-55 (S.D. Ga. Oct. 26, 1978), *aff'd*, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982). The district court's order, findings of facts, and conclusions of law are set out in Appellants' Brief (Statement as to Jurisdiction) at 61a, Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982). Subsequent citations to the district court's holding refer to this source.

165. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1981).

166. *Nevett II*, 571 F.2d 209 (5th Cir. 1978).

167. 554 F.2d 139 (5th Cir. 1977), *cert. denied*, 434 U.S. 968 (1977). *See infra* note 236.

168. Lodge v. Buxton, No. 176-55, *supra* note 164, at 88a.

in 1930, it seems as if the road to Palmer Elementary School, formerly an all-black school, and still predominately black, remains unpaved.[169]

The district court found the lingering effects of past discrimination in the depressed voter participation of blacks, the continuing pattern of racial bloc voting, and the depressed socioeconomic status of blacks. While these findings tend to fit the *Zimmer* framework, the district court, relying on *Kirksey*[170] gave great weight to the economic and educational disparities between blacks and whites in Burke County.

> It is clear that Blacks in Burke County have a depressed socioeconomic status, due in part to past discrimination. The fact that a substantial majority of Blacks have incomes of three-fourths, or less than, a poverty level income is an important factor with respect to access both to the machinery of the political processes, and to the social avenues of political access, each of which is most important in this tightly-knit, rural county.[171]

Regarding the enhancing factors of *Zimmer*, the district court cited the majority vote and place requirements. Furthermore, it noted that the lack of a ward residency requirement and the very large size of the county (832 square miles, or close to two-thirds the area of Rhode Island) made "it more difficult for Blacks to get to polling places or to campaign for office."[172]

Writing for the Supreme Court's majority in *Lodge*, Justice White deferred to the district court's findings of fact and held that on the basis of such a finding the district court had properly inferred that Burke County's at-large system was being maintained for a discriminatory purpose.[173] Indeed, Justice White indicated that the inference of intent was itself a factual finding that the Court ought not to disturb unless such findings were clearly erroneous.[174] Remarkably, despite the caustic language used by the *Bolden [I]* plurality to describe the *Zimmer* criteria, Justice White agreed with the Fifth Circuit Court of Appeals, that the district

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169. *Id.* at 79a-88a.
170. *Kirksey*, 554 F.2d at 139.
171. Lodge v. Buxton, No. 176-55, *supra* note 164, at 95a.
172. *Id.* at 91a.
173. Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272, 3278 (1982).
174. *Id.*

court's application of the *Zimmer* standards to the facts of *Lodge* had been proper and had given due regard to the question of intent.[175]

The grounds on which *Lodge* might be distinguished from *Bolden [I]* are not altogether clear, as the dissenting opinion of Justice Powell noted.[176] Justice White, in fact, makes little, if any, effort to distinguish the two cases. However, *Lodge* might be distinguished from *Bolden [I]* in at least five substantive ways: (1) blacks constituted a majority of the population in Burke County (versus one-third of the population in Mobile); (2) the geographic size of Burke County might be regarded as an impediment to participation not present in Mobile; (3) the record of discrimination in *Lodge* (such as the remains of the "Nigger-hooks" at the courthouse)[177] might be more compelling than the facts in Mobile; (4) socio-economic disparities between blacks and whites might be more severe in Burke County than in Mobile; and (5) the Burke County Board might not engage in the joint exercise of executive and legislative authority to the extent that the Mobile city commission does.

Taken either individually or collectively, these distinctions seem of little import. Indeed, it is difficult to resist the conclusion that in *Lodge* the Supreme Court overruled *Bolden [I]* sub silentio. In his dissenting opinion, Justice Stevens reiterated and elaborated upon themes that he had advanced in *Bolden [I]*.[178] His argument, stripped to its essentials, is this: both *Bolden [I]* and *Lodge* indicate that certain electoral practices, otherwise constitutional, can be rendered unconstitutional by the "subjective motivations" of the officials who adopt or who refuse to modify such procedures.[179] If every racial and political minority were to be accorded protection against the practices complained of in *Lodge*, the Court would be "entering a vast wonderland of judicial review of political activity,"[180] since the Court could determine the validity of a given electoral practice only by examining the context in which it was employed.[181] The Court can avoid this wonderland, according to

175. *Id.*
176. *Id.* at 3282 (Powell, J., dissenting).
177. Lodge v. Buxton, No. 176-55, *supra* note 164, at 77a.
178. Rogers v. Lodge, 102 S. Ct. at 3282-83 (Stevens, J., dissenting).
179. *Id.* at 3286.
180. *Id.* at 3292.
181. *Id.*

Justice Stevens, only by limiting the scope of constitutional protection against dilution to racial minorities. This path he rejects, for "[a] constitutional standard that gave special protection to political groups identified by racial characteristics would be inconsistent with the basic tenet of the Equal Protection Clause."[182]

A better solution, in Justice Stevens' view, would be to identify "specific features" of local governmental structure "that raise constitutional concerns and decide whether, singly or in combination, they are valid."[183] The Court has followed this approach with regard to such issues as burdens imposed on independent candidates and "requiring political candidates to pay filing fees."[184] Once a practice, however, is determined to be unconstitutional, "the objective circumstances that led to [that] declaration . . . would invalidate a similar law wherever it might be found."[185] Justice Stevens cites the poll tax as an example, noting that *Harper v. Virginia Board of Elections* held that " 'a State violates the Equal Protection Clause . . . whenever it makes the affluence of the voter or payment of any fee an electoral standard.' "[186] He goes on to assert that *Lodge* need not address the issue of at-large elections.

> For it is apparent that elimination of the majority run-off requirement and the numbered posts would enable a well-organized minority to elect one or two candidates to the county board. That consequence could be achieved without replacing the at-large system itself with five single-member districts. In other words, minority access to the political process could be effected by invalidating specific rules that impede that access and without changing the basic structure of the local government unit.[187]

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182. *Id.* at 3293.

183. *Id.* at 3285.

184. *Id.*

185. *Id.* at 3286.

186. *Id.* at 3285 n.9 (quoting Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966)).

187. 102 S. Ct. at 3288 n.22 (Stevens, J., dissenting). Justice Powell's dissenting opinion appears to stake a middle ground between Justice Stevens' position and the majority's interpretation. Justice Powell suggests that the intent standard of *Bolden [I]* be retained, but that the presence of "objective factors," as noted by Justice Stevens, be used as indicia of intent. *Id.* at 3282 (Powell, J., dissenting). Apparently this means that the enhancing factors of *Zimmer*—such as the use of a place rule or a majority vote requirement—would provide the key to the determination of invidious purpose.

IV. Vote Dilution: The Search for Manageable Standards

A. *Results versus Intent: A Brief Review of Cases*

Justice Stevens' concern with the failure of the Supreme Court's majority in *Lodge* to set out manageable standards for assessing dilution, as noted, derives from his view that neither the results-oriented approach of *Zimmer* nor the intent-focused analysis of *Bolden [I]* offers much guidance to courts trying dilution cases. From this perspective, the highly publicized 1982 Senate debate over whether section 2 of the Voting Rights Act should embrace an intent test or a results test failed to come to grips with the evident deficiencies of both tests. Indeed, a selective examination of cases decided according to the *Zimmer* criteria and to the intent test of *Bolden [I]* reveals a remarkable degree of inconsistency among judges in the application of law and evidentiary standards.

Cases involving the application of the *Zimmer* criteria to the assessment of at-large systems reveal two major weaknesses in the results-oriented approach. The first problem relates to the subjectivity of each of the factors, taken alone, under a *Zimmer* or other results-type analysis. Responsiveness, for instance, has proved to be a particularly elusive concept. Consider, for example, *Kirksey v. City of Jackson*[188]—an unsuccessful challenge to at-large elections for a three-member city commission to which blacks, who comprised two-fifths of the city's population, had never been elected. In this case, the district court considered in detail an extensive array of policies, including appointments and employment in city government, planning, zoning, street resurfacing and lighting, fire protection, and parks. The court, while recognizing extensive discrimination in city policies through the late 1960's and early 1970's, emphasized a growing responsiveness by the city to minority needs. For example, the judge observed:

> Although the defendants concede that the percentage of black employees does not equate [sic] the percentage of black population . . . and do not deny that the above three employment discrimination suits have "produced results," . . . they nevertheless point out that the city did voluntarily enter into consent decrees in each of the above three cases and that these consent decrees have produced a dramatically favorable hiring increase of blacks.[189]

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188. 461 F. Supp. 1282 (S.D. Miss. 1978), *vacated and remanded*, 625 F.2d 21 (5th Cir. 1980). *See infra* note 208.

189. 461 F. Supp. at 1295.

This interpretation of responsiveness contrasts sharply with that of the district court in *Hendrix v. McKinney*,[190] which found dilution in the at-large election of commissioners in Montgomery County, Alabama.

> While the percentage of blacks employed has increased, they remain assigned for the most part to low paying and unskilled positions. Defendants contend that, despite this slow progress, the Commission is in compliance with the court order. Compliance, however, does not necessarily prove responsiveness. The fact that the Commission continues to operate under court order proves the contrary.[191]

The ambiguity of the responsiveness criterion was criticized by the plurality in *Bolden [I]* and led the Senate Judiciary Committee to place responsiveness far down the list of factors relevant to the adjudication of at-large systems under section 2. In fact, the Committee rejected the view of the Fifth Circuit Court of Appeals in *Lodge v. Buxton* that a showing of nonresponsiveness was an essential element in a successful dilution suit.[192]

The subjectivity of the responsiveness factor is a weakness shared by nearly all of the evidentiary criteria considered under *Zimmer* and under the Senate Judiciary Committee's revised list. The reason for this pervasive subjectivity is not that responsiveness or political access or lingering effects of past discrimination cannot be demonstrated by reference to objective circumstances or facts. On the contrary, nonresponsiveness, however vague in theory, can be readily reduced to evidentiary requirements of employment data, road paving practices, and the record of civil rights litigation against the jurisdiction in question. Denial of political access can be reduced to quantifiable data on the number of minority candidates elected, differential levels of black and white voter registration, and various measures of racially-polarized bloc voting. However, these numbers or facts do not speak for themselves, for both the results test of *Zimmer* and the somewhat different version of the results test in section 2 confer upon district court judges immense discretion in evaluating the legality of at-

190. 460 F. Supp. 626 (M.D. Ala. 1978).
191. *Id.* at 632.
192. Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981). *See* S. Rep. No. 97-417, *supra* note 21.

large systems.[193]

Indeed, the second and more important problem with a results-oriented analysis is that no particular set of data, facts, or circumstances make out a showing of dilution under an at-large system, since a judge is to base his or her decision on the "aggregate of factors" or "totality of circumstances." The flexibility of the "totality of circumstances" doctrine can be illustrated by brief reference to three cases.

In 1977, the Fifth Circuit Court of Appeals affirmed a district court holding of unconstitutional dilution in the maintenance of at-large elections for city council in Dallas, Texas. In *Lipscomb v. Wise*,[194] the court found city policies responsive to blacks and Hispanics who comprised 25 percent and 8 to 10 percent, respectively, of the city's population. The at-large plan dated to 1907 and so was not rooted in tenuous state policy. The facts, however, satisfied the criteria of denial of access and lingering effects of past discrimination.[195]

In *Zimmer*, the facts did not show unequivocally that the challenged at-large system diluted black electoral strength.[196] Elections for three of the nine school board seats in 1972, for example, produced two black winners. However, the majority opinion in the case did not believe such evidence foreclosed the possibility of dilution.

> Such success might, on occasion, be attributable to the work of politicians who, apprehending that the support of a black candidate would be politically expedient, campaign to insure his election. Or such success might be attributable to political support motivated by different considerations—namely that election of a black candidate

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193. The extent of racially polarized bloc voting, for example, can be demonstrated by a variety of statistical measures. *House Hearings, supra* note 21, at 541-43 (statement of Frank L. Parker). But various courts disagree about how sharply voting patterns of white and black neighborhoods must diverge before bloc voting becomes probative evidence of dilution. *See, e.g.*, Washington v. Finley, 664 F.2d 913, 918 (4th Cir. 1981); McMillan v. Escambia County, 638 F.2d 1239, 1241-42 n.6 (1981), *appeal dismissed under Rule 53, sub nom.* City of Pensacola v. Jenkins, 453 U.S. 946, *vacated*, 688 F.2d 960 (5th Cir. 1981); City of Port Arthur v. United States, 517 F. Supp. 987, 1007 n.136 (D.D.C. 1981), *aff'd*, 51 U.S.L.W. 4033 (U.S. Dec. 13, 1982); Mosely v. Sadler, 469 F. Supp. 563, 568 (E.D. Tex. 1979).

194. 551 F.2d 1043 (5th Cir. 1977).

195. Only two blacks had been elected since 1907; voting was racially polarized; and a slating group controlled electoral success. *Id.*

196. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1981).

would thwart successful challenges to electoral schemes on dilution grounds.[197]

The court's observation underscores the looseness of the "aggregate of factors" concept, a fact which becomes more apparent in unsuccessful dilution challenges. In *Blacks United for Lasting Leadership, Inc. v. City of Shreveport*,[198] decided by the Fifth Circuit Court of Appeals on the same day as *Nevett II*,[199] the court reversed a district court's holding that at-large election of a five-member commission resulted in unconstitutional dilution of the black vote. In a city in which blacks comprised about one-third of a population of 182,000, no black had been elected to the governing commission. The appellate court noted, however, that white candidates sought the support of black voters. The underrepresentation of blacks in city employment and the evidence of discrimination against black neighborhoods in street maintenance were offset by a new responsiveness by city officials to minority needs. The panel noted the failure of the district court to show how past discrimination limited present participation by blacks. The court remanded the case for further findings of fact, although a dissent argued that the necessary proof for dilution had been established.[200]

While these examples suggest that a results-oriented analysis leaves too much discretion in the hands of district and appellate court judges, it is plain that the intent standard set out by the Supreme Court in *Bolden [I]* is an even more amorphous guide to adjudication of at-large systems than the effects approach of *Zimmer* or *White*. A major shortcoming in a dilution analysis that relies heavily if not exclusively on the demonstrable motivation underlying the choice or maintenance of a particular electoral system is that the legality of a given at-large system is made to depend upon the politics of its adoption and not on its objective impact.

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197. *Id.* at 1307.

198. 571 F.2d 248 (5th Cir. 1978).

199. *Nevett II*, 571 F.2d 209 (5th Cir. 1978).

200. 571 F.2d at 255-57 (Wisdom, J., dissenting). It should be noted that on May 17, 1978,—less than two weeks after the circuit court's ruling—Shreveport voters approved by a two-to-one margin a referendum that established a mayor-council form of government with a seven member council to be elected from single-member districts. Correspondence from Dianne Lee, Deputy Clerk, City of Shreveport (June 5, 1981). The switch from at-large to ward elections was a condition of the Justice Department's withdrawal of a 1976 objection (under section 5 of the Voting Rights Act) to annexations having a dilutive effect on black voting strength. *See* Cotrell & Stevens, *The 1975 Voting Rights Act, Annexation Policy and Growth in the Sunbelt*, 3 URB. L. REV. 1, 25 (1979).

Thus, an at-large system instituted after the court-ordered elimination of the white primary—as in the Albany, Georgia, case noted earlier—may be more vulnerable to legal challenge than a second system adopted under race-neutral circumstances. This would hold true even though the nature of race-neutral circumstances might have been total disenfranchisement of blacks and even though the second jurisdiction might permit less present electoral opportunity for blacks than the first system.

In *McMillan v. Escambia County*[201] a Fifth Circuit panel ruled in 1981 that the at-large election of the county school board had been adopted in 1947 with impermissible racial motive in response to the elimination of the white primary in 1945.[202] The panel also invalidated at-large elections for city council in Pensacola, largely on the basis of evidence that a change from a mixed ward/ at-large system to at-large elections was motivated by a desire to curb growing black electoral strength in one of the wards. Adoption of an at-large scheme for the county commission in 1901, however, survived court scrutiny; and the panel upheld the present electoral format for the commission. This somewhat anomalous result was reached even though many of the objective circumstances relating to elections to the school board, county commission, and city council were similar, if not identical. Blacks constituted one-fifth of the county population, yet no black had been elected to the five-member commission or seven-member school board. A party primary with a majority vote requirement applied to both the five-member commission and the seven-member school board, while residency requirements affected all five commission seats and five of the seven board seats. The black proportion of the city's population amounted to one-third. Candidates for the ten-member council ran for specific posts based on residency in one of the city's five wards, and general elections carried a majority vote requirement. Following appointment to city council, two blacks subsequently won elections to retain their seats.[203] Racial bloc voting apparently characterized races for the city council, the school board, and the county commission. While the facts relating to these cases admit to more complexity than this brief analysis would suggest, they do illus-

201. 638 F.2d 1239 (5th Cir.), *appeal dismissed under Rule 53, sub nom.* City of Pensacola v. Jenkins, 453 U.S. 946 (1981), *vacated*, 688 F.2d 960 (5th Cir. 1982).
202. 638 F.2d at 1245-47.
203. 638 F.2d 1239.

trate the mischief bred by the intent standard.[204]

The opinions of the district court in the second round of litigation against the city commission in Mobile and the school board in Mobile County further illustrate the problems associated with the search for intent in vote dilution cases. In each case, the retrial focused on the question of whether the at-large system in question had been created with official intent to discriminate against black voters. What made these proceedings so remarkable is that the search for invidious motivation spanned virtually the entire history of Alabama as a state because the use of at-large elections of the school boards dated back to an 1826 state statute, and the first adoption of at-large elections for the city occurred with initial incorporation under Alabama law in 1819.[205]

In the city's case,[206] however, the record showed that from 1828 until 1868 the city utilized ward elections or a combination of ward and at-large elections for the city council, which was bicameral for much of this period. The district court's salient findings regarding discriminatory intent in the city's case are set out in the following passage.

> [T]he court finds first that the 1870 Act was implemented at the local level, and its ambiguities resolved, with the design to eliminate black influence on municipal elections. During the period 1874 to 1907, white supremacist Democrats controlled legislative and municipal positions. All Mobile elections were conducted at-large, though the Democrats selected their candidates by ward with only whites voting. The at-large elections were utilized to negate black influence. The 1901 Alabama Constitution had as a principal purpose the disfranchisement of blacks, the natural and intended consequence of which was to preclude black office holding. That purpose was in general successful, so that most black voting had been eliminated by 1907. The 1908 ward elections in Mobile, however, demonstrated that the remaining black voters had some influence in black wards.[207]

The court went on to describe the 1911 statute setting up Mobile's

204. Following the Supreme Court's decision in *Lodge*, 102 S. Ct. 3272, the Fifth Circuit vacated its holding in the Escambia County Commission case. McMillan v. Escambia County, 688 F.2d 960 (5th Cir. 1982). For further discussion of this case, see *infra* note 230.

205. Brown v. Board of School Comm'rs, 542 F. Supp. 1078 (S.D. Ala. 1982).

206. *Bolden [II]*, 542 F. Supp. 1050 (S.D. Ala. 1982).

207. *Id.* at 1064.

present at-large commission. "[A]lthough the desire to place the business and professional classes in control of Mobile's government and to exclude the lower classes from participation was an important factor in adopting the commission government in 1911—at-large elections—invidious racial reasons played a substantial and significant part."[208]

In the school board's case, the district court followed a similar line of analysis, finding invidious intent in the state legislature's repeal in 1876 of a provision guaranteeing some minority (that is, black and/or Republican) representation on the at-large board.[209] The court also found impermissible intent in the efforts of the school board to maintain the at-large system, particularly in a series of actions undertaken by the school board to thwart the instant litigation.[210]

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208. *Id.* at 1075. Compare Kirksey v. City of Jackson, 506 F. Supp. 491 (S.D. Miss. 1981), where Judge Walter L. Nixon ruled on remand that plaintiffs had failed to show that Jackson's commission plan had been created or maintained with racially discriminatory intent. In a 1978 decision in the same litigation, Judge Nixon had held for the defendant city, but the Fifth Circuit Court of Appeals in 1980 vacated that decision in light of the Supreme Court's *Bolden [I]* ruling. Kirksey v. City of Jackson, 461 F. Supp. 1282 (S.D. Miss. 1978). *See supra* text accompanying note 188. In the 1981 opinion, which followed a supplemental trial, Judge Nixon found that neither the 1912 referendum establishing Jackson's commission plan nor a 1977 referendum in which voters rejected a proposed change to a mayor-council plan with nine single-member districts evidenced unconstitutionally discriminatory purpose. However, Judge Nixon also held that the motivation of individual voters participating in a referendum "is not a proper inquiry." 506 F. Supp. at 500. The court also asserted that regardless of whether racially discriminatory motivation had played a role in the 1912 and 1972 referenda, the outcome in each instance would have been the same, because of the predominant influence of non-racial factors. *Id.* at 517-18. The Fifth Circuit affirmed, 663 F.2d 659 (1981), and denied a rehearing, 669 F.2d 316 (1982). *See also House Hearings*, *supra* note 21, at 515 (statement of Frank L. Parker).

209. Brown v. Board of School Comm'rs, 542 F. Supp. 1078, 1090 (S.D. Ala. 1982).

210. *Id.* at 1096-99. In 1975, after the dilution suit had been filed, the school board agreed to support state legislation establishing a ward electoral scheme for the board, provided that certain minor changes in the proposed legislation were made. After the Alabama legislature enacted the legislation, the board moved to have the suit against it dismissed. When the federal district court dismissed the suit, the board proceeded to challenge the validity of the statute in state court, alleging that the law violated the Alabama Constitution. The state court found the law unconstitutional on the basis of the language that the board itself had recommended be added to the bill in the legislature. The invalidation of the ward plan reactivated the dilution suit. The board then proposed a new single-member district plan to be introduced at the 1976 legislative session and unsuccessfully urged the district court to postpone the suit until the bill was introduced. However, in testimony at the dilution trial, the board's counsel expressed his certainty that the new bill itself would be unconstitutional. This sequence of events led Judge Pittman to find that the board had entered into the litigation with "unclean hands." *Id.* at 1096-97. The record of the board's action was cited in Judge Pittman's original opinion in the school board proceedings as evidence of improper motive. Brown v. Moore, 428 F. Supp. 1123, 1133-34 (S.D. Ala. 1976). After that

Whether the roots of present-day discrimination can be traced to the reconstruction of events one hundred years past is perhaps an important question for historians. It is less clear whether the cause of justice is well served by this kind of tortuous quest for elusive evidence of intent.

B. *The Search for Judicially Manageable Standards of Dilution*

Efforts of the courts, and more recently of Congress, to address the constitutional or statutory validity of at-large elections, whether couched in terms of intent or results, in actuality have sought to answer separate, but interrelated questions. First, what forms of vote dilution does the Constitution or the Voting Rights Act prohibit? Second, can the courts or Congress develop manageable standards for the adjudication of dilution claims? Manageable standards here refer to guidelines that sufficiently direct the discretion of district court judges who try dilution claims and that impose practical limitations on the number of dilution suits that come before the courts. Third, can the courts provide effective remedies for those cases in which illegal dilution is uncovered?

Since it is a settled principle of law that a particular group is not entitled to representation on a legislative body in proportion to its percentage of the population,[211] the first question calls for a definition of the precise circumstances under which the absence of proportional representation amounts to illegal dilution. The question also requires some attention to the issue of whether protection against dilution is limited to racial or language minorities that historically have been victimized by discriminatory treatment under the law or whether the protection extends to any political group whose voting strength is undermined by such devices as at-large elections.

How illegal dilution is defined, of course, affects, and is affected by, concern with the need to establish manageable standards to

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first opinion, Judge Pittman ordered the implementation of a single-member districting plan to be phased in over several elections. The plan led to the election of two blacks in 1978 at the election of the first two ward seats. Before the black members took office, however, the current members of the school board modified the board's operating procedures in order to reduce "the relative power of the new black members." 542 F. Supp. at 1097-99. These actions, incidentally, were noted in the Brief of the Appellees, *Bolden [I]*, 446 U.S. 55 (1978). *See also supra* note 90.

211. *See, e.g.*, Rogers v. Lodge, __ U.S. __, 102 S. Ct. 3272, 3276 (1982); City of Mobile v. Bolden [I], 446 U.S. 55, 75-76 (1978); White v. Regester, 412 U.S. 755, 765-66 (1973); Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971).

govern adjudication of dilution cases. The Supreme Court or Congress may make it easy or difficult to prove dilution, but whatever standards of proof the Court establishes, it does so with the awareness that these criteria will guide the range of discretion judges in lower courts will exercise and will influence the number of dilution suits filed. Thus, the plurality opinion and Justice Stevens' concurring opinion in the Supreme Court's *Bolden [I]* decision expressed concern that the adoption of Justice Marshall's definition of unconstitutional dilution would result in "endless litigation" and plunge the courts into "a voracious political thicket."[212] In contrast, Justice White in his dissent in *Bolden [I]* contended that the plurality's intent standard "leaves the courts below adrift on uncharted seas."[213]

The issue of manageable standards carries over to the consideration of what remedies courts might apply in order to eliminate unconstitutional dilution in those cases in which it is determined to exist. Judicial concern with the problem of developing effective remedies is evidenced by Justice White's comments in *Whitcomb*:

> [If] the problems of multi-member districts are unbearable or even unconstitutional it is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting parties and interests and even for permitting a minority of the voters to control the legislature and government of a State.[214]

Dissenting in the Supreme Court's decision in *Lodge*, Justice Powell asserted that challenges to at-large elections involved the courts in what "is inherently a political area, where the identification of a seeming violation does not necessarily suggest an enforceable judicial remedy—or at least none short of a system of quotas or group representation."[215]

The question of whether dilution can be remedied effectively, like the problems of defining illegal dilution and of developing manageable standards of adjudication, resists easy answers. With

212. The language regarding "endless litigation" which appeared in *Whitcomb*, 403 U.S. at 157, is cited both by the plurality in *Bolden [I]*, 446 U.S. at 80, and by Justice Stevens, who also refers to "a voracious political thicket," *id.* at 93 (Stevens, J., concurring).

213. 446 U.S. at 103 (White, J., dissenting).

214. 403 U.S. at 160.

215. 102 S. Ct. at 3282 (Powell, J., dissenting).

regard to the constitutionality of at-large elections, however, judicial responses have tended to follow one of three paths:[216] (1) nonintervention, a view that would hold that vote dilution is an inherently ambigious political question for which manageable judicial standards cannot be developed and which courts ought to avoid; (2) selective judicial intervention, an approach that would permit courts to strike down an at-large election system where it could be shown that it operated to "fence out" or exclude systematically a racial or language minority from influence at the polls;[217] and (3) uniform judicial or legislative intervention, an approach under which the courts or Congress would forbid on a national basis the use of certain electoral devices such as numbered posts or a majority vote requirement in conjunction with at-large elections or multimember districts.[218] Each of these paths is discussed below.

That courts ought to stay out of the "political thicket" of controversies centering on questions of vote dilution or debasement was articulated forcefully by Justice Frankfurter in his dissenting opinion in *Baker v. Carr*[219] and by Justice Harlan in a succession of dissenting and concurring opinions in reapportionment cases beginning with *Baker.*[220] In *Whitcomb*, Justice Harlan cited the

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216. Ward E. Elliott employs a similar classification in his analysis of the reapportionment cases of the 1960's. W. ELLIOTT, THE RISE OF GUARDIAN DEMOCRACY: THE SUPREME COURT AND VOTING RIGHTS DISPUTES, 1845-1969, at 265-74 (1974).

217. Gaffney v. Cummings, 412 U.S. 735, 754 (1973).

218. It should be emphasized that the "uniform intervention" contemplated here is concerned with the prohibition of one or more percentage-determining rules on a national basis. One can imagine, of course, a very different and more radical brand of uniform intervention, namely an outright prohibition against at-large elections. The view that the logic of Burns v. Richardson, 384 U.S. 73 (1966), and Reynolds v. Sims, 377 U.S. 533 (1964), should lead courts to impose a per se rule against at-large systems is developed in Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U.L. REV. 85 (1979). Leaving aside the validity of this view as a matter of constitutional law, a ban on at-large elections would constitute unwise policy. It would eliminate at-large systems in countless cities, counties, towns, and school districts in which at-large elections do not operate in racially discriminatory fashion; furthermore, it would nearly obliterate what remains of state and local discretion in the realm of local electoral organization. One might add that a rationale that would condemn at-large systems as a rule also would call into question those single-member electoral systems in which the number of seats was too small to insure proportional representation of minority interests. Finally, it should be noted that the 1982 revision of section 2 of the Voting Rights Act was not intended to prohibit at-large electoral systems generally. *See, e.g.*, 128 CONG. REC. S6526 (daily ed. June 9, 1982) (remarks of Sen. Hatch); *supra* text accompanying note 155.

219. 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting). Justice Frankfurter had earlier used the term "political thicket" in his plurality opinion in Colegrove v. Green, 328 U.S. 549, 556 (1946).

220. 369 U.S. at 330 (Harlan, J., dissenting). *See also* Oregon v. Mitchell, 400 U.S. 112,

emergence of litigation challenging multimember districts which are dilutive of minority voting rights as constituting evidence of the judiciary's imprudence in entering the reapportionment thicket.[221]

Justice Harlan's view that the courts had no proper role in vote dilution disputes rested in part on his opinion that the equal protection clause of the fourteenth amendment did not reach such questions, but also on his belief that the development of manageable standards of adjudication was virtually impossible.[222] In vote dilution cases after *Whitcomb*, various justices on the Court have followed Justice Harlan's nonintervention approach, although they have advanced a rationale different from Harlan's. In *Wise v. Lipscomb*,[223] the 1978 case involving the remedy in a successful dilution suit against at-large elections for city council in Dallas, Texas, Justice Rehnquist asserted in a separate opinion, joined by Chief Justice Burger and Justices Powell and Stewart:

> While this Court has found that the use of multi-member districts in a state legislative apportionment plan may be invalid if "used invidiously to cancel out or minimize the voting strength of racial groups," . . . we have never had occasion to consider whether an analogue of this highly amorphous theory may be applied to municipal governments.[224]

The same four justices who joined in the *Wise* opinion came together as the plurality in *Bolden [I]*, where they repeated their doubt about the equivalence of multimember districts and at-large elections.

> We may assume, for present purposes, that an at-large election of city officials with all the legislative, executive and administrative power of the municipal government is constitutionally indistinguishable from the election of a few members of a state legislative body in multimember districts—although this may be a rash assumption.[225]

The *Bolden [I]* plurality went on, of course, to develop a strin-

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152 (1970) (Harlan, J., concurring in part and dissenting in part); Reynolds v. Sims, 377 U.S. 533, 589 (1963) (Harlan, J., dissenting).

221. 403 U.S. at 170.

222. Reynolds v. Sims, 377 U.S. at 589 (Harlan, J., dissenting).

223. 437 U.S. 535 (1977).

224. *Id.* at 550 (Rehnquist, J., concurring) (citations omitted).

225. *Bolden [I]*, 446 U.S. 55, 70 (1980).

gent intent test that received renewed support from Justice Powell, joined by Justice Rehnquist in his dissenting opinion in *Lodge*.[226] For Justices Powell and Rehnquist, the rigorous intent standard set out both by the *Bolden [I]* plurality and by Justice Powell's own dissenting opinion in *Lodge* amounted to nothing more than an effort to extricate the courts from vote dilution challenges to at-large elections—an approach signaled by Justice Rehnquist's opinion in *Wise*.[227] Indeed, Justice Powell's contention in *Lodge* that attacks on at-large systems may not admit to acceptable remedies is wholly consistent with the logic of nonintervention previously articulated by Justice Harlan.

The strategy of nonintervention through the intent test of *Bolden [I]* simply resolved the problems of developing judicially manageable standards for assessing dilution and of protecting the courts against an onslaught of suits against hundreds of local at-large systems by making it highly unlikely that such suits could succeed. The Supreme Court's decision in *Lodge* and congressional revision of section 2 of the Voting Rights Act, however, represent a clear repudiation of the intent test insofar as the test was perceived to support nonintervention. The reason for repudiation, of course, is that a majority of justices and a majority of Congress perceive that at-large elections under certain circumstances operate in plainly discriminatory fashion. Indeed, Justice Stevens, even as he dissented in *Lodge*, lamented the abominable legacy of racial discrimination in Burke County, Georgia.[228]

Under the approach referred to herein as selective intervention, courts would develop and apply a test of unconstitutional dilution or statutorily illegal dilution according to section 2 that would prohibit at-large elections under those limited circumstances in which at-large elections work an invidious and unconstitutional impediment to full electoral participation by racial and language minority voters. Simultaneously, this approach would avoid (a) proscribing at-large elections generally or (b) implying that non-racial or non-language minority groups are entitled to similar constitutional protection.

The principal judicial advocate of selective intervention on the Supreme Court has been Justice White, who wrote the Court's

226. Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272, 3281 (1982).
227. *Wise*, 437 U.S. 535. *See supra* text accompanying note 225.
228. 102 S. Ct. at 3283 (Stevens, J., dissenting).

opinions in *Whitcomb, White*, and *Lodge* and dissented in *Bolden [I]*. Taken together these opinions indicate an attempt to avoid excessive entanglement of the judiciary in disputes arising from the various claims of racial and political groups to a certain level of representation and, at the same time, to strike down electoral mechanisms that foreclose effective minority participation in the political process.

If the virtue of selective intervention is that it can reach and eliminate patently discriminatory systems such as the at-large scheme in Burke County, the inherent weakness of this approach is that clear distinctions among various cases are not easily or convincingly drawn. While Justice White could distinguish between the circumstances in *Whitcomb* and *White* (seeing no discrimination in the first case and invidious dilution in the second), Justices Marshall and Brennan, two other selective interventionists, could not make such a distinction.[229]

Thus, the principal shortcoming in the approach of selective intervention is the inability of either the courts or Congress to set out a test of dilution that will yield predictable results in similar cases. Whether expressed as the *White* standards, the *Zimmer* criteria, the *Nevett II* guidelines, or the section 2 criteria, various tests of dilution have suffered from inherent ambiguity, leaving their interpretation and application to the whim of district court judges. The intent test of *Bolden [I]*—to the extent that it was intended to guide rather than foreclose dilution suits—is, as well, an amorphous standard. The imprecision of the tests under the approach of selective intervention creates a natural pressure among litigants and judges to resolve the uncertainty of the standards. This resolution may lead, in the manner of *Bolden [I]*, to an attempt to shut off dilution suits or, in the case of congressional revision of section 2, to an effort to lessen the evidentiary burdens on plaintiffs bringing such suits. To the extent, however, that the changes in section 2 produce the intended results, the number of dilution actions will increase dramatically; and the courts will face an ever increasing urge to resort to a more mechanistic standard for evaluating dilution suits than is provided by the language of section 2.[230]

229. Justices Brennan and Marshall joined in Justice Douglas's dissenting views on the dilution claim of Marion County blacks in Whitcomb v. Chavis, 403 U.S. 124, 177-79 (1971) (Douglas, J., dissenting in part and concurring in the result in part).

230. Recent cases provide some insight into the combined impact of the Supreme Court's

In fact, much of the opposition to the revision of section 2,

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ruling in *Lodge*, 102 S. Ct. 3272 and the 1982 revision of section 2 on litigation against at-large elections. On September 24, 1982, the Fifth Circuit Court of Appeals, relying on *Lodge*, affirmed two district court decisions against local at-large systems. In McMillan v. Escambia County, 638 F.2d 1239 (5th Cir.), *appeal dismissed under Rule 53, sub nom.* City of Pensacola v. Jenkins, 453 U.S. 946 (1981), *vacated*, 688 F.2d 960 (5th Cir. 1982), a three judge panel vacated the Fifth Circuit's previous holding that the at-large election of the County Commission violated neither consitutional nor statutory prohibitions against vote dilution. Without reaching the claim that the at-large system violated the revised language of section 2 of the Voting Rights Act, the court, citing *Lodge*, affirmed the district court's finding of dilution, 688 F.2d at 961-62, n.2. For further discussion of this case, see *supra* text accompanying notes 201-04. In Broussard v. Perez, 686 F.2d 320 (5th Cir. 1982), a separate three judge panel of the Fifth Circuit affirmed a district court ruling that the at-large election of the five member Commission Council of Plaquemines Parish, Louisiana, violated the fourteenth amendment. *Id.* A majority vote rule applied to the general election. No black had ever been elected to the council in a parish with a population about one-fifth black in 1980. *Id.*

In Cross v. Baxter, 688 F.2d 279 (5th Cir. 1982), decided four days before the Escambia County and Plaquemines Parish cases, a Fifth Circuit panel held that the contention of black plaintiffs failed under either the *Bolden [I]* or *Lodge* standards set out by the Supreme Court; the panel affirmed the district court's dismissal of the suit. *Id. See supra* note 141.

A very fresh case, decided principally on section 2 grounds rather than on the constitutional grounds of *Lodge*, is Jones v. City of Lubbock, No. CA-5-76-34 (N.D. Tex. Jan. 20, 1983). The district court was ruling on this action for a second time, having found vote dilution on the basis of the *Zimmer*, 485 F.2d at 1297, and *Nevett II*, 571 F.2d at 209, standards in a 1979 ruling; the Fifth Circuit had reversed and remanded the decision in light of the Supreme Court's *Bolden [I]* and *Lodge* decisions. *Jones*, slip op. at 1-3. *See* Jones v. City of Lubbock, 640 F.2d 77 (1981), *aff'd on rehearing*, 682 F.2d 504 (5th Cir. 1982). In its second ruling, the district court found that the at-large election of Lubbock's four member city council diluted the voting strength of black and Mexican-American voters in violation of section 2 of the Voting Rights Act. Blacks comprised 8.2 percent and Mexican-Americans, 17.9 percent of Lubbock's population of 173,979. The court found a history of discrimination, racially polarized voting, and a pattern of socioeconomic disparities hindering minority political participation. No black or Mexican-American had ever been elected to the council. The city government was judged responsive to minority interests and the at-large system was not rooted in discriminatory intent. The at-large scheme utilized a majority vote rule and a numbered post requirement. (Interestingly, a Mexican-American candidate had been elected on an at-large basis to the city school board under a plurality vote system. *Jones*, slip. op. at 11. The court's interpretation of section 2 is noteworthy since it would suggest that the revision of section 2 has done more than "restore" the dilution standard that governed federal courts prior to the Supreme Court's *Bolden [I]* ruling in 1980.

> These changes, as enacted by the Congress of the United States, require a different approach to the problem of at-large elections than that required prior to such amendment or even that that was required by *Zimmer* and *Nevett v. Sides.*
>
> Therefore, this court will analyze the evidence at both the first and second trials and apply such evidence to the standards as indicated in the Committee Report of the United States Senate. These standards are very similar to those set forth in *Zimmer*, but if there was any doubt prior to the amendment of the Voting Rights Act as to whether or not discriminatory intention was required, that doubt has not been finally removed. The removal of any requirement of discriminatory intent as an element of recovery for violations of the fifteenth amendment or the Voting Rights Act

within and outside Congress, came from persons who believe that once the door is opened to litigation against at-large systems on a results-test basis, the courts will slide inevitably toward a fixed, measurable standard for assessing the discriminatory impact of at-large elections. That standard, in the view of the opponents of changes in section 2, will be proportional representation—notwithstanding the proviso against proportional representation in the new language of section 2. If proportional representation were to become the standard, of course, few at-large cities or counties with sizable minority populations could survive judicial scrutiny.

That the courts inevitably will push the legal concept of vote dilution toward a precise and inflexible standard of proportional representation may or may not be an unwarranted fear. Yet the unavoidable ambiguity of standards for assessing dilution—the cause of such fear—is a problem that is quite real. This problem could be eliminated if federal courts were to hold unconstitutional the use of percentage-determining devices such as numbered posts or a majority vote rule when employed in conjunction with at-large elections.[231] Indeed, it is such provisions that give at-large elec-

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as amended requires a reevaluation of the evidence.

Jones, slip. op. at 4.

See Taylor v. Haywood County, 544 F. Supp. 1122 (W.D. Tenn. 1982), in which the at-large elections of the Highway Commissioners were enjoined based on the likelihood that the scheduled elections would violate black plaintiffs' rights under the fourteenth and fifteenth amendments and the 1982 revised language of section 2 of the Voting Rights Act.

Of special interest within Virginia is the settlement of the suit against the at-large election of the seven member city council in Hopewell. Before trial, the city agreed to establish a five-ward/two-at-large plan, to be phased in by 1986. Harris v. City of Hopewell, C.A. No. 82-0036-R (E.D. Va. Jan. 5, 1983) (consent judgment). Hopewell had a 1980 population of 23,397 persons, of whom 19.9 percent were black. No black had been elected to Hopewell's at-large council until 1981, after the suit had been filed. According to newspapers accounts, Hopewell's settlement of the suit was influenced by its perception that it could not prevail under the "results" test of the revised section 2 of the Voting Rights Act. Gordon, *Ward Vote Defended by Hopewell Council*, Rich.-Times Dispatch, Jan. 12, 1983, at B4. The suit against Hopewell was the first successful action against an existing local at-large system in Virginia.

See also Ketchum v. Byrne, No. 82C-4085 (N.D. Ill. Dec. 21, 1982) (discussed in White, *Judge Rejects Chicago Remap, Orders Redrawing of 5 Wards*, Chi. Tribune, Dec. 23, 1982, §1, at 4).

231. This sort of approach is suggested by Justice Steven's dissenting opinion in *Lodge*. *See supra* text accompanying notes 178-87. *See also Concerning the Voting Rights Act, 1982: Hearings on S. 1992 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. (Feb. 12, 1982) (statement of James F. Blumstein, Professor of Law, Vanderbilt Univ.) (as of March 1, 1983, this hearing had not been published).

tions, under such political and social conditions as prevail in Burke County or Mobile, their peculiar exclusionary impact. A prohibition against percentage-determining devices could be grounded on the fourteenth and fifteenth amendments, as well as on section 2 of the Voting Rights Act.[232] An alternative to judicial invocation of this approach would be congressional enactment of a national ban on the use of percentage-determining devices in conjunction with at-large elections or multimember districts. The legislative route would be analogous to the nationwide ban on the literacy test, enacted by Congress in 1970 when it extended the Voting Rights Act of 1965,[233] which was upheld by the Supreme Court in *Oregon v. Mitchell.*[234]

Shifting the focus of vote dilution claims away from at-large sys-

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232. Litigation against such dilutive rules as majority vote requirements, numbered post designations, full slate requirements, and staggered terms has occurred rather infrequently and without much success. The relative success of suits against at-large elections per se probably has discouraged the litigation of these rules, removal of which would still leave the at-large system in place. *See, e.g.,* Cherry v. County of New Hanover, 489 F.2d 273 (4th Cir. 1973) (claim that staggered terms of office for city and county governing bodies constituted "invidious discrimination" against black voters rejected); Gordon v. Meeks, 394 F.2d 3 (5th Cir. 1968) (*per curiam*) (challenge to full-slate rule for city council elections in Brimingham, Alabama rejected); Jolley v. School Dist. No. 1, No. 78-880 (D.S.C. June 2, 1978) (suit dismissed against at-large system after school board agreed to abandon numbered post rule and majority vote requirement) (discussed in UNFULFILLED GOALS, *supra* note 13, at 49-50); Dunston v. Scott, 336 F. Supp. 206 (E.D.N.C. 1972) ("numbered seat law" and "anti-single shot law" applicable to some, but not all, state legislative multimember districts in North Carolina struck down by three-judge court on fourteenth amendment grounds based on unequal application of these statutes, rather than their racially dilutive potential); Stevenson v. West, Civil No. 72-45 (D.S.C. April 7, 1972) (full-slate requirement struck down on nonracial grounds but numbered post law for state legislative multimember districts in South Carolina upheld) (discussed in TEN YEARS AFTER, *supra* note 13, at 215-16); Amedee v. Fowler, 275 F. Supp. 659 (E.D. La. 1967) (per curiam) (following Boineau v. Thornton, claim that full-slate law in Louisiana was racially discriminatory dismissed by three-judge court); Boineau v. Thornton, 235 F. Supp. 175 (E.D.S.C. 1964) (Republican challenge to South Carolina statute mandating full-slate voting in multimember state legislative districts rejected by three-judge court). *See also* Cross v. Baxter, 604 F.2d 875, 878 n.1 (5th Cir. 1979), discussed *supra* note 141.

Of related interest is the Supreme Court's December 13, 1982, decision in City of Port Arthur v. United States, 51 U.S.L.W. 4033 (U.S. Dec. 13, 1982), *aff'g* 517 F. Supp. 987 (D.D.C. 1981). Pursuant to section 5 of the Voting Rights Act, Port Arthur sought a declaratory judgment for its 1977 consolidation with two other cities and a 1978 annexation. The city proposed to neutralize the racially dilutive impact of its expansion (the black proportion of its population had declined from 45.21 to 40.56 percent) by replacing its at-large plan of election for city council with a mixed ward/at-large plan. The Supreme Court held that the district court properly had conditioned approval of the mixed plan on the removal of a majority vote requirement applicable to two non-mayoral at-large seats.

233. See *supra* note 17.

234. 400 U.S. 112 (1970).

tems and targeting instead the discriminatory provisions that often accompany at-large elections would clarify the scope of judicial discretion in reviewing these suits; in the process, this approach also would substantially accelerate the pace at which local electoral systems impervious to minority influence are modified to ensure political access to black and/or language minority groups. It should be noted that nearly all of the successful suits against existing at-large systems to date have involved electoral plans utilizing one or more percentage-determining devices.[235]

An emphasis on percentage-determining devices would eliminate many, if not all, of the theoretical and practical difficulties associated with remedying vote dilution in successful challenges to at-large systems. As a rule, when a court finds an at-large system unconstitutional, the judge imposes a remedy of single-member districting in place of the offensive at-large plan. In special circumstances, a mixed ward/at-large plan may be a suitable remedy.[236]

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235. But compare McIntosh County Branch of NAACP v. City of Darien, 605 F.2d 753, 756 (5th Cir. 1980), where the court reversed a district court's dismissal of a suit against the four-member council in Darien, Georgia. Darien employed a plurality voting system, with the four candidates receiving the largest number of votes taking office. *Id.* at 756. Interestingly, there was some question in this case about whether city officials had told members of the black community that single-shot voting was prohibited. *Id.* at 761. However, in Sonnier v. Town of Vinton, 484 F. Supp. 146 (W.D. La. 1980), the district court, following *McIntosh*, found no dilution in the at-large election of a mayor and five-member town council in a town of 3,453 persons, 18 percent of whom were black (in 1970). A majority vote rule applied to an open primary, but single-shot voting was not prohibited. *Id.* at 155.

236. Where courts determine that at-large elections dilute minority voting strength, the remedy lies in the substitution of a ward or mixed plan for the at-large scheme. Absent special circumstances, apportionment plans created by federal courts must employ single-member districts only. *See, e.g.*, Wise v. Libscomb, 437 U.S. 535 (1978); Wallace v. House, 425 U.S. 947 (1976); and East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). Legislative plans, as opposed to court-fashioned plans are accorded more latitude in departing from the presumption in favor of single-member districts. *See Wise*, 437 U.S. 535. *Cf.* McMillan v. Escambia County, 688 F.2d 960, 970-72 (5th Cir. 1982).

Even when a judicial finding of dilution in a challenge to an at-large system unquestionably calls for the implementation of an all-ward plan, the usual remedy, there remains the question of whether districts should be drawn in order to maximize the opportunity for a racial or language minority to achieve proportional representation on the local governing body. In short, should districting be race-conscious or race-neutral? As a practical matter, the federal courts have not resolved the issue clearly. In Marshall v. Edwards, 582 F.2d 927 (5th Cir. 1978), *cert. denied*, 442 U.S. 908 (1979), the court reviewed a district court's remedy in the *Zimmer* case. The district court had accepted a plan submitted by East Carroll Parish which presumably assured blacks proportional representation. 582 F.2d at 931. By 1976, blacks made up 60 percent of the parish population and 48 percent of its registered voters. In effect, the plan assured four safe black seats and gave blacks a chance for a fifth seat on the nine-member board. The Fifth Circuit panel interpreted the plan as court-ordered and rejected it on the grounds that proportional representation is not a proper goal of a court-created plan. *Id.* at 934-37. But the panel's rejection of proportionality seemed to be

The remedy of single-member districts raises two issues touching on both law and policy. One question not clearly resolved by prior case law is whether a ward remedy for an at-large scheme ought to employ race as a criterion of districting so as to maximize the opportunity of a minority population to achieve proportional representation.[237]

A more important issue, however, is whether the choice between at-large and ward elections is purely a matter of electoral mechanics. The first round of litigation in *Bolden [I]* provides an example in which at-large elections were integral to the form of government. Since city commissioners in Mobile performed both executive and legislative functions, election under a ward plan would seem to be inappropriate. When the district court held against the city's at-large plan, the city refused to submit a proposal for dividing the city into wards under the commission plan. The city's view that the commission plan and ward elections were incompatible led Judge Pittman in his remedy to call for the replacement of the commission with a mayor-council form with ward elections. Justice Blackmun concurred in the Supreme Court's *Bolden [I]* ruling only because of this far-reaching remedy; he suggested that the district court should have pursued less radical alternative remedies within the framework of the commission plan, such as abandoning the majority vote requirement or adopting a ward residency requirement.[238]

While the commission plan poses an extreme case, in other structures of municipal and county government, electoral form may be intimately linked in theory and practice to the perceived relationship between the legislative branch and executive branch.

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based less on principle than on doubts about the particular sort of proportionality evidenced in the plan. The panel noted that the plan provided for proportional representation of blacks in terms of registered voters, but fell short of providing proportionality in terms of population—the preferred measure in apportionment cases. *Id.* at 937. *See also* Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. 1981).

In a related case decided in 1977, the Fifth Circuit Court of Appeals utilized the *Zimmer* criteria to evaluate alternative plans for redistricting in an existing single-member system and held that *Zimmer* did not permit race-neutral districting in localities where a racial minority had been denied access to the political process. Kirksey v. Board of Supervisors, 554 F.2d 139 (1977). Judge Gee, specially concurring, lamented the court's apparent endorsement of benign gerrymandering in order to guarantee proportional minority representation, although he believed that the Supreme Court's decision in United Jewish Organizations v. Carey, 430 U.S. 144 (1977), required that ruling. 554 F.2d at 155 (Gee, J., concurring). *See also* United States v. Board of Supervisors, 571 F.2d 951 (5th Cir. 1978).

237. *See supra* note 236.

238. *Bolden [I]*, 446 U.S. 55, 80-82 (1980).

Certainly this is true of the council-manager plan of government, under which at-large elections are the rule.[239] Of course, it is of no small import that two-thirds of American cities, according to a 1981 survey, elected city councils on an at-large basis.[240]

V. Conclusion

Whether the approach to dilution claims discussed here would provide adequate relief to the perceived evil of discrimination against minority voters in at-large systems is an open question. To the extent at-large voting itself, rather than one or more percentage-determining devices, is the principal vehicle through which white bloc voting can effectively foreclose minority political influence, an approach focused on such devices would be misplaced. That at-large elections are the primary impediment to minority influence, however, has not been demonstrated convincingly.[241]

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239. *See* R. Childs, Civic Victories: The Story of an Unfinished Revolution 141-44, 178-80 (1952); National Municipal League, Model City Charter 14-15 (6th ed. 1964). A number of scholars have pointed out that Progressives of the early twentieth century viewed municipal reforms, particularly at-large elections, as mechanisms for reducing the influence of low income whites and blacks. *See* Davidson & Korbel, *At-Large Elections and Minority Representation: A Re-Examination of Historical and Contemporary Evidence*, 43 J. Pol. 982, 985-92 (1981). The board outlines of the Progressive Model (at-large, non-partisan elections, council-manager government) can be divorced, however, from the particular motives of its proponents in certain cities at specific points in time. The essential elements of the model ought to be distinguished from the not-so-subtle devices of discrimination (such as anti-single shot rules) that may be grafted on the model. Indeed, Childs, whose career as a reformer spanned the short ballot movement and the "reapportionment revolution," makes a case for proportional representation. Childs, *supra* this note, at 242-51.

240. Sanders, *Government of American Cities: Continuity and Change in Structure*, 1982 The Municipal Year Book 180 (Washington, D.C.: Int'l City Management Ass'n).

241. Davidson & Korbel, *supra* note 239, at 992-98, summarize thirteen studies of the impact of ward and at-large elections on minority representation. While these studies, on balance, show that blacks achieve greater representation relative to population under ward-elected local governing bodies than under at-large plans, few if any of these studies attempt to sort out the effects of at-large systems with and without single shot rules. *Cf.* MacManus, *City Council Election Procedures and Minority Representation: Are They Related?*, 59 Soc. Sci. Q. 153, 157 (1978). Davidson and Korbel assess the impact of a change from at-large (or multimember) representation to mixed or ward representation in 21 cities, 12 state legislative districts, and 8 education districts in Texas over the 1970-1979 period. Their results show fairly dramatic gains in black and Hispanic representation as a result of the changes, most of which were the result of section 5 objections or dilution suits. However, they point out "several cases had place voting before the change . . . [and thus] our findings are best interpreted as demonstrating the dilutionary effect of these two processes operating simultaneously." Davidson & Korbel, *supra* note 239, at 999 n.64. This author is not suggesting that minority groups would fare as well under ward or mixed plans. Rather, he is suggesting that the exclusionary characteristics of at-large elections in some cities (such that a racial minority can be effectively precluded from influencing electoral outcomes) may be largely if not wholly attributable to such mechanisms.

Moreover, the all-or-nothing approach of *Zimmer*, *Nevett II*, and section 2 of the Voting Rights Act—according to which an at-large system survives legal challenge or is replaced by a ward plan—would appear to be a cumbersome, time-consuming, and expensive strategy for assailing discriminatory systems. The problems of unbridled judicial discretion under a *Zimmer*-linked results test or under an intent test are genuine. Plainly, there is need for the courts or Congress to chart a course out of or through what has become a most muddled area of law.

Some support for this view is provided by Butler, *Election Structures*, *supra* note 12, which examined nationwide the impact of alternative electoral systems on the election of blacks in cities with a population of 5,000 or more persons and with a black population of at least 20 percent. For the four Deep South states—Alabama, Louisiana, Mississippi, and South Carolina—Butler found that one or more blacks were on councils in 92 percent of the ward cities and in only 29 percent of the at-large cities in 1981. Blacks had been elected to half of the at-large city councils in Louisiana (there were only four cities), 18 percent in Mississippi, 36 percent in South Carolina, and 19 percent in Alabama. Butler comments:

> Although additional information is needed to determine whether electing and non-electing at-large municipalities in these states can be distinguished on the basis of differences in their use of percentage-determining devices, some tentative observations can be made. Except for Louisiana, South Carolina has the greatest percentage of electing at-large municipalities, followed by Alabama and finally Mississippi. Mississippi has a full slate requirement and numbered posts are prevalent in Alabama. Alabama and Mississippi have non-partisan elections and both require candidates to receive a majority to win without a runoff. On the other hand, South Carolina has neither a full slate nor a post requirement. South Carolina municipalities may choose between partisan and non-partisan elections, and a majority vote requirement is optional.

Id. at 873 (footnotes omitted).

Butler also found that blacks were less likely to be elected in at-large cities in the South (which includes the four states noted plus Georgia, North Carolina, South Carolina, Texas, and Virginia) than in at-large cities in other regions of the country. *Id.* at 872. Since percentage-determining rules such as majority vote or full-slate requirements are far less common outside the South, the use of such rules may contribute significantly to the exclusionary characteristics of at-large elections in the South. Butler suggests that the level of racial bloc voting is probably much higher in the South than elsewhere and that this may account for the particularly strong dilutive impact of at-large elections in southern states. *Id.* at 875.

In contrast to the pattern Butler found in the four Deep South states, at-large cities in Virginia typically do have one or more blacks on councils. In 1981, blacks sat on councils in 15 of the 18 at-large cities with a black population of at least 15 percent. Virginia's at-large cities, however, utilize a simple plurality vote system, with staggered terms being the only percentage-determining rule in wide use. *See* O'Rourke, *The Voting Rights Act Amendments of 1982: The New Bailout and Virginia*, 69 VA. L. REV. ___ (1983) (forthcoming).

ADDENDUM

In companion cases decided in September, 1982, a district court rejected on all grounds, including the revised language of Section 2 of the Voting Rights Act, a vote dilution claim against the at-large election of the Board of Education and the County Commission of Dallas County, Alabama.[1] Of particular interest in these decisions is Chief Judge Hand's extensive comparative analysis of the dilution standards established by prior cases in the Fifth Circuit Court of Appeals and in the United States Supreme Court, and by the results test of the revised section 2.[2]

1. United States v. Dallas County Comm'n [I], 548 F. Supp. 794 (S.D. Ala. 1982) (school board); United States v. Dallas County Comm'n [II], 548 F. Supp. 875 (S.D. Ala. 1982) (commission).

The five members of the school board were elected to numbered posts for staggered terms and a majority vote rule applied to party primaries. *Dallas County Comm'n [I]*, 548 F. Supp. at 800. The five commission members, including the judge of probate, were elected concurrently to specific posts with a majority vote rule applicable to the party primaries. *Dallas County Comm'n [II]*, 548 F. Supp. at 881-82. Blacks comprised 44 percent of the voting age population of Dallas County in 1976 and 44 percent of registered voters in 1976. *Dallas County Comm'n [I]*, 548 F. Supp. at 842; *Dallas County Comm'n [II]*, 548 F. Supp. at 887. No black had been elected to any county-wide office in modern times. *Dallas County Comm'n [II]*, 548 F. Supp. at 887; *Dallas County Comm'n [I]*, 548 F. Supp. at 842; *but see id.* at 799 n.4a.

2. *Dallas County Comm'n [I]*, 548 F. Supp. at 862-69; *Dallas County Comm'n [II]*, 548 F. Supp. at 914-19. The court discussed Rogers v. Lodge, ___ U.S. ___ 102 S. Ct. 3272 (1982); City of Mobile v. Bolden, 466 U.S. 55 (1980); Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, ___ U.S. ___, 102 S. Ct. 3272 (1982); Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir. 1977), *cert. denied*, 434 U.S. 968 (1977); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd*, 424 U.S. 636 (1976).

In holding against the plaintiff in both cases, Chief Judge Hand attached great weight to the responsiveness of county officials to the interests of black citizens in Dallas. *Cf.* S. REP. No. 97-417, *supra* note 21, at 29 n.116.