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Chisom v. Roemer: Where Do We Go from Here?

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I. INTRODUCTION

In an era increasingly marked by the Supreme Court's willingness to restrict the scope of civil rights statutes and precedents[1], on June 20, 1991, the Court surprised its critics by extending the ambit of the Voting Rights Act of 1965.[2] In *Chisom v. Roemer*[3] and *Houston Lawyers' Association v. Attorney General of Texas*[4] the Court held, by 6-3 majorities[5], that section 2[6] of the

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1. *See, e.g.*, Presley v. Etowah County Commission, 60 U.S.L.W. 4135 (1992) (Court adopted restrictive interpretation of the Voting Rights Act, 42 U.S.C. § 1973, permitting county commissioners to limit scope of individual commissioner's authority after election of African-American commissioner.); Patterson v. McClean, 491 U.S. 164 (1989) (Court decided that 42 U.S.C. § 1981 did not cover racial harassment.); Martin v. Wilks, 490 U.S. 755 (1989) (Court permitted post-judgment challenge to court-ordered affirmative action plan by white employees who had notice of employment discrimination suit and declined to intervene.); Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (Court increased plaintiff's burden of proof in Title VII, 42 U.S.C. § 2000-e-2(a), cases.). *See also* A. Leon Higginbotham, Jr., *A Tribute to Justice Thurgood Marshall*, 105 Harv. L. Rev. 55, 65 n.55 (1991) ("There appears to be a deliberate retrenchment by a majority of the current Supreme Court on many basic issues of human rights that Thurgood Marshall advocated and that the Warren and Burger Courts vindicated.")

2. 42 U.S.C. § 1973 *et seq.*

3. 111 S. Ct. 2354 (1991).

4. 111 S. Ct. 2376 (1991).

5. Justice Scalia filed a dissenting opinion in *Chisom* in which Chief Justice Rehnquist and Justice Kennedy joined. 111 S. Ct. at 2369. Justice Kennedy also filed a separate dissent. *Id.* at 2376. Similarly, in *Houston Lawyers'* Justice Scalia dissented, joined by Chief Justice Rehnquist and Justice Kennedy. 111 S. Ct. at 2382.

6. Section 2 of the Voting Rights Act, as amended in 1982, provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner 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

Voting Rights Act applied to the election of state court judges. In *Chisom* the court was presented with the issue of Congressional intent as to the scope of section 2 of the Voting Rights Act when the statute was amended in 1982. It was undisputed that section 2 as originally enacted covered the election of state judges.[7] The narrow question was whether Congress intended by the use of the word "representative" in the amended section 2[8] to exclude state court judges from the statute's coverage.[9] The Court concluded that Congress' use of the word "representatives" in the statute was not intended to limit the scope of section 2 to the executive and legislative branches of government.[10] Having determined in *Chisom* that section 2 applied to the election of state court appellate judges, the Court had little difficulty in extending the holding in *Houston Lawyers' Association* to include trial court judges.

In *Chisom* and *Houston Lawyers' Association*, the Court declined to address two substantive issues critical for pending and future litigation[11] challenging the at-large election of state judges.[12]

> 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.

42 U.S.C. § 1973 (1982).

7. *Chisom*, 111 S. Ct. at 2362. *Accord* 111 S. Ct. at 2369 (Scalia, J., dissenting) ("I agree with the Court that the original legislation . . . applied to all elections.")

8. Section 2(b) provides that a violation is established if minorities have less opportunity than other members of the electorate to "participate in the political process and to elect *representatives* of their choice." 42 U.S.C. §1973(b) (emphasis supplied).

9. Traditionally, judges are not considered representatives. *See* Wells v. Edwards, 347 F. Supp. 453, *summarily aff'd*, 409 U.S. 1095 (1973) (District court concluded that the concept of one person, one vote did not apply to judicial elections since judges were not representatives.)

10. 111 S. Ct. at 2366-67.

11. Such suits are pending in New York, Alabama, Florida, Georgia, Illinois, North Carolina, Ohio, Tennessee, Texas, and Louisiana. *See Judge Suits Thrive*, Nat'l L. J., Mar. 9, 1992, at 6.

The Court expressly stated that it would not decide the elements that must be proved to establish a violation of section 2 or the remedy that would be appropriate for a violation proven in the context of a judicial election.[13]

Part II will discuss the *Chisom* and *Houston Lawyers' Association* decisions. Analysis of these decisions, combined with a review of the legislative history, supports the Court's view of the amended section 2. In fact, there was no direct or indirect suggestion at any point in the extensive legislative history that Congress intended to exclude judicial elections from the coverage of section 2. Part III will address the liability issue left unanswered by the court. To determine whether the at-large election of judges violates section 2, the courts should apply the standards developed in *Thornburg v. Gingles.*[14] The *Gingles* Court concluded that three threshold questions were critical to a challenge of an at-large election system. In order to prevail in a vote dilution[15] case, plaintiffs were required to demonstrate that the minority population was geographically concentrated, politically cohesive, and that racial bloc voting existed in the jurisdiction.[16]

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12. In an at-large election, a candidate must achieve a plurality or majority of votes from all the citizens of a county or city who are entitled to vote in an election. In jurisdictions where African-Americans, Hispanics, or Asians constitute a minority of the voters, white voters can use racial bloc voting tendencies to defeat minority candidates. An alternative to the at-large election is a district or ward system. In a district election, a candidate must achieve a majority or plurality of votes from the citizens residing in his or her district. Where minority groups are geographically concentrated, districts can be created that afford members of those groups a fair opportunity to nominate and elect candidates of their choice as required by section 2. *See, e.g.*, Paul W. Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev. 353 (1976); Chandler Davidson & George Korbel, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence, in* Minority Vote Dilution 65 (Chandler Davidson, paperback ed. 1984).

13. *Chisom*, 111 S. Ct. at 2361.

14. 478 U.S. 30 (1986).

15. Dilution of a minority group's voting strength may be caused by the dispersal of the group into districts in which they constitute a minority of voters or from overconcentration of members of the group into districts where they constitute an excessive majority. The former condition is called "cracking" and the latter is termed "packing". *See, e.g.*, Armand Derfner, *Racial Discrimination and the Right to Vote*, 26 Vand. L. Rev. 523 (1973); Frank Parker, *Racially Gerrymandering and Legislative Reapportionment, in* Minority Vote Dilution 86 (Chandler Davidson, paperback ed. 1984).

16. 478 U.S. at 50. The reason for requiring these three factors as *prima facie* elements of proof is that unless a minority group is sufficiently large and geographically compact to constitute a majority in a single district, the group can not contend that the at-large system has prevented them from electing candidates of their choice. Unless the minority voters would have the potential to nominate or elect candidates of their choice

Additionally, the courts should utilize the factors identified in the Senate Judiciary Committee's report that accompanied the amendments to section 2.[17]

In Part IV, alternatives to at-large election systems will be examined to determine the appropriate remedy where a state's judicial election system violates section 2. Traditionally, the courts have remedied at-large election violations by creating smaller subdistricts where minority group members constitute a majority of the district.[18] The article concludes that the courts should review at-large judicial systems utilizing the same criteria that have been developed in vote

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in the absence of the challenged at-large system, they can not claim that their rights have been violated by that practice. Similarly, in the absence of racial bloc voting patterns, an at-large election system would not enable a white majority, by voting as a bloc, to defeat minority candidates.

17. The Senate Report noted that the following factors might be probative of a section 2 violation:

> 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 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.

S. Rep. No. 417, 97th Cong., 2nd Sess., at 28-29 (1982), (footnotes omitted) reprinted in 1982 U.S.C.C.A.N. 177 [hereinafter S. Rep.]. The Court in *Gingles* stated that the Senate Report was the authoritative guide to the meaning of the amended section 2. 478 U.S. at 43 n.7.

18. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30 (1986); Citizens For A Better Gretna v. City of Gretna, 834 F.2d 496 (5th Cir. 1987); Ketchum v. Byrne, 740 F.2d 1398, (7th Cir. 1984), *cert. denied*, 471 U.S 1135 (1984); Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd per curiam sub nom.*, East Carroll Parish School District v. Marshall, 424 U.S. 636 (1976).

dilution challenges to other at-large election systems. Similarly, the remedial measures that have been employed to correct violations of section 2 in challenges to other at-large election systems should be equally applicable in the judicial context.

II. THE SUPREME COURT'S ANALYSIS OF SECTION 2'S APPLICABILITY TO JUDICIAL ELECTIONS

A. *Chisom v. Roemer*

In *Chisom*, African-American voters challenged the method for electing justices of the Louisiana Supreme Court from the New Orleans area. The Louisiana Supreme Court contained seven justices, two of whom were elected from the first supreme court district, consisting of the parishes of Orleans, St. Bernard, Plaquemines, and Jefferson. African-Americans constituted more than one-half of the registered voters in Orleans parish whereas more than three-fourths of the registered voters in the other three parishes in the first supreme court district were white. Therefore, the plaintiffs contended that the submergence of the predominantly African-American voters of Orleans parish into the majority white parishes of St. Bernard, Plaquemines, and Jefferson weakened their voting strength in violation of section 2.[19]

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19. Chisom v. Edwards, 659 F. Supp. 183, 184 (E.D. La. 1987). As a remedy for the perceived violation, plaintiffs argued that each of the seven justices of the Louisiana supreme court should be elected from separate judicial districts. With respect to the first supreme court judicial district, the plaintiffs proposed that it be subdivided into two separate subdistricts. One subdistrict would contain Orleans parish. The other subdistrict would consist of St. Bernard, Plaquemines, and Jefferson parishes. *Chisom*. Under plaintiffs' proposal each of the seven justices of the Louisiana Supreme Court would be elected from a separate district. By subdividing the first supreme court district into a majority African-American and majority white districts, African-American voters would have an opportunity to nominate and elect one supreme court justice from Orleans parish.

The district court dismissed the complaint and determined that judicial elections were not covered by section 2. *Chisom* at 187. The Court of Appeals for the Fifth Circuit disagreed with the district court's conclusion regarding the applicability of section 2 to judicial elections. 839 F.2d 1056 (5th Cir. 1988). The circuit court held that Congress' use of the term "representative" in the 1982 amendments to section 2 was not intended to remove judicial elections from the coverage of the statute. *Id.* at 1063. The court interpreted the term "representative" as denoting an office holder selected by popular election from among a field of candidates. *Id.*

On remand, the district court concluded that plaintiffs had failed to establish a violation of section 2 under the standards articulated in *Gingles*. Chisom v. Roemer,

The sole question before the Court was whether Congress, when it amended section 2 in 1982, intended to remove judicial elections from the statute's scope.[20] The Court noted that it was undisputed that section 2 as originally enacted applied to judicial elections.[21] In light of the plain meaning of the original section 2, its purpose and legislative history, the Court determined that as enacted in 1965, section 2 applied to all elections.[22]

Having determined that all elections, including judicial elections came within the purview of the original provisions of section 2, the Court turned to the central issue: whether Congress, in amending section 2, used the term "representative" to limit the scope of the statute.[23] The Court stated that the term "representative" was

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Civ. Act. No. 86-4057, 1989 WL 106485 (E.D. La. 1989). While plaintiffs' appeal of the district court's opinion was pending, the fifth circuit, sitting *en banc*, in *League of United Latin American Citizens Council No. 4434 v. Clements*, 914 F.2d 620 (5th Cir. 1990), rejected the earlier panel decision in *Chisom* and concluded that Congress's use of the term "representative" in section 2 was intended to exclude judicial elections from the statute's protections. Following the LULAC decision, the fifth circuit remanded *Chisom* and directed the district court to dismiss the complaint. Chisom v. Roemer, 917 F.2d 187 (5th Cir. 1990). The Supreme Court granted plaintiffs' petition for a writ of certiorari. Chisom v. Roemer, 111 S. Ct. 775 (1991).

20. 111 S. Ct. at 2361. The Court expressly reserved judgment concerning the elements that must be proved in order to establish a section 2 violation when at-large judicial elections are challenged or the appropriate remedy for such a violation. *Id.*

21. *Id.* at 2361. The text of section 2 as originally enacted provided:

> No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of color.

Pub. L. 89-110, 79 Stat. 437, 42 U.S.C. § 1973 (1964 ed. Supp. I.). The term "vote" or "voting" was defined as "all action necessary to make a vote effective in any primary, special, or general election." §14(c) of the Voting Rights Act of 1965, 79 Stat. 445 (1965). Attorney General Nicholas Katzenbach, in testimony before the House of Representatives regarding the scope of the original section 2, testified that "every election in which registered voters are permitted to vote would be covered" under section 2. Hearings on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitution of the United States before Subcommittee No. 5 of the House Committee on the Judiciary, 89th Cong., lst Sess., 21 (1965).

22. 111 S. Ct. at 2362 ("Section 2 protected the right to vote, and it did so without making any distinctions or imposing any limitations as to which elections would fall within its purview.").

23. Section 2(b) provides that a violation of subsection (a) is established if it is shown that racial and language minorities "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." This phrase was patterned after language used in *White v. Regester*, 412 U.S.

broader than "legislator" and rejected the contention that Congress, by adopting the former, intended to remove judges from the scope of section 2. In the Court's opinion, the change from legislator to representative implied that Congress intended the statute to apply to members of the judiciary as well as the legislative branch.[24] The Court believed that the term "representative" was intended to include the winners of popular elections, not just legislative contests.[25] The Court reasoned that if members of the executive branch of government could be considered "representatives" by virtue of having been selected by popular election, then the same could be said of elected judges.[26] Additionally, the Court considered judges policymakers who brought to the bench a consideration of what was in the best interest of the community.[27] Based on the relationship between the elected judges, the voters, and the role that judges play in American society, the Court decided that elected judges were representatives within the meaning of section 2's use of that term.

The Court, in rejecting the argument that Congress intended to restrict the coverage of section 2, observed that such an intent would have been made explicit in the statute. At the very least, the legislative history would have mentioned that the use of the term "representative" was intended to restrict the categories of elections that came within the purview of the amended section 2.[28] Congress' silence

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755, 766 (1973) ("The plaintiffs' burden is to produce evidence . . . that its members had less opportunity than did other residents in the district to participate in the political process and to elect legislators of their choice.") and *Whitcomb v. Chavis*, 403 U.S. 124, 149 (1971) (Plaintiffs had to show that they "had less opportunity than did other . . . residents to participate in the political process and to elect legislators of their choice.") *See* S. Rep. at 27 (Section 2(b) was intended to "embod[y] the test laid down by the Supreme Court in *White*.").

24. 111 S. Ct. at 2366.

25. The Court observed that:

> If executive officers, such as prosecutors, sheriffs, state attorneys general, and state treasurers, can be considered "representatives" simply because they are chosen by popular election, then the same reasoning should apply to elected judges.

111 S. Ct. at 2366.

26. 111 S. Ct. at 2366.

27. *Id.* at 2366 n.27.

28. *Id.* at 2364. The Court likened the absence in the legislative history of any reference to the limiting effect of the term "representative" to the dog that did not bark. *Id.* at 2364 n.23. In reaching the conclusion that some member of Congress would have noted such a radical change if the amendments were designed to exclude judicial elections, the Court quoted Harrison v. PPB Industries, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting)("In a case where the construction of legislative language . .

in this regard was interpreted by the Court to mean that the statute's scope was coextensive with the original section 2.[29] The Court expressed its belief that Congress, which had made an express effort to broaden the protections afforded by the Voting Rights Act[30] would not, without comment, withdraw an important category of elections from that protection.[31]

The Court also rejected the contention that since judicial elections were not governed by the fourteenth amendment's "one-person, one-vote standards", first articulated in *Gray v. Sanders*,[32] such elections should be immune from vote dilution claims under section 2.[33] The flaw in this argument is that one-person, one-vote claims and vote dilution claims address two completely different issues. In order to prevail under the one-person, one-vote standard, a plaintiff

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. makes so sweeping and so relatively unorthodox a change . . . I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night."). *See also* American Hosp. Assn. v. NLRB, 111 S. Ct. 1539, 1543-44 (1991).

29. 111 S. Ct. at 2368.

30. The conclusion that Congress intended to broaden the protections of the Act is supported by the legislative history of the 1982 amendments. In amending the statute, Congress sought to eradicate the Court's limiting decision in *Mobile v. Bolden*, 446 U.S. 55 (1980). In *Mobile*, the Court determined that in order to establish a violation of the fifteenth amendment and section 2, a voting rights plaintiff had to prove that the challenged practice or procedure had been adopted or was being maintained in order to discriminate intentionally against racial minorities. *Id.* at 60-61. The *Chisom* Court stated that Congress in 1982 eliminated the intent requirement of section 2 and replaced it with a results test. Under the new test, a plaintiff could prevail by demonstrating that a challenged election practice resulted in the denial or abridgement of the right to vote on account of race or color.

In reaching its conclusion regarding the intent of Congress in amending the Voting Rights Act in 1982, the Court relied on the report of the Senate Committee on the Judiciary that accompanied the amended section 2. 111 S. Ct. at 2363 n.20. The Senate Report stated that:

> This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards . . . which applied in voting discrimination claims prior to the litigation involved in *Mobile v. Bolden*.

S. Rep. at 2 (footnotes omitted).

31. *Chisom*, 111 S. Ct. at 2368.

32. 372 U.S. 368 (1963).

33. The Court in a *per curiam* opinion had upheld a district court's decision that judicial elections were not subject to the one-person, one-vote standard. Wells v. Edwards, 409 U.S. 1095 (1973), *aff'g*, 409 F. Supp 453 (M.D. La. 1972).

has to demonstrate the existence of a numerical imbalance,[34] whereas in a vote dilution claim the key issue is whether a practice or procedure operates in a fashion to deny or abridge the right to vote to racial or language minorities. In fact, a claim can pass muster under the one-person, one-vote test and violate section 2's vote dilution standard.[35] The Court concluded that the inapplicability of the one-person, one-vote rule to judicial elections did not insulate those elections from vote dilution claims.

In light of the legislative history of the amendments, the Court's interpretation of that section was consistent with Congress' intent. According to the Senate Report,[36] the objective of Congress in amending section 2 was, in part, to clarify the standards for proving a violation of that section[37] by eliminating proof of discriminatory intent as an element of a section 2 case and restoring the legal standards that predated the restrictive *Mobile* decision.[38] Nothing in the legislative history indicates that Congress intended to eliminate judicial elections from the scope of the amended section 2.[39] Given the complete absence of any suggestion in the legislative history that the revisions to section 2 were designed to restrict the scope of the original

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34. The Court in *Gray* held that under the equal protection clause of the fourteenth amendment,

> [o]nce the geographical unit for which a representative is to be chosen is designated, all who participate in the election are to have an equal vote — whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit.

372 U.S. at 369. The rule has been interpreted to mean that "each person's vote counts as much, insofar as it is practicable, as any other person's." Hadley v. Junior College District, 397 U.S. 50, 54 (1970).

35. *See, e.g.*, White v. Regester, 412 U.S 755 (1973) (Court reversed finding that state reapportionment plan violated one-person, one-vote standard, but sustained finding of racial vote dilution.); Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (Court held that one-person, one-vote principle was inapplicable to a claim of racially based vote dilution.); Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc) ("[A]lthough population is the proper measure of equality in apportionment . . . the Supreme Court announced that access to the political process and not population was the barometer of dilution of minority voting strength.").

36. The Court in *Gingles*, 478 U.S. at 43 n.7, concluded that the Senate Report should be considered as an authoritative source of the legislative intent behind the 1982 amendments.

37. S. Rep., *supra* note 17, at 2.

38. *Id.* at 179.

39. In fact, Senator Orrin Hatch commented that the amended section 2 would "encompas[s] all governmental units, including . . . judicial districts." *Id.* at 151.

statute by excluding judicial elections, the Court properly concluded that no such radical change was intended.

A review of the Senate Report further reveals that the terms "representative", "candidate" and "elected officials" were used interchangeably, buttressing the conclusion that Congress did not choose the term "representative" to have a limiting effect.[40] The *Chisom* Court read section 2(b) contextually and found that the use of the term was not meant to limit the statute to elections for the representative branch of government.[41] This interpretation is consistent with the Court's view that the Voting Rights Act should be construed as having the broadest possible scope.[42]

The *Chisom* Court was also correct in rejecting the argument that judicial elections were exempt from vote dilution claims because of the exclusion of such elections from one-person one-vote challenges. Because the two claims are premised on different questions, the standard utilized to determine the validity of an apportionment plan should not govern racial vote dilution cases. A malapportionment claim is based on the fourteenth amendment and addresses issues of equality of population.[43] Section 2 claims are based on the Voting Rights Act

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40. *See, e.g.*, S. Rep., *supra* note 17 at 16 ("elected officials"); *id.* at 28 ("If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect *candidates* of their choice, there is a violation of this section.") (emphasis added); *id.* at 29 n.115 ("[T]he election of a few minority *candidates* does not necessarily foreclose the possibility of dilution of the black vote in violation of this section.") (emphasis added); *id.* at 30 ("[T]he ultimate test would be the *White* standard codified by this amendment of Section 2: whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect *candidates* of their choice.") (footnote omitted) (emphasis added); *id.* at 31 ("The court should exercise its traditional equitable powers to fashion the relief so that it . . . provides equal opportunity for minority citizens to participate and elect *candidates* of their choice.") (footnote omitted) (emphasis added); *id.* at 32 ("[T]he courts looked to determine whether . . . the members of the minority group had the same 'opportunity' as others in the electorate to 'participate in the political process and to elect *representatives* of their choice.'") (emphasis added).

41. It is a well-settled axiom of statutory construction that "the meaning of a statute is to be looked for, not in any single section, but in all the parts together and in their relation to the end in view." Panama Refining Co. v. Ryan, 293 U.S. 388, 439 (1935) (Cardozo, J., dissenting).

42. Allen v. State Board of Elections, 393 U.S. 544, 566-567 (1966).

43. *See* Hadley v. Junior College Dist., 397 U.S. 50, 56 (1970) ("[W]hen members of an elected body are chosen from separate districts, each district must be established on a basis that will insure, as far as is practicable, that equal numbers of voters can vote for proportionally equal numbers of officials."); Wells v. Edwards, 347 F. Supp 453, 455 (1972).

and are concerned with the racial composition of the election districts not the equal apportionment of population in these electoral units.[44] A redistricting scheme may violate section 2 if the change submerges a geographically and politically cohesive minority population in a majority white district, even though the challenged plans satisfies the one-person, one-vote standard.[45] The determination that judicial elections are not subject to a malapportionment challenge thus has no relevance to the issue of whether those elections may be subject to a claim that the election system denies minority voters an equal opportunity to participate in the electoral process.

The *Chisom* Court was correct in concluding that the scope of section 2 remained unchanged. Both Congressional intent to lessen the proof burdens of plaintiffs in voting rights cases and the complete absence of any mention in the extensive legislative history that judicial elections were to be excluded from the protections afforded under the amended section 2 provide additional support for the Court's decision. Further, the Court's refusal to rely on the one-person, one-vote standard to limit the scope of section 2 in the judicial context demonstrates that the Court was willing to give the section the broadest possible interpretation.

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44. Senator Hatch recognized this distinction and acknowledged that vote dilution and malapportionment claims were separate and distinct. 128 Cong. Rec. 13, 129 (1982) (Senator Hatch stating that the one-person one-vote standard "is an entirely different concept than the one that has evolved under provisions of the Voting Rights Act.").

45. In *White*, the Supreme Court reversed the district court's conclusion that a state reapportionment plan violated one-person, one-vote standards, but sustained the finding that the plan diluted minority voting strength. 412 U.S. at 761-64, 765-70. *See also* Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (One-person, one-vote standard inapplicable to a claim of racially-based vote dilution.) *Accord* Voter Information Project v. City of Baton Rouge, 612 F.2d 208 (5th Cir. 1980).

B. *Houston Lawyers' Association v. Attorney General of Texas*[46]

Houston Lawyers' Association was a challenge to the at-large election of trial court judges in ten counties in Texas.[47] The Court granted certiorari for the limited purpose of deciding the legitimacy of the fifth circuit's conclusion that the election of trial judges was not subject to section 2 review.[48] As in *Chisom*, the Court concluded that elections for state court trial judges were covered by section 2's requirements. In reaching its conclusion, the Court put to rest the notion that certain offices were exempt from section 2's review.[49] The Court ruled that the Voting Rights Act encompassed the election of

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46. 111 S. Ct. 2376 (1991). There were two organizational petitioners in *Houston Lawyers' Association*, the League of United Latin American Citizens (LULAC) and the Houston Lawyers' Association. LULAC, a Texas statewide organization composed of Mexican-Americans and African-American residents of Texas, had challenged the at-large election system used by Texas in the election of district judges. The Fifth Circuit panel held that the election of trial judges was not subject to section 2. LULAC v. Clements, 902 F.2d 293 (5th Cir. 1990). After granting rehearing *en banc*, the circuit court held that all judicial elections were not subject to section 2. LULAC v. Clements, 914 F.2d. 620 (5th Cir. 1990). Houston Lawyers Association, an organization of African-American attorneys, intervened in support of the original plaintiffs in *LULAC* and sought review in the Supreme Court of the Fifth Circuit's *en banc* decision. 111 S. Ct. at 2378.

47. Texas district courts are the trial courts of general jurisdiction and are elected from judicial districts. Eight of the challenged judicial districts elected district judges from a single county and two elected judges from a bi-county district. Each judicial candidate was required to be a resident of the district in which he/she sought judicial office. Candidates for district court sought election for a separately numbered seat or post. The petitioners contended that the at-large, district wide election system diluted the voting strength of African-American and Mexican-American voters due to the submergence of these minority groups into a white majority population that was able usually to defeat minority preferred candidates. 111 S. Ct. at 2378-79.

48. 111 S. Ct. 775 (1991).

49. The panel in *LULAC* had decided that since Texas district court judges were "single-member office" holders, section 2 was inapplicable. 902 F.2d at 308. The panel relied on the second circuit's decision in *Butts v. City of New York*, 779 F. 2d 141 (2nd Cir. 1985), *cert denied*, 478 U.S. 1021 (1986), distinguishing elections for multi-member bodies from single member offices. The *Butts* court concluded that whereas in an election to a multi-member body, a minority class has an opportunity to secure a share of representation equal to that of other classes by electing its members from districts, there could be no share of a single-member office, and, therefore, a section 2 vote dilution challenge was inappropriate. 779 F. 2d at 148. Similarly, the panel, in rejecting *LULAC's* claim, stated that since "the full authority of a trial judge's office is exercised exclusively by one individual," a vote dilution challenge must fail because "there can be no share of such a single-member office." 902 F.2d at 308.

executive officers and trial judges notwithstanding the fact that these office holders act independently or that one person only holds the office.[50] However, despite its decision that single-member office holders, including trial judges, were subject to the Voting Rights Act, the Court concluded that a state's interest in the maintenance of an at-large judicial election system was a legitimate factor to be weighed under the totality of circumstances test of section 2.[51] However, the Court cautioned that the state's interest was merely one factor to be considered and that interest would not in every case be sufficient to outweigh proof of racial vote dilution.[52]

The Court's rejection of the single-member theory in *Houston Lawyers' Association* was justified as applied to the election of trial court judges. Even if this theory had merit in other contexts, which the Court questioned, the single-member exception was inappropriate as applied to trial judges. The hallmark of a single-member office is that there is only one office holder for an entire geographic region, therefore the jurisdiction can not be subdivided without changing the form of government to a multi-member body. In counties that hold at-large elections for trial judges, numerous judges are elected from each county or judicial district and several judges serve within the district. Such is not the case where a single mayor is elected in a city. Thus, the question becomes whether the judicial district can be subdivided into smaller geographical units so that the votes of minority electors are not submerged into a bloc of white votes. The *Butts* case, upon which the panel relied in its decision, does not address that issue, and the Court was correct in rejecting the application of the single-member office theory to the election of multiple judges on an at-large basis. Additionally, the Court's refusal to allow the state's interest in maintaining at-large judicial elections to exclude those contests from vote dilution challenges furthers the interests of the Act. Under the Court's ruling, a state may argue that it has a compelling interest in the maintenance of such a system, but such considerations will be relevant at the liability phase or the remedial phase of a vote dilution litigation only and cannot be used to exclude judicial contests from section 2's coverage.

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50. 111 S. Ct. at 2380.
51. *Id.* at 2381.
52. *Id.* at 2381.

III. DETERMINING LIABILITY IN A SECTION 2 JUDICIAL ELECTION CASE

A. *Thornburg v. Gingles*[53]

Notwithstanding the Court's inclusion of state court judicial elections in the coverage of section 2, the Court's failure to address liability or remedial issues has created little guidance for the courts and potential litigants. With respect to establishing liability, the Court in *Gingles* set forth the criteria for a vote dilution case under the amended section 2, and this standard should be applicable to judicial elections.

In *Gingles*, the Court had the occasion to interpret the recently amended Voting Rights Act and to establish the standard of proof under section 2. The Court relied primarily on the Senate Report to aid in the interpretive process.[54] According to the Senate Report, the primary question in a vote dilution challenge is whether, as a result of the challenged voting practice or structure, minority group members do not have an equal opportunity to participate in the political process and to elect candidates of their choice.[55] The Report lists certain factors in an effort to provide guidance in the determination of this issue.[56] In addition to these factors, the Report states that evidence

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53. 478 U.S. 30 (1986).

54. The Court noted that it had recognized repeatedly that the committee reports on a bill were the authoritative source for legislative intent. 478 U.S. at 43; Garcia v. United States, 469 U.S. 70 (1984); Zuber v. Allen, 396 U.S. 168 (1969).

55. 478 U.S. at 44; *See also* S. Rep., *supra* note 17, at 28.

56. The Senate Report noted the probity of the following factors in a section 2 violation:

> 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 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

concerning the degree to which elected officials are responsive to the needs of members of minority groups may have probative value.[57] The Report also indicates that the interest of the state in the maintenance of the challenged structure is also relevant to the determination of a vote dilution challenge.[58] The *Gingles* Court recognized that these factors were important to deciding a vote dilution challenge, but stressed that the Report stated that the list of factors was neither comprehensive nor exclusive.[59] In the Court's analysis, the determination of the degree of minority access to the political process should be made on the basis of a practical evaluation of the present and past reality, combined with a functional view of the political process.[60]

After setting forth its overview of the determination of a section 2 violation, as evidenced by the Senate Report, the Court turned to an examination of the elements of a vote dilution challenge. The Court stated that the essence of a section 2 claim was that an election law, practice or structure, in conjunction with social and historical conditions, resulted in the diminution of the ability of minority voters to elect their preferred candidates.[61] The Court in prior decisions had recognized that at-large election schemes can operate to deny minority group members equal access to the political process.[62] However, the Court cautioned that minority group members

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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.

S. Rep., *supra* note 17, at 28-29.

57. S. Rep., *supra* note 17, at 29.

58. *Id.* at 29.

59. *Gingles*, 478 U.S. at 45.

60. *Id.* at 45.

61. *Id.* at 47.

62. *See* Burns v. Richardson, 384 U.S. 73, 88 (1966); Rogers v. Lodge, 458 U.S. 613, 617 (1982); White v. Regester, 412 U.S. 755 at 765 (1973); Whitcomb v. Chavis, 403 U.S. 124, 143 (1971). *See also* Barbara L. Berry & Thomas R. Dye, *The Discriminatory Effects of At-Large Elections*, 7 Fla St. U. L. Rev. 85 (1979); James Blacksher & Larry Menefee, *From* Reynolds v. Sims *to* City of Mobile v. Bolden, 34 Hastings L.J. 1 (1982); Paul W. Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 Ga. L. Rev 353 (1976); Katherine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851 (1982).

who challenge such systems must prove that the use of the challenged structure operates to minimize the ability of the group to elect their preferred candidates.[63]

In order to prevail on a claim that the use of a multimember or at-large election system dilutes minority voting strength, the Court stated that the following circumstances must be found by the district court. The minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a single-member district.[64] Additionally, the minority group must be able to show that it is politically cohesive.[65] Finally, the group must establish that the white majority votes sufficiently as a bloc to enable it to defeat minority candidates.[66] By demonstrating the existence of these factors, the minority group can establish that submergence in a white multimember district impedes its ability to elect its chosen representatives.

The standard delineated in *Gingles* should be applicable to a section 2 challenge to an at-large judicial election system. In order to prevail, minority group plaintiffs must make a threshold showing that its members are so geographically compact that single-member districts could be created in which they constitute a numerical majority. Additionally, if the minority group offers proof of minority political cohesion and racially polarized voting patterns among white voters they could establish that the conjunction of the submergence of the minority group into the larger white district, and the at-large

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63. *Gingles*, 478 U.S. at 48.

64. *Gingles*, 478 U.S. at 50. Unless the minority group has the potential to elect representatives in the absence of the challenged structure, there can be no dilution. The single-member district is the appropriate standard against which to measure the potential of the minority group to elect candidates of its choice because it is the smallest political unit from which representatives are elected. *Id.* at 50 n.17. If the minority group is dispersed throughout an at-large district or county or is so numerically small that it could not constitute a majority in a single-member district, the group cannot maintain that they can elect representatives of their choice in the absence of the challenged structure because a smaller political subdistrict or unit could not be created consistent with the Constitution's one-person one-vote standard.

65. *Id.* at 51.

66. *Id.* at 51. In the absence of significant white bloc voting, it can not be contended that the ability of minority group members to elect their chosen representatives was inferior to white voters or that the at-large structure impeded the ability of minorities to win at the polls. *See, e.g.*, McMillan v. Escambia County, Fla., 748 F.2d 1037, 1043 (5th Cir. 1984); United States v. Marengo County Commission, 731 F.2d 1546, 1566 (11th Cir. 1984), *appeal dism'd and cert. denied*, 469 U.S. 951 (1984); Nevitt v. Sides, 571 F.2d 209, 223 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

nature of the election system, resulted in a diminution of the group's ability to elect candidates of their choice.

Once this threshold showing is made, the court may explore the evidence concerning the other factors discussed in *Gingles* and listed in the Senate Report.[67] At this point, the state's interest in maintaining the at-large system as it stands should be weighed. While the *Houston Lawyers' Association* Court did not provide guidance as to how much weight the state's interests are allowed, in light of the purpose of the Act to correct a pernicious history of discrimination[68] in the exercise of the franchise, the state should be required to demonstrate a compelling reason before such an interest outweighs proof of the *Gingles* threshold factors. This approach has been employed with varying results in cases involving challenges to the at-large election of state court judges.[69]

B. *Clark v. Roemer*[70]

In *Clark*, plaintiffs claimed that the use of multimember districts to elect family court, district court and court of appeals judges diluted black voting strength in violation of section 2.[71] Although the

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67. *See supra* note 56 and accompanying text for a discussion of these factors.

68. The Senate Report discussed the history of racial discrimination in the exercise of the franchise as follows:

> [T]raditionally, black Americans were denied the franchise throughout the South. After statutory bars to voting by blacks were lifted, the main device was denial of voter registration — by violence, by harassment, and by the use of literacy tests or other screening methods.

S. Rep., *supra* note 17, at 5.

69. Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991) (District court found section 2 violations employing *Gingles* test and Senate Report factors); Southern Christian Leadership Conference v. Evans, 785 F. Supp. 1469 (M.D. Ala. 1992) (District court rejected challenge to at-large judicial election system).

70. This case was originally filed against Governor Edwin W. Edwards. Charles Roemer, Edwards' successor in office, was substituted as a defendant. Clark v. Edwards, 725 F. Supp. 285 (M.D. La. 1988).

71. Clark v. Edwards, 725 F. Supp at 285. There were 178 district court judges in Louisiana, 169 of whom were elected from multimember districts. *Id.* at 289. In judicial districts that elected more than one district court judge, the elections were held under an at-large system consisting of the entire district (multimember districts). *Id.* at 287-88. Such districts ranged in size from 345 square miles to 2239 square miles. *Id.* at 300. At the time of the litigation, African-Americans held only five of the district court judgeships. *Id.* at 299.

There were five circuit courts of appeal, each of which was divided into separate elections districts. There were 48 court of appeals judges in Louisiana, 44 of

decision on liability was made prior to the Court's rulings in *Chisom* and *Houston Lawyers' Association*, the district court utilized the *Gingles* analysis and the Senate Report's factors in reaching its conclusion that the at-large judicial system in Louisiana violated the Act.[72]

The district court analyzed the facts and found that numerous Senate Report factors,[73] connoting a possible violation, were evident. There had been a long history of official discrimination in Louisiana that touched on the right of African-American citizens to register, to vote and to otherwise participate in the democratic process.[74] In finding the existence of racially polarized voting patterns in elections in each of the family court, district court and court of appeals judicial districts, the court relied on prior judicial findings[75] on this issue and the testimony of two experts.[76] The court concluded that there were

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whom were elected from multimember districts. In those districts that contained more than one judge, the judges were elected on an at-large district basis. *Id.* at 288. The court of appeals districts ranged in size from 19,344 square miles to 350 square miles. *Id.* at 300. The family court in East Baton Rouge Parish, the only family court district challenged by plaintiffs, was composed of three judges who were elected at large from the entire parish. African-Americans constituted 31.3% of the population of the parish. *Id.* at 288. One African-American had been elected to the court of appeals.

Candidates for district court, appellate court judgeships from multimember districts and family court judgeships in East Baton Rouge Parish ran for a designated post within the district. There was a district residency requirement for the aforementioned judicial offices. With respect to the multimember court of appeals districts, there was an additional requirement that the candidate be a resident of the circuit and the respective district. *Id.* at 288. Primaries were conducted on a non-partisan basis. The two top candidates in the primary would compete at the general election with a majority vote requirement. *Id.* at 290.

72. In reaching its conclusion, the district court followed the Fifth Circuit's panel decision in Chisom v. Edwards, 839 F.2d 1056 (5th Cir. 1988), that held that judicial elections were subject to the requirements of section 2.

73. *See supra* note 56 and accompanying text for discussion of the Senate Report's typical factors.

74. 725 F. Supp. at 295. The court took judicial notice of prior decisions finding the existence of *de jure* and *de facto* discrimination regarding blacks and the right of suffrage. *See* Chisom v. Edwards, 690 F. Supp. 1524 (E.D. La. 1988); Major v. Treen, 574 F. Supp. 325, 339-41 (E.D. La. 1983).

75. *See* Citizens for a Better Gretna v. City of Gretna, 636 F. Supp. 1113 (E.D. La. 1986), *aff'd*, 834 F. 2d 496 (5th Cir. 1987); Major v. Treen, 574 F. Supp. 325 (E.D. La. 1983); East Jefferson Coalition for Leadership and Development v. Parish of Jefferson, 691 F. Supp. 991 (E.D. La. 1988).

76. Dr. Richard Engstrom, who testified for the plaintiffs, found widespread racial polarization in voting in Louisiana. The defendants' expert, Dr. Ronald E. Weber, reached the same conclusion. Clark v. Edwards, 725 F. Supp. at 296.

substantial socio-economic disparities between African-Americans and whites in Louisiana, which were viewed by the court as vestiges of past discrimination that hindered the ability of African-Americans to participate effectively in the political process.[77] The court also found that racial appeals had been utilized in election campaigns involving candidates of different races.[78] The court also noted the paucity of African-American representation in the challenged judicial offices.[79] The court did not find that the size of the districts was a hindrance to African-American participation. Additionally, the district court decided that the requirement that candidates run for specific posts limited the ability of African-Americans to elect candidates of their choice.[80]

After reviewing the Senate Report factors, the district court analyzed the facts in light of the *Gingles* threshold test. The court interpreted *Gingles* as holding that multimember districts did not violate section 2 unless a politically cohesive minority group was sufficiently numerous to constitute a majority in a single-member district and white racial bloc voting prevented the election of minority preferred candidates.[81] The court found that African-Americans were sufficiently numerous and geographically compact to constitute a majority in single-member subdistricts in twenty-four district court multimember districts, and the family court district of East Baton Rouge Parish.[82] The court also found that single-member majority African-American districts could be established in each of the existing circuit courts of appeals districts.[83] In all of these districts, white majorities had voted to defeat minority preferred candidates.[84] In light of its findings, the court concluded that the use of multimember election districts and circuit-wide election districts in judicial elections afforded African-Americans less opportunity to elect candidates of their choice.[85]

After the decisions in *Chisom* and *Houston Lawyers'*

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77. *Id.* at 299.
78. *Id.*
79. *Id.*
80. *Id.* at 301.
81. *Id.*
82. *Id.* at 301-02.
83. *Id.* at 301.
84. *Id.* In a subsequent opinion after conducting a district by district analysis of the *Gingles* factors, the district court revised its findings and concluded that violations had been established in only nine district court judicial districts, the family court for the East Baton Rouge judicial district, and one district of the court of appeals. Clark v. Roemer, 777 F. Supp. 445, 469 (M.D. La. 1990).
85. Clark v. Edwards, 725 F. Supp. at 302.

Association, the court reexamined its findings in light of the holding in the latter case that the state's interest in maintaining a link between a district judge's jurisdiction and the area of residency of his or her voters was a relevant factor to be considered under a totality of the circumstances analysis.[86] In support of its linkage argument, the state presented witnesses who testified to the fact that the state had a vital interest in linking a judge's jurisdiction and the residency of the voters that elect that judge. The witnesses also stated that election from smaller subdistricts would create a perception of "hometown justice."[87] After reviewing the record on the issue of the state's interest in maintaining linkage, the district court concluded that the state failed to explain adequately the basis for its contention that such linkage was of vital interest to the state.[88] In light of its conclusion, the court held that the state's purported interest did not preclude a finding of a section 2 violation regarding the at-large method of judicial election.

The *Clark* decision is a well-reasoned, thoughtful analysis of the issues involved in determining whether judicial elections violate the rights of minorities. The district court in several opinions conducted an intense review of the evidentiary record in light of the Senate Report factors and the *Gingles* test. After reviewing all the evidence, the stipulations of the parties, and prior judicial decisions in the jurisdiction in vote dilution cases, the court determined that a violation had been established. Additionally, following the *Houston Lawyer's Association* decision the court afforded the parties the opportunity to demonstrate the existence of a state interest in maintaining a link between a judge's jurisdiction and the residency of the voters that elect that judge. The court required the state to carry its burden by demonstrating that there was a factual basis for such a linkage. After reviewing the evidence submitted, the court determined that the state had failed to demonstrate adequately that such a linkage was required to effectuate a governmental interest and reaffirmed its liability finding. Requiring the party seeking to avoid a liability finding to demonstrate the necessity for the maintenance of a system that hinders minorities from gaining equal access to judicial office is a sound approach given the weight and importance of the right

86. Clark v. Roemer, 777 F. Supp. 471, 479 (M.D. La. 1991).
87. *Id.* at 479.
88. *Id.*

to vote without discriminatory impediments in American society.[89]

C. *Southern Christian Leadership Conference (SCLC) v. Evans*[90]

In *SCLC*, plaintiffs challenged the at-large election system utilized in Alabama for electing trial judges as violative of section 2.[91] The district court noted that while *Chisom* rejected the contention that judicial elections were not subject to a vote dilution challenge, the Supreme Court gave the district courts little guidance as to how to evaluate such a challenge under section 2.[92] Despite the difficulties in negotiating what it believed to be uncharted waters, the district court evaluated the evidentiary record in light of the *Gingles* standard.

The district court began its analysis by noting that two of the three threshold *Gingles* questions had been answered in the affirmative. All parties agreed that the minority group was sufficiently numerous and geographically compact to constitute a majority in a single-member district in all but one of the challenged circuits and in each of the four challenged districts.[93] Additionally, the court found that plaintiffs had established political cohesion.[94] The court also found that Alabama had a history of discrimination and disenfranchisement of minority groups and that there was evidence of racial appeals in some judicial election contests.[95] The court did not consider the size of the challenged circuits or the majority vote requirement as an impediment to political participation by minorities.[96] The issue of racially polarized voting patterns was disputed by the defendants.[97] The court reviewed the testimony of the

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89. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533 (1964) (The right of suffrage is fundamental in a democratic society, and alleged infringements of the right to vote must be carefully and meticulously scrutinized.); *accord* Ball v. James, 451 U.S. 355 (1981); Marston v. Lewis, 410 U.S. 679 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

90. Civ. Act. No. 88-H-462-N, 1992 WL 51575 (M.D. Ala.)

91. Alabama has a unified judicial system of trial and appellate courts. The circuit court is the trial court of general jurisdiction. Circuit courts are divided into forty judicial circuits. Each circuit consists of one or more counties. The number of circuit court judges in the challenged circuits ranged from twenty-four to two. The district courts are trial courts of limited jurisdiction. Each county has at least one district court judge. Candidates for judicial office in multimember circuits or districts compete for designated posts. *Id.* at *1.

92. *Id.* at *2.

93. *Id.* at *4.

94. *Id.*

95. *Id.* at *4.

96. *Id.* at *9.

97. *Id.*

parties' experts and found that significant racially polarized voting did not exist.[98]

In addition to examining the *Gingles* and Senate Report's factors, the court also analyzed issues that it believed had particular relevance to a judicial vote dilution case. The first of these issues was the number of African-Americans lawyers residing in the challenged circuits or districts. The court noted that the number of African-Americans serving in judicial positions in Alabama was far less proportionally than the number of African-Americans in the general population. The court discounted this fact by noting that there was a paucity of African-American lawyers qualified to seek judicial positions

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98. *Id.* at *5. With respect to the racial polarization issue, plaintiffs' expert, Dr. Allan Lichtman, analyzed approximately three hundred election contests over a ten year period in which voters were offered a choice of an African-American and a white candidate. In those races, Dr. Lichtman found that African-American voters tended to vote for African-American candidates and white voters voted for white candidates. However, the district court discounted this evidence, based on the fact that Dr. Lichtman examined only interracial election contests. *Id.* at *5.

There are two critical reasons for examining interracial contests. First, in order to demonstrate political cohesion, plaintiffs must establish that African-Americans vote for African-American candidates when given a choice. Second, in order to establish that white voters have tended to vote as a bloc to defeat minority preferred candidates, election contests that clearly present choices between white and African-American candidates can be examined for evidence of such polarization. In the absence of such proof, the *Gingles* factors cannot be established. In ignoring the evidence of interracial election contests, the district court failed to comprehend the significance of this evidence in establishing racial polarization.

This view of the relevance of racially polarized voting patterns is confirmed by *Gingles*. The Court notes that "[b]ecause both minority and majority voters often select members of their own race as their preferred candidate, it will frequently be the case that an African-American candidate is the choice of African-Americans, while a white candidate is the choice of whites." 478 U.S. at 68. Thus, the critical issue in determining racially polarized voting is "the *status* of the candidate as the *chosen representative of a particular racial group.*" *Id.* (emphasis in original). The issue to be determined is which candidate would be chosen by the minority voters in election contests where minorities are given an opportunity to vote for a minority candidate. If that candidate received a majority of the minority vote, it is reasonable to infer that that candidate was the minority preferred candidate. Similarly, in such a race, if white voters tended to oppose the election of a minority candidate, the court could infer that white voters tended to vote as a bloc to defeat a minority preferred candidate. The danger in relying, as the district court did in *SCLC*, on contests in which no minority candidate competes is the absence of a statistical tool to determine whether minorities voted for a white candidate because he or she was in fact their choice or because there was no minority candidate in the election contest.

in the state.[99] In the challenged circuits and districts where there were no African-American judges, there were also few qualified African-American lawyers residing in those districts and circuits. In contrast, according to the court's analysis, in those circuits where African-American judges had been elected, those judges occupied more than a proportionate share of the judicial offices in comparison with the number of African-Americans residing in those districts who were qualified to run for the subject offices.[100] In weighing this evidence, the court analogized a voting rights case to an employment discrimination case. The court noted that in employment discrimination cases involving exclusion from skilled jobs, the district courts utilize a smaller statistical pool to determine if minorities have been denied skilled positions, and that a larger statistical pool is used where a case involves nonskilled jobs.[101] If this approach is employed in a voting rights case where there were few African-American lawyers qualified to seek judicial office by election, there could be no claim of discriminatory exclusion. Utilizing the employment discrimination analysis, the court concluded, in light of the limited number of qualified African-American attorneys residing in the challenged districts, that the state had a compelling state interest in maintaining a large pool of lawyers from which to make selections for judicial seats.[102]

The court also accepted the state's argument that Alabama had

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99. There were 9,600 licensed lawyers in Alabama, and only 295 were African-American. *Id.* at *7.

100. The tenth judicial circuit had three African-American circuit judges out of twenty four. It had no African-American district judges out of eleven. According to the court's analysis, the proportionate number of African-American trial judges in the tenth circuit was 8.6%, whereas only 3.48% of the qualified lawyers were African-American in that circuit. *Id.* at *7. The thirteenth circuit had fourteen circuit judges, one of whom was African-American and only one African-American district judge. The court found that African-American lawyers held 14.3% of the judicial positions, but constituted only 2.1% of the pool from which judicial offices are filled. *Id.* at *8. Similarly, in the fifteenth circuit, one of seven circuit judges was African-American and all of the three district judges were white. The court concluded that African-American attorneys made up 5% of the qualified attorneys, yet held 10% of the judicial seats. *Id.*

101. *Id.* at *8. The court observed that "[w]hen 'special qualifications are required to fill particular jobs, comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value.' " *Id.* (quoting Hazelwood School District v. U.S., 433 U.S. 299, 307-08 n. 13 (1977). *See also* Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605 (1974); J.A. Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Peightal v. Metropolitan Dade County, 940 F.2d 1394 (11th Cir. 1991).

102. Civ. Act. No. 88-H-462-N, 1992 WL 51575 at *12.

a strong interest in linking a judge's jurisdiction to the population that elects the judge.[103] The court also gave credence to the view that a subdistrict remedy would create the perception for a litigant from outside the judge's election district that a degree of bias exists in favor of an opponent from the judge's electorate.[104] In light of the foregoing and its analysis of the *Gingles* and Senate Report factors, the court rejected the plaintiffs' claims.

The most problematic feature of the district court's determination of the issues in *SCLC* was the adoption of an employment discrimination standard. By incorporating a standard from employment discrimination law, the court completely defeated the purpose of the Voting Rights Act. The Act is not meant to protect employment rights of excluded African-American lawyers or candidates. The purpose of the Act is to guarantee that minority voters will not be disenfranchised by election systems or practices adopted by the majority that work to dilute the voting strength of protected class members. Essentially, the Act seeks to protect the minority from the effects of discriminatory voting practices. The Act is not an equal employment opportunity bill, and therefore considerations appropriate to a case involving exclusion from the workforce have no relevance in determining whether African-American voters have had an equal opportunity to participate in the electoral process. In a voting rights case, the focus is on the rights of the voters, not the rights of the candidates.

This view of the Act is supported by the Senate Report's discussion of the meaning of amended section 2. According to the Report, plaintiffs must prove that the challenged system results in the denial of access to the political process.[105] Thus, Section 2 protects the right of minority voters to be free from election practices, procedures or methods that deny them the same opportunity to participate in the electoral process as other citizens enjoy.[106] In the twenty-three cases that were examined in the Senate Report, the issue in each case was whether the members of the minority group had the same opportunity as others in the electorate to participate and elect representatives of their choice.[107] At no point in the legislative

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103. *Id.* at *10.
104. *Id.*
105. S. Rep., *supra* note 17, at 27.
106. *Id.* at 28.
107. *Id.* at 32.

history was there any suggestion that the number of potential candidates residing in a challenged district was a relevant issue in resolving a vote dilution claim.

It is also disingenuous to rely on the paucity of qualified candidates residing in the challenged districts as a determining factor in a vote dilution case given the mobility of American citizens. It may well be the case that few potential African-American candidates reside in a challenged district because of the existence of an at-large election system that dilutes the voting strength of a politically and geographically cohesive minority group. Additionally, if a court finds in favor of a voting rights plaintiff and creates a subdistricting remedy, such a remedial provision may encourage the migration of minority candidates to that district who might otherwise not have resided there because of the lack of success of other candidates under the at-large system. Because of these reasons, it is inappropriate to utilize the proportion or number of potential candidates residing in a district as a controlling factor in a vote dilution case.

The court also incorrectly used the paucity of prospective minority candidates residing in the challenged areas as support for the state's interest in preserving a qualified judiciary. By accepting this premise as a legitimate state concern and terminating the inquiry at the liability phase, the court denied plaintiffs the opportunity to demonstrate that there were other, less discriminatory means to accomplish the state's purpose. Rather, the court should have afforded plaintiffs an opportunity to demonstrate the existence of alternatives to the at-large election system that could be employed to both remedy the vote dilution of minority group members and protect the state's interest in a qualified judiciary. One possible remedy would be to replace the at-large system with subdistricts and eliminate the requirement that a candidate reside within the geographical subdistrict.[108] This approach furthers the rights protected under

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108. This approach was used in *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), a pre-*Chisom* decision, where the court noted at the liability phase that in some of the challenged counties there were few statutorily qualified African-American lawyers in residence. *Id.* at 1184. African-Americans constituted 35% of the population of Mississippi and 3.7% of the lawyers. Of 5,900 lawyers admitted in Mississippi, only 220 were African-American. Only 150 of the African-American lawyers had the statutory qualifications for the subject judicial offices. *Id.* at 1193. Despite the paucity of qualified African-American lawyers, the court viewed this only as a factor in determining the vote dilution claim, not as a controlling factor, as the court did in *SCLC*. *Id.* at 1193 At the remedial phase, the court decided to create subdistricts for the challenged judicial offices and eliminated any subdistrict residency requirement. The court stated that the ruling was necessitated by the lack of statutorily qualified African-American candidates for

section 2 without impermissibly intruding on a state's right to establish legitimate qualification standards.

The Supreme Court in *Chisom* established that judicial elections are subject to the dictates of section 2. However, the issue of liability determination was not addressed by the Court. This issue should be determined in the judicial context as in other vote dilution challenges to at-large election systems. Specifically, courts should review the facts in light of the standards enunciated in *Gingles* and the Senate Report factors. This approach is a functional one which permits an appraisal of the facts of each case and affords all parties the opportunity to present evidence that will assist the court in determining liability. Additionally, the state's interest in the maintenance of an at-large system should be treated as one factor among many that the court should consider in reaching its liability determination. However, if the court concludes that the state's interest is a compelling one, plaintiffs should have the opportunity at the remedial stage to offer alternatives to the at-large system that will remedy the dilution of minority voting strength and accommodate the state's interest.

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judicial office residing in some of the subdistricts. The court, in eliminating the residency requirement, balanced the state's interest in having qualified candidates against the right of minorities to have equal access to the political process. Martin v. Mabus, 700 F. Supp. 327, 332-33 (S.D. Miss. 1988) (At the remedial stage, Governor Ray Mabus was substituted for former Governor William A. Allain.) *Id.* at 327. The court concluded that the state's interests could be protected by an alternative system that did not impede the ability of minorities to elect judicial candidates of their choice. By employing a balancing approach, the court was able to accommodate the state's interest in maintaining a qualified judiciary and protect the minority group's voting rights.

IV. DETERMINING THE APPROPRIATE REMEDY IN JUDICIAL VOTE DILUTION CASES

In successful vote dilution challenges to at-large election systems, the courts have traditionally utilized the subdistricting remedy to alleviate the section 2 violations.[109] In creating a subdistricting remedy, the courts carefully scrutinized proposed plans to ensure that minorities have an equal opportunity to elect candidates of their choice.[110] Courts have also taken into account traditional redistricting criteria in the creation of subdistrict plans.[111] Two district courts have considered the issue of fashioning remedies where a violation of section 2 exists in a state's at-large judicial election system.[112]

In both cases, the courts considered numerous alternatives to the at-large multimember judicial election system. After evidentiary hearings and consideration of the applicable law, both the *Martin* and *Clark* courts decided that single-member districts were the most appropriate means to remedy the proven violations.

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109. *See, e.g.*, Connor v. Finch, 431 U.S. 407 (1977); East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976) (*per curiam*); Chapman v. Meier, 420 U.S. 1 (1975); Mahan v. Howell, 410 U.S. 315 (1973); Connor v. Johnson, 402 U.S. 690 (1971) (*per curiam*). *See also* Pamela Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 Harv. C.R.-C.L. Rev. 173 (1989); Danial Oritz, Note, *Alternative Voting Systems as Remedies for Unlawful At-Large Systems*, 92 Yale L.J. 144 (1982).

110. The preferred method to ensure that result is the creation of "safe" districts where racial minorities have an effective electoral majority. Because the proportion of minorities who are of voting age tends to be less than that of other groups and minorities have lower registration and turnout rates, the courts have created supermajority districts. *See, e.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144, 164 (1977) ("[S]ubstantial nonwhite population majority - in the vicinity of 65% - would be required to achieve a nonwhite majority of eligible voters."); Kethcum v. Byrne, 740 F.2d 1398 (7th Cir. 1984).

111. Typical criteria include compactness, contiguousness, and population equality. *See, e.g.*, Wyche v. Madison Parish Police Jury, 635 F.2d 1151 (5th Cir. 1981); Marshall v. Edwards, 582 F.2d 927 (5th Cir. 1978), *cert. denied*, 442 U.S. 909 (1979). For an application of these criteria to the creation of judicial subdistricts *see infra* notes 120, 121 and 150 and accompanying text.

112. Martin v. Mabus, 700 F. Supp. 327 (S.D.Miss. 1988); Clark v. Roemer, 777 F. Supp. 445 (M.D. La. 1990) (pre-*Chisom*) and 777 F. Supp. 471 (M.D. La. 1991) (post-*Chisom*).

A. *Martin v. Mabus*

In *Martin*, the plaintiffs challenged the at-large election of circuit, chancery and certain county court judges in the state of Mississippi as violative of section 2. After a trial on the issue of liability, the district court found section 2 violations in eight of the challenged districts.[113] At the remedy phase, the court decided that the creation of single-member subdistricts for election purposes was the most effective remedy for the section 2 violations.[114] Judges were to be elected from subdistricts but their jurisdiction would not be linked with their electorate. Thus, judges elected on a subdistrict basis could serve in their entire judicial district.[115] The court also ruled that there would be a judicial district residency requirement, but judicial candidates would not be required to reside within their election subdistrict. The court refused to require election district residency because of the low number or absence of qualified candidates in some subdistricts.[116] By not requiring residency within the subdistrict, the court balanced the minority group's rights against the state's interest and sought to accommodate both by requiring that judicial candidates reside within the jurisdictional district but not the smaller election subdistrict.

In the remedial phase, the court noted that where a section 2

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113. Martin v. Allain, 658 F. Supp. 1183, 1204 (S.D.Miss. 1987). The court found violations in the fifth, seventh, ninth and eleventh chancery court districts, the fourth, seventh, eleventh circuit court districts, and the Hinds county court district. The chancery court is an equity and probate trial court of unlimited jurisdiction. The circuit courts are the law trial courts of unlimited jurisdiction. *Id.* at 1187. The state was divided into twenty chancery and twenty circuit court districts. All districts were drawn according to county lines. With the exception of two single-county chancery districts, the chancery districts contained from two to six counties. There were thirty-nine chancery judges, six of whom were elected from single judge districts. Of the twenty circuit court districts, only one was a single-county district. The other nineteen districts contained two to seven counties. There were forty circuit judges, six of whom were elected from single-county districts. In all chancery and circuit court multi-judge districts, judges were elected district-wide and to numbered posts. Each judge must be a resident of his or her district. *Id.*

114. 700 F. Supp. at 332.

115. *Id.*

116. Judicial candidates in Mississippi are required to be over thirty years of age and practicing attorneys for five years, thereby reducing the number of potentially eligible candidates. *Id.* at 332-33. *See supra* note 108 for a complete discussion of the court's rationale for not requiring subdistrict residency.

violation has been found, the court must fashion a remedy that is both commensurate with the violation found and completely remedies the dilution of minority voting strength. While the court recognized that it was not bound by the doctrine of one-person, one-vote in the creation of subdistricts,[117] it acknowledged that general equitable principles required that population variance be minimized between sub-districts.[118] In an effort to devise an appropriate remedy, the court, pursuant to Federal Rule of Evidence 706(a), appointed an expert to draft proposed subdistricts.[119] Although the court believed that creating judicial subdistricts presented different issues than traditional legislative redistricting, the court instructed its expert to use certain general redistricting criteria.[120] The court directed its expert to use these criteria in descending order.[121]

At the hearing on the expert's plan, the plaintiffs challenged the numerical percentage of the African-American majority in certain

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117. *See* Wells v. Edwards, 347 F. Supp. 453, 454-55 (M.D. La. 1972) (three-judge court), *aff'd mem.*, 409 U.S. 1095 (1973); Voter Information Project, Inc. v. City of Baton Rouge, 612 F.2d 208, 211 (5th Cir. 1980).

118. 700 F. Supp. at 333.

119. *Id.* at 331.

120. The traditional criteria include compactness, contiguity, community of interest, natural boundaries, and preservation of existing precinct lines. 700 F. Supp. at 332. The court believed that the community of interest criteria should be applied differently in the judicial redistricting context. The court stated that "[s]evere ethical restrictions are placed on an attorney's capabilities in campaigning for judicial office, and . . . lawyers are better known by their association with their home communities and home counties rather than with the district as a whole." *Id.* at 332.

121. The criteria framed by the court were as follows:

> (1) In each district there should be at least one judicial sub-district with a black majority population of 60%. . . .
>
> (2) The single member sub-districts must be contiguous and should be as compact as possible. . . .
>
> (3) In multi-county districts, whole counties should be preserved where possible. . . .
>
> (4) Where possible, cities or towns, with the exception of Jackson, Mississippi, should not be divided among separate sub-districts. . .
>
> (5) Where counties have to be divided, the sub-districts should be drawn along current precinct lines. . . .
>
> (6) Precincts should not be divided among separate judicial sub-districts. . . .
>
> (7) If a county or city has to be divided, wherever possible common lines should be used for both circuit and chancery court sub-district boundary lines. . . .
>
> (8) A 15% maximum range of deviation is allowable for population variance among sub-districts within a judicial district.

700 F. Supp. at 333-35.

subdistricts.[122] The plaintiffs had proposed that these subdistricts have a 68.5% majority because of lower voter registration rates among African-Americans in Mississippi.[123] The court rejected the plaintiffs approach and adopted a 60% numerical majority for minority subdistricts. The court believed that the higher figure was unnecessary to ensure minority success at the polls because of recent electoral victories in predominantly minority districts with less than a 65% majority.[124] The court also rejected the 68.5% majority because it feared that such a requirement would overconcentrate minorities into districts and lessen their ability to influence judicial races in adjacent subdistricts.[125]

In addition to critiquing the court's criteria and the plan proposed by its expert, the plaintiffs proposed an alternative to the subdistricting remedy. One alternative was a limited voting procedure. Under that proposal, at-large multimember districts would be retained and voters would be allocated fewer votes than the judgeships to be filled at an election.[126] The court rejected this alternative as experimental and unnecessary in the context of the pending litigation.

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122. *Id.* at 335.

123. Plaintiffs' expert, Dr. Allan Lichtman, conducted a study that suggested that 54% of the African-American voting age population was registered and 79% of the white voting age population was registered. 700 F. Supp. at 335. A guideline of 65% of the total population has been approved by the Supreme Court as representing the proportion of minority population required to ensure minorities a fair opportunity to elect candidates of their choice. *See, e.g.*, United Jewish Orgs. v. Carey, 430 U.S. 144, 164 (1977) (White, J.) ("[S]ubstantial nonwhite population majority - in the vicinity of 65% - would be required to achieve a nonwhite majority of eligible voters.").

124. The court noted that in the second congressional district with an African-American majority of between 58-60%, an African-American candidate, Mike Espy, was successful in a 1986 race. 700 F. Supp. at 333. The second congressional district covered the same geographical area as the proposed majority African-American judicial subdistrict. *Id.*

125. *Id.* at 333-34.

126. Plaintiffs' expert, Dr. Richard Engstrom, described two different variants of the limited voting procedure. Under a single, non-transferable limited voting system, in judicial districts with two or three judgeships, voters would be able to cast a vote for only one judge at each election. Under a double, non-transferable system, in judicial districts with four judgeships, voters could cast ballots for two judges at each election. According to Dr. Engstrom, this system remedies minority vote dilution by eliminating the submergence of a cohesive minority group. 700 F. Supp. at 337. This system also eliminates the winner-take-all feature of the at-large system and may be useful in cases where minorities are not geographically compact. *See* Karlan, *supra* note 109. The court noted that limited voting systems had been adopted in consent decrees in section 2 cases in Alabama and North Carolina. 700 F. Supp. at 337.

It found that subdistricts were an adequate remedy.[127] After reviewing its expert's redistricting plan and the critique of that plan by plaintiffs' experts, the court ordered the creation of sub-districts.

While questions may remain regarding the court's use of a 60% majority and the criteria it developed to guide its expert, the court did engage in a local appraisal of the factors it believed pertinent to the creation of a workable remedy. In terms of the numerical prerequisite, the court did not accept an ironclad requirement of a 65% majority. In so doing, the court correctly examined the voting behavior, turnout, and registration rates of the minorities living in the subject districts. After making an analysis of the opportunity for electoral success in the districts involved in the litigation, the court developed a 60% threshold requirement. This approach is a sound one. Rather than utilize a 65% yardstick in all cases, courts seeking a remedy for a section 2 violation should study minority electoral success in the jurisdiction in order to determine the appropriate numerical majority in minority subdistricts. Without evidence of voter behavior, a court that creates supermajority minority districts may be overconcentrating minorities or packing them into a district and lessening their ability to achieve a majority in one district and influence elections in an adjacent district where they constitute a sizable percentage of the population.

The court also correctly declined to accept plaintiffs' limited voting alternative to the at-large election system. Having found that minority group members were sufficiently large and geographically compact to constitute a majority in a single member district, the court properly concluded that such an approach was unnecessary. However, that option may be viable in cases where the defendants are able to prevail on a claim that the state has a compelling state interest in maintaining an at-large judicial election system. In cases where the state has demonstrated a legitimate interest in maintaining an at-large election system, the limited voting method could be utilized to protect the state's interest and provide a remedy for a violation of section 2. The advantage of a limited voting system is that it prevents a numerical majority from bloc voting to fill all the judicial offices. By limiting the votes of both the majority and the minority group, the latter has an opportunity to elect a portion of the office holders, and the winner-take-all feature of the at-large election system is thereby eliminated. The possible disadvantage of this approach is that it requires a sophisticated electorate. Minority voters must understand that they have to aggregate their votes behind a minority candidate in

127. *Id.*

order to achieve electoral success. Since, in most instances, local judicial contests are not highly visible contests, the limited voting option may not be a realistic choice to remedy section 2 violations.

Additionally, in *Martin*, the court employed the appropriate approach with respect to the issue of the low number of potential candidates residing in subdistricts. Unlike the court in *SCLC*, the *Martin* court did not view the paucity of potential candidates as a controlling factor. Despite the concern over this issue, the court realized that there was another method to ensure an adequate number of qualified candidates and afford minority group members an equal opportunity to elect candidates of their choice. Rather than enshrine the at-large election system as the sole means of preserving the state's interest, the court ruled that judicial candidates did not have to reside within their election subdistrict and provided that judges elected from smaller geographical units would have jurisdiction in the entire judicial district. By balancing the state's interest and the minority group members' right to equal access, the court was able to ensure that both concerns were addressed in its remedial plan. This approach is preferable to that of the *SCLC* court that gave too much weight to the state's purported interest in maintaining the at-large feature of its judicial election system and did not adequately consider the other options available to accommodate the state and protect minority group members' voting rights.

B. *Clark v. Roemer*[128]

In *Clark*, the plaintiffs challenged the at-large election system utilized in Louisiana to elect trial and intermediate appellate judges.[129] At the liability phase, the court determined that the use of multimember judicial districts in eleven districts violated plaintiffs' rights under section 2.[130] At the remedy stage, the district court granted the state an opportunity to develop legislation to redress the violations.[131] Such legislation was adopted but the voters of

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128. 777 F. Supp. 471 (M.D. La. 1991).

129. *See supra* note 71 and accompanying text for a discussion of the factual contentions raised in *Clark*.

130. 725 F. Supp. 285 (M.D. La. 1988). *See supra* note 84 and accompanying text.

131. 777 F. Supp. at 451. In vote dilution cases, the courts traditionally afford the state or political subdivision a reasonable period of time to develop plans to remedy the violation. *See, e.g.*, Upham v. Seamon, 456 U.S. 37, 41-43 (1982); McDaniel v. Sanchez, 452 U.S. 130, 138-39 (1981); Wise v. Lipscomb, 437 U.S. 535, 539-40 (1978). However,

Louisiana rejected the Legislature's proposed revisions.[132] After the legislative initiative was rejected by the voters, the court permitted the parties to submit proposed remedies for the section 2 violations. After considering all plans and evidence submitted, the court decided that a subdistricting remedy would be most efficacious in correcting the dilution of minority voting strength.[133] In the course of two opinions on the remedial issues, the court analyzed various alternatives submitted by the parties and commented on the evidence of the state's interest in the maintenance of the at-large election system.

At the remedy phase, plaintiffs proposed two possible remedies. One was a traditional subdistricting approach with districts drawn that would maximize minority voting strength.[134] The court acknowledged that there were problems inherent in the adoption of a subdistricting remedy. There would be a need to modify the subdistrict lines due to population shifts or when additional judgeships were created and traditional redistricting criteria would have to be employed in the creation of the subdistrict lines. Additionally, the court stated that there may be a perception that a judge elected from a small geographical unit would be prone to rule favorably for his or her constituents, thereby creating the impression of "hometown justice."[135] Despite these concerns, the court ultimately concluded that the subdistricting approach was superior to other alternatives because it was the only remedy that had a substantial likelihood of alleviating the section 2 violations.

Another alternative proposed by the plaintiffs was the limited voting option.[136] Under this proposal, multimember districts would be retained in all judicial districts, and the number of votes cast by each elector would be limited to less than the number of positions to be filled. The benefit is that a minority group can overcome the effects of vote dilution by submergence in a predominantly white voting bloc by aggregating its votes behind a particular candidate. The court perceived numerous difficulties with this proposal. First, it would require the elimination of Louisiana's majority vote requirement, thus requiring all candidates to run in a pool. Elections would be required

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the defendant's plan is subject to court review under a section 2 analysis. *See* Dillard v. Crenshaw County, 831 F.2d 246, 250-52 (11th Cir. 1987).

132. 777 F. Supp. at 451.

133. *Id.* at 468; *See* 777 F. Supp. 471 (reconsideration of remedy phase post-*Chisom*).

134. 777 F. Supp. at 467.

135. *Id.*

136. *Id.*

at the end of every judicial term since all candidates would qualify for the same office and the top vote getters would fill the available office. Finally, the court stated its reluctance, in a case seeking greater access to the ballot, to limit the number of votes electors would have to cast for candidates of their choice.[137] For these reasons the court rejected the limited vote option. This option was not seen by the court as viable in light of the state's policy of election by majority vote.[138]

A proposal to replace the popular election of judges with a political appointment system was suggested by the Louisiana Organization for Judicial Excellence (LOJE).[139] LOJE contended that the appointment system would improve the quality of the judiciary and eliminate the possibility of further vote dilution. The court, however, took a limited view of its responsibilities at the remedy stage. It believed that in fashioning a remedy for voting rights violations, a court should not intrude unnecessarily on policies expressed in the state's statutory or constitutional provisions.[140] The court stated that its equitable powers were limited to correcting the violation found, not replacing the system that the state had devised for the selection of its judges.[141] In this regard, the district court found that the state of Louisiana had expressed a strong preference for popular election of judges by a majority vote.[142] Accordingly, the court believed it was precluded from eliminating that policy in favor of gubernatorial appointment and a retention election.[143]

Another remedy for the at-large election system was proposed by the Louisiana District Judges Association and the governor. They suggested that the majority vote requirement be replaced by a

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137. *Id.* at 468.
138. *Id.*
139. *Id.* at 465.
140. *Id.*
141. *Id.* The court stated that:

> [T]he federal court is not free to impose its own notion of whether a better system than that employed by the state could be devised. Federal authority becomes involved only because of a federal violation and, while the court has broad equitable authority to remedy the federal violation, that authority ends when the remedy is devised.

777 F. Supp. at 467. *See also* White v. Weiser, 412 U.S. 783, 795 (1973); Martin v. Mabus, 700 F. Supp. 327, 330 (S.D. Miss. 1988).
142. 777 F. Supp. at 466.
143. *Id.* at 466-467.

plurality voting standard.[144] The court acknowledged that this approach had a certain appeal in its simplicity. There would be no necessity for drawing or redrawing subdistrict lines, and it would retain Louisiana's strong preference for popular election of judges.[145] The plurality vote solution was rejected by the court because there was insufficient evidence to demonstrate that the elimination of the majority vote requirement, without creating subdistricts, would actually remedy the violation.[146] Additionally, in order for a plurality system to provide minorities with an equal opportunity to elect candidates of their choice, there would have to be more than two candidates and in Louisiana the overwhelming number of judicial elections involved only two candidates. Thus, in the court's opinion, the plurality plan did not address adequately the violation of plaintiffs' voting rights.[147]

In light of the numerous difficulties perceived in the alternatives to subdistricts, the court concluded that subdistricting was the only solution that would actually alleviate the section 2 violation. The court ordered that a subdistrict plan be devised with election subdistricts to be drawn in the eleven judicial districts where violations had been found at the liability stage.[148] Under the court's remedial order, a prospective candidate would be required to be a resident of the judicial district but not of his or her election subdistrict.[149] Additionally, the court found that the redistricting criteria relied on by defendants' expert in the creation of subdistricts were appropriate.[150] In reviewing both the plaintiffs' and defendants'

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144. *Id.* at 467.
145. *Id.*
146. *Id.*
147. *Id.* at 467.
148. *Id.* at 468.
149. *Id.*
150. Those factors were:
(1) All subdistricts must be compact;
(2) All subdistricts must be contiguous;
(3) Parish and municipal boundaries should be maintained;
(4) Current parish precinct lines should be followed;
(5) Each subdistrict must be drawn using the existing number of judgeships;
(6) Deviation in population must be kept to a minimum;
(7) Gerrymandering to dilute minority voting strength must be avoided;
(8) "Packing" or gerrymandering to concentrate minority voting strength in an attempt to achieve proportional representation must be avoided.

plans, the court found that neither completely addressed the redistricting criteria and ordered the parties to submit new plans or stipulate as to the configuration of the districts.[151]

Before the court could review proposals from the parties for the implementation of the subdistrict remedy, the Supreme Court decided *Chisom* and *Houston Lawyers' Association*. In light of the Court's holding that a state's interest in the preservation of its at-large judicial election system was a legitimate factor to be considered by a district court in assessing a section 2 vote dilution case, the *Clark* court provided the defendants the opportunity to submit additional evidence regarding the state's interest. Numerous defense witnesses testified that a subdistricting remedy would produce perceptions of "hometown" justice, subject judges to special interest group pressures, that the appointment system would produce a more qualified judiciary than election by subdistrict, and that election districts should be linked with the jurisdictional parameters of a judge.[152] Plaintiffs called an African-American circuit judge from Mississippi, Robert Gibbs, who had been elected in 1990 under the remedial plan developed in *Martin*.[153] Judge Gibbs testified that he was not subject to local pressure from his subdistrict electorate, and, in most cases he did not know whether a party resided within or without his election district. He further stated that the perception of minorities concerning the judicial system had improved since his election to the bench.[154] In comparison to the improved perception of Mississippi black citizens of the judicial system, three of the plaintiffs in *Clark* testified that the general perception of the judicial system in the Louisiana minority community was one of apprehension and mistrust.

After reviewing the evidence, the court concluded that although numerous witnesses testified about the fear of hometown justice and the need to link a judge's jurisdiction with his or her electorate, these concerns were not sufficiently vital so as to preclude a finding of section 2 violations. The court accordingly reaffirmed its earlier liability findings.[155] On the basis of the record, the court also ruled that the interests advanced by the state were not sufficient to preclude

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777 F. Supp. at 468.

151. *Id.*

152. 777 F. Supp at 475-77.

153. *Id.* at 477. *See supra* note 113 and accompanying text.

154. 777 F. Supp at 477.

155. *Id.* at 479.

the adoption of a subdistricting remedy.[156] With respect to the appropriate remedy, the court concluded that the alternatives to subdistricting would require a greater intrusion into state policies than was appropriate to remedy the deprivation of plaintiffs' voting rights. In accordance with its rulings on liability and the appropriate remedy, the court concluded by approving various proposals for the creation of subdistricts.[157]

The court in *Clark* was faced with the daunting prospect of remedying a finding of vote dilution in a judicial election case without any guidance from the Supreme Court or the circuit court. Guided by the principle that the remedy must be tailored to fit the violation, the court refused to engage in a wholesale replacement of the election system with an appointive system. While the court believed it was restrained under traditional equitable principles from engaging in a complete restructuring of the method of selecting state court judges, there are other sound reasons of policy for a court's refusal to dismantle a judicial election system in order to remedy a vote dilution determination. When minority voters seek federal intervention to remedy a deprivation of their rights, they are seeking to improve their access to the elective system. They are calling upon the federal judiciary to step in and, if a violation is found, to aid in the creation of an election system that will equalize the rights of the minority with those of the majority. It would be anomalous if after finding a vote dilution violation, the federal court, instead of improving minority access to the electoral system, orders that minority group members can no longer vote for the subject office. That result would send a terrible message to future voting rights and civil rights plaintiffs. While there are arguments advanced that the appointment system would enable more African-Americans to become judges, the best guarantee of that reality is to afford minority group members the opportunity to elect the judges who will sit in judgment of them. It is for this reason that the subdistricting remedy is the most appropriate remedy for section 2 violations. It is the remedy that best insures that the members of the protected classes will have the opportunity to vote and elect representatives of their choice.

Additionally, the *Clark* court properly rejected the state's contentions that its interests were so compelling that a violation could not be established or, alternatively, that a subdistricting remedy was

156. *Id.*
157. *Id.* at 481-83.

inappropriate. The *Clark* court refused to accept at face value the assertions of the state's witnesses. In order to overcome the liability finding, the court required the state to come forward with credible evidence demonstrating that the at-large scheme was essential to the advancement of a legitimate state interest. Also, the court, in considering various alternatives, gave all parties the opportunity to advance alternative methods for protecting the state's alleged interests and remedying the violations. In the end, the court concluded that the least intrusive and most efficacious method of achieving both ends was to create subdistricts with African-American majorities. This was a legitimate response in light of the fact that the African-American population was geographically compact. In other situations, where there is a lack of geographical cohesion or the state demonstrates a compelling governmental interest for maintaining an at-large system, the limited voting option or other alternatives should be explored. However, in those cases where geographical cohesion is established, the subdistricting remedy represents the optimal choice to ensure the protection of the rights of minority group members to equal access to the political process.

V. CONCLUSION

The United State Supreme Court surprised its liberal critics by ruling in *Chisom* that state court judges were subject to the requirements of section 2 when those judges achieved office by popular election. While this decision represents a tremendous opportunity for minority voters, it could still be a hollow victory if the courts narrowly interpret the ruling. In *Houston Lawyers' Association*, the Court afforded the states an opportunity to undercut the holding in *Chisom*. By ruling that a state's interest in the preservation of its system of electing judges on an at-large basis was a legitimate factor to be considered in a vote dilution case, the Court gave the states and federal judges, who may be inclined to disagree with the broad holding in *Chisom*, the opportunity to undercut the promise of *Chisom*.

The concern is that the federal courts will permit a state to advance arguments that it has a strong interest in the preservation of its system as a counterpoint to a *prima facie* case of vote dilution. Some courts may give greater weight to the state's contentions and rule against minority voters at the liability stage. This was the approach of the *SCLC* court that held that plaintiffs had not established a section 2 violation, in large part, due to the court's

acceptance of the governmental interest argument of the state.[158] This method of resolving the liability determination places too great an emphasis on the state's interest and undervalues proof of the *Gingles* criteria and Senate Report factors.[159] A superior approach was that taken by the *Clark* court that refused to accept speculative arguments regarding the state's interest and required credible evidence demonstrating the existence of this factor.[160] Additionally, the *Clark* court permitted plaintiffs to adduce evidence suggesting that there were alternative remedies that would rectify the dilution of minority voting strength and protect the state's purported interests.[161] By permitting such proof, the district court provided the plaintiffs with an opportunity to demonstrate that the state's interest could be accommodated by alternatives that did not dilute minority voting strength.

In addition to giving the states a means of limiting the effect of *Chisom*, the Court also left the lower courts at sea with respect to how to assess a vote dilution case involving judicial at-large elections and the appropriate remedy where liability is established. The cases that have addressed these issues have all chosen to follow the dictates of *Gingles* and the Senate Report factors.[162] Since vote dilution cases in the legislative context have been resolved by utilizing the threshold test of *Gingles*, this method, in conjunction with reliance on the Senate Report factors, should be relied upon by the courts in determining liability in the judicial setting.

Finally, the issue of the appropriate remedy for a section 2 violation will have to be resolved in future litigation. Here, as in the liability phase, the courts appear to be turning to the traditional subdistricting approach employed in legislative vote dilution cases.[163] While the subdistricting remedy is an appropriate means of alleviating minority vote dilution, the courts should be willing to consider other alternatives, such as limited voting, where either a state has demonstrated a compelling interest in the maintenance of its system or where a politically cohesive minority group population is not geographically compact.

The Voting Rights Act is one of the most effective tools that

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158. *See supra* notes 99-101 and accompanying text.
159. *See supra* notes 56, 64-66 and accompanying text.
160. *See supra* note 88 and accompanying text.
161. *See supra* notes 134-136 and accompanying text.
162. Martin v. Mabus, 700 F. Supp. 327 (S.D. Miss. 1988); Clark v. Roemer, 777 F. Supp. 471 (M.D. La. 1991); SCLC v. Evans, 785 F. Supp. 1469 (M.D. Ala. 1992).
163. *See supra* notes 120, 121, 150 and accompanying text.

minority communities have for improving the representation that they receive from legislative and executive officials. With the holding in *Chisom* and *Houston Lawyers' Association*, racial and language minority groups have been given an opportunity to diversify the state judiciary and to enhance the quality of justice accorded members of these groups. But these guarantees of diversity and quality will be empty vessels unless minority groups vigorously seek to have these decisions enforced.