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Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice

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Voting Rights Act Section 2: Racially Polarized Voting and the Minority Community's Representative of Choice

Not a single Southern legislature stood ready to admit a Negro, under any conditions, to the polls; . . . there was scarcely a white man in the South who did not honestly regard Emancipation as a crime, and its practical nullification as a duty. In such a situation, the granting of the ballot to the black man was a necessity, the very least a guilty nation could grant a wronged race

— W.E.B. DuBois¹

A much needed congressional effort to give substance to African-American suffrage resulted in the enactment of the Voting Rights Act of 1965² (the Act). Although the fifteenth amendment gave African-American men the right to vote in 1870,³ almost a hundred years later they were still largely unable to exercise the right.⁴ This condition did not result from apathy on the part of African-American voters, but rather from their inability to overcome barriers set up by white racists. Practices whites instituted, such as “[l]iteracy and ‘understanding’ tests, poll taxes, the white primary, intimidation, [and] violence,” prevented African-Americans from realizing their constitutional right to vote.⁵

The following facts illustrate the efficacy of these techniques. In 1965, when Congress responded to denial of voting rights, only 383 African-Americans of voting age, out of approximately 15,000, were registered to vote in Dallas County, Alabama.⁶ In the three months following the enactment of the Voting Rights Act, 8000 African-Americans registered.⁷ Under such conditions, assuring African-Americans access to the ballot alone marked a congressional achievement.

By 1980, even in the South, at the heart of the problem, African-American registration had reached approximately 60%, on a par with the registration level of whites.⁸ Thus, in revising section 2 of the Act

1. W.E.B. DuBois, *THE SOULS OF BLACK FOLK* 76 (1903) (Signet Classic ed. 1969).

2. Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971-1974e (1988)).

3. African-American women, along with white women, received the right to vote from the nineteenth amendment in 1920.

4. 128 CONG. REC. 13,171 (June 9, 1982) (statement of Sen. Kennedy); see A. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 1-2* (1987) (The Act “enfranchised the southern black, thereby fulfilling the promise of the Fifteenth Amendment ninety-five years late.”).

5. A. THERNSTROM, *supra* note 4, at 2.

6. *Id.* at 17-18.

7. *Id.*

8. Williams, *Blacks, the Changing Political Climate, and Redistricting*, in *REDISTRICTING IN THE 1990S: A GUIDE FOR MINORITY GROUPS* 21, 27 (W. O'Hare ed. 1989).

in response to Supreme Court action,⁹ Congress could refocus on protecting *all* that the right to vote encompasses, a great deal more than the mere ballot. As amended, section 2 requires that minority groups¹⁰ be afforded equal opportunity “to participate in the political process and to elect representatives of their choice.”¹¹ Lower courts struggled to determine the meaning of this phrase for four years. The Supreme Court finally spoke on the issue in *Thornburg v. Gingles*.¹² Besides creating a test and standards in this decision, the Court created a controversy: in a section 2 “vote dilution” case, how does one determine who the minority community’s candidate of choice is?

Plaintiff minority voters bring vote dilution claims under section 2 by alleging that a districting scheme has prevented their votes from having full value. For example, an “at-large districting scheme” exists if a city, 60% white and 40% minority, has a city council made up of five members, and all voters vote for five members. Such a scheme does not violate section 2 per se, even though if all 60% of the white voters vote together consistently against candidates supported by all 40% of the minority voters, the minority group could never numerically elect a single representative to the council. If, however, the minority group shows that the city could be divided into five districts, one or two of which would consist primarily of minority voters, then the group proves a *prima facie* violation of section 2. The at-large scheme in this hypothetical dilutes the minority votes. A scheme of five single-member districts would allow the minority group to elect one, or even two, representatives, whereas under the at-large scheme they can elect none.

The controversy created in *Gingles* centers on the minority group’s most difficult step — proving that white voters consistently vote as a bloc against a minority group’s representative.¹³ This proof is necessary, according to the *Gingles* Court, to show that the minority group is unable to elect their chosen representative.¹⁴ Here, the question becomes: of what significance is the race of the candidates in deciding which elections should be considered when courts must evaluate a section 2 vote dilution claim? More specifically, courts must ask whether

9. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (holding that vote dilution plaintiffs must prove discriminatory intent); see also *infra* section II.A.

10. Section 2 protects not only African-Americans, but all citizens, including, for example, Latinos and Asian-Americans, from state practices which result in abridgment of their right to vote “on account of race or color.” 42 U.S.C. § 1973(a) (1988). In this Note, the term “minority” sometimes describes a particular group, and other times describes all groups covered by the statute. It will be clear from the context when the term only describes one group.

11. 42 U.S.C. § 1973(b) (1988).

12. 478 U.S. 30 (1986).

13. See section I.A for a discussion of “racial bloc voting” in the context of vote dilution claims.

14. 478 U.S. at 51.

all elections held under the challenged election scheme did, in fact, include a minority group representative.

This Note attempts to identify the sources of this conflict and proposes an approach to answering questions posed above. Part I analyzes the case law, beginning with the first Supreme Court interpretation of section 2 and then examining the three general ways the lower courts have responded. Part II explores the legislative history of the amendment to section 2 in order to uncover congressional intent. Part III then proposes a solution based on congressional intent and a theory of civic inclusion for minorities. Finally, Part III concludes by testing the proposed solution against the concerns which originally created the debate and shows that the solution meets the concerns voiced on both sides of the issue.

I. THE COURTS' TREATMENT OF AMENDED SECTION 2

This Part describes judicial interpretation of section 2. The first section analyzes *Thornburg v. Gingles*, currently the only Supreme Court guidance on amended section 2. It discusses the opposing positions of Justices Brennan and White on the issue of "racially polarized voting" — the condition which exists when white voters vote consistently for different candidates from those for whom minority group voters vote. Congress suggested in the legislative history of section 2 that racially polarized voting should be one factor considered by courts in determining whether the Act has been violated.¹⁵ Congress intended that a showing of racially polarized voting be some evidence that a "practice or structure . . . [impairs a minority group's right to] an equal opportunity to participate in the political processes and to elect candidates of their choice. . . ."¹⁶ Left to their own devices, lower courts have loosely formed three different approaches to the problem, a problem which so sharply divided the Justices that only a plurality was formed. The second section of the Part considers each of the three approaches in turn, and concludes by identifying the concerns which fuel the debate over the significance of a candidate's race in determining whether racially polarized voting exists.

A. Supreme Court Guidance — *Thornburg v. Gingles*

In 1986, the Supreme Court handed down *Thornburg v. Gingles*,¹⁷

15. S. REP. NO. 417, 97th Cong., 2d Sess. 29 [hereinafter SENATE REPORT], reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 177, 206.

16. *Id.* at 28, reprinted at 206.

17. 478 U.S. 30 (1986). The *Gingles* Court was only divided on the issue this Note addresses. Justice Brennan's opinion secured a majority of the Court, except section III.C, in which Justices Marshall, Blackmun, and Stevens joined, and section IV.B, in which Justice White joined. Justice White wrote a short dissent to section III.C, and Justice O'Connor wrote an opinion, joined by Justices Burger, Powell, and Rehnquist concurring in the judgment.

its only interpretation to date of section 2 of the Voting Rights Act as amended in 1982.¹⁸ The plaintiffs, African-American registered voters of North Carolina, proved at the district court level that a redistricting scheme for the state legislature resulted in the dilution of their votes, in violation of the Act. The state appealed directly to the Supreme Court, arguing in part that the district court had erred by using both an incorrect definition of racially polarized voting and a legally incorrect standard for determining whether the amount of racially polarized voting found in the case was sufficient to trigger section 2 protection.¹⁹

The Court formulated a three-prong test to determine whether or not plaintiffs have made a *prima facie* case that the dilution of their votes results from a multimember districting scheme. The test focused selectively on only one of the nine factors Congress suggested courts consider.²⁰

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.²¹

The first prong is not based on any of the factors suggested by Congress, but was what Justice Brennan described as a logically necessary requirement.²² He argued that an at-large districting scheme could

18. 42 U.S.C. § 1973 (1988). Section 2, as codified and amended, reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or 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 1973b(f)(2), as provided in subsection (b) of this section.

(b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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.

19. 478 U.S. at 42.

20. See SENATE REPORT, *supra* note 15, at 28-29, *reprinted* at 206-07, for the list of nine factors; *infra* note 115 (same). The Senate Committee derived and explicitly listed nine factors, which it concluded were likely to be relevant in these cases, from the Supreme Court's findings in *White v. Regester*, 412 U.S. 755, 765-70 (1973). See SENATE REPORT, *supra* note 15, at 22, *reprinted* at 199.

21. 478 U.S. at 50-51 (citations omitted). The *Gingles* test is applicable only to an "ability to elect" claim. The Court reserved judgment on the potential merit of an "ability to influence" claim, and on what test would apply to such a claim. 478 U.S. at 46 n.12; cf. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 201-02 (1989) (criticizing courts which have not recognized this distinction).

22. 478 U.S. at 50.

not harm a plaintiff group if the injury would not be remedied by having the area divided into single districts, at least one of which would have over 50% minority voters.²³ Both the second and third prongs of the test turn on a determination of the existence of racially polarized voting, which was the second of Congress' factors.²⁴ These two prongs are merely flip sides of racial bloc voting: proof that the minority group votes as a bloc and proof that the white voters consistently vote as a bloc against the candidate supported by the most minority votes. By proving the minority community usually votes differently from the white majority, the minority community demonstrates that it is politically cohesive, that it shares common concerns, and that "submergence in a white multimember district impedes its ability to elect its chosen representatives."²⁵ Therefore, the second and third prongs of the Court's test make proving significant racial bloc voting²⁶ crucial to the voters' case by requiring such proof for a minority group to establish even a *prima facie* case.²⁷

While a majority of the Court agreed upon the importance of racial bloc voting to a vote dilution case, only a plurality could agree upon what evidence a court should consider persuasive in finding the presence or absence of racially polarized voting. Justice Brennan, joined by three other Justices, argued that the basic inquiry under section 2 is whether minorities have an equal opportunity to elect representatives of their choice. "It is," he therefore maintained, "the *difference* between the choices made by blacks and whites — not the reasons for that difference —" which is important under section 2.²⁸ Brennan urged that a showing of "a *correlation*" between race and different candidates' supporters should be enough to prove racial bloc voting.²⁹ He rejected the defendant's argument that the fact that white voters vote for different candidates than African-American voters is not enough to prove racial bloc voting; that, rather, there must be a racial *motive* behind the polarization.³⁰ For example, the defendant insisted that if whites in the relevant area do not vote for African-American candidates because of racial hostility toward those candidates, racially polarized voting is proved, whereas if the reason for their withholding

23. 478 U.S. at 50 n.17. *Contra* Karlan, *supra* note 21, at 201-04.

24. *See infra* note 115.

25. 478 U.S. at 51.

26. In this Note, as in the *Gingles* opinion, the terms "racially polarized voting" and "racial bloc voting" are used interchangeably. *See* 478 U.S. at 52 n.18.

27. Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 494 n.231 (1988); *see* *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir. 1987); *City of Carrollton NAACP v. Stallings*, 829 F.2d 1547, 1550 (11th Cir. 1987).

28. 478 U.S. at 63 (Brennan, J., plurality).

29. 478 U.S. at 74 (Brennan, J., plurality) (emphasis added).

30. 478 U.S. at 63, 74 (Brennan, J., plurality).

votes is those candidates' inexperience, racial bloc voting has not been proved. Brennan responded "that the race of the candidate *per se* is irrelevant to racial bloc voting analysis."³¹

Brennan cited the language of section 2 as authority for his statement, which protects minority voters, not minority candidates, guaranteeing the former the opportunity to "elect representatives of their choice."³² According to Brennan, a minority candidate will often be the choice of the minority voters.³³ The success or failure of a minority candidate's campaign, however, is of no relevance to an assessment of the degree of racial bloc voting in an area *except* insofar as the minority candidate is the preferred candidate of the minority voters.³⁴ Thus, Brennan argued that the existence of racial bloc voting should be determined based on the facts of the case, in terms of how strong a correlation exists between the voters' race and the candidate they support, regardless of the candidate's race. That Brennan did not, however, intend to take away as much as his words indicate is illustrated in that, interestingly, when he evaluated the facts of *Gingles*, he considered only elections including a minority candidate. His purpose in deeming the candidate's race irrelevant was to protect plaintiffs from having to prove that white voters had discriminatory *intent* — which would foil Congress' purpose in establishing a results test.³⁵

By contrast, Justice White, while concurring in the judgment, argued that party politics and interest group politics can, in certain instances, produce electoral results that would look like racial bloc voting, as Justice Brennan defines it. Where the motive for voting is considered irrelevant, White argues, a situation could exist in which white and black voters voted for different candidates, for reasons not

31. 478 U.S. at 67 (Brennan, J., plurality).

32. 42 U.S.C. § 1973(b) (1988).

33. 478 U.S. at 68 (Brennan, J., plurality); cf. Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 420 (1989) (noting that African-Americans vote in greater numbers when there is a "black representative" — usually, but not necessarily, a black person — running).

34. 478 U.S. at 68 (Brennan, J., plurality) ("Under § 2, it is the *status* of the candidate as the *chosen representative of a particular racial group*, not the race of the candidate, that is important."). Brennan argued further that one of the evils that amended § 2 is intended to remedy is precisely the fact that white voters are less likely to vote for African-American candidates — who are more likely to be the minority voters' preferred candidates — because African-American candidates have less money to campaign with, less media coverage, or less education, for example. 478 U.S. at 69.

35. See *Gingles*, 478 U.S. at 66-67, 69-70.

It would be both anomalous and inconsistent with congressional intent to hold that, on the one hand, the effects of past discrimination [such as poverty or inferior education] which hinder blacks' ability to participate in the political process tend to prove a § 2 violation, while holding on the other hand that, where these same effects of past discrimination deter whites from voting for blacks, blacks cannot make out a crucial element of a vote dilution claim.

478 U.S. at 70. For a discussion of Congress' statutory elimination of an intent test, in favor of a results test, see *infra* section II.A.

actually involving racial discrimination, but which would still be considered racially polarized voting.³⁶ White offers this example:

Suppose an eight-member multimember district that is 60% white and 40% black, the blacks being geographically located so that two safe black single-member districts could be drawn. Suppose further that there are six white and two black Democrats running against six white and two black Republicans. Under Justice Brennan's test, there would be polarized voting and a likely § 2 violation if all the Republicans, including the two blacks, are elected, and 80% of the blacks [in] the predominantly black areas vote Democratic.³⁷

In his hypothetical, there is a correlation between race and different candidates' supporters, which also corresponds to party lines, to White's dissatisfaction. White would prevent this type of situation from establishing a section 2 claim by taking cognizance, for example, of the election of the two black Republican candidates as an indication that white voters do not vote against African-American candidates simply because they are African-American. Justice O'Connor, in her opinion concurring in the judgment, agreed with White's position.³⁸ Brennan, in response to O'Connor and White, would argue that it is irrelevant that some or any African-American *candidates* were elected by white votes; the candidates who received the African-American *votes* were not.

The *Gingles* Court thus sent an extremely unclear message to the lower courts.³⁹ It is therefore not surprising that the courts have taken a number of different approaches to determining the level of racially polarized voting in a particular election district needed to trigger a violation of the Act. The confusion centers on the importance of the race of the candidate. The level of importance assigned to the candidate's race determines whether a court will consider all elections under the challenged districting scheme as relevant evidence of the presence or absence of racial bloc voting, or only those elections in which a minority candidate ran. If the candidate's race is irrelevant, all elections under the challenged scheme will be examined because the minority group will have had the opportunity to vote for a "candidate of their choice" in each election; courts will merely determine whether the candidate who received the most minority votes won or not. If, however, the candidate's race is to some extent relevant, then courts may consider whether, in a race that offered only white candidates, the opportunity to vote for a candidate of choice existed at all.⁴⁰ The next

36. 478 U.S. at 83 (White, J., concurring).

37. 478 U.S. at 83 (White, J., concurring).

38. 478 U.S. at 101 (O'Connor, J., concurring).

39. Abrams, *supra* note 27, at 464 n.107 ("confusion . . . has been [*Gingles*'] primary legacy"). For another discussion of this controversy which offers a different solution see Note, *Defining the Minority-Preferred Candidate Under Section 2*, 99 YALE L.J. 1651 (1990).

40. For example, see *infra* section I.B.3.

three subsections will outline the three most visibly distinct approaches lower courts have taken.

B. *Following Gingles: Approaches Taken by Lower Courts*

1. *Cases Finding the Race of the Candidate Irrelevant*

The first approach courts have taken is to consider the race of the candidate irrelevant when determining the level of racial bloc voting. The Tenth Circuit, in *Sanchez v. Bond*,⁴¹ chose to follow precisely the language used in Justice Brennan's plurality opinion. The plaintiffs, Latino voters in Saguache County, Colorado, challenged a system of at-large elections of county commissioners.⁴² The district court held for the defendants, finding that the Latino community did not vote cohesively and, moreover, that the white community did not usually vote as a bloc against the preferred candidate of the Latino community.⁴³ On appeal, the court of appeals affirmed the district court's decision.⁴⁴

Plaintiffs argued that, among other things, the district court improperly considered the election of three white Democrats as proof that the Latino community had been able to elect candidates of their choice.⁴⁵ The district court had found that Latinos in the county had a "very strong say as to which candidates could run on the Democratic ticket."⁴⁶ The court of appeals refused to assess racially polarized voting using only elections which included minority candidates, and likewise, it refused to consider only such candidates when determining the success of a minority group in electing candidates of its choice.⁴⁷ The *Sanchez* court, like Brennan, quoted section 2 to support a holding that the minority voters' "representatives of . . . choice" need not be minorities themselves, adding that section 2 "requires that [courts] make a determination from the totality of the circumstances, not from a selected set of circumstances."⁴⁸ The court

41. 875 F.2d 1488 (10th Cir. 1989).

42. 875 F.2d at 1489-90.

43. 875 F.2d at 1492-93.

44. 875 F.2d at 1497. The Tenth Circuit used a "clearly erroneous" standard of review in upholding the district court. 875 F.2d at 1495.

45. 875 F.2d at 1494.

46. 875 F.2d at 1492.

47. 875 F.2d at 1494-95.

48. 875 F.2d at 1495. The Supreme Court plurality did *claim* that it is not the race of the candidate, but his or her status as the minority voters' chosen representative, that is important. *Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) (Brennan, J., plurality). The Court's practice may have belied its words, however. The record in *Gingles* contained evidence only of races in which a minority candidate had run, yet the Court decided the case rather than remanding with instructions to take evidence of cases in which no minorities had run. At least one court of appeals has taken the Court's willingness to decide the case on such a record as an indicator that courts should consider only races in which minority candidates participated. See *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (The Fifth Circuit noted, among other things, that

also considered the unopposed election of Latino candidates as evidence of the support of the white community for those candidates.⁴⁹ Thus, the *Sanchez* court claimed that the presence or absence of candidates who were minorities was irrelevant in examining an election for evidence of vote dilution.⁵⁰

A Louisiana federal district court recently followed the same approach as the Tenth Circuit. In *Chisom v. Roemer*,⁵¹ plaintiffs challenged an election system in which one Louisiana Supreme Court justice was elected from each of five districts, and the remaining two justices were elected from the New Orleans area district. The New Orleans district included three majority-white suburban parishes and the Orleans parish, which had an African-American majority. Plaintiffs argued that electing two justices from the New Orleans district submerged the African-American vote in the Orleans parish in violation of section 2, and that the court could remedy the situation simply by splitting the district into two districts, one of which would have an African-American majority.⁵²

In the three most recent contested elections in the district challenged in *Chisom*, only white candidates had run. The court examined the number of African-American votes and the number of white votes each candidate received. In each case, the candidate who had received the majority of the African-American vote also received the majority of the white vote and was elected. The court declared that each of the three winning candidates was therefore the minority-preferred candidate in his election.⁵³

"*Gingles* itself looked only to elections where Black candidates were running" and concluded that the trial court in the case at bar "was warranted in its focus on those races that had a minority member as a candidate."); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503-04 (5th Cir. 1987) ("[I]mplicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate."). The Tenth Circuit chose in *Sanchez* to ignore the fact that, no matter what the *Gingles* plurality claimed it was doing, the Court accepted a record which included only races involving a minority candidate. 875 F.2d 1488 (10th Cir. 1989).

49. 875 F.2d at 1494.

50. 875 F.2d at 1495 ("We do not believe that a *per se* rule against examining races that have only white candidates is implicit in *Gingles*. Such a rule would be clearly contrary to the plurality opinion, which views the role of the candidates as irrelevant in voting analysis.").

51. 1989 U.S. Dist. LEXIS 10816 (D. La.). The *Chisom* court applied the Act to the election of members of the judiciary; the Fifth Circuit later ruled application to judicial elections improper in a separate case. *League of United Latin American Citizens v. Clements*, 914 F.2d 620, 631 (5th Cir. 1990), cert. granted sub nom. *Houston Lawyers' Assn. v. Attorney Gen. of Texas*, 59 U.S.L.W. — (U.S. Jan. 18, 1991). *Chisom* is therefore not currently good law on the application of the Voting Rights Act to judicial elections, although the Supreme Court may revive it; it is this issue that the Supreme Court will decide on certiorari in *Houston Lawyers' Association. Court to Review How Law Applies to Electing Judges*, Chicago Tribune, Jan. 19, 1991, § 1, at 11, col. 1 (final ed.). *Chisom's* analysis of racial bloc voting, however, was unaffected by the *Clements* decision. The same analysis would be applied to a challenge involving legislators, for example.

52. 1989 U.S. Dist. LEXIS 10816 at 1-12.

53. 1989 U.S. Dist. LEXIS 10816 at 36-37.

The *Chisom* court also found "substantial" African-American crossover voting for white candidates in the most recent election which offered African-American candidacies.⁵⁴ Furthermore, the court considered evidence of African-American candidates' recent success in elections to other judicial and non-judicial offices as showing that the minority community had "increased access . . . to local political processes."⁵⁵ The court concluded that the amount of racially polarized voting was not legally significant, and that the minority community had "been able to elect their candidates of choice in a significant number of elections."⁵⁶

Clearly the *Chisom* court gave great weight to the white candidates' success as indicative of minority ability to elect candidates of their choice. Although the court did not state explicitly, as did Brennan, that "the race of the candidate *per se* is irrelevant,"⁵⁷ the court obviously found Brennan's position persuasive. Thus, *Chisom* and *Sanchez* illustrate one approach that lower courts have taken in analyzing racial bloc voting after *Gingles*. These courts were able to find, as a result of their determining that the candidate's race is irrelevant, that a minority group elected its representatives even where no minority candidate ran. Because these courts evaluate no criteria besides receipt of the majority of the African-American vote, they ironically have used Brennan's language to the disadvantage of minorities. Their approach denies a remedy to minority plaintiffs who, having no opportunity to vote for a true representative of their community, are forced either to vote for the most palatable of the existing candidates or not vote at all. Under the Tenth Circuit's interpretation, either choice the plaintiffs make harms their case to some extent.

2. *Cases Not Explicitly Addressing the Issue of the Candidate's Race*

Another approach taken by courts uses the candidate's race in evaluating the level of racial bloc voting without acknowledging its use. While never stating this proposition explicitly, these cases support the theory that the candidate's race is a relevant factor in such an evaluation.

In *City of Carrollton NAACP v. Stallings*,⁵⁸ the plaintiffs-appellants

54. 1989 U.S. Dist. LEXIS 10816 at 38. In 1972, a special election was held to fill both seats available from the First Supreme Court District (the New Orleans area district). An African-American candidate ran for each seat. Although no statistics were available showing the racial breakdown of the votes, neither candidate received over 21% of the vote in either the District as a whole or the Orleans parish alone. The Orleans parish has an African-American voting population of 53.6%. 1989 U.S. Dist. LEXIS 10816 at 30, 37-38.

55. 1989 U.S. Dist. LEXIS 10816 at 31-32.

56. 1989 U.S. Dist. LEXIS 10816 at 43-44.

57. See *supra* note 31 and accompanying text.

58. 829 F.2d 1547 (11th Cir. 1987).

alleged that the single-county-commissioner form of government diluted their votes in county elections in violation of section 2.⁵⁹ The district court had applied the *Gingles* three-prong test to the plaintiffs' claim. It had held that, as to the third prong concerning white bloc voting, racially polarized voting had not been proved because the statistical evidence plaintiffs presented only included analysis of the three county elections in which there were African-American candidacies, and because it did *not* include analysis of state- or city-wide elections in which African-American candidates ran successfully.⁶⁰ In reversing the district court, the Eleventh Circuit held that the success of African-American candidates' campaigns in city and state elections was not relevant to plaintiffs' claim, because only the county election system was being challenged and because the race of the candidate was irrelevant. The case turned on the success or failure of *minority voters in Carroll County* to elect candidates of their choice to county offices.⁶¹

The court of appeals reiterated Justice Brennan's argument that the candidate's race is not relevant.⁶² Nevertheless, in reversing as clearly erroneous the district court's finding that plaintiffs had not proved racially polarized voting, the court indicated by its *actions* that courts analyzing racially polarized voting should examine only races in which minority candidates had run. First, plaintiffs' analysis of voting patterns touched only on races in which minority candidates had run; they analyzed no cases in which all of the candidates were white. The court of appeals nevertheless found that plaintiffs had proved that voting was racially polarized.⁶³ The court, therefore, was willing to disregard elections not involving a minority candidate.⁶⁴ Second, the

59. 829 F.2d at 1548.

60. 829 F.2d at 1556. The district court also cited plaintiffs' failure to analyze a county election in which an African-American candidate successfully "ran" for deputy sheriff. 829 F.2d at 1559. The court of appeals pointed out that in that election the African-American candidate was not elected; the white candidate for sheriff was elected, and as a member of his ticket, the African-American candidate was *appointed* to the deputy office. 829 F.2d at 1559.

61. 829 F.2d at 1558. *But cf.* *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1988) ("Because the district court had statistical data of only two Gretna aldermanic elections to consider, it properly looked to voting patterns in two additional elections in which Gretna voters had the opportunity to vote for a black candidate.").

62. 829 F.2d at 1557 n.12, 1558.

63. 829 F.2d at 1559.

64. The court's willingness to find racially polarized voting although the record contained no evidence of races which lacked minority candidates is some indication that it would have considered such evidence irrelevant if the evidence had been offered. The Act requires a violation of section 2 to be "established . . . based on the totality of circumstances." 42 U.S.C. § 1973(b) (1988). This language is hardly stock statutory filler; the Supreme Court's decision in *White v. Regester* supplied these words, as well as much of the rest of the language of § 2(b). 412 U.S. 755, 769 (1973); see SENATE REPORT, *supra* note 15, at 21, *reprinted* at 199. Thus, arguably, any evidence comprising the relevant "totality of circumstances," *see infra* text accompanying notes 167-69, is *necessary* to a determination of racial bloc voting. It follows that any evidence the *Carrollton* court was willing to decide the case without should have been irrelevant to the determination.

This interpretation is not at all inevitable, however, in that the opinion does not indicate that

appellate court *rejected* the district court's argument that plaintiffs should have analyzed another campaign, in which the appellate court found that no African-Americans had run.⁶⁵ The court's *holding* was only that analysis of the election was unnecessary to the plaintiffs' case; the words it used to reach that holding, however, suggest that the election was not even relevant: "It is the access of minority voters to the political process, not [white candidates'] access to the black vote, which is the chief concern of Section 2"⁶⁶ Requiring the plaintiffs to analyze elections in which no minority candidates have run "misconstrues the theory of vote dilution."⁶⁷

The Fourth Circuit, in *Collins v. City of Norfolk*,⁶⁸ explicitly denied any need to address the issue created by the Supreme Court's conflicting opinions on the relevance of the candidate's race in deciding the case.⁶⁹ Its holding lends even more support, however, than that in *Carrollton* for the position that the race of the candidate is relevant. *Collins* found it intuitively reasonable that the minority candidate, in a race against a white candidate, is the minority group's candidate of choice.⁷⁰

Plaintiffs in *Collins* challenged the at-large system of voting for city council members. The district court found for the defendants, based on its determination that "Norfolk's whites do not vote sufficiently as a bloc that they usually defeat the minority's preferred candidate."⁷¹ The court of appeals reversed, finding fault with the district court's method of determining who is the minority's preferred candidate.⁷² The district court consistently found that white candidates who re-

either party directly raised the issue of whether races not involving minority candidates were relevant to the racial-polarization inquiry. Given appellate courts' general reluctance to consider issues that have not been briefed and argued, *see* *United States v. Godoy*, 821 F.2d 1498, 1504 (11th Cir. 1987) ("The general rule . . . is that an appellate court will not consider a legal issue unless it was presented to the trial court."); 9 J. MOORE, B. WARD & J. LUCAS, *MOORE'S FEDERAL PRACTICE* ¶ 228.02 [2.-1] (1986), if the parties did not raise the issue, one might argue, the appellate court may not have considered it explicitly.

65. In this race, a white candidate had run for sheriff and an African-American was named on his ticket as a deputy sheriff. The district court had concluded that the African-American was a candidate and stated that the failure to analyze this race "cast[] doubt on the ultimate conclusions of [plaintiff's] expert." 829 F.2d at 1556 (quoting district court). The court of appeals concluded that the African-American was not a candidate but rather a prospective appointee. 829 F.2d at 1559.

66. 829 F.2d at 1559.

67. 829 F.2d at 1559. The mere fact that plaintiffs were not required to present the evidence does not mean that it would not have been relevant if defendants had presented it. The court's rationale, however — that § 2 is not concerned with "the majority's" access to "the black vote" in elections without minorities — suggests that such elections are not relevant to vote-dilution claims.

68. 883 F.2d 1232 (4th Cir. 1989).

69. 883 F.2d at 1237 n.7.

70. *See infra* text accompanying notes 77-78.

71. *Collins v. City of Norfolk*, 679 F. Supp. 557, 566 (E.D. Va. 1988).

72. *Collins*, 883 F.2d at 1234-35.

ceived a majority of the African-American community's vote were the minority-preferred candidates.⁷³ As a result, because those white candidates were elected, the district court was able to report that racial bloc voting had not prevented the minority community from electing the representative of its choice.⁷⁴ In those same elections, however, each voter was allowed to cast a ballot for each seat of the city council, making it possible for African-American candidates to run, to win even higher percentages of the African-American vote than the white candidates who were elected, yet to be defeated.⁷⁵ The district court did not consider the candidates in this category to be the minorities' candidates of choice.⁷⁶

The court of appeals found the district court's result counterintuitive:

The mere election of a candidate who appears to have received votes from more than fifty percent of minority ballots does not count as a minority electoral success, when each ballot may contain votes for more than one candidate. In such a situation, if there were other candidates, preferred by a significantly higher percentage of the minority community, who were defeated in the same election, then it cannot fairly be said that the minority community has successfully elected representatives of its choice. Each such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community. The presumption must be that they cannot, if some other candidate has received significantly more minority votes.⁷⁷

Thus, while the Fourth Circuit maintains that it will not address the relevancy of the race of the candidate, its holding reflects a concern that if a candidate who receives a large number of minority votes is elected, she will be considered the minority preferred candidate, despite the existence of a more clearly preferred minority candidate who suffered defeat. The possibility of such a result disturbed the court because it would skew the evidence toward a showing that minorities are able to elect the candidates of their choice. Probably, had an African-American candidate received the second-largest number of minority votes, and had this candidate won the election, the court would have felt less compelled to inquire whether the candidate was a minority representative.⁷⁸ The court requires non-minority candidates to

73. 883 F.2d at 1238.

74. 679 F. Supp. at 574-75.

75. 883 F.2d at 1238.

76. 679 F. Supp. at 574-75.

77. 883 F.2d at 1238 (quoting *Collins v. City of Norfolk*, 816 F.2d 932, 937 (4th Cir. 1987)).

78. See 883 F.2d at 1238-39 (attempting to ascertain whether the elected white candidates who had received a majority of the African-American vote were representatives of the African American community, but not applying the same procedure to the African-American candidates). But for one example to the contrary, see Justice White's hypothetical, *supra* text accompanying note 37.

prove their status as minority representatives, without requiring the same of minority candidates, because, presumptively, tracking the success of minority candidates seems like a more accurate way to trace the success of minority voters in electing candidates of their choice. Like the Eleventh Circuit in *Carrollton*, the Fourth Circuit thus supports the proposition that the race of the candidate is relevant to a racial bloc voting analysis. This support is, however, unstated, and illustrates an approach to the question different from that of the two cases in the following section.

3. Cases Finding the Candidate's Race Relevant

The Fifth Circuit, first in *Citizens for a Better Gretna v. City of Gretna*,⁷⁹ and a year later in *Campos v. City of Baytown*,⁸⁰ disregarded Brennan's plurality opinion and instead applied a theory that the candidate's race must be considered in a racial bloc voting assessment. In *Gretna*, the plaintiffs challenged an at-large system for the election of alderpersons as an impermissible dilution of the minority community's votes.⁸¹ Defendants forced the appellate court to confront the relevance of the candidate's race head on, by assigning as error the fact that the district court only considered elections containing African-American candidates.

The Fifth Circuit stated: "We consider Jones to be an aldermanic candidate sponsored by Gretna's minority group because he received a significant portion of the black vote, and because he is black."⁸² The court concluded that it was free to establish whatever standard it found proper, since Brennan's opinion on this issue carried only the weight of a plurality and, therefore, was not binding. While discarding the *language* of *Gingles*, the Fifth Circuit explicitly based its holding on the *Gingles* Court's *conduct*.⁸³ The court of appeals held that as long as the minority community has the opportunity to vote for a "viable" minority candidate, the candidate's race will be otherwise "of less significance than the race of the voter."⁸⁴ In other words, the Fifth Circuit decided that it will assess the level of racial bloc voting in a challenged district using only those elections containing a serious minority candidate, but will not otherwise consider the race of the candidate as significant.

In *Campos*, the Fifth Circuit solidified its position. Plaintiffs,

79. 834 F.2d 496 (5th Cir. 1987).

80. 840 F.2d 1240 (5th Cir. 1988).

81. 834 F.2d at 497.

82. 834 F.2d at 503 (footnote omitted).

83. 834 F.2d at 503 ("[A]lthough the Supreme Court plurality in *Gingles* emphasizes the race of the voter over the race of the candidate, it upholds the trial court finding of vote dilution based upon analyses of only those elections in which *blacks ran*."); see *supra* text accompanying note 34.

84. 834 F.2d at 503.

members of both the African-American community and the Latino community, challenged an at-large voting system, as in *Gretna*.⁸⁵ Defendants, relying on Brennan's language that the focus should be on a candidate's *status* as minority community representative, charged, as in *Gretna*, that the district court had erred in considering only elections in which a minority candidate opposed a white candidate.⁸⁶ The Fifth Circuit reiterated that the focus on the candidate's race was proper. Pointing out that *simply being* African-American or Latino is not enough to make a candidate the minority's candidate of choice,⁸⁷ the court emphasized that the minority-preferred candidate must be "*sponsored* by the minority group."⁸⁸ According to the Fifth Circuit, a candidate is sponsored when she both is a member of a minority *and* receives strong minority voting support.⁸⁹ The Fifth Circuit thus illustrates a third approach to analyzing racially polarized voting in a Voting Rights section 2 claim.

In sum, the line of judicial interpretation which argues that the race of the candidate is irrelevant in determining whether racial bloc voting exists focuses on: (1) ensuring that defendants do not use the race of the candidate as a means of circumventing congressional intent;⁹⁰ (2) following the language of section 2 in considering only a candidate's status as the minority group's "representatives of . . . choice";⁹¹ and, (3) considering "the totality of the circumstances," as also required by the language of section 2, by not excluding any elections under the challenged electoral system from consideration.⁹²

The other line of interpretation, which regards the race of the candidate as relevant, argues that: (1) intuitively it seems easier to trace a more accurate, logical picture of the minority community's success in electing candidates of their choice by considering only those elections in which a minority candidate ran;⁹³ (2) ignoring the candidate's race could lead to findings of racial bloc voting that were actually reflections of interest group politics as opposed to intentional or uninten-

85. 840 F.2d 1240, 1242 (5th Cir. 1988).

86. 840 F.2d at 1245.

87. See 840 F.2d at 1245 n.7.

88. 840 F.2d at 1245.

89. 840 F.2d at 1245 (quoting *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987)). "[T]he court [need not] look at every election where there is a minority candidate. If the minority candidate is not serious and gains little support from any segment of the community, it cannot be said that the minority community 'sponsored' the candidate" 840 F.2d at 1245 n.7.

90. See *supra* note 35 and accompanying text.

91. *Gingles*, 478 U.S. at 67; see *supra* note 32 and accompanying text.

92. *Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989); see *supra* note 48 and accompanying text.

93. *City of Carrollton NAACP v. Stallings*, 829 F.2d 1547, 1556-59 (11th Cir. 1987), *cert. denied*, 485 U.S. 936 (1988); see *supra* notes 77-78 and accompanying text.

tional discrimination;⁹⁴ and (3) only a minority candidate sponsored by the minority group can be considered their "chosen representative."⁹⁵ This line of interpretation includes the approaches of the Fourth and Eleventh Circuits, because their practices in these cases support the theory that the candidate's race is relevant.⁹⁶

To determine the best way of approaching an analysis of racially polarized voting in a challenged district it is important to understand amended section 2 and what function Congress intended it to have. Part II attempts to outline this function briefly.

II. CONGRESSIONAL INTENT: THE LEGISLATIVE HISTORY OF SECTION 2

This Part studies the legislative history of section 2 and concludes that it was intended to break down the barriers to full minority participation in politics. The first section of this Part shows that Congress was determined to replace an intent test — which required vote dilution plaintiffs to prove discriminatory intent on the part of the legislature or legislators who instituted the challenged practice — with a results test — which merely requires such plaintiffs to prove that the practice causes discriminatory results. The second section documents Congress' realization that section 2 could be an instrument for procuring greater responsiveness to the minority community from elected officials. Congress also intended section 2 to provide minorities with access to the full political process, as shown in the third section.

A. Replacement of the Intent Test with the Results Test

Congress' overriding purpose in amending section 2 was to overrule statutorily the Supreme Court decision in *City of Mobile v. Bolden*,⁹⁷ which introduced an intent test into vote dilution litigation.⁹⁸ In *Bolden*, the Court held that plaintiffs must prove that defendants instituted the challenged electoral procedure for a discriminatory reason.⁹⁹ This requirement significantly increased the burden on plaintiffs, where proof of a procedure's discriminatory results alone had previously been sufficient.¹⁰⁰ Under *Bolden*, plaintiffs

94. 478 U.S. at 83 (White, J., concurring); see *supra* note 35 and accompanying text; see also *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 503 (5th Cir. 1987).

95. See *supra* notes 82-88 and accompanying text.

96. See *supra* section I.B.2.

97. 446 U.S. 55 (1980).

98. SENATE REPORT, *supra* note 15, at 16, reprinted at 193.

99. *Id.*; *Bolden*, 446 U.S. at 70 ("[W]here the character of a law is readily explainable on grounds apart from race, as would nearly always be true where, as here, an entire system of local governance is brought into question, disproportionate impact alone cannot be decisive, and courts must look to other evidence to support a finding of discriminatory purpose." (emphasis added)).

100. SENATE REPORT, *supra* note 15, at 16, 19 n.59, reprinted at 193, 196 n.59.

needed to conduct extensive research into the history of the legislature that had enacted the challenged system, in order to prove discriminatory intent on the part of either the legislature or individual legislators.¹⁰¹

Senator Kennedy complained of three inadequacies of the *Bolden* intent test. First, the intent test was "divisive," requiring minority groups to "identify[] public officials or whole communities as racist."¹⁰² Second, it allowed "defendants . . . to offer manufactured evidence of an alternative nonracial explanation for the challenged procedure," so that even in cases where a legislature did have a discriminatory intent in enacting a certain procedure, intent would be difficult to prove.¹⁰³ Third, the presence or absence of such intent was "the wrong question," in any event. "If a minority citizen is denied equal opportunity to participate in the political process, then that inequity should be corrected, regardless of what may or may not have been in someone's mind 100 years ago."¹⁰⁴

Congress, to reinstate its original purpose in enacting section 2,¹⁰⁵ codified a results test — as articulated in *White v. Regester*,¹⁰⁶ a 1973 Supreme Court decision — which provides that plaintiffs need not prove discriminatory intent in a vote dilution case to prevail.¹⁰⁷ Thus, subsection (a) guarantees that:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which *results* in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this article, as provided in subsection (b) of this section.¹⁰⁸

Congress, by enacting the amendment, indicated its agreement with Senator Kennedy that the results test was a fairer, more effective standard for the achievement of an equal opportunity for minority participation.¹⁰⁹

Based on this history, Justice Brennan was quite correct to be concerned about any standard for analyzing racially polarized voting which might allow defendants to incorporate a back-door intent

101. *Id.* at 26, 27, reprinted at 204; see 128 CONG. REC. 13,132 (1982) (statement of Sen. Dole) (discussing practical and conceptual difficulties with proving discriminatory intent).

102. 128 CONG. REC. 13,172 (1982) (statement of Sen. Kennedy).

103. *Id.*; Engstrom & Wildgen, *Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering*, 2 LEGIS. STUD. Q. 465, 467-68 (1977).

104. 128 CONG. REC. 13,172 (1982) (statement of Sen. Kennedy).

105. *Id.*

106. 412 U.S. 755 (1973).

107. SENATE REPORT, *supra* note 15, at 28, reprinted at 205.

108. 42 U.S.C. § 1973 (1988) (emphasis added).

109. See 128 CONG. REC. 13,172 (1982) (statement of Sen. Kennedy).

test.¹¹⁰ Defendants in *Gingles* proposed that racial bloc voting could be shown only when whites refused to vote for an African-American candidate solely because of the candidate's race, not when they withheld their votes because of unfamiliarity with his name, for example.¹¹¹ Brennan viewed this as merely an attempt to require plaintiffs to prove racial hostility and discriminatory intent on the part of the voting public, as opposed to the legislature.¹¹² As such a requirement would be directly contrary to congressional intent behind section 2,¹¹³ Brennan declared the race of the candidate irrelevant to an analysis of racially polarized voting, which focuses exclusively on the race of the voter.¹¹⁴ His position is understandable, given the emphasis Congress placed on allowing plaintiffs to prove vote dilution without *requiring* proof of discriminatory intent.

B. *Election of Officials Who Are More Responsive to Minorities*

In amending section 2, Congress also aimed to prevent elected officials from being insensitive to the needs of the minority community. The legislative history of the amendment documents this concern. Congress listed nine factors which typically evidence a section 2 violation; two of the nine relate to insensitivity to minority needs.¹¹⁵ First, the Senate Report accompanying the amendment explicitly cited the

110. See *supra* notes 29-34 and accompanying text.

111. *Gingles*, 478 U.S. 30, 69 (1986); cf. *supra* note 34.

112. 478 U.S. at 69-73.

113. See *supra* note 109 and accompanying text.

114. 478 U.S. at 67.

115. See SENATE REPORT, *supra* note 15, at 28-29, reprinted at 206-07. The nine factors listed were

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

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

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

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

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

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

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

Additional[ly] . . . :

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

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

Id. (footnotes omitted).

"significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group" as having probative value.¹¹⁶ Second, "whether political campaigns have been characterized by overt or subtle racial appeals" was a factor that the Senate Committee agreed was probative of a violation of section 2.¹¹⁷

Ours is a representative democracy, and therefore, the *full* right to vote is "essential."¹¹⁸ By voting, Americans may express their wishes to their elected officials, who should, in most cases, act on those wishes.¹¹⁹ An indication of whether a government is truly representative — whether the governed are really *represented* by the governing — is the degree of responsiveness that government shows.¹²⁰ When the governing are held accountable to the governed through the elective process, they will be responsive:

Even under the most favorable conditions provided by the social environment and the immediate political context, governors will be responsive to community wishes or needs if, and perhaps only if, they are held accountable for their actions and decisions. . . .

Accountability means that there are standards against which the performance of officeholders can be measured. If these standards are not met or are violated, officeholders will be removed from office. In a democracy, these standards are not just legal and formal requirements for appropriate conduct, but the wishes and welfare of the citizenry the governors are chosen to represent. Governors failing to meet these exacting standards are held accountable, and it is for this reason that there is a strong presumption that they will strive to be responsive to the citizenry.¹²¹

Congress clearly recognized the relationship between a minority group's inability to influence elections and a candidate's or official's ability to ignore the concerns of that group.¹²² Where the voting power of a minority group has been so divided or diluted that a candidate can comfortably be elected without addressing that group's needs, those needs may well go unaddressed.¹²³ Thus, logically, a showing

116. *Id.* at 29, reprinted at 207.

117. *Id.* at 29, reprinted at 206.

118. 128 CONG. REC. 13,171 (1982) (statement of Sen. Kennedy).

119. H. PITKIN, *THE CONCEPT OF REPRESENTATION* 232-33 (1967).

120. *Id.* at 232 ("[W]e show a government to be representative . . . by demonstrating that its subjects have control over what it does. . . . A representative government must not merely . . . promote the public interest, but must also be responsive to the people.").

121. H. EULAU & K. PREWITT, *LABYRINTHS OF DEMOCRACY: ADAPTATIONS, LINKAGES, REPRESENTATION, AND POLICIES IN URBAN POLITICS* 444 (1973).

122. *See, e.g.*, 128 CONG. REC. 13,171 (1982) (statement of Sen. Kennedy) ("Without full enjoyment of the right to vote, a citizen cannot be sure he or she will have a fair opportunity to protect his or her other rights or to ask the Government to listen to his or her concerns.").

123. *See* Abrams, *supra* note 27, at 476 ("If minority voters have more opportunity to participate, they may compel legislators to redress [their] grievances . . ."). Interestingly, one scholar has noted that a candidate who seemingly *cannot* win an election without the minority "swing vote" may refuse to address minority issues anyway, preferring not to risk alienating

that candidates in a certain election district have run on overtly racist platforms is an indication, as Congress perceived, of a possible section 2 violation in that district.¹²⁴ Such candidates must certainly have no need of the minority vote, and thus probably are not and need not be sensitive to minority concerns.¹²⁵

Thus, courts which implicitly or explicitly found the race of the candidate relevant were responding to Congress' goal of electing officials who are more responsive to the minority community, in so far as they believed that minority officials were more likely to be responsive to the minority community. For example, the Fourth Circuit clearly holds this belief, as the facts of *Collins v. City of Norfolk* support.¹²⁶ The district court deemed two white candidates the minority candidates of choice in elections in 1974 and 1980, passing over two African-American candidates who received even greater percentages of African-American votes. The two white candidates, however, *themselves* testified that they were not minority community representatives.¹²⁷ They had either ignored, avoided, or opposed the position of the African-Americans who voted for them.¹²⁸ African-American candidates are seen as more likely to be representatives of the African-American community because they are more likely to live with that community and share its experiences.¹²⁹ The Fourth Circuit, and the Fifth Circuit as well in its decisions, were sensitive to Congress' concern that elected officials respond more frequently and effectively to minority issues.

C. Incorporation of Minority Voters into the Political Process

A third important purpose of section 2 as amended is to provide equal opportunity of access for minorities "to participate in the polit-

current or potential white supporters. See Guinier, *supra* note 33, at 415 (discussing the Democratic Party's recent attempt to distance itself from the concerns of African-American voters).

124. As recently as November 6, 1990, a candidate — Jesse Helms — was elected who ran on a racist platform. In his senatorial campaign against Harvey Gantt, an African-American candidate and the former mayor of Charlotte, North Carolina, Helms aired a television ad that may have won the election for him.

The ad showed a man's hands — white hands — crumpling a piece of paper. The paper was a rejection letter from a prospective employer. Over the pictures was this narration: "You needed that job, and you were the best qualified. But they had to give it to a minority because of a racial quota. Is that really fair?" Daley, *TV Holds Power in Politics*, Chicago Tribune, Nov. 19, 1990, § 1, at 1, col. 2 (final ed.). Gantt had openly supported the 1990 Civil Rights Act, which Helms has interpreted as setting quotas. *Id.*

125. See SENATE REPORT, *supra* note 15, at 29, reprinted at 206.

126. See *supra* notes 68-78 and accompanying text.

127. See *Collins v. City of Norfolk*, 883 F.2d 1232, 1238-39 (4th Cir. 1989).

128. 883 F.2d at 1239 (One candidate commented, "There are problems in the black community right now which I don't care to be involved in, so I'm not.").

129. See 883 F.2d at 1238-39.

ical process and to elect representatives of their choice."¹³⁰ A study of the legislative history leaves no doubt that Congress intended section 2 to protect more than the bare right to mark a ballot on election day.¹³¹ Literally borrowing the following language from *White v. Regester*,¹³² Congress clarified what the protected voting right consists of:

The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question — that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.¹³³

White is clearly the basis for subsection (b)¹³⁴ of the statute which defines a violation of section 2. Thus, Congress provided a mechanism to make it possible for minority groups to participate in all phases of the political process, not merely on election day.¹³⁵

The language of "political process" is used consistently throughout the legislative history.¹³⁶ In addition, two of the nine factors Congress suggested for consideration in section 2 cases support this emphasis on the political process. The first factor Congress listed requires courts to consider "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."¹³⁷ Another factor requires courts to ask, "if there is a candidate slating process, whether the members of the minority group have access to that process."¹³⁸ By focusing on parts of the political process which precede and follow election day, and by using such language both in the legislative history and in the statute itself, Congress pointedly provided for the incorporation of minority communities into the whole political process.

The courts which decided the cases examined in this Note have neglected to address this congressional concern with incorporation. It is, however, no less important because of that neglect. Although it has not formed the basis for any court's approach to the relevance of the candidate's race in a vote dilution claim so far, it does inform the approach this Note recommends in Part III. Courts could more easily

130. 42 U.S.C. § 1973(b) (1988).

131. See, e.g., 128 CONG. REC. 13,293-94 (1982) (statement of Sen. Grassley).

132. 412 U.S. 755 (1973); SENATE REPORT, *supra* note 15, at 21, reprinted at 199. For a brief discussion of the results test see *supra* notes 97-114 and accompanying text.

133. 412 U.S. at 766.

134. See *supra* note 18 for text of subsection (b).

135. For a discussion of why this range of participation is and should be important see *infra* notes 140-55 and accompanying text.

136. See generally SENATE REPORT, *supra* note 15; see also Abrams, *supra* note 27, at 459.

137. SENATE REPORT, *supra* note 15, at 28, reprinted at 206 (emphasis added).

138. *Id.* at 29, reprinted at 206.

identify the minority community's candidate of choice if there were evidence of this choice throughout the political process rather than only on election day.

Thus, Congress has attempted to use section 2: (1) to replace the intent test with the results test; (2) to force elected officials to be more responsive to minority groups; and, (3) to incorporate minority voters into the entire political process. These goals suggest that Congress valued the participation of minorities in the political process, and understood that their problems have often been magnified by their exclusion. Congress intended that section 2 make it possible for minority groups to remove discriminatory obstacles to their full participation.

III. MINORITY COMMUNITY SPONSORSHIP

Against this backdrop of Congress' intent, Part III returns to the task of determining the appropriate approach to defining racially polarized voting. First, taking into account recent emphasis on the benefits of minority civic inclusion, Part III offers "minority sponsorship"¹³⁹ as the key to identifying the minority-preferred candidate. Then, Part III examines the sponsorship approach in light of the concerns of the Justices and courts as summarized in the last paragraphs of Part I. By examining the concerns important to each side of the issue, this Note shows that the minority sponsorship approach satisfies the concerns of both.

A. *Minority-Preferred Equals Minority-Sponsored*

1. *The Importance of Minority Civic Inclusion*

A theme that runs through much of the recent scholarship on section 2 of the Voting Rights Act is that the civic inclusion of minorities is *extremely important*.¹⁴⁰ This "civic inclusion" is what Congress meant by its "participat[ion] in the political process" language.¹⁴¹ Envisioned is minority participation in legislative lobbying, in meeting and talking with their representatives and with other groups, in forming electoral coalitions and legislative alliances,¹⁴² in nominating¹⁴³ and slating¹⁴⁴ candidates — in all "phase[s] of the electoral process."¹⁴⁵

Scholars have offered various reasons for emphasizing the goal of

139. "Minority sponsorship" is defined in full *infra* notes 157-59 and accompanying text. Briefly, it is a minority community's *active* support of a candidate's campaign from beginning to end of the election process.

140. See generally Abrams, *supra* note 27; Guinier, *supra* note 33; Karlan, *supra* note 21.

141. 42 U.S.C. § 1973(b) (1988).

142. See Abrams, *supra* note 27, at 460.

143. See Guinier, *supra* note 33, at 422.

144. See Karlan, *supra* note 21, at 198.

145. See SENATE REPORT, *supra* note 15, at 30, *reprinted* at 207.

increased minority participation. Professor Lani Guinier argues that "equal status as participants within the political sphere is possible [for minorities] only if members of the [minority] group are allowed to participate at all stages of the process."¹⁴⁶ Equal opportunity to mark the ballot is a necessary part, but not the equivalent, of the equal opportunity to participate in the political process. A vote is worth more, another scholar argues, both to the individual voter and in terms of its translation into political power, when the voter can use it to elect the candidate and the platform that the voter's community placed on the ballot.¹⁴⁷ Guinier notes that being eternally relegated to the position of swing vote is no longer acceptable to the African-American community.¹⁴⁸

Professor Kathryn Abrams' article discusses several benefits of minority political participation. From the perspective of the minority group, civic inclusion can enhance governmental responsiveness,¹⁴⁹ allow the group to be more self-determining, and strengthen the group's bonds.¹⁵⁰ From the perspective of the nonminority, civic inclusion of minorities can bring benefits in the form of racial diversity in government and the legitimation of the government for the minority citizens it governs.¹⁵¹

Civic inclusion, according to Professor Pamela Karlan, affords minority candidates the opportunity, by electing minority candidates to office, to participate in the actual decisionmaking process. Minority officials, she argues, wield influence by voicing the concerns and advocating the interests of their minority constituents to a small, but powerful group — such as a city council.¹⁵² Moreover, when a minority official represents a minority community on the governing body, that community has a voice in each decision the body makes, as opposed to only one decision regarding for whom to vote.¹⁵³

This focus on civic inclusion in relation to section 2 is proper, be-

146. Guinier, *supra* note 33, at 426.

147. See Abrams, *supra* note 27, at 476-77.

148. Guinier, *supra* note 33, at 422.

149. Abrams, *supra* note 27, at 460, 476.

150. *Id.* at 477.

151. *Id.* at 477-79. A racially diverse government, says Abrams, is better able to consider all the advantages and disadvantages of issues, and even to perceive previously unseen issues, due to the different perspectives minority officials can bring to the governing body. *Id.* at 478.

Abrams defines the legitimation of government as a way of running government that "make[s] it acceptable to those who live under it, and that make[s] the laws enacted by it worthy of being followed." *Id.* at 479. This includes a formal component — attained by following its own laws — and a substantive component — attained when the government is consistent with the general societal notions regarding humanity and the political system. *Id.* Minorities are more likely to comply willingly with the laws of a society that they feel they have had a part in making.

152. Karlan, *supra* note 21, at 216, 218.

153. *Id.* at 217.

cause the language of the statute — “to participate in the political process”¹⁵⁴ — supports it. Further, the civic inclusion focus is compatible with Congress’ goals in amending section 2, particularly the goal of incorporating minority voters into the entire electoral process, which is practically identical to the goal of civic inclusion.¹⁵⁵

2. *The Minority Sponsorship Approach as a Solution*

None of the judicial approaches for determining the relevance of a candidate’s race discussed in Part I are completely satisfactory. While Justice Brennan’s irrelevance approach properly dispels the return of the intent test, its wording hinders courts in taking into account the candidate’s race where it may be very relevant; in terms of responsiveness, for example. The approach taken by Justice White is unacceptable in that it indeed emasculates the “results”-oriented amendment. The Tenth Circuit’s approach ignores two purposes of section 2: that of increasing responsiveness to the minority community, and that of incorporating the minority community into the political process. The Fourth and Eleventh Circuits fail to acknowledge the issue, which merely adds to the confusion. And finally, the Fifth Circuit’s approach does not allow for the improvement of race relations through cooperation envisioned by proponents of the minority civic inclusion theory.

The analyses of section 2 and the civic inclusion theory suggest that, rather, the answer lies somewhere *between* Justice Brennan’s theory of irrelevance and the Fifth Circuit’s insistence on its primacy. The best approach relies on *sponsorship*: the minority community’s “representative of choice” can only be a candidate who was sponsored by that community.¹⁵⁶

The minority sponsorship approach requires a court faced with a *Gingles*-type vote dilution claim to follow three basic steps. First, it must determine whether the minority group can be drawn as the majority of a single-member district, as directed by the first *Gingles* prong.¹⁵⁷ Next, the court should look generally at past elections under the challenged system to decide whether the minority community votes as a group, the second *Gingles* prong. If so, the court must then decide which of those elections afforded the minority community an opportunity to elect a representative of their choice, by asking whether a candidate in each election was sponsored by that community.

154. 42 U.S.C. § 1973(b) (1988).

155. See *supra* notes 130-38 and accompanying text.

156. This solution borrows its language from, and was inspired by, both the Fifth Circuit’s opinion in *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988), and Professor Guinier’s article, Guinier, *supra* note 33, at 420.

157. This solution is proposed in relation to “ability to elect” claims only. “Ability to influence” claims are beyond the scope of this Note. See *supra* note 21 and accompanying text.

The race of the candidate will not *determine* which elections a court should consider when looking for evidence of racial bloc voting; however, the presence of a minority candidate in an election should serve as a useful starting point, indicating a strong likelihood that the minority community had sponsored a candidate in that race. The emphasis on the minority group's sponsorship will satisfy proponents of a focus on civic inclusion, in that the court could find sponsorship only where the minority group had been involved in supporting a candidate *throughout* the process. A finding that the group had been financially active in a campaign would be only one signal. Evidence that the minority community ran or significantly staffed the campaign, that the community made efforts to build coalitions with white voters, or that, to the extent possible, the community had a hand in the candidate's nomination or slating¹⁵⁸—efforts like these would distinguish a minority-sponsored candidate from one who merely received the endorsement of the community within a "lesser of two evils," swing-vote context.¹⁵⁹ At that point, the court could proceed to consider whether the white voters voted as a bloc against the minority-preferred, minority-sponsored candidate. If so, the plaintiffs have proved their *prima facie* case.

As is the case under more than one of the approaches previously used in the courts, every election will not include a minority-preferred candidate. The racial bloc voting evaluation would be made only in the context of those elections offering a minority-sponsored candidate. It is not to be expected that many elections in some areas of the country will meet this standard immediately; where this is true, it will in and of itself constitute evidence of vote dilution.

As well as satisfying the proponents of minority civic inclusion, the sponsorship approach offers a method of evaluating racial bloc voting consistently with congressional intent for section 2. First, the goal of minority incorporation into the political process is satisfied when the minority civic inclusion theory is fulfilled. Next, because the race of the candidate does not *determine*, explicitly or implicitly, the identity of the minority-preferred candidate, the use of an intent test as applied to white voters becomes useless. Further, the candidate as an elected official will be responsive to the minority community, because its people will have worked to place the candidate in office, thus assuring that the candidate will be familiar with and sympathetic to the community's problems. Moreover, even nonminority-sponsored officials will be compelled to be more responsive to the minority community, due to its increased influence on election outcomes.

158. Cf. *supra* text accompanying notes 140-45 (describing civic inclusion as minority participation in the very activities which would support a finding of minority sponsorship of a candidate).

159. See *supra* note 148 and accompanying text.

The minority sponsorship approach does not deemphasize the importance of having minority candidates and elected officials. As discussed earlier,¹⁶⁰ both minorities and nonminorities benefit simply from having officials with diverse perspectives able to speak to each governmental issue as it arises. Further, it is unlikely that a legislature aiming for minority participation in the political process would have the participation stop just short of the governing aspect of that process. The focus of section 2, however, must rest on empowering minority voters to put in representatives of any race who will, because they must, be active in pursuing minority objectives.

The next subsection tests the suggested approach against the concerns articulated under both lines of interpretation discussed in Part I.¹⁶¹ Although the approach takes the name from the language of the Fifth Circuit in *Campos*,¹⁶² it is not identical to that court's approach or to any other taken in the cases discussed. Therefore, the sponsorship approach must be tested against the concerns of all.

B. *Examining the Minority-Group Sponsorship Approach*

First, Justice Brennan was seriously concerned in *Gingles* that if the race of the candidate were considered relevant in a vote dilution claim, defendants would use this factor to get an intent test back into the litigation.¹⁶³ He worried that defendants would argue that whites voted as a bloc against the minority-preferred candidate, not because he was Latino, but rather because he was uneducated, unfamiliar, inexperienced, and so on. This argument is nothing more than another way of saying there was no discriminatory intent on the part of white voters. If such a showing could prove the absence of racially polarized voting, then courts would allow the effects of past discrimination to perpetuate present-day discriminatory results, thus doubly undermining congressional intent.¹⁶⁴

To prevent this possibility, Brennan argued that the race of the candidate should be irrelevant to a section 2 vote dilution claim. He never intended, however, to imply that an African-American candidate, for example, would not often be the minority-preferred candidate for the African-American community.¹⁶⁵ Thus, in *Gingles*, he did not

160. See *supra* notes 149-53 and accompanying text.

161. See *supra* notes 90-95 and accompanying text.

162. *Campos v. City of Baytown*, 840 F.2d 1240, 1245 (5th Cir. 1988) (emphasizing the significance of "elections in which the minority group has sponsored candidates" (emphasis added) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 57 n.25 (1986))).

163. See *supra* notes 29-34, 90, and 110-14 and accompanying text.

164. Congressional intent would be doubly undermined in that (1) Congress intended § 2 to aid minorities in overcoming the effects of past discrimination, see SENATE REPORT, *supra* note 15, at 28-29, reprinted at 206; and (2) it intended § 2 to replace the intent test with a results test, see *supra* notes 97-114 and accompanying text.

165. *Thornburg v. Gingles*, 478 U.S. 30, 68 (1986) (Brennan, J., plurality).

consider elections in which there was no African-American candidate.

The minority sponsorship approach would satisfy Justice Brennan because it does not open the door for an intent test. The race of the candidate would only be relevant to the extent that it may help courts identify the minority-sponsored candidate. Being a minority would not alone be enough; evidence that in a certain election the minority community sponsored a white candidate in the ways described in section III.A would require a court to evaluate that election for racially polarized voting as well. The important element under this approach is a finding that the white voters vote as a bloc against candidates who represent the minority community's interests.

The minority sponsorship approach satisfies the second and third concerns under the irrelevance line of interpretation as well.¹⁶⁶ Those who refused to rewrite the language of section 2 by changing "representative[] of . . . choice" to "minority candidate" can be confident that the presence of a minority candidate can often begin, but never end, an inquiry as to who is the minority-preferred candidate. The sponsorship approach does not require that the candidate herself be a minority.

The *Sanchez* court stated that to consider "the totality of the circumstances" as required by section 2, *all* elections were potentially relevant in determining whether or not there has been racial bloc voting.¹⁶⁷ The response to this third concern is that the *Sanchez* court misapplied the "totality" language, in two senses. First, Congress requires that the "totality of the circumstances" be considered in evaluating a vote dilution claim as a whole, not merely in assessing the level of racial bloc voting, as the Tenth Circuit implies.¹⁶⁸ Second, a logical reading of the language demands that it be interpreted as the totality of *relevant* circumstances. The *Sanchez* court should not have ignored the strong argument that elections which do not offer a minority community representative are irrelevant to an assessment of racial bloc voting. Those elections would, however, be considered as evidence, not of the presence or absence of racial bloc voting, but of any of the other factors suggested by Congress, perhaps of a "history of official discrimination in the state or political subdivision that touched the right of . . . the minority group . . . to participate in the democratic process."¹⁶⁹ Thus, under the minority sponsorship approach, *all* elections would be considered in regard to one or another of the suggested factors — but not necessarily the racial bloc voting factor, because all

166. See *supra* notes 91-92 and accompanying text.

167. See *Sanchez v. Bond*, 875 F.2d 1488, 1494-95 (10th Cir. 1989).

168. Section 2(b) imposes the "totality of circumstances" requirement. See 42 U.S.C. § 1973(b) (1988). The *Sanchez* court implies that this requirement means that *every* election must be considered as to racial bloc voting. *Sanchez*, 875 F.2d at 1495.

169. SENATE REPORT, *supra* note 15, at 28, reprinted at 206.

elections are not relevant to that factor.¹⁷⁰

Under the minority sponsorship approach, while the race of the candidate is not *irrelevant* — because of its usefulness in quickly identifying candidates who were probably minority-sponsored — neither is it determinative. The following discussion looks at the approach in light of the three arguments which originated with those who concluded that the race of the candidate is relevant to the point of being determinative.¹⁷¹

The first remaining argument claims that it seems easier to form an accurate, logical account of the minority group's success in electing their candidates when only considering elections in which a minority ran for office.¹⁷² While it may be easier, it is not necessarily more accurate. Attempting to speed up the judicial process by using the candidate's race as a proxy for minority representation is a meritorious goal, but not at the expense of overlooking or misidentifying a minority-preferred candidate. The proponents of minority civic inclusion hope that one result of the enactment of section 2 will be coalition-building across race.¹⁷³ As this occurs, more minorities will probably be willing to sponsor and vote for whites, and more whites will probably be willing to sponsor and vote for minorities. Thus, the accuracy of such an oversimplified test would decline over time.

The second remaining argument is a closely related one, offered by the Fifth Circuit: that *only a minority candidate* sponsored by the minority group *can* be considered their "chosen representative."¹⁷⁴ The minority-sponsorship approach is based on this argument to an extent. The Fifth Circuit did note that "the court [need not] look at every election where there is a minority candidate. If the minority candidate . . . gains little support from any segment of the community, it cannot be said that the minority community 'sponsored' the candidate."¹⁷⁵ The Fifth Circuit's argument, however, does not take into account the theory of civic inclusion, which informs the minority sponsorship approach. While the Fifth Circuit's approach maintains that the minority sponsored representative *must* be a minority, the approach suggested by this Note envisions that as minorities successfully use section 2 to counter vote dilution, the probability that minority groups will sponsor white candidates will grow. As this occurs, what may be socially true today — that only a minority candidate can or will represent the minority community — may not be true forever.

The final argument, first offered by Justice White, is that to deem

170. See *supra* notes 159-60.

171. See *supra* notes 96-95 and accompanying text.

172. See *supra* note 93 and accompanying text.

173. See, e.g., Abrams, *supra* note 27, at 494-504.

174. See Campos v. City of Baytown, 840 F.2d 1240, 1245 (5th Cir. 1988).

175. 840 F.2d at 1245 n.7.

the candidate's race irrelevant opens the possibility that findings of racially polarized voting might actually be reflections of interest group politics as opposed to intentional or unintentional discrimination. Under the sponsorship approach, White's illustrative hypothetical in *Gingles*¹⁷⁶ would no longer be problematic. This approach would force a closer look at the amount of support the two African-American Democrats had received from the African-American voters. If, on the one hand, the African-American voters had not sponsored the two African-American Democratic candidates, but had merely voted for all the Democrats because that has been "the most obvious way for blacks to assure their community of some voice in the public debate,"¹⁷⁷ then there would be no proof of racial bloc voting in that election because there would be no minority-sponsored candidate to consider.

On the other hand, suppose the great part of the African-American community had sponsored the two African-American Democrats, but had not sponsored the African-American Republicans. Justice White might argue that what is at play is interest group politics, not discrimination, if the African-American and white Democrats lose. The minority sponsorship approach, however, anticipates that, as African-Americans are gradually integrated throughout society, it should be harder and harder to find an interest group that does not include them. Where African-Americans in a district continue to vote so cohesively, it is an equally plausible explanation that the Republican party in the district continues to run on a platform which is not responsive to the particular needs of a group of people still living today with the effects of past discrimination.¹⁷⁸ Nonresponsiveness is one of the factors which Congress suggested is indicative of a violation of section 2.¹⁷⁹ The fact that it corresponds to party lines should not deter the courts from a finding of nonresponsiveness.¹⁸⁰

176. See *supra* text accompanying notes 37-38.

177. Guinier, *supra* note 33, at 393-94.

178. See SENATE REPORT, *supra* note 15, at 28-29, reprinted at 206 (Factor 5 illustrates congressional recognition of the existence of the continuing effects of past discrimination.)

179. Senate Report, *supra* note 15, at 29, reprinted at 207.

180. The minority sponsorship approach may not long be a matter simply of Democratic versus Republican. While African-Americans have long voted loyally Democratic because of a perceived lack of responsiveness on the part of the Republican Party, many African-Americans are now frustrated and offended by the Democratic Party's new tendency to "distanc[e] itself from black interests." Guinier, *supra* note 33, at 415. In Chicago, this frustration has led to the revitalization of the Harold Washington Party, an "all-black alternative slate," which, depending on the amount of African-American support it begins to receive, could decrease the likelihood that either a Democratic or Republican candidate could claim to be the minority-sponsored candidate in upcoming Cook County elections. See *Washington Party is Back on Ballot; Officials Fear Confusion on Election Day*, Chicago Tribune, Oct. 26, 1990, § 1, at 1, col. 1 (final ed.); *Democrats Staggered by High Court Ruling*, Chicago Tribune, Oct. 26, 1990, § 1, at 1, col.3 (final ed.).

CONCLUSION

Over four years after *Thornburg v. Gingles*¹⁸¹ was handed down, the case law under section 2 of the Voting Rights Act is still in disarray. While the Court was supposed to have clarified the application of section 2 to vote dilution claims, it further confused lower courts by introducing controversy over the way to determine the existence of racially polarized voting. As the lower courts continue to apply widely diverging methods, the Court will be forced, eventually, to resolve the dispute it created. The minority sponsorship approach offers a resolution that fits neatly with congressional intent for section 2, and which looks ahead to the goal of a society which allows minorities to participate both in governing and in all phases of being governed.

— *Evelyn Elayne Shockley*

181. 478 U.S. 30 (1986).