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Equal Electoral Opportunity: The Supreme Court Reevaluates the Use of Race in Redistricting in *Johnson v. De Grandy*

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EQUAL ELECTORAL OPPORTUNITY: THE SUPREME COURT REEVALUATES THE USE OF RACE IN REDISTRICTING IN *JOHNSON v. DE GRANDY*[*]

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INTRODUCTION

The Voting Rights Act[1] ensures a constitutionally protected minority's right to have a voice in government. Congress enacted it to abolish both overt restraints on voting and registration and more subtle impediments caused by districting schemes that dilute minority electoral strength. To remedy a dilutive scheme that violates the Voting Rights Act, legislators commonly create single-member districts in which the minority has a majority of the electorate sufficient to elect a candidate of the minority's choice.[2]

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[*] 114 S. Ct. 2647 (1994).

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[1] Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1(1988)).

[2] A single-member district is a district in which one representative is elected; an at-large or multi-member district is a large district where many representatives are elected. *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 85-87 (1986) (illustrating alternate districting plans and their effects on minority voting strength). In an at-large or multi-member districting scheme, the political, social, or racial majority of the population could elect all of the representatives of the area. Rogers v. Lodge, 458 U.S. 613, 616 (1982). When these larger districts are split into single-member districts, the members of the minority of the larger area will be able to comprise a majority of one or more of these smaller districts (a majority-minority district) and elect candidates of their choice. *Id.*

In *Thornburg v. Gingles*,[3] the U.S. Supreme Court delineated the factors necessary to find a violation of section 2 of the Voting Rights Act[4] and compel the creation of single-member, majority-minority districts.

Recently, in *Johnson v. De Grandy*,[5] the Court devalued the weight of the *Gingles* factors and reevaluated the limits of remedial action to enhance minority voting opportunity by redistricting. In *De Grandy*, the Court rejected a section 2 challenge brought by a Hispanic minority against a proposed redistricting plan that would give the minority roughly proportional representation in the Florida Senate and House of Representatives.[6] The *De Grandy* plaintiffs claimed that if they could satisfy the requirements that were set by *Gingles*,[7] then the state would be required to maximize the number of minority districts.[8] However, the Court held that minorities are limited to a number of districts proportionate to the minority

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[3] 478 U.S. 30 (1986).

[4] Section 2 of the Voting Rights Act provides as follows:

> (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 matter which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2), as provided in subsection (b).
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973.

[5] 114 S. Ct. 2647 (1994).

[6] *Id.* at 2651.

[7] *Id.* at 2652.

[8] *Id.*

voting-age population.[9] To prove a section 2 violation, the Court proposed a new "totality of the circumstances" test, whereby, after an extensive review, the court would determine if the overall circumstances have an effect on the electoral opportunity of the minority population.[10] Thus, this new *De Grandy* test transfers the Court's focus from voting behavior to discriminatory practices and effects to determine if minority voting opportunity is diluted. Proportionality[11] is a central aspect of the totality of the circumstances, but it is not dispositive in determining whether a districting plan is free from a section 2 violation.[12]

The Court's analysis in *De Grandy* further obfuscates the already confusing jurisprudence of dilution claims under the Voting Rights Act. After reviewing the history of these claims under the Voting Rights Act and the Constitution, this Comment surveys how lower courts have interpreted the *De Grandy* standard in single-member and multi-member districts. This Comment analyzes the effects of maximization of minority voting strength and proportionality in determining a violation of section 2. Furthermore, this Comment argues that a court lacks an appropriate standard to measure dilution claims without the predominant factor of proportionality. Although continuing use of proportionality as the dispositive factor perpetuates racial division in society, it at least guarantees minorities a modicum of representation. Finally, this Comment urges courts to use a standard other than race to determine the composition of districts. The practice of relying on racial population to delineate single-member districts is not required by the Voting Rights Act and is contrary to the objectives of the Fourteenth Amendment.

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[9] *Id.* at 2658.

[10] *Id.*

[11] The Court defines proportionality as "the number of majority-minority voting districts to minority members' share of the relevant population . . ." in order for the minority to have an equal opportunity to elect their chosen representatives. *Id.* at 2658 n.11; *see infra* note 77.

[12] *De Grandy*, 114 S. Ct. at 2658-59.

I. HISTORY OF VOTING DILUTION CLAIMS[13]

After more than a century of discrimination and disenfranchisement of African Americans, Congress enacted the Voting Rights Act of 1965[14] "to rid the country of racial discrimination in voting."[15] The Voting Rights Act immediately produced a dramatic increase in minority voter registration.[16] Subsequently, states devised other methods to discriminate against minority voters and render the new minority vote meaningless.[17] These methods included the creation of devices to dilute the minority vote in the majority voting pool, such as racial gerrymandering,[18] majority

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[13] For background on the history of the Voting Rights Act, see generally Chandler Davidson, *The Voting Rights Act: A Brief History*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 7-51 (Bernard Grofman & Chandler Davidson eds., 1992).

[14] 42 U.S.C. § 1973.

[15] South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

> After enduring nearly a century of widespread resistance to the Fifteenth Amendment, Congress has marshalled an array of potent weapons against the evil [of discrimination and disenfranchisement], with authority in the Attorney General to employ them effectively . . . . We here hold that the portions of the Voting Rights Act properly before us are a valid means for carrying out the commands of the Fifteenth Amendment. Hopefully, millions of non-white Americans will now be able to participate for the first time on an equal basis in the government under which they live.

Id. at 337.

[16] Davidson, *supra* note 13, at 21.

[17] "[E]very citizen has an inalienable right to full and effective participation in the political process . . . [which requires] that each citizen have an equally effective voice in the election of members of his state legislature." Reynolds v. Sims, 377 U.S. 533, 565 (1964). Dilution schemes may operate "to minimize or cancel out the voting strength of racial or political elements of the voting population." Fortson v. Dorsey, 379 U.S. 433, 439 (1965).

[18] Racial gerrymandering occurs when a state purposely draws districts to split a distinct population or unreasonably concentrates this population in a few districts to minimize the voting power of the minority. *Compare* Gomillion v. Lightfoot, 364 U.S. 339, 347 (1960) (holding that a state violated the Fifteenth Amendment by creating a many-sided district for the sole purpose of excluding African Americans from the district) *with* Shaw v. Reno, 113 S. Ct. 2816 (1993)

runoffs,[19] anti-single-shot voting laws,[20] annexation[21] and at-large and multi-member districting.[22]

Prior to 1980, a minority only needed to show how the electoral mechanism diluted minority voting strength to prove illegal racial dilution.[23] In 1980, the Supreme Court held that the plaintiff must also demonstrate a discriminatory purpose to prove a dilution claim.[24] In response to this decision, Congress amended the Voting Rights Act, eliminating the need to show a discriminatory

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(invalidating an unusually shaped district that was created solely to increase the number of minority districts).

[19] A majority runoff occurs when no candidate receives over 50% of the vote and the two candidates with the largest number of votes must run against each other in a subsequent election. This affects minority voting strength by guaranteeing electoral success for the majority which could assemble the largest block vote. *See, e.g.,* White v. Regester, 412 U.S. 755, 766 (1973).

[20] Such laws require a voter to vote for as many candidates as the number of offices available and prohibit a voter from concentrating her vote for one candidate. *See* City of Rome v. United States, 446 U.S. 156 (1980).

[21] An annexation (or consolidation) of an electoral area could dilute minority votes if the annexation increased the White population. A proscribed annexation occurs when a political subdivision expands its borders to incorporate areas with predominately White voters at the expense of diluting minority voting strength. *See* City of Pleasant Grove v. United States, 479 U.S. 462 (1987); City of Port Arthur v. United States, 459 U.S. 159 (1982); City of Petersburg v. United States, 354 F. Supp 1021 (D.D.C. 1972), *aff'd,* 410 U.S. 962 (1973).

[22] At-large and multi-member districts submerge the minority in a majority so that a minority candidate can never be elected and minority voters will not have influence in the political process. Thornburg v. Gingles, 478 U.S. 30 (1986); *see also* Rogers v. Lodge, 458 U.S. 613, 617 (1982) (finding that at-large and multi-member districts are not unconstitutional per se); Allen v. State Bd. of Elections, 393 U.S. 544, 568 (1969) (finding that a change from single-member districts to an at-large district would "nullify [the ability of the minority] to elect the candidate of their choice just as would prohibiting some of them from voting").

[23] In *Whitcomb v. Chavis,* the Court stated that if the use of a multi-member district "minimize[s] or cancel[s] out the voting strength of racial or political elements of the voting population," then the district would be subject to challenge. 403 U.S. 124, 144 (1971). Also, in *White v. Regester,* the Court invalidated a multi-member district because of the history of discriminatory treatment of minorities. 412 U.S. at 755.

[24] City of Mobile v. Bolden, 446 U.S. 55, 65-66 (1980) (holding that discriminatory intent or purpose must be shown to prove a claim under § 2).

intent.[25] Congress intended to embrace the *White-Zimmer* "results test,"[26] which focused on an "intensely local appraisal" of the history and electoral system of a state or political subdivision to determine whether the minority was invidiously deprived of political and electoral opportunity.[27] The factors involved in determining the totality of the circumstances referred to in section 2(b) include the following:

> 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;

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[25] 42 U.S.C. § 1973(2) (1988)

> The amendment to the language of Section 2 is designed to make clear that plaintiffs need not prove a discriminatory purpose in the adoption or maintenance of the challenged system of practice in order to establish a violation. Plaintiffs must either prove such intent, or, alternatively, must show that the challenged system or practice, in the contexts of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process.

S. REP. NO. 417, 97th Cong., 2d Sess. 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 205. For background on the House and Senate hearings, see generally ABIGAIL M. THERNSTROM, WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS 79-136 (1987) (claiming that the push toward the amendment of the Voting Rights Act was due to the concentrated efforts of special interest groups that characterized legislation of civil rights issues as a litmus test for sensitivity to African American interests).

[26] *White*, 412 U.S. 755; *Whitcomb*, 403 U.S. 124; Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976); S. REP. NO. 417, 97th Cong., 2d Sess. 28 (1982), *reprinted in* 1982 U.S.C.C.A.N. 205.

[27] *White*, 412 U.S. at 769-70.

> 4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
> 5. The extent to which members of the minority group in the State or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
> 6. Whether political campaigns have been characterized by overt or subtle racial appeals;
> 7. The extent to which members of the minority group have been elected to public office in the jurisdiction.
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> Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> Whether there is a significant lack of responsiveness on the part of the elected officials to the particularized needs of the members of the minority group.
>
> Whether the policy underlying the State or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.[28]

Opponents criticize the *White-Zimmer* test because the Supreme Court left lower courts without adequate guidance as to what measure of these factors would constitute a violation of the Voting Rights Act.[29]

Thornburg v. Gingles[30] was the Court's first opportunity to interpret the Voting Rights Act after the 1982 amendments. *Gingles*

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[28] S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 206-07. Congress did not make this list all-inclusive, and one or more of the factors may be present in a dilution scheme. *Id.*

[29] Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1844-48 (1992). Professor Issacharoff compares the totality of the circumstances review in the results test to Justice Potter Stewart's "I know it when I see it" standard to evaluate unprotected pornography. *Id.* at 1845 (quoting Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring)); *see also* Davidson, *supra* note 13, at 32-34 (claiming that lack of priority in the factors left plaintiffs without guidance).

[30] 478 U.S. 30 (1986).

involved a section 2 challenge to North Carolina's use of multi-member legislature districts.[31] The Court discarded the results test in favor of a clear and simplified three-prong analysis.[32] The first condition that a plaintiff must satisfy to prevail on a dilution claim is that the minority group is large and compact enough to comprise a majority in a single-member district.[33] Second, the minority group must be "politically cohesive."[34] Third, the White majority must form a voting block that consistently defeats the minority's preferred candidate.[35] Thus, the Court placed emphasis on statistical factors to establish the existence of vote dilution.[36] These

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[31] *Id.* at 34-35.

[32] *Id.* at 48-51.

[33] *Id.* at 50. Because single-member districts are the smallest political unit, they provide an accurate measure of the minority electoral potential. *Id.* at 50 n.17. Also, single-member districts provide minorities with an opportunity to elect representatives that does not exist when the minority population is outnumbered by the majority. To determine what would constitute a sufficiently large minority population in a district, a court examines a number of factors, including how large the minority must be to elect the chosen candidate. United Jewish Org. v. Carey, 430 U.S. 144, 160 (1977). The general rule is that minorities must comprise 65% of the district to have an effective opportunity to elect a candidate. *Id.* at 164; Ketchum v. Byrne, 740 F.2d. 1398, 1415 (7th Cir. 1984), *cert. denied*, 471 U.S. 1135 (1985). The figure is comprised of 50% to gain a numerical majority, and 5% extra for each of the following: lower number of eligible minority voters, lower minority voter registration and lower minority turnout. *Id.*; *see* J. Morgan Kousser, *Beyond* Gingles: *Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 586 (1993) (arguing that there is no precise point in which a minority group is guaranteed an election).

[34] *Gingles*, 478 U.S. at 51. For a minority population to prove cohesiveness, it must prove that members of the minority group have common political beliefs. "[M]embers of geographically insular racial and ethnic groups frequently share socioeconomic characteristics, such as income level, employment status, amount of education, housing and other living conditions, religion, language, and so forth." *Id.* at 64.

[35] *Id.* at 51.

[36] "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historic conditions to cause an inequality enjoyed by Black and White voters to elect their preferred representatives." *Id.* at 47. This test measures voter behavior and the electoral practice and does not require discriminatory acts to establish a dilution claim. *Id.* at 73. However, Justice Sandra Day O'Connor, in her concurrence, claims that this test creates a

factors included the character of a minority population, degree of racial polarization and voting patterns and behavior.[37] The Court relegated the results test to being a fourth factor used to assess whether the dilutive districting scheme occurred in the context of historical or continuing discrimination.[38]

Justice Sandra Day O'Connor's concurrence[39] recognized that the Court misconstrued the results test and disregarded congressional intent by creating a test that would entitle minorities to proportional representation if the plaintiffs could satisfy the three preconditions.[40] The Court made electoral success the linchpin of a dilution claim, with a review of the totality of circumstances merely supporting a determination that a minority lacks the opportunity to participate in the political system.[41] In contrast, Justice O'Connor stated that the Court should focus on the factors in the congressional record, which demonstrate that the minority has less opportunity to elect representatives, rather than on the ability of the minority to elect representatives.[42]

When determining if a minority's electoral strength is diluted, a court must have an idea of the minority's electoral strength in the absence of the dilutive scheme.[43] A minority population's electoral opportunity is determined by calculating the difference between the undiluted voting strength of the minority voting-age population and the alleged dilutive system at issue.[44] The first *Gingles* condition

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right of proportional representation for all minority groups that can satisfy the *Gingles* criteria. *Id.* at 85 (O'Connor, J., concurring).

[37] *See* Bernard Grofman, *Expert Witness Testimony and the Evolution of Voting Rights Case Law*, *in* CONTROVERSIES IN MINORITY VOTING: THE VOTING RIGHTS ACT IN PERSPECTIVE 225-27 (Bernard Grofman & Chandler Davidson eds., 1992) (explaining the differences between the amorphous totality of the circumstances test and the social science-based *Gingles* test.)

[38] *Gingles*, 478 U.S. at 48.

[39] Justice O'Connor's concurrence was joined by Chief Justice Warren Burger, and Justices William Rehnquist and Lewis Powell.

[40] *Gingles*, 478 U.S. at 85 (O'Connor, J., concurring).

[41] *Id.* at 93 (O'Connor, J., concurring).

[42] *Id.* at 99-100 (O'Connor, J., concurring); *see supra* note 28 and accompanying text.

[43] *Gingles*, 478 U.S. at 88 (O'Connor, J., concurring).

[44] *Id.* at 88-89 (O'Connor, J., concurring).

implies that the Court's measure of undiluted voting strength is the single-member district.[45] When a districting plan is found to dilute minority voting strength, a court directs the legislature of the state or political subdivision to enact a plan that satisfies the requirements of the Voting Rights Act, usually single-member, majority-minority districts. If the legislature is dilatory, a court may impose single-member districts,[46] ensuring that the minority elects a candidate of its choice.[47]

Even single-member districts are not immune from vote dilution claims under the Voting Rights Act. Similar to claims against multi-member districts, a plaintiff challenging a single-member districting scheme must also satisfy the *Gingles* conditions.[48] Minority voting strength in single-member districts is diluted by redrawing the district lines either to fragment the minority over

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[45] *Id.* at 50. "The Court's definition of the elements of a vote dilution claim is simple and invariable: a court should calculate minority voting strength by assuming that the minority group is concentrated in a single-member district in which it constitutes a voting majority." *Id.* at 90 (O'Connor, J., concurring).

[46] A federal court will not impose a districting scheme unless the state judiciary or legislature fails timely to do so. Growe v. Emison, 113 S. Ct. 1075, 1081 (1993) (quoting Chapman v. Meier, 420 U.S. 1, 27 (1975)).

[47] A majority-minority district is an electoral district where a protected minority has a majority of the voters in a district to ensure the representation of the preferred candidate of the minority. Single-member districts are the desired voting scheme because the single-member district represents the undiluted votes of a minority group to elect its preferred candidate. *Gingles,* 478 U.S. at 88 (O'Connor, J., concurring). "The single-member district is generally the appropriate standard against which to measure minority group potential to elect." *Id.* at 51 n.17. *But see* Holder v. Hall, 114 S. Ct. 2581, 2599 (1994) (Thomas, J., concurring) ("[T]here is no principle inherent in our constitutional system, or even in the history of the Nation's electoral practices, that makes single-member districts the 'proper' mechanism for electing representatives to governmental bodies."); LANI GUINIER, THE TYRANNY OF THE MAJORITY 13-16 (1994) (maintaining that single-member districts only transfer the inequities of the majority-take-all from the popular level to the representative level, where the minority interests are still subjugated by the majority interests); *see infra* note 177.

[48] *Growe*, 113 S. Ct. at 1084.

many districts or to pack a minority population into relatively few districts.[49]

Any districting scheme must be narrowly tailored to further a compelling state interest, because a state or political subdivision must comply with section 2 of the Voting Rights Act that requires determinations based on race.[50] The state has a compelling interest to create racially based districts to avoid violating the Voting Rights Act;[51] however, the redistricting must not go beyond what

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[49] Voinovich v. Quilter, 113 S. Ct. 1149, 1156 (1993). Fragmentation occurs when the minority is dispersed into a number of districts so that the minority is not a majority in any district, making it unlikely that it will elect a candidate of its choice. *Id.* at 1155. Packing occurs when a minority is concentrated into a few districts so that the minority will comprise an excessive majority in these districts. *Id.*

[50] Shaw v. Reno, 113 S. Ct. 2816, 2832 (1993); Johnson v. Miller, 864 F. Supp. 1354 (S.D. Ga. 1994); Vera v. Richards, 861 F. Supp. 1304, 1342 (S.D. Tex. 1994); Shaw v. Hunt, 861 F. Supp. 408, 417 (E.D.N.C. 1994); Hays v. Louisiana, 862 F. Supp. 119, 122 (W.D. La. 1994); *see* City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 277-78 (1986). The guidelines for Department of Justice preclearance requirements for districts under § 5 demonstrate the overt racial considerations taken into consideration when determining if a districting scheme violates the Voting Rights Act:

> (1) The extent to which minorities have been denied an equal opportunity to participate meaningfully in the political process in the jurisdiction.
> (2) The extent to which minorities have been denied an equal opportunity to influence elections and the decision making of elected officials in the jurisdiction.
> (3) The extent to which voting in the jurisdiction is racially polarized and political activities are racially segregated.
> (4) The extent to which the voter registration and election participation of minority voters have been adversely effected by present and past discrimination.

Miller, 864 F. Supp. at 1359 (quoting 28 C.F.R. § 51.58 (1994)). *Shaw v. Reno* held that any race-based legislation must satisfy strict scrutiny. Any legislation that "rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and . . . lacks sufficient justification" is invalid under the Equal Protection Clause. 113 S. Ct. at 2828.

[51] Shaw v. Hunt, 861 F. Supp. at 436-42; *cf. Miller*, 864 F. Supp. at 1380 (The Voting Rights Act "formalizes, codifies and universally imposes a 'compelling state interest' to redress historically persistent discriminatory voting

is required to remedy the potential violation.[52] This tailoring has two inquiries: "(1) whether the current plan contains more majority black districts than reasonably necessary to comply with the [Voting Rights Act], and (2) whether the existing majority black districts contain larger concentrations of minority voters than reasonably necessary to give those voters a realistic opportunity to elect candidates of their choice."[53] In addition, narrow tailoring requires that districts are compact, contiguous and "exhibit respect for neighborhoods, communities, and political subdivision lines."[54] These principles do not alter the analysis to determine whether minority vote dilution exists; instead, they limit a political subdivision's flexibility to design a district which assists the racial minority's opportunity to elect candidates. Therefore, to create valid

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practices."). *But see Hays*, 862 F. Supp. at 123-24 (holding that the Voting Rights Act, incumbency politics, past discrimination, or present socio-economic effects of discrimination do not justify creating racially segregated voting districts). Both courts have assumed that the 1982 amendments to § 2 are constitutional because this section has been continuously interpreted as such by the Supreme Court. *Hunt,* 861 F. Supp. at 438, n.24; *see Holder*, 114 S. Ct. at 2625-30 (Stevens, J., separate opinion responding to Justice Thomas' dissent) (claiming that Congress adopted the Court's pre-1982 decisions in the amendments of 1982 (with the exception of *Bolden*), thus, the weight of stare decisis of the pre- and post-amendment decisions validates the interpretation of dilution claims by the Court).

[52] *Miller,* 864 F. Supp. at 1381 (finding that the Voting Rights Act is not a license to engage in racial gerrymandering); *see also* Shaw v. Reno, 113 S. Ct. at 2830 (distinguishing between "what the law permits, and what it requires").

[53] *Miller*, 864 F. Supp. at 1383. *But cf.* Shaw v. Hunt, 861 F. Supp. at 445. The *Hunt* court held that a court must look to five factors to determine if a plan is narrowly tailored:

> (i) the efficacy of alternative remedies; (ii) whether the program imposes a rigid racial 'quota' or just a flexible racial 'goal'; (iii) the planned duration of the program; (iv) the relationship between the program's goal for minority representation in the pool of individuals ultimately selected to receive the benefit in question and the percentage of minorities in the relevant pool of eligible candidates; and (v) the impact of programs on the rights of innocent third parties.

Id.

[54] *Vera*, 861 F. Supp. at 1310. *Contra* Shaw v. Hunt, 861 F. Supp. at 449 (finding that "[c]ompactness, contiguity, and respect for political subdivisions . . . are not constitutional imperatives").

districts, a state or political subdivision must walk the tightrope between falling afoul of the directive of the Voting Rights Act and the limitations set by the Equal Protection Clause. In *Johnson v. De Grandy*,[55] the Court finds itself walking this tightrope and uncomfortably decides that the creation of single-member, majority-minority districts that are proportional to the minority population is the maximum requirement of remedial districting under the Voting Rights Act.

II. BACKGROUND OF *JOHNSON V. DE GRANDY*[56]

A. Facts of the Case

Hispanic voters, including Miguel De Grandy, brought this action claiming that Florida's reapportionment plan for the State Senate and House of Representatives violated section 2 of the Voting Rights Act.[57] This action involved Dade County, in which there are twenty single-member House districts[58] and seven single-member Senate districts.[59] The voting-age population of the House district was 46.6% Hispanic, 15.6% African American and 36.4% Anglo.[60] The voting-age population of the Senate districts was 44.8% Hispanic, 15.8% African American and 39.4% Anglo.[61] The new redistricting plan provided for nine House districts[62] and

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[55] 114 S. Ct. 2647 (1994).

[56] *Id.* For an excellent background of the *De Grandy* case in the context of the history of redistricting legislation and litigation in Florida, see generally George L. Waas, *The Process and Politics of Legislative Reapportionment and Redistricting Under the Florida Constitution*, 18 NOVA L. REV. 1001 (1994).

[57] 42 U.S.C. § 1973. The State Conference of the National Association for the Advancement of Colored People filed a similar suit, which was resolved separately. Johnson v. De Grandy, 114 S. Ct. at 2651-52; *see* De Grandy v. Wetherell, 794 F. Supp. 1076 (N.D. Fla. 1992).

[58] *De Grandy*, 114 S. Ct. at 2654.

[59] *Id.* at 2663.

[60] Appellant's Brief at 7 n.10, *De Grandy* (No. 92-519).

[61] *De Grandy*, 114 S. Ct. at 2663.

[62] Nine districts comprise 45% of districts in that area. Appellant's Brief at 7 n.10, *De Grandy* (No. 92-519). Four African American and seven Anglo House districts were created, constituting 20% and 35% of the area, respectively. *Id.*

three Senate districts;[63] in all of these districts, Hispanics would have a voting-age population sufficient to elect candidates of their choice.[64] Nonetheless, the plaintiffs claimed that the new plan diluted Hispanic voting strength because eleven House districts and four Senate districts could have been created if the legislature had not packed, fractured and otherwise submerged the Hispanic voting-age population to protect White incumbents.[65]

The district court found a violation of section 2 because the *De Grandy* plaintiffs satisfied the three *Gingles* factors and continued to suffer from the effects of discrimination.[66] First, the Hispanic population was sufficiently large and geographically compact to comprise eleven House and four Senate majority-minority districts.[67] The court found that the sixty-five percent guideline for minority composition of the districts was suitable because of the high concentration of recent immigrants and lower voter registration numbers.[68] Second, the Hispanic minority was politically cohesive.[69] Third, the non-Hispanics voted sufficiently as a block to defeat Hispanic candidates.[70] The division of Dade County into three distinct ethnic communities, Hispanic, African American and Anglo, has led to the development of a political process in which ethnic factors predominate.[71] Because the Hispanic and African

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[63] One African American and three Anglo districts were created, constituting 14.3% and 42.9% of the district area, respectively. *De Grandy*, 114 S. Ct. at 2663.

[64] De Grandy v. Wetherell, 815 F. Supp. 1550, 1567 (N.D. Fla. 1992), *aff'd in part and rev'd in part sub nom.* Johnson v. De Grandy, 114 S. Ct. 2647 (1994).

[65] *Wetherell*, 815 F. Supp. at 1559.

[66] *Id.* at 1563.

[67] *Id.* at 1568.

[68] *Id.* at 1564-67; *see supra* note 33.

[69] *Wetherell*, 815 F. Supp. at 1571. Even though there might be differences among the several subgroups of the Hispanic population—Cuban, Nicaraguan, Honduran, Guatemalan, Puerto Rican and Dominican—the court found that these groups have many of the same views and tend to vote similarly. *Id.*

[70] *Id.* at 1572.

[71] *Id.* According to Dr. Moreno, an expert on racial voting practices in Miami who is recognized by the district court, there are four combinations of racially polarized voting in Miami:

American populations are not politically cohesive, the court did not address the importance of cross-ethnic voting coalitions;[72] instead, the court stressed the importance of racial considerations in Dade County politics. Finally, the court recognized the existence of discrimination against Hispanics, including English-only initiatives, which outweighed the significant gains that members of the Hispanic community had made in their political representation.

The district court held that the additional Senate district requested by the plaintiffs could not be constructed without adversely affecting and submerging African American voting strength.[73] On the other hand, the court held that two additional House districts could be constructed to give Hispanics a super-majority without adversely affecting African American districts.[74] Therefore, the court required the *De Grandy* plaintiff's plan to create eleven House districts.

B. The Supreme Court Decision: Justice David Souter's Majority Opinion

The U.S. Supreme Court reversed the district court's judgment,[75] holding that there is no violation of section 2 of the

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> First, [there] are races featuring a Hispanic candidate versus a White candidate with Black[s] supporting the White candidate; Second, a Black candidate versus a White candidate with Hispanic voters supporting the White candidate; third, a Black candidate versus a Hispanic candidate with White voters holding the balance of power, and finally the[re] are races between two candidates of the same ethnic group in which voters from the other two group[s] support the least ethnic of the two candidates.

Id. (quoting Moreno Aff. at 21).

[72] For a coalition of racial minorities to establish a § 2 violation, the coalition must establish the *Gingles* factors. For example, two minority groups must demonstrate politically cohesive behavior. *See* Campos v. City of Baytown, 840 F.2d 1240 (5th Cir.), *cert denied*, 492 U.S. 905 (1989); League of United Latin Am. Citizens v. Midland Ind. Sch. Dist., 812 F.2d 1494 (5th Cir.), *vacated and rev'd on other grounds*, 829 F.2d 546 (5th Cir. 1987).

[73] De Grandy v. Wetherell, 815 F. Supp. at 1574-80.

[74] *Id.* at 1582.

[75] Because the plaintiffs brought their Voting Rights Act case in federal

Voting Rights Act where the minority voting-age population has a proportional share of majority-minority districts and an equal opportunity to participate in the political process.[76] The Court reevaluated the totality of the circumstances test to determine the existence of a section 2 violation. In particular, the Court examined the importance of proportionality[77] within the totality of the circumstances. By shifting the focus from demographic patterns and electoral failure that demonstrates a lack of minority electoral strength to discriminatory practices that have a dilutive effect on minority voting opportunity, the Court made it difficult for a claimant to prevail on a section 2 claim.

The totality of the circumstances test has a different impact on dilution claims of single-member districts than on multi-member districts. Challenges against single-member districts under section 2 of the Voting Rights Act require the same threshold conditions as a dilution claim against multi-member districts;[78] however, single-member districts have a harder time proving a lack of electoral opportunity because "judgments about inequality may

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district court, the appeal was heard by a panel of three judges pursuant to 28 U.S.C. § 2284 (1988). Any party may appeal a decision by a three-judge court directly to the U.S. Supreme Court under 28 U.S.C. § 1253 (1988).

[76] The two questions that the Court asks are whether all three *Gingles* factors are satisfied, and whether the totality of the circumstances demonstrates that Hispanics are able to elect the candidates of their choice in proportion to their number in the general population. Johnson v. De Grandy, 114 S. Ct. 2647, 2655 (1994).

[77] The Court defines proportionality as "link[ing] the number of majority-minority voting districts to minority members' share of the relevant population." *Id.* at 2658 n.11. This definition is not to be confused with the limitation in 42 U.S.C. § 1973(b), which states, "*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." The difference is that the creation of majority-minority districts only gives minorities the opportunity to create districts in which they may elect a member of their choice, not secure a seat for a member of the protected class. For example, a majority-minority district may elect a member of the majority who best represents the minority's interests, rather than a member of the minority.

[78] *De Grandy*, 114 S. Ct. at 2654-55; *see also* Voinovich v. Quilter, 113 S. Ct. 1149, 1156-57 (1993); Growe v. Emison, 113 S. Ct. 1075, 1084 (1993).

become closer calls."[79] In single-member districts, the issue is whether the districts could have been delineated in a way that would give a minority group additional districts.[80] "Plaintiffs challenging single-member districts may claim, not total submergence, but partial submergence; not the chance for some electoral success in place of none, but the chance for more success in place of some."[81] In applying this standard to *De Grandy*, the Court asks

> whether a history of persistent discrimination reflected in the larger society and its bloc voting behavior portended any dilutive effect from a newly proposed districting scheme, whose pertinent features were majority-minority districts in substantial proportion to the minority's share of voting-age population [and] . . . whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity.[82]

The first part of this question reiterates the *Gingles* conditions and the discriminatory effects, but the second part of the question asks whether the minority has an equal opportunity "in spite of these facts."[83]

The Court equates proportionality of effective majority-minority voting districts[84] with equal political opportunity under the Voting

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[79] *De Grandy*, 114 S. Ct. at 2658.

[80] *Id.*

[81] *Id.*

[82] *Id.*

[83] *Id.* In *Baird v. Consolidated City of Indianapolis*, a dilution claim against a city-county council comprised of single-member districts and a multi-member district was dismissed because "other considerations [demonstrated] that the minority ha[d] an undiminished right to participate in the political process." *De Grandy*, 114 S. Ct. at 2657 n.10 (quoting Baird v. Consolidated City of Indianapolis, 976 F.2d 357, 359 (7th Cir. 1992), *cert. denied*, 113 S. Ct. 2334 (1993)); *see infra* notes 113-17 and accompanying text.

[84] An effective voting district is a district in which the minority has a fair opportunity to elect the candidate of its choice. *See, e.g.*, White v. Regester, 412 U.S. 755, 765 (1973) (finding that the political processes were not equally open to the minority population).

Rights Act.[85] Because Hispanics possess a percentage of the districts roughly equal to their percentage of the total population in Dade County, there is no dilution claim because this proportionality encourages Hispanic participation in the electoral process.[86] Similarly, proportionality would vitiate any fragmentation or packing claims unless the minority districts were drawn inconsistently with the regular practices of drawing districts.[87] However, section 2 does not require maximization of the number of Hispanic majority-minority districts.[88] The Court noted that if the number of Hispanic districts is maximized to the greatest possible number of districts, it is possible to provide the minority population with political participation seventy-five percent above its numerical strength.[89] The Court provided the following hypothetical:

> Assume a hypothetical jurisdiction of 1,000 voters divided into 10 districts of 100 each, where members of a minority group make up 40 percent of the voting population and voting is totally polarized along racial lines. With the right geographical dispersion to satisfy the compactness requirement, and with careful manipulation of district lines, the minority voters might be placed in control of as many as 7 of the 10 districts. Each such district could be drawn with at least 51 members of the minority group, and whether the remaining minority voters were added to the groupings of 51 for safety or scattered in the other three districts, minority voters would be able to elect candidates of their choice in all seven districts.[90]

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[85] 42 U.S.C. § 1973.

[86] *De Grandy*, 114 S. Ct. at 2658.

[87] *Id.* at 2659. If the minority voting-age population had districts proportional to its population, then the Court's holding in *De Grandy* would not require additional minority districts even if there were purposeful fragmentation or packing in drawing the district lines.

[88] *Id.* at 2659-60.

[89] *Id.* at 2660.

[90] *Id.* at 2659. The brief for the appellant provides two other hypotheticals:

> [I]n a hypothetical 10-district jurisdiction with 100 voters per district (1,000 total voters), a group constituting only 50% of the population (500 voters) could control up to 9 of the 10 districts, so long as their geographic dispersion was such that 9 districts could be drawn each

According to Justice Souter, this situation is "absurd" and against the "textually stated purpose" of the Voting Rights Act.[91] "One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast."[92] In other words, rough proportionality indicates the lack of a dilutive electoral scheme.

Even though proportionality provides strong evidence of a fair districting scheme, it is not dispositive. Other factors may outweigh proportionality to deny minority voters an equal electoral opportunity. For example, a state may use racially drawn, majority-minority districts to isolate a minority group that has successfully established coalitions with other groups to elect candidates. Because other recognized voting impediments could be used in conjunction with proportional single-member districts,[93] proportionality alone is not the touchstone of dilution claims. In spite of the majority's focus on constructing proportional districting plans, the Court recognized that the goal of the Voting Rights Act is to reduce the reliance of race-conscious remedies.[94] The Court stated:

> If the lesson of *Gingles* is that society's racial and ethnic cleavages sometimes necessitate majority-minority districts to ensure equal political and electoral opportunity, that should not obscure the fact that there are communities in which minority citizens are able to form coalitions with

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containing 51 members of the group (9 x 51 = 459). Similarly, depending on how district lines are drawn, a group constituting only 38[%] of the population could control three of five legislative districts even when the minority group must have at least a 60% majority in a district to ensure election of a candidate of choice.

Appellant's Brief at 25, *De Grandy* (No. 92-519).

[91] *De Grandy*, 114 S. Ct. at 2659-60.

[92] *Id.*

[93] The Court recognized that even the most blatant discriminatory practices may occur with proportional districting. These practices include: "ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, and the white primary." *Id.* In addition, "the most blatant racial gerrymandering in half of a county's single member districts would be irrelevant under § 2 if offset by political gerrymandering in the other half, so long as proportionality [is] the bottom line." *Id.* at 2661.

[94] *Id.* at 2661.

> voters from other racial and ethnic groups, having no need to be a majority within a single district in order to elect candidates of their choice. Those candidates may not represent perfection to every minority voter, but minority voters are not immune from the obligation to pull, haul, and trade to find common political ground, the virtue of which is not to be slighted in applying a statute meant to hasten the waning of racism in American politics.[95]

The majority relegated the importance of disproportionality to a footnote.[96] Similar to proportionality, the effects of the extent of the disproportionality must be weighed with other factors to determine if the districting scheme would deny the minority equal political opportunity.[97]

C. Justice Sandra Day O'Connor's Concurrence

Justice O'Connor focused on the limited impact of proportionality in the totality of the circumstances review in all dilution claims, notwithstanding whether the districts demonstrate or lack proportionality.[98] She implicitly acknowledged the Court's acceptance of her interpretation of dilution claims under section 2 of the Voting Rights Act.[99] Her argument in *De Grandy* was that "[l]ack of proportionality can never by itself prove dilution, for courts must always carefully and searchingly review the totality of the circumstances, including the extent to which minority groups have access to the political process."[100] This position is directly reminiscent of her proposed test in *Gingles*. In *Gingles*, Justice O'Connor stated that a court must not only analyze the chance that the preferred minority candidate will be elected, but must also consider the extent of the minority group's access to the political

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[95] *Id.*

[96] *See id.* at 2661 n.17.

[97] *Id.*

[98] *Id.* at 2664 (O'Connor, J., concurring).

[99] *See* Thornburg v. Gingles, 478 U.S. 30, 104-05 (1986) (O'Connor, J., concurring); *see supra* notes 37-41 and accompanying text.

[100] *De Grandy*, 114 S. Ct. at 2664 (O'Connor, J., concurring).

process.[101] Justice O'Connor recognized that the majority's opinion was an affirmation of her test that combined the *Gingles* conditions and the effects of the totality of the circumstances on minority electoral opportunity, rather than requiring the maximum number of minority-majority districts.[102]

D. Justice Anthony Kennedy's Concurrence

Under a section 2 analysis, Justice Kennedy agrees with the majority opinion that section 2 does not require maximization; however, he finds that "placing undue emphasis upon proportionality risks defeating the goals underlying the Voting Rights Act of 1965, as amended."[103] Purposely creating racially-based, proportional majority-minority districts "tend[s] to entrench the very practices and stereotypes the Equal Protection Clause is set against."[104] Because the constitutionality of section 2 was not challenged, Justice Kennedy could not evaluate these implications, but he maintains that redistricting plans which are racially based must comply with both the Voting Rights Act and strict scrutiny under the Equal Protection Clause.[105]

E. Justice Clarence Thomas' Dissent, Joined by Justice Antonin Scalia

The dissent found that apportionment plans are not a justiciable "standard, practice, or procedure" under section 2 of the Voting

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[101] *Gingles*, 478 U.S. at 105 (O'Connor, J., concurring).

[102] In making proportionality relevant and not dispositive, Justice O'Connor's claim that § 2 does not require maximization may be interpreted to mean that § 2 does not even require proportionality where the totality of the circumstances proves otherwise. *De Grandy*, 114 S. Ct. at 2664. Therefore, Justice O'Connor is in agreement with the majority, even though the majority supported a districting scheme in which proportionality remains the standard.

[103] *Id.* at 2665 (Kennedy, J., concurring).

[104] *Id.* at 2666 (Kennedy, J., concurring).

[105] *Id.* at 2667 (Kennedy, J., concurring); *see* Chisom v. Roemer, 501 U.S. 380, 418 (1991) (Kennedy, J., dissenting).

Rights Act.[106] A justiciable standard, practice, or procedure only includes those impediments that hinder a voter's ability to register or cast a ballot, not whether the individual vote has meaning or not.[107] The dissenters argue that the Court, in choosing to apply majority-minority single-member districts when electing minority representatives, is making a political decision which is better left to Congress or state legislatures.[108] In addition, the Court is condoning the practice of districting by race. By "creating racially 'safe boroughs' . . . [w]e have involved the federal courts, and indeed the Nation, in the enterprise of systematically dividing the country into electoral districts along racial lines—an enterprise of segregating the races into political homelands that amounts in truth to nothing short of a system of 'political apartheid.'"[109]

Furthermore, the dissent claims that the present method of determining the validity of section 2 claims is unworkable. Even

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[106] *De Grandy*, 114 S. Ct. at 2667 (Thomas, J., dissenting); Holder v. Hall, 114 S. Ct. 2581, 2591 (1994) (Thomas, J., concurring). In his dissent in *De Grandy*, Justice Thomas refers to his concurring opinion in *Holder* for the explanation as to why an apportionment plan is not a "standard, practice, or procedure" justiciable under § 2. *De Grandy*, 114 S. Ct. at 2667 (Thomas, J., dissenting).

[107] *Holder*, 114 S. Ct. at 2605 (Thomas, J. concurring).

[108] *Id.* at 2614 (Thomas, J., concurring)

> We would be mighty Platonic guardians indeed if Congress had granted us the authority to determine the best form of local government for every county, city, village, and town in America. But under our constitutional system, this Court is not a centralized politburo appointed for life to dictate to the provinces the 'correct' theories of democratic representation, the 'best' electoral systems for securing truly 'representative' government, the 'fairest' proportions of minority political influence.

Id. at 2602 (Thomas, J., concurring). Justice Thomas criticizes the fact that a judge is only limited by his 'political imagination' when creating a remedy for a dilution claim. *Id.* at 2601 (Thomas, J., concurring) (quoting Lani Guinier, *The Representation of Minority Interests: The Question of Single Member Districts*, 14 CARDOZO L. REV. 1135, 1137 (1993)).

[109] *Holder*, 114 S. Ct. at 2598 (Thomas, J., concurring) (citations omitted). In fact, any district that is created to give a minority an opportunity to elect a candidate of its choice is blatant racial gerrymandering. *Id.* at 2618 (Thomas, J., concurring).

though the Court recites the *Gingles* factors and the totality of the circumstances test, the Court inevitably uses racial proportionality as a guide to determine dilution.[110]

III. ANALYSIS

The Court's decision in *Johnson v. De Grandy* is a dramatic change in philosophy from that of *Thornburg v. Gingles*. *Gingles* held that every protected minority group that was numerous, compact, cohesive and consistently outvoted as a result of historic discrimination, could establish a section 2 claim and be entitled to single-member districts. This test emphasized the minority's ability to elect candidates in proportion to their number in the population. *De Grandy* honored Congress' original intent by investigating whether the minority has an opportunity to elect candidates *despite* past discrimination. *De Grandy*, however, makes vote dilution claims more difficult for plaintiffs to prove because it requires both the *Gingles* factors and the results test. Not only must a claimant show numerosity, compactness, cohesiveness and circumstances which may lead to an inference of vote dilution, but now a claimant must show how the discriminatory factors and effects have a dilutive effect on political opportunity in contrast to the advances that the minority population has made.[111]

This Comment surveys how the *De Grandy* rationale is applied in both single-member districts and multi-member or at-large districts. In a challenge to single-member districts, the evidence of

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[110] *Id.* at 2616-17 (Thomas, J., concurring). According to Justice Thomas, the *Gingles* test solely determines if minorities can be placed in minority districts and runs counter to the express reservation against proportionality in 42 U.S.C. § 1973(b). *See supra* note 77 and accompanying text. The *Gingles* factors "are nothing but puffery used to fill out an impressive verbal formulation and to create the impression that the outcome in a vote dilution case rests upon a variety of relevant circumstances." *Holder*, 114 S. Ct. at 2616 (Thomas, J., concurring). "Few words would be too strong to describe the dissembling that pervades the application of the totality of circumstances test under our interpretation of § 2. It is an empty incantation—a mere conjurer's trick that serves to hide the drive for proportionality that animates our decisions." *Id.* at 2618 (Thomas, J., concurring).

[111] Johnson v. De Grandy, 114 S. Ct. 2647, 2658 (1994).

rough proportionality of the number of districts to the minority population, combined with the achievements of the minority population, has made establishing a section 2 claim difficult. On the other hand, in challenges to multi-member or at-large districts, courts are following *Gingles* and emphasizing the complete lack of electoral success. However, despite the Court's move from a racial group's proportionality toward each individual's political opportunity through cross-racial coalitions, the Court did not establish standards for determining vote dilution in the absence of racial proportionality.[112] Thus, in future cases, courts will continue either to follow *Gingles* and objectively rely on the degree of racial polarization and electoral success, or weigh the effects of discrimination subjectively. This substantial reliance on proportionality of majority-minority districts to minority voting-age population is misplaced because it limits the potential of minorities to exercise electoral power in other types of districting schemes and promotes a purpose contrary to the Voting Rights Act and the U.S. Constitution.

A. De Grandy *and Section 2 Challenges to Single-Member Districts*

Dilution challenges to single-member districts concern the "reasonableness of drawing a series of district lines in one combination rather than another . . . ."[113] A court must do a comprehensive analysis of the totality of the circumstances to determine whether the effects of discrimination and the districting scheme deny the minority an opportunity to effectively participate in the political process.[114] The main query is whether minorities have equal political opportunity in spite of racial polarization and a history of discrimination. After *De Grandy*, the only method of proving a section 2 claim is to establish a nexus between discriminatory practices or effects and its subsequent impact on minority

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[112] *See Holder*, 114 S. Ct. at 2617 n.30 (Thomas, J., concurring) ("[M]easuring political effectiveness by any method other than counting numbers of seats can rapidly become a wholly unmanageable task.").

[113] *De Grandy*, 114 S. Ct. at 2658.

[114] *Id.*

voting opportunity. If a minority group is fragmented[115] to the extent that the group members will never be able to elect a candidate of their choice *and* if the minority group is suffering from the effects of historical and present discrimination, there will be a *De Grandy* violation.

The nexus between the electoral system and the discrimination leads to the conclusion that the discrimination deprives the minority group of electoral opportunity. However, when some majority-minority districts exist, the issue changes from the "chance for some electoral success in place of none [to] the chance for more success in place of some."[116] In this scenario, the relationship between discriminatory effects and voting patterns becomes more tenuous; a dilution claim can only be established if the plaintiff can prove that packing or fragmentation was the result of discrimination. Moreover, if the minority has achieved a proportional number of majority-minority districts, a dilution claim is impossible to establish, unless overt discriminatory practices exist. Even though the Court maintained that proportionality will not create a "safe harbor" for states, the Court based its decision on proportionality and has not announced a different standard to determine whether equal political opportunity exists.[117]

Unless a nexus between the discrimination and voting opportunity is established, a plaintiff's presentation of substantial proof of historical and present discrimination will not be sufficient to prevail on a claim under section 2. In *Sanchez v. Colorado*,[118] the plaintiffs challenged the delineation of District 60 of the Colorado House of Representatives as unlawfully diluting the Hispanic vote.[119] The district court balanced a litany of past and present

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[115] *See supra* note 49 and accompanying text.

[116] *De Grandy*, 114 S. Ct. at 2658.

[117] *Id.*

[118] 861 F. Supp. 1516 (D. Colo. 1994). The court disposed of the case by finding that the plaintiffs did not satisfy the numerosity and compactness elements of the *Gingles* test; nevertheless, the district court completed the entire analysis even though it was not required.

[119] *Id.* The district in question consisted of a 42.38% voting-age, Hispanic population. *Id.* at 1519. The plaintiffs asked for a district that would consist of a 50.03% voting-age, Hispanic population. *Id.* at 1522.

discrimination against the present realities of Hispanic opportunity and held that there is no connection between this discrimination and the minority's opportunity to participate in the political process.[120] In addition, the court emphasized the totality of the circumstances over the *Gingles* factors.[121]

Similarly, in *Straw v. Barbour County*,[122] plaintiffs challenged a proposed districting plain that established three majority-minority districts and one additional influence district.[123] The plaintiffs claimed that an alternate plan should have been adopted so that the influence district would contain 48.57% African Americans rather than the 37.76% in the challenged plan.[124] Without addressing the existence of proportionality, the district court held that the plaintiffs must use "sophisticated statistical and historical evidence" within the totality of the circumstances to substantiate a section 2 claim.[125] Because the plaintiffs did not present any evidence of lack of electoral opportunity, their claim failed.[126]

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[120] The list of discriminatory incidents is exhaustive and would have been sufficient to satisfy a dilution claim pre-*De Grandy*. The Hispanic population in South Central Colorado has suffered a history of social, economic and political effects of discrimination, an official discriminatory act by the county clerk 18 years ago, an English-Only Amendment in 1988 which was defeated in a referendum, the loss of Hispanic voter registrations in 1986, lower education levels, higher unemployment and allegations of racial comments in elections. Sanchez v. Colorado, 861 F. Supp. 1516, 1529-30 (D. Colo. 1994). These discriminatory incidents were balanced by the fact that Hispanics today have equal access to jobs, education and loans, and the fact that Hispanics have representatives in many public offices in Colorado. *Id.*

[121] "The court must be careful not to overemphasize the relative importance of the three *Gingles* factors and of historical discrimination, when measured against evidence tending to show that in spite of the facts, minority voters have an equal measure of political and electoral opportunity." *Sanchez*, 861 F. Supp. at 1521 (quoting Johnson v. De Grandy, 114 S. Ct. 2647, 2658 (1994)).

[122] 864 F. Supp. 1148 (M.D. Ala. 1994).

[123] *Id.* at 1150-53. The county's racial composition is 55.55% White and 44.04% Black. *Id.* at 1150. An influence district is a district in which the minority does not constitute a majority, but is large enough to elect its candidate of choice if the candidate could attract enough cross-over votes from the majority. Voinovich v. Quilter, 113 S. Ct. 1149, 1155 (1993).

[124] Straw v. Barbour County, 864 F. Supp. 1148, 1153 (M.D. Ala. 1994).

[125] *Id.* at 1154.

[126] *Id.*

However, when proportionality is used as a defense to section 2, it dominates the analysis of the totality of the circumstances. In *NAACP v. Austin*,[127] plaintiffs argued that the Michigan Supreme Court's 1992 legislative apportionment plan[128] diluted African American voting strength by concentrating African Americans in a number of districts proportional to their population.[129] The district court applied *De Grandy* to determine that there was not a violation of section 2 without considering the *Gingles* factors.[130] The presence of rough proportionality was used as an affirmative defense to the plaintiff's allegations. "Even if the plaintiffs prove the existence of the *Gingles* preconditions, the defendants may be able to defeat a section 2 claim by showing that the minority group in question has achieved, or will achieve, substantially proportional representation under the challenged districting plan."[131] After finding rough proportionality and noting an absence of "official impediments to registration or voting," the court ended its inquiry.[132] The court found that historic official discrimination does not affect a system which provides proportional electoral opportunity.[133] Because the Supreme Court did not specify a formula to determine when a minority's electoral opportunity is diluted, these lower courts had to balance the evidence of discriminatory practices against proof of equal opportunity, which includes a heavy emphasis on roughly proportional districting. This is a confusing standard to resolve claims, and different courts will resolve similar claims differently. The Seventh Circuit Court of Appeals admits that it is not even sure what is required under a section 2 claim.

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[127] 857 F. Supp. 560 (E.D. Mich. 1994) (per curiam).

[128] If the Michigan Legislature fails to pass a legislative reapportionment plan after the census, the Michigan Supreme Court is required to develop a plan. *Id.* at 563.

[129] *Id.* at 566.

[130] *Id.* at 571. "[W]e do not reach, nor need we reach in light of *De Grandy*, the question of whether the plaintiffs have established the *Gingles* preconditions." *Id.*

[131] *Id.* at 568.

[132] *Id.* at 571.

[133] *Id.* "[T]he defendants' showing of persistent, proportional representation is sufficient to defeat the plaintiffs' Section 2 claims, absent proof of a racially discriminatory motivation in the drawing of the district lines." *Id.*

"We wish we knew exactly what a plaintiff must prove in order to prevail under the Voting Rights Act. Section 2(b) . . . directs the trier of fact to consider the 'totality of circumstances,' and the judicial glosses on this vague phrase do not provide clear guidance."[134] The U.S. Supreme Court must articulate a standard or most dilution claims of single-member districts will fail.

B. De Grandy *and Challenges to Other Districting Plans*

The Supreme Court intended *De Grandy* to apply to multi-member and at-large challenges to a lesser extent than challenges to single-member districts. The basis for applying *De Grandy* to single-member districts is that minorities in these districts have some representation, and the only question is the extent of that representation.[135] However, minorities may not have the opportunity to elect any representatives in multi-member or at-large districts. Most challenges to at-large or multi-member districting plans are not hindered by the *De Grandy* decision. In *Baird v. Consolidated City of Indianapolis,*[136] for example, the minority group's opportunity was not impeded by a multi-member electoral scheme. *Baird* involved a twenty-nine-member city-county council, of which twenty-five representatives were elected from single-member districts and four representatives were elected from one multi-member district.[137] Because the African American minority controlled seven of the single-member districts and none of the multi-member seats, members of the minority group challenged the multi-member district as diluting minority voting strength.[138] Because the African American minority controlled 24.14% of the total districts (28% of the single-member districts), while it

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[134] Barnett v. Daley, 32 F.3d 1196, 1201-02 (7th Cir.) (internal citations omitted).

[135] Johnson v. De Grandy, 114 S. Ct. 2647, 2658.

[136] 976 F.2d 357 (7th Cir. 1992), *cert. denied,* 113 S. Ct. 2334 (1993). The Supreme Court used this case as an example of the effect of the totality of the circumstances test on a multi-member district. *De Grandy*, 114 S. Ct. at 2657 n.10.

[137] Baird v. Consolidated City of Indianapolis, 976 F.2d at 358.

[138] *Id.*

constituted only 21.28% of the total population, the Seventh Circuit held that the totality of the circumstances, consisting of proportionality and the political differences of African American and White voters, failed to establish a dilution claim against the multimember district.[139] Thus, *De Grandy* also requires the court to examine the totality of the circumstances and its effects on minority political opportunity. Without the strong countervailing factor of minority political representation, the effects of the districting plan along with the other *Gingles* factors will be sufficient to establish a violation of section 2.[140]

Cane v. Worcester County[141] was the first case after *De Grandy* to challenge an at-large electoral system.[142] The Fourth Circuit viewed *De Grandy* essentially as a restatement of *Gingles*[143] and considered the effects of racially polarized voting and discriminatory practices in place over ninety years ago. It determined that

> under the totality of the circumstances, the current system for election to the Worcester County Commission interacts with past and present discrimination to deprive African Americans of Worcester County the same "opportunity [as] other members of the electorate to participate in the political process and to elect representatives of their choice."[144]

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[139] *Id.* at 360-62; *see* Whitcomb v. Chavis, 403 U.S. 124, 149-56 (1971); League of United Latin Am. Citizens v. Clements, 999 F.2d. 831, 858-61 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 878 (1994) (finding no § 2 claim when the electoral behavior is based on partisan politics and not race).

[140] The determinative question is "whether a history of persistent discrimination reflected in the larger society and its bloc voting behavior portended any dilutive effect from a [districting scheme, and this] scheme would deny minority voters equal opportunity." *De Grandy*, 114 S. Ct. at 2658.

[141] 35 F.3d 921 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (Feb. 21, 1995).

[142] *Cane* involved the at-large election of five commissioners for the county board. *Id.* at 923.

[143] *Id.* at 925.

[144] *Id.* at 926 (citing Cane v. Worcester County, 840 F. Supp. 1081, 1091 (D. Md.), *aff'd in part and rev'd in part*, 35 F.3d 921 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1097 (Feb. 21, 1995) (quoting 42 U.S.C.A. § 1973(b)). In

Similarly, in *Harvell v. Blytheville School District #5*,[145] an unsuccessful African American candidate challenged the at-large method of electing members to the school board.[146] The voting-age population of the county is sixty-four percent White and thirty-five percent African American.[147] The school board consisted of eight members; two African American members were consistently elected from 1975 to 1991.[148] After considering the *Gingles* conditions and the totality of circumstances, the circuit court reversed the lower court's decision as clearly erroneous and held that the at-large electoral scheme diluted minority votes.[149] The Eighth Circuit heard a chronicle of potential discriminatory effects and it emphasized those that supported the plaintiff's claim that the minority's political opportunity was diminished.[150]

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making its determination, the district court found that the three *Gingles* conditions were satisfied and the "totality of the circumstances" was sufficient to establish a violation of § 2. *Id.* The totality of the circumstances finding was based on Maryland's employment of voting prerequisites from 1870 to the early 1900s that discriminated against African Americans. *Id.* Racial polarization was the main emphasis in the determination of vote dilution. *Cane*, 840 F. Supp. at 1089-90. The plaintiff, Honiss Cane, Jr., claimed that racial polarization exists because his businesses are predominately supported by African Americans and the county has never elected an African American commissioner, even though the African American population comprises 21% of the total population of the county. Neal A. Lewis, *Maryland County Embroiled in Voting Rights Suit*, N.Y. TIMES, Dec. 2, 1994, at B8. However, the defendant claimed that the minority candidates expect special treatment to be elected and the present racial polarization is the result of this voting rights lawsuit. *Id.*

[145] 33 F.3d 910 (8th Cir. 1994), *vacated*, No. 93-1009EAJ, 1994 U.S. App. LEXIS 32295 (8th Cir. Nov. 16, 1994).

[146] *Id.* at 911.

[147] *Id.*

[148] *Id.*

[149] *Id.* at 917.

[150] *Id.* at 915-16. The litany of past discrimination was similar to *Sanchez*, *supra* notes 118-121 and accompanying text, however, the court in this case made the logical leap and held that these effects of past and present discrimination do have an impact on the voting opportunity of the minority population. Harvell v. Blytheville Sch. Dist. #5, 33 F.3d at 916.

However, in applying the totality of circumstances test to judicial elections,[151] the state's interest in a fair and effective judiciary will generally outweigh the minority's right to have an equal opportunity to elect judges of its choice. In *Nipper v. Smith*,[152] the Eleventh Circuit rejected a challenge to the at-large system to elect judges in Florida's Fourth Judicial Circuit and Duval County court[153] because the defendants effectively rebutted the plaintiff's dilution claim. Under *De Grandy*, courts must examine all evidence of minority political opportunity before concluding that, given the totality of the circumstances, the minority group was not excluded from "meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme."[154] Because the factors involved in a judicial election are distinctive, the court gave substantial weight to the nonracial factors, including the lower court's finding that "justice in the Fourth Circuit and Duval County courts is being administered fairly and impartially by judges who are 'responsive to the needs of all citizens'" and the importance of maintaining an at-large system.[155]

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[151] Judicial elections are justiciable under § 2 of the Voting Rights Act. *See* Houston Lawyers' Ass'n v. Attorney Gen., 501 U.S. 419 (1991); Chisom v. Roemer, 501 U.S. 380 (1991).

[152] 39 F.3d 1494 (11th Cir. 1994) (en banc).

[153] *Id.* at 1496.

[154] *Id.* at 1524. The Eleventh Circuit maintains that bias remains an essential part of a § 2 claim:

> The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral clause.

Id. at 1515.

[155] *Id.* at 1541 (citations omitted). Single-member districts would run counter to a fair and efficient judicial system because impartial judges would be accountable to their constituents in a sub-district to the detriment of another person living in the greater district. *Nipper*, 39 F.3d at 1543. More importantly, non-minority judges should be responsive to minority interests. Under a districting plan that segregates people by race, a judge who is elected in the White districts would not be accountable to a minority member appearing before her;

Even though the *De Grandy* Court cautions against creating majority-minority districts,[156] evidence of racial polarization and existing discrimination compels most courts to prefer single-member districts to ensure representation of minority voters. A court will create single-member districts without examining countervailing circumstances that would demonstrate the minority achievements in the districting scheme unless a state has a strong interest in maintaining an at-large or multi-member electoral scheme.[157]

C. Effect of Maximization of Minority Voting Strength

Districting plans that maximize the number of majority-minority districts substantially above their proportional levels exceed the requirements of the Voting Rights Act[158] and may violate the Fourteenth and Fifteenth Amendments. Justice Souter did not address the implications of maximizing minority districts, but merely claims that maximization is an "absurd suggestion."[159] Justice Souter explained why such a plan was absurd in his dissent in *Shaw v. Reno*:[160]

> [A] distinction between districting and most other governmental decisions in which race has figured is that those other decisions using racial criteria characteristically occur

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and it would be inefficient, and further entrench racial tensions, to transfer all cases that involve a minority party to a minority judge. *Id.*

[156] Johnson v. De Grandy, 114 S. Ct. 2647, 2661 (1994). The Court encourages cross-racial coalition building to eventually eliminate the need for majority-minority districts. *Id.*

[157] *De Grandy* does not materially alter the method for determining violations of § 2 once the *Gingles* conditions have been met. Even though it is not difficult to establish a dilution claim in an at-large or multi-member district, these devices are not per se violations of § 2. Thornburg v. Gingles, 478 U.S. 30, 48 (1986).

[158] *See* Johnson v. Miller, 864 F. Supp. 1354, 1379, *stay granted*, 115 S. Ct. 36 (1994) (stating that even though a state may create proportional majority-minority districts, neither the Voting Rights Act nor the Constitution requires such action).

[159] *De Grandy*, 114 S. Ct. at 2660.

[160] 113 S. Ct. 2816 (1993).

> in circumstances in which the use of race to the advantage of one person is necessarily at the obvious expense of a member of a different race . . . . In districting, by contrast, the mere placement of an individual in one district instead of another denies no one a right or benefit provided to others.[161]

Justice Thomas correctly maintains that this "dividing line" between fairness and absurdity is proportionality.[162] In *United Jewish Organizations v. Carey*,[163] the Court held that the attorney general had complied with the Voting Rights Act when he created an African American majority-minority district by splitting a district comprised of Hasidic Jews.[164] Even though race was taken into account in this decision, it did not "minimize or unfairly cancel out white voting strength."[165] However, when the state maximizes the representation of a minority, it reduces the majority's opportunity to elect candidates; thus, a member of the majority has a cognizable injury under the Fourteenth and Fifteenth Amendments.[166]

To avoid section 2 litigation, a state or political subdivision must create majority-minority districts in proportion to the number of members of the minority population. Creating a proportional number of districts directly consolidates and limits representation

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[161] *Id.* at 2846 (Souter, J., dissenting).

[162] "Greater deviations from proportionality may appear more patently 'absurd' than lesser, but the dividing line between what seems fair and what does not remains the same. The driving principle is proportionality." Holder v. Hall, 114 S. Ct. 2581, 2617 (1994) (Thomas, J., dissenting).

[163] 430 U.S. 144 (1977).

[164] *Id.* at 162-63.

[165] *Id.* at 165. If a state changes its electoral system from an at-large district to single-member districts, majority voters will lose substantial representation. However, as long as the minority or majority is limited by its proportional share of districts, the majority is not injured. *Id.* at 167.

[166] If a member of the majority "can show that a redistricting plan has assigned him to vote in a particular district at least in part because of his race [he] has standing to challenge [the redistricting scheme], even if he cannot show that it caused any concrete injury to his political interests." Shaw v. Hunt, 861 F. Supp. 408, 426 (E.D.N.C. 1994), *petition for cert. filed*, 63 U.S.L.W. 3439 (U.S. Nov. 21, 1994) (No. 92-202). The concrete injury stems from the indignity that one suffers when one is distinguished because of race. *Id.*

of minority interests to a few majority-minority districts. For example, in *Barnett v. Daley*,[167] the defendants were accused of maintaining proportional apportionment for an unlawful purpose.[168] The Chicago City Council is comprised of fifty aldermen, each elected from a single-member district.[169] The plaintiff claimed that the districting plan was purposely drawn to limit the African American minority to a proportional number of majority-minority districts, while the White majority had control of a number of districts that was eight percent above its number in the population.[170] However, the court of appeals determined that the disparity was caused by the requirement of a super-majority in the African American districts and a small majority in the White districts.[171] If it was discovered that the White members of the council or the White voters purposely limited the African American majority's districts to ensure dominance of the White majority in the city council, then the plaintiff would have a claim under the Fourteenth and Fifteenth Amendments.[172] However, the city council or the court could not maximize the number of African American majority-minority districts without having a detrimental effect on the White and the Hispanic population by violating their

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[167] 32 F.3d 1196 (7th Cir. 1994).

[168] This case was on appeal from the District Court for the Northern District of Illinois, which dismissed the case for failure to state a claim. The Seventh Circuit Court of Appeals reversed and remanded to determine whether unconstitutional racial gerrymandering existed or if African Americans did not have an equal opportunity to participate in the political process. *Id.* at 1203.

[169] *Id.* at 1197.

[170] The voting-age population of Chicago is comprised of 38.6% Black, 37.9% White and 19.6% Hispanic. They control 19, 23, and 8 districts respectively. *Id.* at 1198. Black plaintiffs claim that 24 Black super-majority wards could be created. *Id.*

[171] Barnett v. Daley, 32 F.3d 1196, 1200 (7th Cir. 1994).

[172] *Id.* at 1202. The circuit court held that proportionality would not be a defense to such an action. However, in this situation, the evidence for a § 2 claim might be legislative intent rather than the effects of past or present discrimination. Thus, the plaintiffs must establish the necessary level of proof to deduce that the legislature purposely placed a cap on minority districts to ensure dominance of the council. *Id.* at 1202-03.

constitutional right to equal protection.[173] Thus, even if a violation is established, the remedy would take into account the entire population with the exception of the Black minority, which already controls its proportionate number of districts.[174]

The Supreme Court in *De Grandy* warned of such a situation when the state would have an "irresistible inducement" to create majority-minority districts even where it would not be necessary to ensure political opportunity.[175] Although single-member districts are encouraged by the first prong of the *Gingles* test,[176] these districts do not always benefit the minority. The main argument against single-member districts is that they waste votes for the minority interests in return for a modicum of representation.[177] In the absence of overt voting impediments, single-member districts would not benefit the minority whenever a protected population becomes the majority or when effective influence districts could be created to give minorities an effective political voice.[178] In addition, the creation of African American majority-minority districts concentrates Democratic votes in a few districts, while

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[173] *Id.* at 1199. The Seventh Circuit believes that proportionality is an unreasonable goal. "[T]he geographical distribution of a population as well as the legitimate claims of other racial or ethnic groups may make it impossible to give each racial group voting power proportional to its share of the total or voting-age population." *Id.* at 1202.

[174] *Id.* at 1203.

[175] Johnson v. De Grandy, 114 S. Ct. 2647, 2661 (1994).

[176] Thornburg v. Gingles, 478 U.S. 30, 50 n.17 (1986).

[177] Professor Lani Guinier opposes creating single-member districts to ensure minority representation. According to Professor Guinier, a citizen's vote may be wasted in three ways. First, one who votes for the losing candidate does not have direct representation of that voter's interests. Second, winning votes in a majority-minority district above the electoral margin are wasted because the accumulation of votes in one district dilutes the minority's interest jurisdiction-wide. Third, concentration of minority votes in a few districts maximizes majority representation in many districts, thus reproducing this effect at the legislative level and disenfranchising minority legislators. Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1613-14 (1993).

[178] *See supra* text accompanying note 123.

allowing Republicans to gain a majority in more districts.[179] Thus, the few minority representatives that are elected are vastly outnumbered by the majority representatives who do not share interests with the minority, in contrast to a greater number of moderate representatives that embody a cross-section of the population. If legislatures are motivated to create majority-minority districts to avoid section 2 litigation, minorities will be isolated solely to single-member districts.

D. Effect of Proportionality in Race-Conscious Districting

The goal of *Gingles* and its progeny is to create proportional, majority-minority, single-member districting plans. The thrust of a dilution claim is whether a minority population has electoral opportunity in proportion to its voting-age population.[180] The Court in *Johnson v. De Grandy* attempts to shift the emphasis of a dilution claim from racial polarization and political cohesion determined by statistical analysis of electoral results to a comprehensive review of the actual circumstances involved within the state or political subdivision.[181] *De Grandy* recognizes proportionality as a factor in the totality of the circumstances to determine if a minority has had political opportunity within the districting

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[179] Some commentators speculate that the "Republican tidal wave" in the 1994 elections was caused by the creation of minority-majority districts that removed African American Democratic voters from districts that subsequently elected Republican representatives. Steven A. Holmes, *Did Racial Redistricting Undermine Democrats?*, N.Y. TIMES, Nov. 13, 1994, at 32. *Contra* Steven A. Holmes, *Civil Rights Group Disputes Election Analyses on Black Districts*, N.Y. TIMES, Dec. 1, 1994, at A15 (reporting that only a small fraction of the losses were due to the reconfiguration of district lines). "'It's like someone took away a couple of sandbags in front of your house, and then a 30-foot tidal wave came along,' said one [Legal Defense Fund] lawyer, Eric Schnapper. 'Was the removal of two sandbags a factor? Absolutely not; the house was gone no matter what.'" *Id.*

[180] *See, e.g.*, Thornburg v. Gingles, 478 U.S. 30, 85 (1986) (O'Connor, J., concurring) (finding that the majority's decision would create a right to proportional representation for any minority group that can satisfy the three *Gingles* factors).

[181] See Johnson v. De Grandy, 114 S. Ct. 2647, 2657 (1994).

plan,[182] but its unfortunate consequence is the continuation of race-conscious districting in order to create a violation-free districting plan. The Court questions the creation of majority-minority districts as a remedy and encourages the creation of cross-racial coalitions, but it does not give any guidance on how cross-racial districts will pass scrutiny under the Voting Rights Act.[183]

E. Fashioning a Remedy that Is Consistent with the Voting Rights Act and the Constitution

A violation of the Voting Rights Act is determined by examining all aspects of the relationship between the minority groups and the majority group; however, a remedy to the Voting Rights Act should not exacerbate differences by segregating racial groups into different districts. Strict scrutiny of a governmental action requires that this action be narrowly tailored to serve a compelling state interest.[184] If a violation is established, a court or legislature is required to search for narrowly tailored alternatives to racially-based electoral schemes.[185] If no alternatives can be devised to represent minority interests, only then may majority-minority districts be constructed. Such alternative factors other than race may include common political or social beliefs and economic conditions.

> Race is not, and must not be allowed to become, the sole defining characteristic by which we judge individual citizens or reapportionment plans. There are a multitude of other factors that have a profound influence on who we are, as well as how we vote. In evaluating whether a particular group has been afforded a fair opportunity to elect representatives of its choice, justice requires a

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[182] *Id.* at 2661.

[183] "[T]he degree of probative value assigned to proportionality may vary with other facts. No single statistic provides courts with a short-cut to determine whether a set of single-member districts unlawfully diluted minority voting strength." *Id.* at 2661-62.

[184] *See supra* notes 50-54 and accompanying text.

[185] *See supra* notes 50-54 and accompanying text.

consideration of these other, complex factors in addition to racial concerns.[186]

In reality, race is used from the inception of the redistricting process. Computer technology has reached a point in which racial and ethnic information is available on a block-by-block level.[187] Moreover, these programs do not take interests other than population, race and compactness to delineate district lines into account.[188] Districting plans that use race as a proxy for interests without searching for alternate plans[189] should be invalid under the Equal Protection Clause.

One attractive alternative would be to create influence districts where the minority would have an opportunity to build a coalition with a sympathetic portion of the majority to win elections.[190] The effect of this type of districting would integrate the political process and give minorities adequate representation. More importantly, the minority would not be consigned to influence that is limited to its proportional number in the population.

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[186] NAACP v. Austin, 857 F. Supp. 560, 578 (E.D. Mich. 1994).

[187] Vera v. Richards, 861 F. Supp. 1304, 1318. (S.D. Tex. 1994) The congressional districting software analyzed by the district court was REDAPPL. *Id.* at 1314. "If the Legislature intended to allocate voters on the basis of race, REDAPPL certainly provided a readily available, efficient means of doing so." *Id.* at 1318.

[188] *See* Arthur J. Anderson & William S. Dahlstrom, *Technological Gerrymandering: How Computers Can Be Used in the Redistricting Process to Comply with Judicial Criteria*, 22 URB. LAW. 59 (1990).

[189] Viable plans could be determined by examining socio-economic factors of the area, drive-by knowledge and the personal knowledge of the legislator of the constituents of her district. *Vera*, 861 F. Supp. at 1336.

[190] For an influence group to be effective in electing a coalition candidate, the minority population must be politically cohesive and the majority must not be politically cohesive. J. Morgan Kousser, *Beyond* Gingles: *Influence Districts and the Pragmatic Tradition in Voting Rights Law*, 27 U.S.F. L. REV. 551, 563 (1993). "As minority group cohesiveness increases and majority group cohesiveness declines, the level of minority group concentration necessary to elect the choice of that group declines, and vice versa." *Id.*

CONCLUSION

The U.S. Supreme Court in *Johnson v. De Grandy* vacillated between the desire to give minorities a proportional opportunity to elect representatives and the goal of building a society where race does not affect decisionmaking. However, the Court failed to create a test that will satisfy these goals, leaving the lower courts without clear guidelines for determining violations of section 2 of the Voting Rights Act. The Court signals acceptance of coalitions that would satisfy the requirements of the Voting Rights Act, but it continues to rely on proportionality of race to establish a violation. To solve this problem, the Court must establish a test which determines a minority group's actual political opportunity by analyzing minority interests rather than concentrating on race as a proxy for interests.