Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act

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"RAISING POLITICS UP": MINORITY POLITICAL PARTICIPATION AND SECTION 2
OF THE VOTING RIGHTS ACT

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Professor Kathryn Abrams argues that while Thornburg v. Gingles, the Supreme Court's first construction of amended section 2 of the Voting Rights Act, represents a crucial victory for minority voters, the Court's focus on the electoral phase of the political process was too narrow. She examines precedent on political participation and elements of the legislative history that suggest that, in amending section 2, Congress sought to protect a broad spectrum of political rights, not merely the right to electoral success. By focusing on a broader notion of political participation, characterized by cooperative interaction among groups both before and after electoral contests, section 2 can produce participational, as well as representational, benefits for minority voters. Professor Abrams suggests several ways in which an interactive view of political participation can inform the assessment of violations and the implementation of remedies under section 2.

INTRODUCTION

What would I look like fighting for equality with the white man?
I don't want to go down that low. I want the true democracy that'll
raise me and that white man up . . . raise America up.

Fannie Lou Hamer

The struggle for the political rights of racial and language minori-

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1 J. Williams, Eyes on the Prize: America's Civil Rights Years 244 (1986) (quoting exchange between Mrs. Hamer and reporter at 1964 Democratic Convention).
ties has achieved one luminous victory: an end to the stark exclusion and disenfranchisement of minority citizens. Yet it would be an error to mistake this victory for the final goal. Though many members of minority groups now vote, many of the attitudes that fostered exclusion persist, and societal vestiges of past discrimination transform neutral or careless acts into barriers to full political expression. These barriers deprive minority voters of opportunities for exchange and concerted action, and deny them the satisfaction of seeing their preferences shape life in our communities. If the struggle for minority political rights is to succeed, its focus must move beyond questions of access, to the conditions of politics.

Crucial to these efforts will be a comparatively new legal instrument: section 2 of the Voting Rights Act. Section 2 was amended in 1982 in response to Mobile v. Bolden, which held that proof of vote dilution under the Constitution requires a showing of discriminatory intent. In Bolden, the Supreme Court noted that the original section 2 tracked the language and purpose of the fifteenth amendment, and that under that amendment, courts were obliged to evaluate violations using an intent standard. Rejecting this interpretation of section 2, Congress amended

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2 Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (1982), covers both racial and language minorities. I will occasionally use the term “racial minority” when I mean to refer to all such groups. My choice of this term reflects considerations of convenience, as well as the fact that racial discrimination remains the dominant paradigm in anti-discrimination law. Each protected group, of course, has its own distinctive history and patterns of participation; when I refer to evidence that applies to only one such group, I make this clear. In addition, I will use the term “nonminority” to refer to groups who do not suffer the kind of deprivation which § 2 addresses.


5 446 U.S. 55 (1980).

6 In general terms, vote dilution occurs when a voting scheme or device diminishes the political power of a minority group, without barring that group from the exercise of the franchise. For a full discussion of the meaning of vote dilution, see Davidson, Minority Vote Dilution: An Overview, in Minority Vote Dilution 1, 3-9 (C. Davidson ed. 1984); see also text accompanying notes 23-30 infra.

7 Bolden, 466 U.S. at 62-68.

8 Section 1 of the fifteenth amendment provides: “The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.” U.S. Const. amend. XV, § 1.

9 Bolden, 466 U.S. at 62.
it, creating a second avenue of relief under which plaintiffs need demonstrate only that a voting device "results" in the denial of equal opportunity to "participate in the political process." Because it avoids an exclusive focus on invidious motivation and scrutinizes the results of ostensibly neutral devices, section 2 now has the potential to reach the entrenched discrimination that still impairs minority participation.

However, interpreting and implementing section 2's command has proved a difficult task. First, the section itself does not clearly demarcate the scope of its protection. The statute contains almost no discussion of the "opportunity . . . to participate in the political process" that it is intended to secure, nor does it specify the voting arrangements it is designed to encourage or proscribe. In addition, the courts' imprecision in defining the opportunities that the statute protects has defeated any expectation that courts might lend interpretative clarity to the statute. Because courts have focused primarily on a single dilutive device—the at-large or multi-member district—they have given little attention to

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11 Id. § 1973b.
As amended, 42 U.S.C. § 1973 states:

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

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

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13 See White v. Regester, 412 U.S. 755, 765-70 (1973); Marengo County, 731 F.2d at 1571-75. A "multi-member" district is a district that sends more than one representative to a legislative body. In most multi-member districts, voters have the opportunity to vote for as many candidates as the district has representatives, although the list of eligible candidates may be much larger. See Davidson, supra note 6, at 3-9. In some districts, voters may be permitted to rank any or all of the candidates, and the candidates with the highest aggregate rankings become the district's representatives. Candidates in a multi-member district may be required to run from a particular neighborhood or subdivision of the district, in which they presumably live, or they may be permitted to run without residential affiliation.

The term "at-large" district may be used to refer to a multi-member district. It may also
the full scope of section 2's protection. Even within the discussions of at-large districts, courts have not offered a consistent description of the hindrances such districts create. In some cases, the courts claim that they prevent minority voters from winning elections;\(^{14}\) in others, courts conclude that they vitiate minority influence in the pre- or post-election political process.\(^ {15}\)

The Supreme Court’s recent decision in *Thornburg v. Gingles*\(^ {16}\)—its first pronouncement on the amended section 2—has added to this confusion. In *Gingles*, the Court focused exclusively on the electoral portion of the section’s guarantee,\(^ {17}\) ignoring the statute’s apparent protection of participation in other facets of the political process. The Court protected the opportunity of minority voters “to elect representatives of their choice”\(^ {18}\) by articulating a standard that compares electoral performance in the challenged district with performance in a hypothetical single-member district.\(^ {19}\) Although *Gingles* reserves the question of whether other types of political activity are protected by amended section 2,\(^ {20}\) its subsequent construction by the lower courts suggests that its logic may make it more difficult for plaintiffs to assert, and courts to elaborate, such rights.\(^ {21}\)

In the aftermath of *Gingles*, it is crucial to reconsider the meaning of “political opportunity” under section 2. While the Court may have intended the opinion as a cautious first foray into ill-charted waters, *Gingles*’s electoral focus threatens to rigidify into an approach that employs a misleadingly simple measure of political effectiveness. It may therefore leave minorities who suffer subtler forms of political impairment without legal remedy. One way to combat this danger is to reexamine the reasons for enhancing minority political participation, and the way in which minority interests—and those of other participants—are vindicated through the political process. Such a reevaluation suggests that the opportunity to elect candidates, while important, is not the sole or even the most crucial element of political efficacy. Important political goals such as expression of preferences and alteration of substantive policies are ac-

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\(^{14}\) See notes 47-49 and accompanying text infra.
\(^{15}\) See notes 35-41 and accompanying text infra.
\(^{16}\) 478 U.S. 30 (1986).
\(^{17}\) Id. at 48-50.
\(^{19}\) 478 U.S. at 49.
\(^{20}\) Id. at 46 n.12.
\(^{21}\) See, e.g., Martin v. Allain, 658 F. Supp. 1183, 1204 (S.D. Miss. 1987) (relying on *Gingles*, court held that redistricting was not required if result would only augment blacks’ influence over outcome of elections and not create ability to elect representatives).
accomplished not simply by pulling a lever, but by engaging in activities such as discussion, lobbying, and coalition-building with others. Minority voters can be barred from these kinds of interaction by the present effects of past discrimination, gerrymandering, and other electoral devices that perpetuate these effects. Enforcement under section 2 should address these forms of impairment as well. Although enhancing the ability of minority voters to elect candidates of their choice is an important means of reducing disaffection and ensuring a voice for minority voters in the political process, over the long run, enforcement must secure opportunities for interaction and political coalescence as well.

In Part I, I will examine judicial efforts to construe the guarantee of political opportunity under section 2, culminating in Gingles and its progeny. I will argue that Gingles, while perhaps intended to apply only to the facts presented, poses the risk of narrowing the concept of "political opportunity" to minority electoral success. In Part II, I will argue that a broader understanding of "political opportunity," that comprehends participation in the pre- and post-electoral process, emerged from a range of cases on political participation that preceded the vote dilution litigation. I will argue, moreover, that such a view necessarily follows from an examination of the goals of enhancing minority participation and the salient features of the political process. Based on the analysis, I will propose a description of the political process that highlights not only "aggregative" events such as elections, but the ongoing "interactive" participation among interested groups that shapes and translates those events. Finally, in Part III, I will consider several ways in which this "interactive" view of political participation can inform a judicial approach to finding and remedying violations under section 2.

I

VOTE DILUTION, SECTION 2, AND "POLITICAL OPPORTUNITY"

Litigation under section 2, like much contemporary voting rights litigation, is based on a claim of "vote dilution." Vote dilution claims

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22 See text accompanying notes 32-41 infra.
are not asserted by individuals, but by members of an identifiable racial, ethnic, or political group. The claim of such a plaintiff group is that the voting arrangement in question deters its members from taking part in the electoral process, or makes its votes "less effective" than they might be under an alternative scheme, or "less effective" than the votes of other, comparable groups. This deterrence of, or diminution in the effectiveness of, minority participation can be a result of electoral processes, such as polling or registration procedures, making elected positions appointive, or of districting arrangements. This Article fo-

25 Most plaintiffs, under the Constitution and under § 2, have been black or Hispanic, see, e.g., Thornburg v. Gingles, 478 U.S. 30 (1986) (black plaintiffs); White v. Regester, 412 U.S. 755 (1973) (black and Hispanic plaintiffs); Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984) (black and Hispanic plaintiffs), cert. denied 132 U.S. 755 (1986); Ketchum v. Board of Supervisors, 554 F.2d 139 (5th Cir.), cert. denied, 434 U.S. 968 (1977) (black plaintiffs), although recently Chinese- and Korean-American groups have asserted vote dilution claims in California, see, e.g., United States v. City of Los Angeles, No. CV 85-7739 (C.D. Cal., settled Oct. 10, 1986). The Supreme Court recently adjudicated the first vote dilution case involving members of a political party as plaintiffs. See Davis v. Bandemer, 478 U.S. 109 (1986). Although the Court held that the Democrats had not demonstrated that Indiana's legislative districting scheme diluted their votes in violation of the Constitution, it signalled its willingness to hear dilution claims brought by political parties in the future. Id. at 124.

26 Vote dilution cases are distinct from those involving direct denials of the franchise. See, e.g., Perkins v. Matthews, 400 U.S. 379 (1971) (changes in poll locations violated § 5 of Voting Rights Act).


30 One example of a district arrangement that courts have found renders minority votes "less effective" is the at-large or multi-member legislative district. See, e.g., White, 412 U.S. at 124 U.S. at 765-70 (affirming district court holding that invalidated multi-member districts in two Texas counties where multi-member districts minimized the voting strength of minority racial groups).

Assume a metropolitan area has a population that is 40% black and 60% white. Each group resides in its own racially distinct neighborhood. Imagine that these two groups, instead of being placed in two smaller districts, are merged in a single district from which all city councilpersons from that area are elected. The black voters could claim that the device of the multi-member district dilutes their vote, making it "less effective" than it might otherwise be.
cases on violations involving districting arrangements, as these have been the primary focus of the courts to date.

A. The Treatment of Dilution Claims from White to Bolden

The first parties to raise dilution claims did so under the fourteenth and fifteenth amendments of the Constitution.\(^3\) In *White v. Regester*,\(^2\) a challenge brought under the equal protection clause of the fourteenth amendment, the Supreme Court struck down two multi-member districting schemes that plaintiffs alleged diluted the votes of black and Hispanic participants.\(^3\) The Court affirmed the findings of the district court that black and Hispanic voters were "effectively excluded from participation in the Democratic primary selection process" and were generally not permitted to enter into the political process in a reliable and meaningful manner.\(^4\)

The Court held that, to establish dilution, plaintiffs were required to demonstrate more than a failure to elect representatives in proportion to their "voting potential;"\(^5\) they must prove that they enjoyed "less opportunity than did other residents to participate in the political processes and to elect legislators of their choice."\(^6\) They could make this showing by means of what the Court termed the "totality of the circumstances" test.\(^7\) This test considered disparate factors, such as the history of official discrimination affecting the rights of minority group members "to register and vote and to participate in the democratic process,"\(^8\) the use of exacerbating devices such as majority vote or "place" requirements,\(^9\) and the use of racial campaign tactics by the white-dominated Demo-

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\(^{3}\) See Reynolds v. Sims, 377 U.S. 533, 537 (1964) (equal protection clause of fourteenth amendment requires substantially equal legislative representation for all citizens in state); Baker v. Carr, 369 U.S. 186, 188 (1962) (Court found violations of equal protection clause of fourteenth amendment where district lines had not been changed from 1901 until 1961, and during that time population had shifted from rural to urban areas).


\(^{1}\) Id. at 759.

\(^{4}\) Id. at 767 (quoting lower court decision in Graves v. Barnes, 343 F. Supp. 704, 726 (W.D. Tex. 1972)).

\(^{5}\) Id. at 765-66.

\(^{6}\) Id. at 766.

\(^{7}\) Id. at 769. The totality of the circumstances test of *White* was later codified in § 2 of the Voting Rights Act, as amended. See notes 58-61 and accompanying text infra.

\(^{8}\) 412 U.S. at 769.

\(^{9}\) Id. at 766. Majority vote rules require that one receive the vote of a majority of voters as a prerequisite to nomination in a party election. Id. "Place" rules require that candidates for office from a multi-member district run for a specified place on the ticket. Id. Both devices make it more difficult for members of minority groups to get elected.
By considering past discrimination and legislative responsiveness, the Court’s test seemed to suggest a concept of protected political opportunity that included phases of activity both before and after the general election.\footnote{Id. at 766-67.}

This concept of extended political opportunity appeared in opinions that followed \textit{White},\footnote{See id. at 767.} although it was occasionally replaced by a narrower electoral focus.\footnote{See Cross v. Baxter, 604 F.2d 875, 880 (5th Cir. 1979); Kirksey v. Board of Supervisors, 554 F.2d 139, 143 (5th Cir.), cert. denied, 434 U.S. 968 (1977); Zimmer v. McKeithen, 485 F.2d 1297, 1305 (5th Cir. 1973), aff’d sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).} In \textit{Zimmer v. McKeithen},\footnote{When I use the term “electoral focus,” I mean an approach to the Voting Rights Act that treats the opportunity to elect the candidates of one’s choice as the primary or single opportunity that is protected by the statute. Courts may perpetuate such an approach by using the single member district in which minority voters are numerous and concentrated enough to elect the candidate of their choice as the benchmark for measuring vote dilution, as did the Court in \textit{Gingles}. See notes 83-91 and accompanying text infra. I use electoral focus to describe this sort of judicial approach. Courts also perpetuate an electoral focus by regarding a districting plan with one or more “supermajority” safe districts as the most appropriate remedy for correcting a pre-existing violation, as did the Seventh Circuit in \textit{Ketchum v. Byrne}, 740 F.2d 1398, 1413-17 (7th Cir. 1984), cert. denied sub nom. City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985). See notes 136-40 and accompanying text infra.} the Fifth Circuit reiterated the \textit{White} Court’s emphasis on the opportunity of minority voters to “participate in the political processes and to elect legislators of their choice.”\footnote{485 F.2d 1297 (5th Cir. 1973), aff’d sub nom. East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976).} Moreover, the court’s examination of the totality of the circumstances emphasized factors such as “the opportunity to participate in the slating of candidates” and the responsiveness of “representatives slated and elected . . . to [the] minority’s needs,”\footnote{Id. at 1305 (quoting \textit{White}, 412 U.S. at 766).} suggesting the central importance of participation in pre- and post-election phases.

In \textit{Kirksey v. Board of Supervisors},\footnote{Id. at 764.} a case involving the claim that
single member districts violated the fourteenth and fifteenth amendments, the court offered a less coherent vision of the opportunities that had been impaired. In an opening section, the court stated that the plaintiffs had established the existence of "[a] pervasive denial of access to the democratic political process and . . . official unresponsiveness to the needs of blacks," suggesting the protection of a continuing process involving communication between constituents and their representatives. In the final part of the opinion, however, the court's conclusion that the scheme diluted the "voting strength of the black minority and will tend to submerge the interests of the black community" emphasized only the electoral component of the political process. Kirksey reflected the Fifth Circuit's conceptual difficulty in characterizing political participation, as well as a temptation to resolve this difficulty by narrowly focusing on elections and their results.

The Supreme Court's decision in Mobile v. Bolden interrupted the developing definition of political opportunity. In Bolden, the Court refused to invalidate an at-large districting scheme despite circumstantial evidence of discriminatory effects. The Court held that a plaintiff must demonstrate that a districting arrangement was enacted with discriminatory intent, in order to make out a case of vote dilution under the fourteenth or fifteenth amendment. Evidence of discriminatory effect, which the Court had considered under the totality of the circumstances test, could not in itself establish a violation, although it could be used as evidence of discriminatory intent. Bolden thus transformed the emerging right of a minority group to express its views through the political process into a narrower right not to be excluded on the basis of discriminatory motivation.

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48 Id. at 146.
49 Id. at 151.
50 446 U.S. 55 (1980). Plaintiffs in Bolden brought suit claiming that the at-large election of city commissioners diluted black citizens' right to vote, in violation of the fourteenth and fifteenth amendments. Both the district court, 423 F. Supp. 384 (S.D. Ala. 1976), and the Fifth Circuit, 571 F.2d 238 (1978), found for the plaintiffs, but the Supreme Court reversed.
51 446 U.S. at 74.
52 Id. at 62 (fifteenth amendment); id. at 66 (fourteenth amendment). The Court based its decision in Bolden on a line of cases commencing with Washington v. Davis, 426 U.S. 229 (1976) (challenging disparate effect of city personnel test on minorities as discriminatory), and Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252 (1977) (challenging refusal to rezone to allow integrated low-income housing as discriminatory), in which the Court had held that the application of the fourteenth amendment to instances of alleged discrimination required a showing of intent.
53 Bolden, 446 U.S. at 73.
54 Id. at 70. The Court refined the latter conclusion in Rogers v. Lodge, 458 U.S. 613 (1982), in which it held that plaintiffs could use indirect evidence, including the discriminatory effects of a districting scheme, to raise an inference of intentional discrimination. Id. at 618.
B. Dilution Under Section 2 of the Voting Rights Act

In 1982, Congress responded to Mobile v. Bolden by amending section 2 of the Voting Rights Act. Under the amendment, plaintiffs need not demonstrate discriminatory intent to make out a dilution claim. They may demonstrate simply that voting schemes or practices "result in" the denial of equal political opportunity to members of a racial or language minority group. The amendment undeniably lightens the burden on plaintiffs, but, as the language and history of the statute reveal, it makes only limited progress in clarifying the notion of "political opportunity" that had been left unclear by the earlier cases.

Section 2, as amended, prohibits states and political subdivisions from imposing any voting qualifications or prerequisites to voting, or any standards, practices, or procedures that result in the denial or abridgment of the right to vote on any citizen who is a member of a racial or language minority. The statute establishes that there has been a violation where "the totality of the circumstances" reveals that "the political processes leading to nomination or election . . . are not equally open to participation by members [of a protected class] . . . 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." This language, including the totality of the circumstances test, is a codification of the test set out in White v. Regester, which the legislative history of the section 2 amendment describes as "the leading pre-Bolden vote dilution case."

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55 See Senate Report, supra note 4, at 5, 1982 U.S. Code Cong. & Admin. News at 192-94 (amendment to § 2 restores "results" based legal standard that was applied by courts before Bolden imposed requirement of intent).
58 See id.
59 Id. § 1973b.
61 Senate Report, supra note 4, at 2, 1982 U.S. Code Cong. & Admin. News at 179. The Senate report accompanying the amendment listed several typical factors, "derived from the analytical framework in White," which courts should consider in evaluating dilution claims:
1. [T]he extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority
MINORITY POLITICAL PARTICIPATION

The language of the amended statute, and of the cases on which the Senate relied, suggests that Congress intended to protect a broad conception of the political process. White and Zimmer, as noted above, were concerned with activities both prior and subsequent to the actual election.62 Reflecting these cases, the statute refers to the openness of the "political processes leading to nomination or election" and the equal opportunity to participate in that process, as well as the opportunity "to elect representatives of [one's] own choice."63 Similarly, the legislative history of the provision emphasizes the concern with providing minorities the "same opportunity to participate in the political process as other citizens enjoy"64 and preventing the "denial of access to any phase of the electoral process for minority group members."65 While the legislative history makes reference to the "voting strength" of minority groups, and the opportunity of such groups to elect their preferred candidates,66 Congress intended these references to be merely illustrative of one phase of the protected activity, rather than indicative of the central focus of the provision.67

Although the statute seems to envision minority participation in an extended political process, it does not elaborate on the specific features of this participation. The hearings that preceded passage of the amend-

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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.

Id. at 28-29, 1982 U.S. Code Cong. & Admin. News at 206-07 (footnotes omitted). The same report indicated that there may be "additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation":
whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group,
whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.
Id. at 29, 1982 U.S. Code Cong. & Admin. News at 207 (footnotes omitted). The report also stressed that in some cases other factors may be "indicative of the alleged dilution," and that there is no case law support for, or legislative intent that there be, a "requirement that any particular number of factors be proved, or that a majority of them point one way or the other."
Id. (footnotes omitted).

62 See text accompanying notes 32-46 supra.
64 Senate Report, supra note 4, at 28, 1982 U.S. Code Cong. & Admin. News at 206; see id. at 3, 16, 32, 1982 U.S. Code Cong. & Admin. News at 179, 193, 210 (issue to be decided under results test is whether political processes are equally open to minority voters).
67 See note 61 supra (discussing amendment at length).
ment, while not part of the official legislative history, provide some amplification of the protected activities. Testifying about the harms that would be remedied by amending section 2 of the Voting Rights Act, several witnesses gave a more precise account of the political opportunities they sought to protect. Some described the Act as enhancing governmental responsiveness, thus suggesting the importance of activities such as legislative lobbying, and meetings between representatives and their constituents.68 Others described the Act as combatting the reluctance of white and minority voters to interact in the political process, thus highlighting not only lobbying activities, but the caucuses, meetings, and informal contacts through which political alliances are forged.69 While legislators appear to have relied on such testimony in amending section 2, they largely deferred the task of defining participation in the political process to a later date.

However, the courts have focused less on the more ambiguous statutory language than on the comparatively direct “opportunity . . . to elect the representatives of [one’s] choice.”70 In the first cases adjudicated after amendment of section 2, courts returned to the pre-Bolden focus on political process.71 They referred to the ability of minorities to “assert their political influence and participate in public life,”72 and considered indicia of discrimination stemming from many phases of the political process,73 although they added little to the White and Zimmer accounts of the specific activities that comprised participation.74

In subsequent cases, however, the lower courts began to take a different tack. In Gingles v. Edmisten,75 for example, the district court fo-

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69 See id. at 255 (testimony of James Loewen, Associate Professor, U. of Vt.); id. at 590 (testimony of Laughlin McDonald, Director, Southern Regional Office, ACLU). Of course, some witnesses also focused on districting arrangements that interfere with the election of minority candidates. See id. at 365 (testimony of Henry Marsh, Mayor, Richmond, Va.); id. at 380 (testimony of Michael Brown, Coordinator, Va. NAACP).
70 42 U.S.C. § 1973b (1982); see text accompanying notes 80-104 infra.
71 See, e.g., United States v. Marengo County Comm’n, 731 F.2d 1546 (11th Cir.), cert. denied, 469 U.S. 976 (1984); see also Lee County Branch of NAACP v. City of Opelika, 748 F.2d 1473, 1481-82 (11th Cir. 1984) (focusing on racially polarized voting, but also examining voter registration rates and election practices); cf. McMillan v. Escambia County, Fla., 748 F.2d 1037, 1046 (Former 5th Cir. 1984) (similar analysis applied in using evidence of effect to draw inference of intent under fourteenth amendment).
72 Marengo County, 731 F.2d at 1567 n.36.
73 Lee County, 748 F.2d at 1481-82; Marengo County, 731 F.2d at 1566-72.
75 590 F. Supp. 345 (E.D.N.C. 1984), aff’d in part and rev’d in part sub nom. Thornburg v. Gingles, 478 U.S. 30 (1986). To avoid confusion, I will refer to the district court opinion as
cused on electoral performance in the same way Kirksey v. Board of Supervisors had done nearly ten years earlier. In Edmisten, the court referred not to minorities' "political influence," but to their voting strength. Although the court employed the totality of the circumstances test, it required the plaintiffs who challenged a multi-member districting scheme to make a threshold showing that the challenged districts contained "concentrations of black citizens... sufficient in numbers and contiguity to constitute effective voting majorities in single member districts," a requirement that focused on the electoral strength of the plaintiff group.

When the Supreme Court granted review of Edmisten, many observers hoped for clarification of ambiguous terms of the statute. The Court's opinion in Gingles sheds light on several important issues, including the use of a results, rather than an intent, test for proving discrimination, the standard for measuring racially polarized voting, and the impact of minority electoral victories on plaintiffs' ability to prevail.

Edmisten and to the Supreme Court opinion as Gingles.

76 554 F.2d 139, 149 (5th Cir. 1977).
77 590 F. Supp. at 359.
78 Id. at 358.
79 In Major v. Treen, 574 F. Supp. 325 (N.D. La. 1983), the court required a showing that defendants' districting arrangement had "fragment[ed] what would otherwise be a cohesive minority voting community." Id. at 353 (quoting Kirksey, 554 F.2d at 149). While this requirement may appear similar to the required showing in Edmisten in that it asks for a comparison of the voting strength of the minority group in the challenged district and a hypothetical single member district, it differs significantly in that it does not require that the plaintiff group constitute an effective voting majority in the hypothetical district. The Major standard is far preferable because it acknowledges that even minority voters insufficiently numerous to control a district by themselves can suffer politically debilitating effects from being divided among several districts. The opinion in Edmisten did not make clear how the court moved from an "impaired ability to participate" standard to its own "impaired ability to elect" standard. I believe that the explanation is that the "ability to elect" standard is easier to quantify, a rationale to which the court referred in its Supplemental Opinion. Edmisten, 590 F. Supp. at 381. For a discussion of the court's Supplemental Opinion, see text accompanying notes 113-19 infra.
81 478 U.S. at 43-44.
82 The majority (Justices Brennan, White, Marshall, Blackmun, and Stevens) held that the district court had not erred in finding polarized voting based on evidence derived from three election years that demonstrated that blacks strongly supported black candidates and that whites strongly supported white candidates. See id. at 58-61. A plurality of Justices Brennan, Marshall, Blackmun, and Stevens, held that, to establish racially polarized voting, it was sufficient for plaintiffs to show a correlation between the race of the voters and the selection of the candidates, and that it was not necessary to show causation. See id. at 63-70.
83 Despite the assertions of the defendants and the Solicitor General, the majority held that sporadic or recently established patterns of minority electoral victory do not preclude plaintiffs from stating a claim under § 2, see id. at 74-76, although a different majority (Justices Brennan and White, and those in concurrence—Justices O'Connor, Burger, Powell, and Rehnquist) held that a claim might be defeated by a showing that minorities had consistently elected
However, it leaves considerable confusion as to the meaning of "political opportunity." The plaintiffs in *Gingles* had challenged a districting scheme for the North Carolina legislature, which included a number of at-large districts. The Court affirmed the district court's finding of a violation in an opinion that placed considerable emphasis on electoral performance, but described itself as limited to the facts and claims presented.

Describing the opportunities protected under section 2 of the Voting Rights Act, Justice Brennan's majority opinion took an ambivalent stance. He reviewed the history and terms of the statute, citing both the participational and the electoral language of amended subsection b. However, when he characterized the plaintiffs' claim itself, Justice Brennan focused on black citizens' "ability to elect representatives of their choice." Justice Brennan described this restriction as imposed by the plaintiffs' choice of claim, noting that

> [t]he claim we address in this opinion is one in which the plaintiffs alleged... that their ability to elect the representatives of their choice was impaired by the selection of a multi-member electoral structure. We have no occasion to consider whether § 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group... that the use of a multi-member district impairs its ability to influence elections.

The fact that plaintiffs' brief on appeal addressed no such distinction suggests that this choice by the plaintiffs may have been unwitting; the distinction between "influence" and "election" claims—while perhaps suggested by the language of the statute—received little attention before *Gingles* was decided.

The standard which the Court established for finding a violation reflected its electoral focus. In surveying the legislative history of the section, Justice Brennan noted the statutory endorsement of the totality of the circumstances test, and stressed the need for further elaboration. Taking what he described as a "'functional' view of the political process," he observed that:

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84 Id. at 35.
85 Id. at 42.
86 Id. at 48-50.
87 Id. at 46 n.12.
88 Id. at 43-46.
89 Id. at 46.
90 Id. at 46 n.12 (emphasis omitted).
92 *Gingles*, 478 U.S. at 43.
93 Id. at 45 (quoting Senate Report, supra note 4, at 30 n.120, 1982 U.S. Code Cong. &
While many or all of the factors listed in the Senate Report may be relevant to a claim of vote dilution through submergence in multimember districts, unless there is a conjunction of the following circumstances, the use of multimember districts generally will not impede the ability of minority voters to elect representatives of their choice. Stated succinctly, a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group.  

To make the necessary showing, the Court required a plaintiff to demonstrate that the minority group, though dominated in size in the multimember district, is sufficiently large and compact to constitute a majority in a putative single member district within the existing district’s bounds. The plaintiff must further show that the racial groups in question tend to vote in blocs, causing differences in the size of the minority populations to yield differences in electoral outcome in the actual and putative districts. The Court described these new standards, which were employed but not required by the district court, as “necessary preconditions for multimember districts to operate to impair minority voters’ ability to elect representatives of their choice . . . .” Justice Brennan’s opinion suggested that the role of these standards was to establish causation. If the plaintiff cannot demonstrate that there is a minority group large and compact enough to form a majority in a single member district, Justice Brennan noted, the plaintiff cannot prove that “the [multi-member form] of the district . . . [is] responsible for minority voters’ inability to elect [their] candidates.” In contrast, the Court characterized non-electoral factors, such as the lingering effects of past discrimination or the use of racial campaign appeals, that had constituted the core of a section 2 showing in cases such as White and Marengo County, as “supportive of, but not essential to, a minority voter’s claim. Although the new standard appeared to give the totality of the circumstances test a distinctly electoral cast, Justice Brennan was circumspect about its application. The opinion explicitly reserved the question of whether the same standard would apply to potential “ability to

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Admin. News at 208 n.120).

94 Id. at 48-49 (emphasis omitted).
95 Id. at 50.
96 Id. at 51.
98 478 U.S. at 50.
99 Id.
100 Id. (emphasis omitted).
102 See United States v. Marengo County Comm’n, 731 F.2d 1546, 1569 (11th Cir. 1984).
103 478 U.S. at 48 n.15.
influence" cases, or cases involving other electoral arrangements, such as single member districts.104

C. Untangling Gingles

Gingles is an opinion that gives the careful reader pause. Though it was obviously the product of considerable effort, it seems, on close inspection, to say both more and less than its authors intended. The confusion becomes greater when one ventures beyond the specific facts of the case. Over the past two years, more than a dozen lower courts have applied the standards articulated in Gingles to the cases before them.105 Their differing interpretations suggest that, when it comes to defining the meaning of “political opportunity” and the scope of available relief under section 2, Gingles may have created more problems than it resolved.

One matter that remains a puzzle, for example, is the impact of the opinion on the totality of the circumstances test. Gingles added to the statutorily-prescribed factors the requirement that the plaintiff group show that it is large and compact enough to constitute a majority in a single member district within the challenged district.106 How this new requirement functions in practice, however, is not clear. In her concurrence, Justice O'Connor criticized the Court for adopting a standard that virtually replaces the statutory test. “As shaped by the Court today,” she observed, “the basic contours of a vote dilution claim require no reference to most of the [factors] . . . which were highlighted in the Senate Report . . . Electoral success has now emerged, under the Court’s standard, as the linchpin of vote dilution claims . . . .”107

Even if the Court intended the new test to function as a supplement, rather than a replacement, questions remain. Is the electoral test a threshold condition to further evaluation under the totality of the circumstances test? Is it simply another factor to be considered along with

104 Id. at 46 n.12.
106 478 U.S. at 50.
107 Id. at 92-93 (O'Connor, J., concurring). Of all the opinions in the case, Justice O'Connor’s opinion most clearly articulated the radical departure from previous § 2 jurisprudence implicit in the majority opinion, and the potential of that opinion to rigidify our understanding of what constitutes “political opportunity.” Her dismay with the majority’s opinion, however, has different sources than my own. Justice O'Connor believed that it extended the scope of relief so much as to entail a virtual right to proportional representation. Id. at 93 (O'Connor, J., concurring). I believe, instead, that the opinion contracted the scope of relief, leaving non-numerous or diffuse plaintiff groups without remedy. That the opinion could generate two such divergent responses is further evidence of the confusion that has been its primary legacy.
the statutory list? Is it a judicially prescribed first among equals? This uncertainty is amply reflected in recent lower court opinions, which range from virtually ignoring the electoral standard or ignoring it entirely,\(^\text{108}\) to considering it a prerequisite to the application of the totality of the circumstances test,\(^\text{109}\) to treating it as a, if not the, central element of that test.\(^\text{110}\)

The uncertainty about what constitutes proof of a violation is symptomatic of a more pervasive ambiguity the opinion created as to the scope of relief available. Asked whether *Gingles* expands or contracts the set of plaintiffs previously judged entitled to relief under section 2, one might be tempted to say that the opinion leaves this group unchanged. But closer scrutiny suggests a different answer. The imposition of the electoral standard, in the multi-member district context alone, would seem to exclude at least two groups of plaintiffs who might ordinarily prevail under the statutory test: those not numerous enough to constitute a majority in a single member district lying within the challenged district, and those whose patterns or residency render them insufficiently compact to meet this requirement. While victory might once have been likely for such groups under the statutory test, they are unable, under the *Gingles* standard, to establish an “ability to elect” claim. Whether they can claim any kind of protection under section 2 depends on how courts regard the as yet unconsidered “ability to influence” claim. The lower court opinions that have confronted the *Gingles* standard suggest that, notwithstanding the intent of its authors, that opinion may make it more difficult to raise an “ability to influence” claim in the future.\(^\text{111}\)

The district court opinion in *Gingles v. Edmisten*\(^\text{112}\) obviously predates the Supreme Court’s opinion, but it is relevant because it is one of the first opinions to have combined the statutory totality of the circumstances test with the electoral standard. That court’s Supplemental


\(^{111}\) See, e.g., McNeil v. Springfield Park Dist., 851 F.2d 937, 947 (7th Cir. 1988) (“ability to influence” claim not allowed where plaintiffs failed to meet *Gingles* threshold standard); see also text accompanying notes 122-24 infra.

Opinion,113 issued several months after the initial judgment, but before the Supreme Court opinion, made apparent the consequences of the electoral standard for the court’s view of a violation. In that opinion, the district court evaluated the redistricting plan that the defendants offered to remedy the section 2 violation. The plan divided the preexisting multi-member districts into single member districts, including one or more districts with a majority of minority voters. The minority population outside those majority districts was divided randomly among a number of districts with the result that minority voters comprised no more than thirty-one percent, and often as little as five or six percent, of the districts in which they were located.114 The plaintiffs challenged this plan as, inter alia, a fresh violation of section 2, alleging that it diluted the “outside” voters’ power to affect, let alone prevail in, electoral contests.115 Judge Phillips, also the author of the original opinion, rejected this claim, holding that plaintiffs could not claim dilution under section 2 unless they could demonstrate that these “outside” voters could comprise an effective voting majority in some single member district.116 He admitted that an “effective voting majority” was not, in the context of disadvantaged minorities, “an easily defined or measured voting entity.”117 But he observed that the concept at least “has a specific low-side limit that provides a measurable reference point.”118 If courts were to depart from this quantifiable index of electoral power, Judge Phillips concluded, “nothing but raw intuition” could be used to determine whether a violation had occurred.119

It is not difficult to see the way in which one might draw this conclusion from the electoral standard later elaborated in Gingles. While the vagaries of “political influence” are difficult to capture in numerical terms, and may vary from district to district, we can quantify with relative consistency and precision a group that is “large and compact” enough to win a single member district election. Once courts have estab-

114 Id. at 377-78.
115 Id. at 379.
116 Id. at 381.
117 Id. at 381 n.3.
118 Id. By “low-side limit,” the court means a percentage population figure below which it assumes minority political power is negligible. My position is that minority political power cannot and should not be understood in such binary terms. I argue that once we begin to look at political influence, as well as electoral victories, we will see that minority political power is a continuum dependent upon the minority population of a district, as well as other factors, rather than being existent or nonexistent in the way Judge Phillips suggests. Although this conception of minority political power is somewhat less determinate than the measure suggested by Judge Phillips, it is, as I will argue, a more accurate depiction of the way groups exercise power in the political system.
119 Id. at 381.
lished a showing of the latter as the centerpiece of a section 2 violation—even in the multi-member district context—one might think it risky and conceptually unnecessary to venture beyond the solid ground of this standard into the murky seas of “political influence.” Yet it is far from clear that this is the appropriate resolution of the issue. The emphasis on quantifiability implicit in the Gingles standard obscures the fact that elections are rarely won by a single voting group, and that electoral influence is often a crucial step on the path to electoral victory.120

The seductively clear standard articulated in Gingles has made some other courts reluctant to embrace broader constructions of the statute. In Martin v. Allain,121 a recent district court decision applying the Gingles standard, plaintiffs challenged the multi-member districting schemes for electing county judges, chancellors, and circuit judges for the state of Mississippi.122 The district court held that, while all districts had been marked by the indicia of dilution highlighted in the Senate Report on the section 2 amendment, only a few districts had a minority population of sufficient size and compactness to prevail in a hypothetical single member district.123 Under the Gingles standard, the court concluded, only plaintiffs in these latter districts established a violation of section 2.124 This portion of the opinion suggests that Gingles may, in fact, contract the scope of section 2.

The final section of the Martin opinion, however, reveals the most troubling implication of the Gingles decision: that it can erroneously be understood to reject an “ability to influence” claim. Plaintiffs in the nonmajority districts, following the reservation of the ability to influence question in the Gingles opinion,125 had argued that the multi-member districting arrangement diluted their “ability to influence,” if not to win elections.126 The court summarily rejected this challenge, which it described as “the contrary of [Gingles],” quoting the portion of the majority opinion in Gingles that stated that “[u]nless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice.”127

The court's conclusion that an “ability to influence” claim is foreclosed by Gingles is clearly erroneous in light of Gingles's clear reserva-
tion of that question. However, the language from Gingles that creates the "ability to elect" standard may prove to be Gingles's more enduring and problematic legacy. The "ability to elect" standard requires a plaintiff group to show that it could win in a single-member district but will predictably lose in a multi-member district, thereby identifying the districting arrangement as the single causal factor. Courts may be tempted to require this strict causal showing in connection with other types of section 2 claims—a requirement that is not easily met where the plaintiffs are asserting a dilution of "influence" claim. A districting arrangement may undermine influence, but so may other, less tangible factors, which the districting arrangement did not necessarily create. Because it is generally more difficult for courts to identify such indefinite causes of the harm, they may be reluctant to recognize such non-electoral claims under section 2.

Nonetheless, Gingles's appealingly simple notion of causation should not provide the exclusive ground for future constructions of sec-

128 478 U.S. at 46 n.12.
129 Id. at 50.
130 Such a legacy would not, moreover, be an unforeseeable consequence of the analytic path taken by the Court in Gingles. Voting rights attorneys James Blacksher and Larry Mene-
fee, who articulated the standard ultimately embraced by the Court in Gingles, made it clear in an earlier essay on constitutional enforcement that excluding from recovery those plaintiffs who could not demonstrate an "ability to elect" in a single member district was a predictable, and in some respects, necessary outcome of the standard. Blacksher & Menefee, At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution, in Minority Vote Dilution 203 (C. Davidson ed. 1984). In their essay, the authors discuss Wise v. Lipscomb, 437 U.S. 535 (1978), which involved a group of black plaintiffs challenging Dallas's districting scheme, as well as a group of Mexican-Americans who were permitted to intervene at the remedial stage. The salient difference between these groups, from the standpoint of the authors, was that the group of black voters was large and compact enough to constitute a majority in a single member district, while the Mexican-American group was not. When the city replaced its unconstitutional at-large districting plan with a plan providing eight single member districts and three multi-member districts, the black plaintiffs were satisfied, but the Mexican-American intervenors objected. The latter group argued that the at-large district better permitted them to influence the political process. Blacksher and Menefee observed:

Under the at-large dilution standard proposed here, Dallas's Mexican American community would be entitled neither to demand nor to oppose districted elections. Without the possibility of at least one district with a Mexican American population majority, they could not prove devaluation of their voting strength by the at-large plan . . . . Because the residentially dispersed Hispanic voters could not be assured of having their choices succeed, solely on the weight of their ballots . . . their contention that the at-large plan offered them a greater degree of influence would fall short of a constitutional standard . . . .

Blacksher and Menefee, supra, at 235-36. Blacksher and Menefee endorse this distinction between the two claimant groups on the ground that "only . . . proportional representation . . . can provide fair representation and equally effective voting strength to literally every voter." Id. at 236. However, as I will argue, by using the remedy of "strong plurality" rather than "supermajority" districts, it is possible to recognize the claims of even those groups lacking the "ability to elect" without resorting to a system of proportional representation.
tion 2. When drafters of the section rejected the intent test in favor of a results standard, they acknowledged that any voting scheme operates against a backdrop of historical circumstances that cannot accurately be separated out. Rather than viewing potentially discriminatory attitudes as extraneous, Congress sought to eliminate the present effects of past discrimination through the use of advantageous voting arrangements. The goal, the Senate Report stated, was "not only to correct an active history of discrimination [in the areas of registration and voting], but also to deal with the accumulation of discrimination." A standard that relies on uni-dimensional causation in contexts in which causation is likely to be more complex misunderstands the goals of section 2. Despite Gingles's express limitation to a narrow context, cases such as Edmisten and Martin are examples of the ways in which Gingles's electoral focus may limit the concept of "political opportunity" and the availability of relief under section 2.

This contraction of the notion of "political opportunity" may be amplified by a second feature of enforcement under section 2: the prevalence of supermajority "safe" districts in arrangements designed to remedy violations. In constructing such remedies, courts or districting authorities often create a series of single member districts, one or more of which includes a minority population so large that it is virtually assured of electing representatives of its choice. In the first multi-member district cases, this remedy resulted naturally from the division of the district. Because of the prevalence of compact, racially identifiable neighborhoods in many challenged districts, one of the subdistricts that the new plan created contained a substantial majority of the protected group. In recent cases, however, the approach has become more carefully calibrated to increase the likelihood of electoral victory. Courts have begun to ask whether even single member districts containing a majority of the

131 See Senate Report, supra note 4, at 5, 1982 U.S. Code Cong. & Admin. News at 182. A standard that reduced the importance of a showing of past discrimination in proving a violation would seem to be in tension with this purpose of the Act.

132 Id.

133 478 U.S. at 46 n.12.

134 See Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution 85, 87-89 (C. Davidson ed. 1984) (discussing redistricting of at-large districts in Alabama, Louisiana, and Hinds County, Mississippi). Parker notes that the redistricting in Alabama and Louisiana, which responded to both vote dilution and "one person, one vote" claims, and the redistricting in Hinds County, Mississippi, which responded to vote dilution claims, produced single member district plans which ultimately permitted blacks to elect the representatives of their choice.

protected population assure minority voters of the ability to elect candidates of their choice. In *Ketchum v. Byrne*\(^{136}\) and other cases,\(^{137}\) courts have reflected concern that factors such as low voting-age population, registration, and turnout diminish chances of minority electoral success, even in districts where the group enjoys a majority.\(^{138}\) In response, these courts have encouraged the use of "supermajority" districts, with at least sixty-five percent minority population, to compensate for such disadvantages and virtually assure minority voters the opportunity to elect the representatives of their choice.\(^{139}\) Supermajority districts have proved to


\(^{138}\) *Ketchum*, 740 F.2d at 1412 (low voting-age population); id. at 1413 n.16 (low registration and turn-out).

\(^{139}\) See id. at 1416-17 (encouraging creation of districts with 65% minority voters); Jones v. City of Lubbock, 727 F.2d 364, 386-87 (5th Cir. 1984) (affirming creation of districts with black/Hispanic populations of approximately 73% and 56%); Jordan v. Winter, 604 F. Supp. 807 (N.D. Miss.) (implementing plan creating district with black voting age population of approximately 53%); id. aff’d sub nom. Mississippi Republican Executive Comm. v. Brooks, 469 U.S. 1002 (1984); see also Mississippi v. United States, 490 F. Supp. 569, 575 (D.D.C. 1979) (district containing minority population of 65% or minority voting-age population of 60% necessary to permit minorities to elect candidates of choice), aff’d mem., 444 U.S. 1050 (1980). But see City of Woodville v. Monroe, 819 F.2d 507 (5th Cir. 1987) (60% minority voting-age population may not be adequate to prevent § 2 violation in at-large district context), cert. denied, 108 S. Ct. 774 (1988). The 65% "safe" districting approach has been cited with approval not only in *Ketchum*, 740 F.2d at 1413, but in *Rybicki*, 574 F. Supp. at 1113 n.87, and *Illinois Reapportionment Cases*, No. 81C 1395, slip op. at 19. See generally, Parker, supra note 134, at 111-12 (describing 65% supermajority districts as most appropriate, and increasingly common, remedy in both § 2 and § 5 cases).

Reliance on supermajority districts appears to have begun in those states and districts subject to § 5 preclearance requirements. Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1982), requires preclearance by the Attorney General of the United States of any change in a "standard practice or procedure with respect to voting" made by jurisdictions that fall within coverage of § 4(b) of the Act. Id. The Attorney General may clear a voting practice only if it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." Id. Officials in covered jurisdictions included one or more supermajority districts in new districting schemes to assure that these arrangements passed preclearance scrutiny. See United Jewish Org. v. Carey, 430 U.S. 144 (1977); Mississippi v. United States, 490 F. Supp. 569 (D.D.C. 1979), aff’d mem., 444 U.S. 1050 (1980); Donnell v. United States, Civil No. 78-0392 (D.D.C. July 31, 1979), aff’d mem., 444 U.S. 1059 (1980). In some cases, plans including such "safe" districts have been submitted and rejected, for unrelated reasons or because additional "safe" districts could have been constructed, given the population of the jurisdiction. See City of Port Arthur v. United States, 459 U.S. 159 (1982) (plan containing "safe" single member districts rejected because retention of some multi-member districts impaired minority electoral opportunity); A. Thernstrom, Whose Votes Count? 172-79 (1987) (discussing Justice Department objections to districting plans submitted for preclearance by Barbour County, Ala. and Sumter County, Ga.).

Ms. Thernstrom has assembled a compendious record of contemporary enforcement efforts, which will serve as useful background for many in the field, but I disagree strongly with the conclusions she draws from it. She argues that enforcement efforts have fanned out inap-
be a crucially important remedy at a time when disaffection and the present effects of past discrimination still impair political participation. But, one effect of the prevalence of supermajority districts in recent remedial schemes has been to reinforce the emerging judicial perception that the potential for electoral victory is the central opportunity protected by section 2.

All of these factors suggest a common danger: that well-intended—and even beneficial—aspects of current enforcement may rigidify our understanding of political opportunity at precisely the time when we should be enriching and expanding it. In the remainder of this Article, I will explain why it is essential to extend the boundaries of our current, electorally-based notion of “political opportunity,” and suggest some of the activities that this broader understanding should include.

II
PARTICIPATION IN THE POLITICAL PROCESS: A REEVALUATION

In order to give content to the “political opportunity” protected by
section 2 of the Voting Rights Act, we are clearly obliged to look beyond
the statute and the recent cases attempting to construe it. Yet, the nature
of the statute provides an important clue as to the first place to look.
Section 2 does not attempt to assert congressional control over an issue
formerly within the province of the judiciary. It provides an exclusively
judicial remedy free of the onerous intent requirement that the Supreme
Court imposed in Mobile v. Bolden.1 Cryptically endorsing the totality
of the circumstances test announced in White v. Regester,1 Congress
left future enforcement—and future resolution of ambiguities—to the
courts. Because the amendment of section 2 was, in essence, a congress-
ional redirection of a judicial discussion, we can best understand it
within the context of that discussion.

A. The Jurisprudence of “Political Opportunity”

The range of contexts in which courts have intervened to protect
political rights is itself evidence of the extended character of the political
process. With the exception of one line of cases,143 the Supreme Court
has never focused primarily on the election phase of that process. The
first intrusion of the courts into the political process, for example, con-
cerned the exclusion of blacks from political primaries by “white primar-
ies.”144 These cases asked whether participation in a primary was part of
the fundamental right to vote, the infringement of which violated the
fourteenth and fifteenth amendments.145 Replying in the affirmative, the
Court advanced a notion of a political process that consisted not merely
of an election, but of a series of interrelated steps; interference with any
one of these steps could alter the final outcome.146 In Smith v. All-
wright,147 the Court held that the “white primary” violated the four-
teenth and fifteenth amendments, noting that primaries may be “part of

141 446 U.S. 55 (1980); see text accompanying notes 50-54 supra.
142 412 U.S. 755 (1973); see text accompanying notes 32-41 supra.
143 These exceptional cases are the ones in which the Court imposed the requirement of equipopulous districts, known as the “one person, one vote” cases. See, e.g., Karcher v. Daggett, 462 U.S. 725 (1983); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962).
were not permitted to vote. Allwright, 321 U.S. at 658.
145 Allwright, 321 U.S. at 651 (fourteenth and fifteenth amendments); Classic, 313 U.S. at 305 (fourteenth amendment); Condon, 286 U.S. at 74 (fourteenth amendment); Herndon, 273 U.S. at 537 (fifteenth amendment).
147 321 U.S. 649 (1944).
the machinery for choosing officials, state and national.148 The Court strengthened this position nearly a decade later in *Terry v. Adams*,149 in which Justice Black, writing for the majority, noted that primaries may be "an integral part, indeed the only effective part, of the elective process that determines who shall rule and govern in the country."150

Concurring in *Terry*, Justice Clark not only affirmed the integral role of primaries, but pressed toward a more sophisticated view of the political process in which the general election might not only be influenced, but be determined, by events that had transpired at an earlier stage. "[T]he negro minority's vote is nullified," he observed, "at the sole stage of the local political process where the bargaining and interplay of rival political forces would make it count."151 Stressing the importance of interaction and exchange among political groups, he described the local political party's primary as the "locus of effective political choice."152

Fifteen years later,153 the Court began to elaborate on this theme in a series of cases on candidate access to the ballot.154 In these cases, the Court described an extended political process. While striking down a state law limiting ballot access to the major parties in *Williams v. Rhodes*,155 the Court described the right to vote as more than the opportunity to pull a lever: "[T]he right to vote is heavily burdened if that vote may be cast only for one of two parties at a time when other parties are clamoring for a place on the ballot."156 In *Lubin v. Panish*,157 a case involving filing fees, the Court explained the importance of ballot access to a right to participate that was primarily expressive: "[T]he voters can assert their preferences only through candidates or parties or both and it is this broad interest that must be weighed in the balance."158

148 Id. at 664.
149 345 U.S. 461 (1953).
150 Id. at 469; see also *Classic*, 313 U.S. at 318 (primary which is necessary step in choice of representatives is election within meaning of Art. I, §§ 2, 4 of Constitution).
151 345 U.S. at 484 (Clark, J., concurring).
152 Id.
153 In the intervening time, judicial enforcement efforts focused on the extension of the franchise to black citizens, and the constitutional requirement that districts have equal populations. See, e.g., Reynolds v. Sims, 377 U.S. 533 (1964); Wesberry v. Sanders, 376 U.S. 1 (1964); Baker v. Carr, 369 U.S. 186 (1962). While these cases did nothing to undercut the notion of a complex political process with key elements occurring both before and after elections, they did little to amplify it, as the challenged practices related primarily to balloting in the general election.
155 393 U.S. 23 (1968).
156 Id. at 31.
158 Id. at 716; see also *Anderson*, 460 U.S. at 787 (exclusion of candidates burdens voters'
More recently, in *Illinois State Board of Elections v. Socialist Workers*, the Court appended to this argument the additional observation that "by limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." This analysis echoes Justice Clark's suggestion that voters are not simply anonymous ciphers, the aggregation of whose preferences produces a victory at the polls, but actors, for whom participation in the political process is a means of expression and interaction with their fellow citizens. This expressive view suggests that the courts should consider a variety of activities—from participating in party caucuses to consulting with elected representatives—as important components of political opportunity.

The Court gave this extended, interactive vision of the political process its fullest expression in *Davis v. Bandemer*. In *Davis*, the Democratic party challenged the Indiana legislative districting scheme as unconstitutionally diluting its members' votes. In resolving the fourteenth amendment claim, the Court explicitly took its bearings from the constitutional standards developed in racial vote dilution cases. Citing the requirement that the Court articulated in those cases, that plaintiffs demonstrate not only a lack of proportional representation, but also evidence of exclusion from the political process, the Court stated:

> These holdings rest on a conviction that the mere fact that a[n]... apportionment scheme makes it more difficult for a particular group... to elect the representatives of its choice does not render that scheme constitutionally infirm. This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections.

Those who vote for a losing candidate, the Court explained, rarely suffer a serious disadvantage, because they can exert their influence at subsequent stages in the political process to assure that the newly elected representative does not ignore their interests. It is only when "the electoral system is arranged in a manner that will consistently degrade... a group of voters' influence on the political process as a whole" that a constitutional violation has occurred. Among the forms of participation the *Davis* Court intended to protect were deliberations leading to the slating or nomination of candidates, and efforts to secure the legislative attention...
These cases on political participation help to bring into focus additional features of “political opportunity.” They depict an extended process in which pre-election horse trading and post-election assertions of influence are as important as the balloting itself. They describe an expressive activity in which individuals come together to negotiate and articulate collective points of view. Yet the insights from these cases are not the end of the inquiry. Section 2 is not concerned simply with political participation, but rather with political participation for racial and language minorities—groups historically subject to pervasive discrimination, both inside and outside of the political realm. The amendment of section 2 reflects a desire not only to broaden political participation, but also to combat the patterns and effects of societal discrimination. By re-examining the larger goals of the statute, we can shed light on the forms of political activity that courts should find within its ambit.

B. Enhancing Minority Participation: A Dialogue About Goals

Congress’s specific purpose in amending section 2 was to curtail the restriction imposed on voting rights enforcement by Mobile v. Bolden. But, in more general terms, the enactment of the statute was an effort to enhance the political participation of minority groups. The legislative history does not make clear why Congress wanted to enhance minority participation in the political process. However, by considering the

167 Id. at 133. The contrast between Gingles and Davis is particularly curious, not only because these cases were decided on the same day, but because Davis self-consciously took its bearings from the racial vote dilution cases, of which Gingles is purportedly the latest example. The fact that Davis applied the standard developed in constitutional vote dilution cases, while Gingles was concerned with preventing vote dilution under § 2 is unlikely to explain this contrast. Given the clear intent of Congress to re-establish the constitutional standard set forth in White, albeit in statutory form, it is peculiar that the Court took the first available opportunity to point adjudication under the statute in a different direction. The Court’s attempt to distinguish the cases by suggesting that Gingles considered the configuration of a single district, while Davis considered districting arrangements in the state as a whole, id. at 127, is no more persuasive. The configuration of lines in one district serves the same function as do the lines for the state as a whole: to establish the boundaries within which voters will participate in the political process. Whether the process is being considered in one district or statewide should not affect the content of the activities we understand to constitute the process.

168 446 U.S. 55 (1980); see text accompanying notes 50-54 supra.

169 See Senate Report, supra note 4, at 5, 1982 U.S. Code Cong. & Admin. News at 183 (Voting Rights Act and amendments intended not only to increase minority registration but to achieve “full effective participation” for minority voters in political process).

170 The legislative history, which focuses on intent and the elements of proof necessary to establish a violation of amended § 2, scarcely addressed this point. However, several witnesses at the House hearings on the bill testified as to why minority participation should be enhanced. Their reasons included increasing the numbers of minority representatives, generating substantive enactments favorable to minority interests, and facilitating political interaction between minority and white voters. See Hearings, supra note 68, at 365 (testimony of Henry Marsh,
normative arguments that may have influenced this choice, we may better understand the types of participation that courts should protect under section 2. To elicit the full range of arguments it will be necessary to consider the benefits of minority political participation from a variety of perspectives.

For members of racial minorities, or those who share their substantive commitments, the answers are varied. Some view enhancing participatory opportunities as a way to help alter political outcomes. One consequence of discrimination against minorities is the enactment of legislation with a discriminatory impact or the failure to enact legislation that would correct longstanding inequities. If minority voters have more opportunity to participate, they may compel legislators to redress these grievances—a possibility that appealed to some proponents of the amendment.

Yet the need for legislative reform is not the only reason to enhance the political opportunities of minority voters. If it were, we could accomplish reform without altering minority participation; a benevolent Congress, freed from the shackles of discrimination, might correct inequities directly through the passage of substantive legislation. This approach, however, would neglect a second goal of enhancing minority participation: the value to minority citizens of taking an active part in self-government or political change.

The benefits inherent in political participation, a subject of renewed interest among political theorists, take several forms. Participation confers benefits on the individual actor; it highlights her autonomy and

Mayor, Richmond, Va., and Michael Brown, Coordinator, Va., NAACP); id. at 590 (testimony of Laughlin McDonald, Director, Southern Regional Office, ACLU).

171 See id. at 365 (testimony of Henry Marsh, Mayor, Richmond, Va.); Alkaimat and Gills, Chicago—Black Power v. Racism: Harold Washington Becomes Mayor, in The New Black Vote: Politics and Power in Four American Cities 53-180 (R. Bush ed. 1984) (leaders of successful minority voter registration drive in Chicago in early 1980s urged that control over election outcomes and municipal services were at stake); Morris, Black Electoral Participation and the Distribution of Public Benefits, in Minority Vote Dilution 271, 271-85 (C. Davidson ed. 1984) (articulating belief of black activists that increased political participation can change outcomes and offering evidence from several municipalities showing increases in black officeholding, community services, and public employment for minorities following increased participation).

172 Hearings, supra note 68, at 365 (testimony of Henry Marsh, Mayor, Richmond, Va.).

173 It does not appear, however, that Congress considered the benefits of direct political participation in passing either the Voting Rights Act or the 1982 amendments. Arguments about the community-reinforcing effects of minority political participation were beginning to influence more radical groups such as Student National Coordinating Committee (SNCC) by the 1960s, Carson, In Struggle: SNCC and the Black Awakening of the 1960s, 18, 30, 45 (1981), but there is no evidence that such arguments had an effect on the comparatively centrist white Congress.

control over her own destiny, and it permits her to express herself and deliberate with others on matters of public importance. Perhaps more important, political participation can play a role in forging or maintaining connections among members of a community. By acting together in the political sphere, a group of apparently disparate individuals may come to appreciate the strength of their common interests, and those already so connected may recognize the power that comes from concerted effort. These benefits may be of particular value to members of minority groups, for whom discrimination has often thwarted control over their own destinies and capacity to act collectively.

Nonminority voters with divergent interests might offer different reasons to support enhancement of minority political participation.

175 It is interesting that not only theorists, but many participants themselves grasp the value of political participation in altering political outcomes. In an oral history of the Civil Rights Movement, Mrs. Fannie Lou Hamer, later a leader of the Mississippi Freedom Democratic party, described her response upon hearing for the first time that blacks were entitled to vote and would soon be called upon to attempt to register:

I didn't know what a mass meeting was, and I was just curious to go to a mass meeting. So I did . . . and they was talkin' about how blacks had a right to register and how they had a right to vote . . . . Just listenin' at 'em, I could just see myself votin' people outa office that I know was wrong and didn't do nothin' to help the poor. I said, you know that's sumpin' I really wanna be involved in . . . .


177 See B. Barber, supra note 174, at 133 ("[S]trong democratic theory understands the creation of community as one of the chief tasks of political activity in the participatory mode.").


179 B. Barber, supra note 174, at 178-98; A. de Tocqueville, supra note 178, at 520-24.

180 A possible limitation on this justification is that many of the community-building benefits of political action arise from participation in very small groups. B. Barber, supra note 174, at 245-47, 248; R. Dahl & E. Tufte, Size and Democracy 41-65 (1973). Because the Voting Rights Act is concerned with participation in politics at the local, state, and national levels, it might not seem to be the best instrument for producing these benefits. Nonetheless, because many remedies under the Act require the redrawing of individual districts, they may alter the character of politics at the neighborhood level.

The constitutive or community-reinforcing rationale is also insufficient if considered in isolation. Most people undertake collective action, not simply as a means of self-definition, but because they expect some substantive good to come of it. See Morris, supra note 171, at 271 (citing belief of black and other ethnic groups that political participation is means to "improve their social and economic status" and "influence the distribution of benefits"). This is particularly true of participants, such as minority voters, who see much in the world that needs to be changed. If collective efforts fail, over time, to yield the desired change, participants are more likely to be discouraged than elevated by their efforts. Many political observers argue, for example, that the failure of blacks in New York City to win major policy initiatives or elect a black candidate to major office has resulted in low morale and divisive in-fighting among black leaders and voters. See Blacks and Political Power: The Key to Easing Tensions, N.Y. Times, Apr. 2, 1987, at B1; Blacks in New York: The Anguish of Political Failure, N.Y. Times, Mar. 31, 1987, at B1.
First, those who do not share minority interests may acknowledge the contribution of racial diversity to the political process. Diversity of perspective has recently begun to enrich institutional dialogues of many sorts. For example, the movement of women into the workplace has created a new awareness of the relationship between work and child-rearing. The achievement of greater racial and ethnic diversity on college campuses has encouraged reconsideration of questions ranging from curriculum to the diversity of faculty. Whatever the outcome of these explorations, the participants have been encouraged to view their environments in a new way, and see choices of which they were not previously aware. Similarly, decision-making in the political sphere becomes richer and more comprehensive when it can draw on a variety of perspectives. Members of each minority group possess a unique history, culture, and contemporary experience that will help participants to see political issues in a different light. Increasing the role of such groups in the political process will enable them to enlarge those deliberations of which they are a part.

Second, nonminority participants may favor enhanced minority participation because of concern for the legitimacy of the governmental system. By the "legitimacy" of a governmental system, I mean those features that make it acceptable to those who live under its laws, and that make the laws worthy of compliance. Although no theorist with whom I am familiar has advanced precisely the understanding of governmental legitimacy that I offer here, some have offered accounts of the features that make a governmental system (or our governmental system) acceptable to those who live under it.

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181 For example, the argument that the goal of diversity justifies affirmative measures in civil rights remediation has become increasingly prominent in recent anti-discrimination jurisprudence. See, e.g., Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 315 (1986) (Stevens, J., dissenting) ("desirability of multi-ethnic representation on the teaching faculty" justified collective bargaining agreement protecting junior minority teachers in case of layoff); Sullivan, Sins of Discrimination: Last Term's Affirmative Action Cases, 100 Harv. L. Rev. 78, 96 (1986) (increasing diversity of workforce is appropriate "forward-looking" reason for affirmative action). The perceived need for forward-looking justifications such as diversity seems to have arisen from the difficulties involved in advancing a compensatory justification for affirmative action measures that often benefit those who are not the actual victims of discrimination. See id. at 91-96.


184 Black and Asian groups, for example, have enriched the debate over surrogate mothering by raising concerns not only with the potentially coercive effects of the practice on lower income women, but with its impact on thousands of non-white babies whose prospects for finding a home may grow even dimmer with such a practice. For a fuller discussion of this and related issues in surrogacy, see Cohen, Posnerism, Pluralism, Pessimism, 67 B.U.L. Rev. 105 (1987).

185 By the legitimacy of a governmental system, I mean those features that make it acceptable to those who live under the systems laws, and that make the laws worthy of compliance. Although no theorist with whom I am familiar has advanced precisely the understanding of governmental legitimacy that I offer here, some have offered accounts of the features that make a governmental system (or our governmental system) acceptable to those who live under it.
features that make it acceptable to those who live under it, and that make the laws enacted by it worthy of being followed. A system attains one kind of legitimacy by following whatever rules are set down, but this formal legitimacy must be supplemented by a substantive component. Substantive legitimacy requires that the features of the political system, and the government that arises from it, appear to be consistent with the commonly held premises concerning human nature and the need for a political society that underlie the system.  

Although substantive legitimacy may be less problematic in some political systems, it presents a potent challenge to our “republican,” or representative democratic form of government. This is because a representative democracy embodies an unresolved, and unresolvable, tension. Although the system understands all citizens to be equal, a comparatively small number make most of the decisions that will shape the lives of the rest. In order to be acceptable to its citizens, this paradoxical form of government must meet certain conditions. All features of the system not subject to the constraint of representation must preserve the premise of equality.

For example, the system must permit all citizens to participate in the selection of their representatives. Here, however,

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See, e.g., A. Bickel, The Morality of Consent 3-25 (1975) (describing features that make governmental system acceptable to “liberal contractarians” as opposed to “Burkeans” or “Whigs”). Others have described the features that make a system identifiable as democratic to a citizen or outside observer. See, e.g., R. Dahl & E. Tufte, supra note 180, at 36-38 (describing conditions that must be met in order for system to be a “populistic democracy”); id. at 84-85 (describing conditions that must be met for a “polyarchal democracy”). Some theorists argue that it is not simply the legitimacy of the governmental system that makes its legal output legitimate, but also features of the laws promulgated. See L. Fuller, The Morality of Law 39 (1964) (describing “internal” elements that make laws acceptable, such as publicization, prospectivity, comprehensibility); id. at 40-41 (distinguishing internal legitimating features of law in theory from the degree of realization of those features in practice).

For an example of how the essential features of a political system can be developed from simple premises about human nature, see R. Dahl & E. Tufte, supra note 180, at 37-38 (deducing majority rule from assumptions of popular sovereignty and political equality).

See Michelman, Foreword: Traces of Self-Government, 100 Harv. L. Rev. 4, 50-55 (1986) (discussing theories of virtual and actual representation of constituencies or interests and continuing interpretive debate over which theoretical model corresponds to American system).

Dahl and Tufte employ an analogous assumption when they discuss the conditions for polyarchal democracy. See R. Dahl & E. Tufte, supra note 180, at 84. They state that the only phase of the American political process in which the majority rule (derived from political equality) appears to be satisfied is vote counting in elections and legislative bodies. Id. at 66. But they suggest that during the other phases other conditions, such as full information about alternatives and the subordination of interelectoral processes to electoral processes, respect the political equality of citizens. Id. at 70-71. However, other theorists, such as Bickel, believe that the tension is not so easily ameliorated. Bickel describes the fact that, in an extended polity, not all citizens can participate in lawmaking as a fundamental, continuing problem for those “majoritarians” who regard human equality as one of the founding premises of the governmental system. See A. Bickel, supra note 185, at 6-7.
nonminority participants might object on the ground that minority citizens enjoy the right to vote. In this view, an end to disenfranchisement secures the legitimacy of the system, without the need to enhance minority participation. However, reflection on their own experience would suggest to these participants that what minimizes the tension between equality and representation in the American system is not simply the election of representatives but, rather, the voters' ability to participate directly or indirectly in numerous phases of an ongoing political process.

Through a variety of predicate activities, those of us who do not exercise the final decision-making power can attempt to influence those who do. This influence can be wielded by discussing our substantive preferences, forming organizations to support candidates who reflect them, lobbying our representatives, and monitoring their responsiveness to our substantive concerns. Since these and other activities play a role in easing the tension between equality and representation, our political system must provide the opportunity to participate in all of them to all citizens on an equal basis. A system that proscribes participation in one or more of these activities by certain citizens, or that does not provide its citizens an equal opportunity to engage in them, compromises the legitimacy of the governmental activity that follows from it.

A concern for the legitimacy of our governmental system may in fact help us to secure all the goals of participatory politics. By assuring all citizens an opportunity to participate in the predicate activities of government, we permit them to express and define themselves at some stage of the political process, and provide them a chance to affect the content of decisions. The promise of equal access also assures a diverse process,

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189 Although they do not relate these activities to the legitimation of a governmental system, Professors Verba, Nie, and Kim have identified four distinct modes of political participation which appear in a variety of different political systems. Only one of these modes is voting; the others are: individual initiation of contacts with governmental officials, participation in campaigns, and cooperation with others in influencing the political system. See S. Verba, N. Nie & J. Kim, The Modes of Democratic Participation: A Cross-National Comparison 15-16 (1971). These modes, particularly campaign participation and cooperation with others, overlap or intersect with the more particularized set of "predicate activities" I describe. This listing is purely illustrative. For a systematic exploration of the essential predicate activities, see text accompanying notes 216-18 infra.

190 This equality of access to predicate activities is admittedly an ideal that may not be realizable. Differences in wealth, organization, educational background, social connections, and other factors mean that the ability to exert influence through these predicate activities is not often equal in practice. But equal access is nonetheless the ideal according to which representative democracy is legitimated. See L. Tribe, American Constitutional Law 1142 n.6 (1988) (criticizing Supreme Court in Buckley v. Valeo, 424 U.S. 1 (1976), for giving inadequate consideration to access issues implicit in limitations on campaign expenditures). While some inequalities may persist for reasons related to wealth or organizational advantage, our legal system has a particular interest in rectifying those that exist on the basis of race, the classification that historically has been entitled to the strongest legal protection.

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in which participants with numerous perspectives will contribute to the final legislative product.\textsuperscript{191}

Assuming that we want to enhance minority political participation because equal access to predicate activities legitimates representative democracy, we must next describe the relationship between this goal and voting rights enforcement. The foregoing discussion suggests that, under any account of our political process, one can find a set of assumptions about what predicate activities legitimate democratic government. We must first consider the electoral focus that is beginning to emerge from the courts, and the predicate activities that this focus assumes are important. We must then determine whether these activities present a convincing picture of the political process as we know it.

\textbf{C. Legitimation and the Electoral Focus}

In enforcing section 2, some courts have begun to focus on the opportunity of minority voters to elect the candidates of their choice.\textsuperscript{192} The logic of \textit{Thornburg v. Gingles}\textsuperscript{193} and its subsequent interpretation raise the danger that this may become the exclusive definition of "political opportunity." The language of the statute, and the preceding cases on political participation, suggest that this focus provides too narrow an account of the activities that Congress intended the provision to protect.\textsuperscript{194} The present stage of our inquiry, however, requires us to consider this development from a different perspective: does an exclusive focus on electoral results give an adequate account of the predicate activities that legitimate democratic government?

The electoral focus seems to suggest that the single act of voting for representatives, unenhanced by any prior or subsequent involvement, can legitimate the subsequent processes of government.\textsuperscript{195} This seems implausible on its face, but if we are to understand fully the implications of an electoral focus, we must consider it more carefully. The act of voting

\footnotesize{\textsuperscript{191} In subsequent sections of this Article, references to the "legitimation of democratic government," denote not simply the need to reduce the tension between equality and representative democracy, but also each of the above goals.  
\textsuperscript{192} See text accompanying notes 55-104 supra.  
\textsuperscript{193} 478 U.S. 30 (1986).  
\textsuperscript{194} See text accompanying notes 23-140 supra.  
\textsuperscript{195} One might argue that this test is not concerned simply with voting, but with the range of activities leading up to it, using voting simply as a proxy for these activities. While this interpretation is plausible in theory, the language of the \textit{Gingles} opinion militates against it. The opinion incorporates no conceptual analysis suggesting the importance of interaction. The majority insists that the right protected in the case is the right of members of a minority group to "elect candidates of their choice," \textit{Gingles}, 478 U.S. at 50 (quoting Senate Report, supra note 4, at 28, 1982 U.S. Code Cong. & Admin. News at 206), not a right to participate in or influence the political process. Nor does the opinion detail the difficulty of demonstrating interaction or give any other indication of the perceived need for a proxy.}
for representatives is sufficient to legitimate governmental power only if it is an accurate aggregation of citizens' revealed preferences, which representatives could then correctly translate into the personnel and policies of government. This hypothesis rests on a number of supporting assumptions it will be helpful to consider.

First, it assumes that citizens are capable of expressing their preferences in an unequivocal fashion. Second, it assumes that they are capable of doing so on a single occasion. Third, it assumes that voting for legislative candidates represents the best such occasion for doing so. Fourth, it assumes that the preferences that individuals express through voting can be easily aggregated. Finally, it assumes that this aggregation can be translated into the policies by which citizens are governed. Far from being widely accepted, however, most of these assumptions have been the subject of continuous, persuasive criticism. Some of these objections should lead us to question the appropriateness of the electorally focused model as a basis for voting rights enforcement.

The first assumption—that mature adults in full possession of their mental faculties are capable of expressing their political preferences—seems uncontroversial. Moreover, it is a central assumption on which we base our system of representative democracy. Yet the meaning of the term “preference” has been the subject of considerable dispute, and an acceptable definition may require a more complex view of the formation and elaboration of preferences than can be accommodated by a model of one-time electoral aggregation. Many commentators have criticized the notion that preferences, such as those recorded through voting, accurately reflect the objective interests of the citizens who express them. The earliest strand of this analysis suggested that expressed preferences do not reflect the subjects' interests because of their historically determined “false consciousness” of the objective, material conditions of life. A second, more recent, strand argues that voters may act strategically or arbitrarily rather than expressing their objective preferences when they cast their ballots, because they suspect their vote will have a negligible impact on the outcome of the process. A third strand, per-

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196 Although most of these assumptions have been subjected to numerous and varied criticisms, only certain objections relate to the individualized or aggregate features of the model. These are what I discuss below.


198 See Balbus, supra note 197, at 154, 166 n.21.

199 The question of what voters will make of their increasing numerical insignificance in the modern state has informed much contemporary political and social choice theory. A few optimists argue that, regardless of the perceived impact of their ballot, many voters will embrace election days as opportunities to “record [their] true preferences.” Sen, Rational Fools: A
haps most applicable here, suggests that individuals do not always form preferences by thinking and acting in isolation, but often do so through a process of interaction. Some proponents of this model of preference-formation argue that preferences, like the values that underlie them, emerge from living, discussing, and acting within a larger group. More individualist proponents claim that preferences are the product of a process of deliberation that includes conversation with, or consideration of, the views of those who hold different preferences. Both variants argue that, through such interaction, the preferences that individuals express will be better understood, and they will discover and advance new preferences by discussion with others.

If any expression of preference that occurs without interaction may

Critique of the Behavioral Foundations of Economic Theory, 6 Phil. & Pub. Aff. 317, 333 (1977); see also A. Sen, Collective Choice and Social Welfare 195 (1970) (asserting same theory). Many, however, are not so sanguine. Some theorists have predicted that voters confronted with the inconsequentiality of their own contributions will attempt to cast their ballot in a way that maximizes the impact of their vote. See, e.g., A. Hirschman, Shifting Involvements: Private Interest and Public Action 105 (1982). Others hypothesize that voters will abandon their preferences and persuade themselves that they are satisfied with, or indeed prefer, those options that are more likely to prevail. See, e.g., J. Elster, Sour Grapes: Studies in the Subversion of Rationality 111-24 (1983). Still others predict that voters will respond to their electoral impotence by withdrawing from the political process or by voting arbitrarily. Perhaps the most extreme version of this theory is that of Brennan and Buchanan, who argue that voters who despair of affecting political outcomes will separate the act of voting from their substantive preferences and pick a candidate arbitrarily. Brennan & Buchanan, Voter Choice: Evaluating Political Alternatives, 28 Am. Behavioral Scientist 185, 186-97 (1984).

The first two hypothetical responses are less disturbing, because voters still view political participation as a means of making choices about how a community should conduct its collective life, however Machiavellian the means, and however limited the range of choices. The last type of behavior, which involves a radical separation of participation from substantive policy preferences, appears far more dangerous, as it posits an extreme political cynicism on the part of participants which, if sufficiently widespread, could result in disastrous collective choices. Minimizing such behavior, which I will label “nonproductive,” and the fear of political impotence from which it arises, should be a goal of any legitimate participatory system. For an examination of the effect of a more interactive view of the political process on such behavior, see text accompanying notes 215-33 infra.


Commentators differ on the question of precisely how group deliberation helps members to understand and identify their preferences. My own view incorporates elements of both Connolly, supra note 197, and Sunstein, supra note 201. I agree with Connolly's description of a “real interest” (which I call a “preference”) as that which the holder would choose if she had experienced all the alternatives. Connolly, supra note 197, at 472. Although no person can actually experience all of the available options, she still needs to have some way of comparing them. Connolly does not explain precisely how members of an “interest” group perform this task. It is here that Sunstein's notion of group deliberation provides assistance. When a group comes together to discuss preferences, individuals air alternatives and argue for one or another, see Sunstein, supra note 201, at 31-35, giving each participant a chance to compare her choice with other options which are being presented in the best possible light.

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be flawed, the assumption that individuals can express their preferences on a single occasion is also called into question. The expression of preferences might be reliable if preferences could be assessed continuously over a period of time, during which they would be shaped by discussion and deliberation among participants.\textsuperscript{203} A more extended process of expression might also calm the fears of those who tend not to vote their preferences because they anticipate that their vote will have no effect. But the assumption that preferences can be measured on one occasion (and the correlative legal directive that there need be no scrutiny of the opportunities that precede this expression) seems to be the approach least likely to mitigate problems associated with the electoral model.

The model's third assumption—that voting for representatives constitutes the best single occasion for the expression of preferences—is the one that has provoked the least criticism. In a polity the scope of which is too vast and the legislative agency of which is too complicated to be governed by direct democracy, it appears to be generally accepted that if citizens are to have only one opportunity to express their preferences, voting on legislative candidates is the best such occasion.\textsuperscript{204} However, one could object to this assumption on the ground that citizens may have preferences as to substantive policy that they cannot express if they can cast votes only for representatives or for the occasional referendum. Why citizens must be limited to one occasion to express their preferences, and whether expression on this occasion, in the absence of any prior opportunities to participate, is sufficient to legitimate governmental power are separate questions that must be addressed below.

The fourth assumption—that individual preferences can be clearly aggregated to produce collective choices—has also been subject to criticism. Some of these criticisms relate to the aggregation rule employed in the United States: equally weighted votes with a simple majority prevailing. The winner-take-all character of the majority rule means that nonmajority preferences may not be reflected in the choice of representatives. The simple summation of preferences that the "one person, one vote" rule mandates fails to take account of intensity of preferences.\textsuperscript{205}

\textsuperscript{203} See note 207 infra.

\textsuperscript{204} Dahl and Tufte, for example, note without negative comment that the voting phase of the political process is the only one in which even approximate adherence to majority rule is achieved. See R. Dahl & E. Tufte, supra note 180, at 66. This conclusion seems reasonable in light of the fact that, for American citizens, participation in voting far exceeds any other form of political participation. See S. Verba & N. Nie, Participation in America 31 (1972) (Table 2-1).

\textsuperscript{205} R. Dahl, A Preface to Democratic Theory 90-123 (1956). This raises the possibility that a comparatively indifferent majority could prevail over a minority with intense preferences, a result that would not accurately reflect one salient feature of collective preferences—their intensity.
Although these criticisms would apply to any account of the American political system, they apply with particular force to an account of that system that is focused on a single electoral event. If one expands the time frame of collective decision-making and allows for the possibility of interaction among participants prior to the actual voting, it is likely that exchanges and accommodations will occur that will mitigate the intensity and minority-neglecting aspects of majoritarian democracy. But where the model of the political process ascribes legitimating force to a single aggregative event, these drawbacks persist unabated.

A view of elections as translating individual preferences into social choices also neglects the mediating influence of groups in the political process. The influence of groups in post-election legislative policymaking is well documented. I would argue that their influence is also pervasive in the pre-election phase of the political process. Groups often try to solicit support for candidates whom they collectively favor. Furthermore, most individuals, solicited or unsolicited, vote on the basis of judgments about what is good or bad for themselves or others that they share with other people. In the sense that people vote on the

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207 Buchanan and Tullock's account suggests that most such bargains and exchanges among groups would occur within the context of a single election, with groups trading support on one issue or candidate for support on another. See id. at 120-30. In a noninteractive process with the focus on a single event, the chances of such exchanges would be limited. Although it is possible that groups could conduct a temporally extended exchange (a vote in this election for a vote in the next one), this possibility would be limited by the difficulty of foreseeing the issues that would arise in the future, and by the participants' understandable reluctance to rely on their exchange partners' word that the promised future performance will in fact occur. See id. at 134 (exchanges more likely to occur where it is easy to monitor performance according to agreed-upon conditions).

208 See Sen, Rational Fools, supra note 199, at 318 (much choice behavior based not on contemplation of individual or general welfare, but on considerations arising from membership in groups).

209 See D. Mayhew, The Electoral Correction 130-31 (1974) (noting legislative influence of large, well-organized groups); N. Ornstein & S. Elder, Interest Groups, Lobbying and Policymaking 53-65 (1978) (describing ways in which groups influence policymaking); id. at 69-75 (money, membership size, and organizational skill are crucial resources that produce legislative influence). Much recent economic literature addressing the “collective action problem” is premised on the notion that groups influence legislative policy formation; the question is what kinds of groups are best able to mobilize and exercise influence? See, e.g., M. Olson, The Logic of Collective Action 2 (1965) (in absence of coercion or other special circumstances, rational, self-interested individuals will not act to achieve their common or group interests); Krier & Gillette, The Uneasy Case for Technological Optimism, 84 Mich. L. Rev. 405, 424 (1985) (large groups in favor of policies that create diffuse collective benefits are disadvantaged relative to small groups opposing policies that impose concentrated costs).

210 In his analysis of several decades of voter studies, Professor Natchez highlights the common finding that group affiliations and opinions are a primary source of direction in voting. See P. Natchez, Images of Voting/Visions of Democracy 45-77, 78-100 (1985). Two groups of works are particularly enlightening on this point. In some of the earliest systematic studies of
voting and political participation, Lazarsfeld and Berelson found that political predispositions that exert substantial influence on voting behavior tend to be derived from primary group associations such as family, friends, co-workers, fellow union members, or neighbors. See B. Berelson, P. Lazarsfeld & W. McPhee, Voting 116-17 (1954); P. Lazarsfeld, B. Berelson & H. Gaudelet, The People's Choice: How the Voter Makes Up His Mind in a Presidential Campaign 148 (1948). Later scholars, such as Verba and Nie, concurred in these conclusions. S. Verba & N. Nie, Participation in America 136-37, 148 (1972). Verba and Nie also cited the influence of "secondary" groups, such as religious groups and private clubs and organizations, on political participation. Id. at 208, 298.

While I tend to agree with these judgments about the magnitude of group influence on political participation, scholars such as Lazarsfeld or Verba tend to suggest that the affiliation dictates the attitudes that subsequently influence participation. I want to suggest that substantive attitudes and preferences can encourage affiliations that then influence political participation. See Abrams, Kitsch and Community, 84 Mich. L. Rev. 941, 950 (1986) (group ties can be forged by collective action toward shared preferences or goals). Sen has offered a theoretical account of the complex of shared preferences that can connect individuals and influence political participation. Elaborating on his position that many people vote their "true preferences," Sen, Rational Fools, supra note 199, at 333, Sen argues that there are judgments that go beyond specific electoral choices that condition and explain voters' preferences. Id. at 323 (describing search for "non-choice sources of information on preference"). Particular moral commitments or principles held by each voter establish hierarchies of preferences. Id. at 337-38. People order preferences differently—and subsequently vote in accordance with that ordering of preferences—depending on what principle or principles they hold most important. Id. I would add to this analysis that when a citizen votes in accordance with preferences derived in this fashion, she votes as a member of a group that shares a particular moral commitment.

I have avoided, and will avoid, describing such judgments as publicly-interested or self-interested, in order to avoid the debate over whether voting should be described as a self-interested activity. Compare B. Barber, supra note 174 (participation creates communitarian ethos that permits decision-makers to transcend individual interest) with M. Olson, supra note 209 (collective action in public as well as private realm undertaken according to calculations of self-interest) and J. Schumpeter, Capitalism, Socialism and Democracy 262 (1947) (participation motivated by individualized "dark urges"). My reluctance to enter this particular fray stems from the fact that I do not find the terms self-interested or publicly-interested particularly helpful in describing what people are doing when they vote. These terms disguise the fact that almost everyone (those sports fans described by Brennan and Buchanan aside) votes most of the time on the basis of shared normative judgments. These judgments can be broad ("Richard Nixon will get us out of Vietnam, which is good because war is a bad thing."), or narrow ("I will vote yes on the upcoming village proposal because children should not have to attend school in dilapidated buildings."). Whether one makes these normative judgments because one adheres to some notion of the public interest or because they serve one's individual interest is difficult to determine as an objective matter because there is little agreement as to what the "public interest" is. It is difficult to determine as a subjective matter because most voters find both their principles ("the Vietnam war is an immoral war") and their individual circumstances ("my nephew has lottery number 150") to be implicated by a particular electoral choice, and it is impossible for them, let alone an outside observer, to know why they voted as they did.

Additionally, I think using these terms has proved to be detrimental because it conceals the actual basis of our criticism of others' political choices. Because no one is sure what the "public interest" is, I can say that your vote is not publicly-interest, instead of making the more vulnerable claim that I do not share your normative judgments or undertaking the more burdensome task of explaining why not. There are obviously some choices or judgments to which this definitional problem does not apply (e.g., blacks are inferior to whites; killing chil-
Their vote for a candidate may be understood as a way to express that shared judgment. The problem with an aggregation device such as an election is that it presents a picture of the winning and losing voters as homogeneous masses, without reference to the distinct judgments that formed the basis of their votes. It suggests that elections are won by nondescript “majorities” rather than by shifting combinations of smaller groups, who support a candidate for different reasons, but whose votes combine to produce a victory. Because this concept of aggregation obscures the reasons for people’s votes, it produces the problems of translation that are the final drawback to the preference aggregation model.

The final assumption underlying this electorally focused model is that the results of legislative elections can be easily translated into substantive policies. This assumption would hold if translation did not matter or if our system of representative government embodied some reliable means of accomplishing it. But neither of these possibilities obtains in our system. Representation in our system is not purely symbolic, nor do we understand legislators to have the superior judgment or information that would make citizens’ contributions unnecessary. Although many citizens may intend to send messages regarding substantive policies when they cast their ballot, the vote provides no dependable mechanism through which representatives can decipher those messages. On the contrary, the aggregation device of the election garbles these messages, producing winners while obscuring the reasons for their victories. Moreover, even in those few cases where an actual majority sends a clear message, the representative may have difficulty translating this message into substantive policy. She may be unable to persuade her legislative colleagues or she may feel obliged to support initiatives opposed by those who elected her. She may be subject to pressure from constituent groups or other organized interests not responsible for her election. Alternatively, a representative’s incumbency may so insulate her from electoral pressures that she feels little need to respond to constituent demands.

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212 See H. Pitkin, The Concept of Representation 92-93, 169 (1967).
213 Brennan and Buchanan suggest that, while voters are viewing politics as a spectator sport, organized interests are capturing the hearts and minds of legislators. Brennan & Buchanan, supra note 199, at 198-99. But see D. Mayhew, Congress: The Electoral Connection 120-35 (1974) (“servicing of organized” one of several goals that legislators must balance).
214 Recently, however, the insulation implicit in incumbency has been called into question. See Ferejohn, Incumbent Performance and Electoral Control, 50 Pub. Choice 5 (1986) (empirical evidence and proposed model suggest that electorate may critically evaluate performance of incumbents); see also D. Mayhew, supra note 209, at 35 (incumbents may feel electorally vulnerable even if evidence suggests they are not). But see Ledyard, Elections and Reputations: A Comment on the Papers of Coughlin and Ferejohn, 50 Pub. Choice 93, 95-98 (1986)
In short, the enactment of legislative policies supported by those who voted for a particular candidate is less likely to follow from the voting itself than from collective action following the election that helps representatives to understand and implement those preferences.

D. From Preference Aggregation to Interactive Participation

These critiques point to several pervasive flaws in a "preference aggregation" model that focuses on electoral performance. First, it inaccurately describes the political process. It directs attention to a single event—the general election—thereby neglecting a series of other events that often determine electoral outcomes and help translate election results into substantive policy. If preferences are shaped by reflection and conversation, if electoral victories are often won by coalitions, and if substantively unintelligible electoral victories are frequently translated into policy by the intervention of groups in the political process, the preference aggregation model gives a highly distorted view of what actually occurs.

By imposing a misleadingly narrow focus on the political process, the preference aggregation model mischaracterizes the nature of the activity that occurs within it. This model expresses preferences as either individual (before the election) or general (after it), transformed by the somewhat mysterious aggregative event of voting. This characterization is flawed because it neglects the critical role of groups in the political process. Groups are instrumentally important as mediators between the individual and the general. They are also crucial in the creation or shaping of voters' preferences. Individuals' affiliations—familial, residential, professional, religious, or political—help determine the things individuals seek from the political system. Even individuals who are not formally affiliated may be united by a principle or goal that orders and directs their choices, making them members of a group with similar views.

Because the preference aggregation model neglects the numerous ways in which group activity dominates the political process, it also fails to capture the interactive character of that process. The model describes voters as expressing their preferences in isolation, and describes preferences as being aggregated by a mechanical device—the voting machine. See B. Barber, supra note 174, at 188. In a wonderfully original reflection on the limitations of voting, Barber compares this crucial act of participation to using a public toilet: "[W]e wait in line with a crowd in order to close ourselves up in a small compartment where we can relieve ourselves in solitude and in privacy of our burden, pull a lever and . . . go silently home." Id.

(criticizing assumptions of Ferejohn's model).

215 See B. Barber, supra note 174, at 188. In a wonderfully original reflection on the limitations of voting, Barber compares this crucial act of participation to using a public toilet: "[W]e wait in line with a crowd in order to close ourselves up in a small compartment where we can relieve ourselves in solitude and in privacy of our burden, pull a lever and . . . go silently home." Id.
in a different way. Individuals deliberate together in groups to determine what they want. Groups engage in bargains or exchanges with other groups to increase their chances of obtaining what they want. The action is associative or collective; the means of attaining goals are collaborative or cooperative.

A model that more accurately reflects what really happens would apply a wider lens to the political process. It would describe the activity that legitimized governmental power not as a single electoral event, but as a process that began with reflection on, and discussion of, preferences and concluded with the enactment of substantive policies. It would acknowledge those occasions on which processes of aggregation made choices final, but it would also highlight the interactive activities that informed and shaped electoral participation. These might include the neighborhood, union, or PTA gatherings at which people discuss their views on local issues, and the meetings of candidates with the local veterans organization or NAACP, at which voters try to connect their own views with the program of a particular candidate. Such activities might also include the informal exchanges through which partisans of one position try to persuade another, the informal alliances among groups that are negotiated on the eve of the general election, and the meetings between citizens and their new representatives that follow it. A more accurate model would recognize that what makes the assertion of governmental power acceptable to a group of citizens with an articulable point of view is not simply the opportunity to vote for a candidate who may help to enact it, but the opportunity to develop that perspective through deliberations among themselves and with others, to express that perspective in public debate, and to have it seriously considered by other participants in the process before the government acts.

The gains that would arise from a more interactive view of the polit-

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216 See Michelman, supra note 187, at 31-33 (tracing dialogic strain of American political tradition).

217 This model of the political process combines elements of both the communitarian or republican strain, see B. Barber, supra note 174, at 24-25; Michelman, supra note 187, at 16-17; Sunstein, supra note 201, at 31-35, and the pluralist strain, see R. Dahl & E. Tufte, supra note 180, at 137; D. Truman, The Governmental Process 1-13 (1951); Ackerman, The Storrs Lectures: Discovering the Constitution, 93 Yale L.J. 1013, 1032-40 (1984), of American political theory. I believe that pluralist accounts accurately describe the political process as a series of encounters among groups, some of which espouse differing goals, but I would diverge from the pluralist tendency to characterize all such encounters as competitive. Many instances of interactive politics—for example, those that take place among members of the same group—have as their goal the investigation or clarification of shared objects, a function I see as indisputably deliberative.

218 Dahl and Tufte closely approximated this view of the legitimating predicates in the American political system when they wrote that "[a] central guiding thread of American constitutional development has been the evolution of a political system in which all the active and legitimate groups in the population can make themselves heard at some crucial stage in the
ical process, however, involve more than descriptive accuracy. Interactive politics, in which more people act together in pre- or post-election policy formulation, would produce several normative advantages. First, one might expect to see an improvement in the substantive policies which participants espouse. These policies would be superior in that they would reflect the contribution of a larger segment of the voting public. They might well be substantively stronger, having been enriched by a larger variety of perspectives and life experiences. At the very least, the products of such an interactive process, having been more thoroughly aired, challenged, and revised, would be less likely to contain any elements that might make them impractical or dangerous in their process of decision.” R. Dahl & E. Tufte, supra note 180, at 137.

Of course, although this interactive model captures several critical features of the political process, it enjoys no monopoly on descriptive accuracy. There are many who participate by discussing, deliberating, and attempting to influence others, but there are others who vote solitarily, unreflectively, or arbitrarily, or do not vote at all. See S. Verba & N. Nie, supra note 204, at 31 (Table 2-1). Verba and Nie reported that of the 2549 people they surveyed, 72% of the respondents voted regularly in presidential elections and 47% in local elections, 28% attempted to change the electoral preferences of others through persuasion, 26% had been involved in campaign work, and 19% had attended at least one political meeting or rally in the preceding three years. Id. These figures show that more than half the population does not vote in local elections and approximately one quarter does not vote in presidential elections. The figures also suggest that many citizens vote without attending political meetings or having extended contact with a campaign. But, aside from providing the data on attempts to influence the votes of others, Verba and Nie do not attempt to measure engagement and the more informal kinds of political interactions that precede voting. See id. at 104 (voters more likely to be influenced by candidate images or party affiliation than issue positions of candidates or parties); id. at 104-16 (greater issue orientation exists in forms of participation other than voting, such as citizen-initiated government contact and community and campaign activity).

The existence of numerous nonparticipants might seem to militate against the normative as well as the descriptive appropriateness of an interactive model (i.e., if most people don’t behave this way, why pattern legal enforcement on these assumptions?). I would argue that this conclusion is unjustified. The fact that a substantial percentage of the population does not vote, Voter Turnout Up Slightly, Reversing Trend, N.Y. Times, Nov. 8, 1984, at A23 (noting 20-year trend of declining participation in presidential elections, such that only 52.9% of the voting age population voted in 1984 presidential election), does not alter the fact that, for those who enter the political process—and for those who exert substantial influence over it—their participation seems to this author to conform more to the interactive model than to the aggregative model. The reason for reevaluating the political process is to determine how minorities may be able to play a more effective role within it. If they want to play a more effective political role, the question is not “How do the majority of people behave?” but rather, “How do those who exert themselves effectively within the system behave?”.

219 Cf. Sunstein, supra note 201, at 76 (increased citizen participation may exert salutary check on policies adopted by representatives). Professor Sunstein argues for a more deliberate or interactive view of political processes, particularly that final part of the process in which elected representatives enact legislation. See id. at 77-85. Sunstein derives this view, in substantial part, from his interpretation of James Madison. See id. at 38-48. Among the claimed advantages of a deliberative legislative process is its salutary effect on the substance of the legislation being considered. Through discussion and debate, an enactment can be strengthened by the inclusion of new perspectives, and its weaknesses can be identified and ameliorated. Id. at 45-47.
implementation.

Furthermore, an interactive political process would be likely to decrease the arbitrary, uninformed voting and withdrawal from political activity that have become an acute problem in our political system. If these problems are attributable, as some analysts suggest, to the participant's perception that her vote will have negligible effect on political outcomes, an extended, interactive political process could change her approach to political participation. A person who simply casts her ballot in a general election controls just that one vote, at a time when it is too late to influence others. But a person who acts with a group from the early stages of the political process increases her potential influence by joining with others and acting at a time when persuasion, negotiation, and collaboration are still possible. Because she has a greater chance to have some impact on electoral outcomes, there is a greater likelihood that she will work and vote for the policies or candidates she prefers.

Interactive participation may also be the answer if nonproductive behavior arises, as other analysts contend it does, from the limited expressive potential of the vote. A yes or no choice on a school funding proposal might seem frustratingly inadequate for a person ardently committed to her children's education, or a person torn between school funding and urban renewal. Both might conclude that they would be better off pursuing nonpolitical means to their ends, rather than attempting to

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220 See B. Barber, supra note 174, at xiii (citing "crisis in participation"); Ackerman, supra note 217, at 1034 (citing apathy and uninformed voting as two of three central problems in democracy).

221 See Ackerman, supra note 217, at 1034-35; S. Benn, The Problematic Rationality of Political Participation 292; Brennan & Buchanan, supra note 199, at 187.

222 Professors Verba and Nie have observed that membership in private, voluntary organizations, including political organizations, tends to correlate with higher levels of political participation (including voting and campaign activity), and may even be controlling for such participants' general propensity toward activity. See S. Verba & N. Nie, supra note 218, at 183-208. Although Verba and Nie do not probe the basis for this correlation, one explanation might be a feeling, among group members, of enhanced power to influence social choices.

An example of group coalescence leading to political mobilization occurred among minority voters in Oakland, California in the early 1980s. Citizens who were previously discouraged or cynical about their ability to affect the political process responded to the "open mike" rallies and intensive door-to-door canvassing efforts organized by the Peace and Justice Organization (PJO). Responding to the PJO's 1982-83 voter registration drive, and its unsuccessful, but inspiring campaign on behalf of county supervisor candidate Sandre Swanson—both of which articulated a jobs-related agenda that working-class and minority citizens could share—some 15,000 new registrants were added to the rolls. See Bush, Oakland: Grassroots Organizing Against Reagan, in The New Black Vote 342-48 (R. Bush ed. 1984). A related example is the numerous black voters who registered and voted for the first time in connection with the efforts of POWER (People Organized for Welfare and Economic Reform) and the candidacy of Harold Washington in Chicago. See Bush, Black Enfranchisement, Jesse Jackson, and Beyond, in The New Black Vote 24-26 (R. Bush ed. 1984).

223 See A. Hirschman, supra note 199, at 107-08; S. Benn, supra note 221, at 292.
translate their views via the voting machine. But if the concerned parent could express the intensity of her preference by acting in a variety of contexts to support the policies she prefers, and the urban renewal supporter could, through deliberations and discussions, share with others the trade-offs that inform her perspective, neither might feel the need to turn away from public participation.\textsuperscript{224}

To achieve these gains, of course, it is necessary that the view of participation embodied in voting rights enforcement actually change the conduct of participants. However, there are few more effective ways of highlighting the importance of particular forms of participation than according them the protective scrutiny of law and proscribing interference with them. The Voting Rights Act of 1965, which highlighted and protected participatory norms, produced precisely such a change in political behavior. Its enactment led to increases in registration and voting among protected groups.\textsuperscript{225} Particularly when compared with a pattern of enforcement that places exclusive emphasis on the vote, an approach that embodies a model of extended interactive participation would encourage citizens—particularly minority citizens—to become involved in a more substantial way.

An increase in popular participation might also combat a third source of nonproductive political behavior: the perception that individuals or lay groups have no chance of competing successfully with organized political interests. It would be naive to suggest that a mobilized citizenry could consistently defeat the efforts of better funded, better organized, and more influential lobbyists. Yet re-election requires attention to constituent satisfaction,\textsuperscript{226} perhaps even more than to campaign fund-

\textsuperscript{224} See A. Hirschman, supra note 199, at 104-05, 111 (inability to register intensity of political feelings places “ceiling” on political involvement). Hirschman surveys a variety of expedients for mitigating this deterrent to public participation. Id. He expresses some doubt about the possibility of a solution because of the tension between the “one person, one vote” rule and the desire to accord importance to the intensity of political feelings in order to maximize their effect on political outcomes. The alternatives he appears to favor, however, are those which impose some sort of cost, or inconvenience, in exchange for the opportunity to reflect the intensity of preference: the opportunity under one proposed scheme to vote three times on three different days, id. at 105, or the opportunity for citizens under the Vichy regime to register resistance in a variety of ways, but with the possible sanctions increasing in proportion to the intensity of the expression, id. at 106. Lobbying and campaign activity, which express intensity or nuance of preference through interactive participation, exact precisely such a tribute through the inconvenience or exertion they require. Id. at 110.

\textsuperscript{225} Senate Report, supra note 4, at 6, 1982 U.S. Code Cong. & Admin. News at 183 (from 1965 to 1972, more than one million black citizens added to voting rolls).

\textsuperscript{226} See Abramowitz, Party and Individual Accountability in the 1978 Election, in Congressional Elections 188-90 (1981) (voters hold members of Congress accountable for performance, and opinions about performance, or prospective performance, of candidates are strongest direct influence on voting decisions); Parker, Incumbent Popularity and Electoral Success, in Congressional Elections 249-62 (1981) (popularity of incumbent, as determined by such factors
ing, and constituent groups are more likely to prevail when their interests are continuously and vocally expressed. Moreover, many legislative issues will not entail a conflict between constituent and organized interests; indeed a mobilized constituent group may be able to use the resources of influential interests to its advantage.

If we are to attain such benefits from a more interactive political process, we must next consider how such a view of the process can inform an approach to section 2. Incorporating a new view of participation could mean altering the focus of judicial scrutiny: assessing districting plans and other devices not simply for their impact on the ability to elect, but for their effect on the ability to interact with, and influence others in group-mediated ways. For example, courts would consider evidence that minorities had been excluded from caucuses or avoided by candidates, as well as the failure of legislators and legislative policy to respond to the articulated interests of these groups. In cases where direct evidence was not available, courts would look for factors that are likely to produce such failures of interaction. Such factors would include discriminatory attitudes and present effects of past discrimination which, as I argue below, often make participants of one race reluctant to engage with participants of another. District lines that permit white voters to ignore their minority counterparts perpetuate the effect of this discrimination and must therefore be subject to judicial scrutiny.

Critics of interactive participation could argue, however, that this view is unrealistically—perhaps dangerously—optimistic. They would assert that, while the interactive model may accurately describe the behavior of some segments of the electorate, the relationship among racial groups is marked by polarization. Polarization makes discussion less

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228 See N. Ornstein & S. Elder, Interest Groups, Lobbying and Policymaking 74-75 (1978) (ability of group to mobilize and make voice heard is highly valuable resource in group effectiveness).

229 This lesson is well illustrated by experience of a recent, grass-roots effort to preserve the Tuolumne river in California. Area residents, acting alone, had been unable to secure the support of one senator; yet by enlisting the assistance of a few influential campaign contributors, they were able to win his support. Interview with Margit Roos Collins, participant in preservation effort (Apr. 30, 1987).

230 See text accompanying notes 253-56 infra.

231 The critics would argue that polarization is a pervasive national pattern. However, they would point out the standards for adjudicating § 2 make it particularly likely that courts will find polarization in those districts that they scrutinize for violations. That is, Congress, wary of creating or exacerbating racial tension, would direct enforcement officials to focus efforts on
crucial, collaboration unlikely, and representation the only reliable feature of political life for minority voters. These critics would claim that to shift judicial focus from electoral success to the more collaborative features of politics risks depriving minority participants of the voice they have only begun to gain through enforcement under section 2.

E. Polarization and the Participatory Model

The foregoing objection suggests that racial polarization brings minority political behavior closer to that described by the preference aggregation model than to interactive participation. Discussion and deliberation play a smaller role, for example, because the desire to ameliorate the condition of one's racial group becomes the primary determinant of one's preferences, and, consequently, one's choice among candidates. A victory in a primary or general election is more likely to reflect the support of a cohesive majority than a shifting coalition of minorities, as there is little chance of coalition-building, negotiation, or exchange among racial groups. Because a candidate's racial affiliation is a forceful determinant of her policy positions, there is less need for constituents to interact with their representatives in order to see that their policy preferences are implemented. Under these assumptions, election of their preferred representatives is virtually the only effective means of

areas where strong polarization already existed. Since the Supreme Court's opinion in Thornburg v. Gingles, 478 U.S. 30 (1986), a showing of racially polarized voting has become an essential element of a prima facie case under § 2. See id. at 61.

I am intentionally employing a nontechnical definition of racial polarization that depicts tension and suggests the importance of racial considerations in selecting among candidates. I have done so because I mean to abstract from the debate over how racial polarization should be measured, a debate which of course bears on its definition. See, e.g., Grofman, Criteria for Districting: A Social Science Perspective, 33 UCLA L. Rev. 77, 135-44, 137 n.255 (1985) (discussing difficulty of proving racially polarized voting from statistical point of view). The debate moved from the political science literature into the courtroom in Gingles, in which the Court was asked to consider how a plaintiff could prove "racially polarized voting" in a § 2 case. Gingles, 478 U.S. at 61. In Gingles, a majority affirmed the district court's finding of polarized voting, which had been based largely on bi-variate (correlation) analysis, and a plurality held that it was sufficient for plaintiffs to demonstrate racially polarized voting by bi-variate analysis, rather than by multi-variate (causation) analysis. Id. at 62.

I am proposing as hypotheses for examination beliefs apparently held by some whites that black voters "behave as a bloc" or "define the importance of an issue only in proportion to its racial implications".

Cole notes that approximately half the white officials and citizens interviewed believed that black officials did not develop their policy positions through a process of negotiation with all interested groups, but rather, reflexively favored the interests of the black community. A few black officials also suggested that they had a desire to advance, as well as an intuitive grasp of, the position of their minority constituents. See id. at 89 ("If you are a minority person you know what's needed. And what you do is go about the business of trying to fill the need.").
political expression for racial and language minorities,\textsuperscript{237} and an approach to section 2 that does not recognize this primacy—at both the liability and the remedial phases of litigation—threatens to hinder those voters the statute was intended to help.

While this view accurately identifies the tension that can shape relations among racial groups, it exaggerates the effect of such tension on political behavior.\textsuperscript{238} For example, the suggestion that substantive choice on issues implicating race will be possible without interaction simplifies and trivializes the process of preference formation among minority groups. The fact that a particular event or proposal has different consequences for racial groups does not, in itself, determine the course of action that a group should take regarding it. That this may appear to be the case by the time of the general election is misleading. Although choices have been forced into a binary framework by election time, the substantive issues that legislators resolve rarely present themselves in this form. Discussion and debate among members of a group are often necessary to determine what members want, and may, in some cases, be useful in preventing a rigid or divisive response.

The recent political controversy over the Howard Beach assaults provides a good example. Michael Griffith, a twenty-three year old black man, was struck and killed by a car while fleeing from a group of white men in Howard Beach, Queens, New York, a predominantly white, middle-class neighborhood.\textsuperscript{239} Griffith and two friends had been chased through the streets of Howard Beach and severely beaten. This incident had strong racial overtones both in the sense that the assault itself was racially motivated,\textsuperscript{240} and in the sense that racial groups disagreed over the appropriate actions to take to investigate the assault and to prevent similar occurrences in the future. Moreover, because of these characteristics, it is an issue that might be expected to shape preferences in future

\textsuperscript{237} Cf. Parker, supra note 134, at 11-113 (defending centrality of supermajority districts in voting rights enforcement). Although Parker does not go so far as to suggest that election of their preferred representatives is the only effective means of political expression for minorities, he strongly defends the centrality of supermajority districts in voting rights enforcement. Id. But see Still, Alternatives to Single-Member Districts, in Minority Vote Dilution 263 (C. Davidson ed. 1984) (as compared with alternatives such as limited voting or cumulative voting, "safe" districts encourage racial segregation and harden racial separation).

\textsuperscript{238} The fact that plaintiffs must demonstrate racially polarized voting in order to make out a case under § 2 does not undercut this point. The racial polarization that plaintiffs must demonstrate to make a case under § 2—that there is a correlation between voting patterns and race—is a far more localized phenomenon than the pervasive patterns of behavior described above.


\textsuperscript{240} Id.
voting for local, state, or even national officials.241 Yet, rather than responding in the unified or reflexive fashion that proponents of the polarization objection might predict, the black community engaged in a series of far-ranging and contentious discussions of what the appropriate response should be.242 Leaders disagreed with each other publicly, and choices were debated in a variety of fora before the community began to coalesce around a demand for the appointment of a special prosecutor.243 This phase of deliberation and debate, which ultimately included members of white groups as well,244 was not only essential to shaping minority preferences on the question, it may also have helped to relieve the kind of intense division and antipathy that might have transformed the issue into a clear-cut binary choice on a future election ballot.245 The initial debate among black leaders and the subsequent collaboration on this issue between white and black groups illustrate the exaggerated character of the polarization objection.

Another weakness of this objection is that the extent to which racial characteristics will be automatic determinants of electoral choices is likely to vary among different voters. Some minority voters would support a minority candidate even if they disagreed with her position on substantive issues, because of the symbolic value of electing a person of a particular race;246 others would find this choice difficult to make.247

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241 For example, the incident may well have contributed to the minority dissatisfaction with Mayor Koch that has required him to engage in belated fence-mending with the black community. See Levine, Ed (Nice Guy) Koch?, N.Y. Times, Sept. 2, 1988, at B3.


244 See Schmalz, supra note 243, at A1.


247 See Bush, Interview with Ken Cockrel, in The New Black Voter at 187 (R. Bush ed. 1984) ("Key decision-making institutions of the black community" declined to support candidacy of former Detroit City Councilman Ken Cockrel because of his identification with Marxism and lack of connection with "orthodox" black politicians); Jennings, Boston: Blacks and Progressive Politics, in The New Black Voter 278–79 (R. Bush ed. 1984) (some blacks failed to
Political interaction would be an important factor in resolving such difficult questions. Members of a minority community may also find deliberation essential when they must decide between supporting a minority candidate who is likely to lose and gaining potential leverage by supporting a nonminority candidate with compatible preferences. Black leaders and voters, for example, have engaged in continuing discussions about how to respond to the Democratic party in the wake of the triumphant, if unsuccessful, candidacy of Reverend Jesse Jackson. The need for intra-group discussion to determine candidate choice is likely to increase as it becomes more common for more than one minority candidate to compete for the same seat in a legislative or municipal district.

Similarly, minority representatives, once elected, may need more guidance than the simple fact of their racial affiliation to make legislative choices. This is true not only because they face many issues on which race has little or no bearing, but because some issues implicating race may be sufficiently complicated as to require extensive discussion before a representative can make a choice. Issues involving de facto discrimination, for example, may generate disagreement among racial groups be-

248 Similarly, nonminority voters may engage in intra-group discussion as they decide to support minority candidates, a phenomenon that is becoming increasingly prevalent in the case of minority incumbents. See L. Cole, supra note 235, at 4-5. It is arguable, however, that as this begins to occur, we no longer have polarization.

249 See Oreskes, In His Way, Jesse, Too, Asks, 'What Does Jackson Want?', N.Y. Times, June 26, 1988, § 4, at 1; Dionne, Many Black New Yorkers Believe Campaign Is Tinged with Racism, N.Y. Times, Apr. 18, 1988, at A1. Although Jackson generated his strongest support among minority voters, his campaign may also illustrate the drawbacks of adhering too strictly to a racially polarized view of political participation. He was able to capture five to ten percent of the white vote in South Carolina, Berke, Jackson Wins Easily in South Carolina Caucuses, N.Y. Times, Mar. 13, 1988, at A28, 17% of the white vote in Massachusetts and Rhode Island, Rosenbaum, Blacks, Years After Selma, Share in Jackson's Victory, N.Y. Times, Mar. 10, 1988, at A1, approximately 23% of the white vote in Wisconsin, Dionne, How Jesse Jackson Made History While Losing Wisconsin, N.Y. Times, Apr. 10, 1988, § 4, at 1, and 10% of the Jewish vote in the primaries prior to New York, Dionne, Jackson's Burden Among Jews: Fear Overpowers Unity on Civil Rights, N.Y. Times, Apr. 14, 1988, at D27. Conversely, while many New York Hispanics subsequently gave their votes to Jackson, Lynn, Ethnic Coalitions Mark the Voting, N.Y. Times, Apr. 20, 1988, at B7, the primary campaign produced intense controversy among Hispanic leaders and voters about whether to support Jackson or Governor Michael Dukakis. Mariott, Contest is Tight for New York's Hispanic Vote, N.Y. Times, Apr. 18, 1988, at A17.

250 The 1986 elections witnessed this development in at least one prominent race among female candidates, see Robbins, Nebraska Gubernatorial Bid: It's Woman Against Woman, N.Y. Times, May 15, 1986, at A22 (describing race between Democrat Helen Boosalis and eventual victor Republican Kay Orr), and the much-publicized congressional race between Julian Bond and John Lewis of Georgia, see Schmidt, Campaign in Georgia Strains Black Political Ties, N.Y. Times, Aug. 9, 1986, at A5. This development indicates the growing potential of increasingly numerous black candidates to weaken the correlation between minority affiliation and candidate choices.
cause both the discriminatory impact and the responsible actors are difficult to identify. To pick an example that has affected many municipalities, when black students were excluded from white schools by de jure segregation, virtually all black groups agreed that mandatory desegregation was the answer. However, as racially separate schools became in large part the result of housing patterns, many groups disagreed on the appropriate response. Under such circumstances, it is particularly important for representatives to consult with their constituents in order to formulate their positions.

Intra-group discussion and collaboration is clearly a fact of political life for both whites and minorities. However, the suggestion that different racial groups tend not to interact with each other, either before general elections or afterward, is more difficult to refute. Blacks were excluded from political participation almost continuously until the middle of this century, by devices ranging from slavery to manipulation of municipal boundaries. Because of their majoritarian power to control the terms of electoral contests, white voters have rarely had to accommodate assertions of political power by minority groups. Such assertions were not very frequent until recent years because of the low registration and turn-out rates that are the predictable product of the legal and practical disenfranchisement of minority groups. This history of exclusion has been ameliorated with the passage of the Voting Rights Act of 1965 and the advent of statutory and constitutional enforcement.

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251 See Bell, Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 475-80 (1976) (describing unified position of black groups early in desegregation struggle when major issue was de jure segregation).

252 See id. at 482-87 (local black groups favored enrichment remedies, while national litigation-oriented groups, such as NAACP, favored busing).


254 See Ketchum v. Byrne, 740 F.2d 1398, 1405 (7th Cir. 1984) (political power of blacks and Hispanics in Chicago limited by adverse social and economic circumstances as well as low voter registration and turnout), cert. denied sub nom. City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985); United States v. Marengo County Comm’n, 731 F.2d 1546, 1568 (11th Cir.) (past discrimination against blacks has impaired their ability to participate in the political process), cert. denied, 469 U.S. 976 (1984).


256 The Voting Rights Act of 1965 contributed in two important ways to ending the overt exclusion of minority voters. Section 4 suspended the use of the literacy test and like devices in any state in which they had been in force. See The Voting Rights Act of 1965, Pub. L. No. 89-110, § 4(a)-(b), 79 Stat. 437, 438, (codified as amended at 42 U.S.C. § 1973(b) (1982)). This enactment thus removed an effective barrier to the registration of minority voters in many Southern states, without resort to litigation. Section 5 subjected all states that had employed a literacy test, or showed a voter turn-out rate of less than 50% of the adult population in the 1964 presidential election, to a requirement that they preclear all electoral changes with the
Yet one may still question whether patterns of interaction among racial groups have changed. And if interaction remains depressed in at least some cases, one may then ask what consequences this should have for formulating an approach to voting rights enforcement.

Both of these questions have been addressed in a growing literature on the influence of race in urban politics.257 These analysts, many of whom draw on original empirical work, have attempted to determine who supports minority officials, and what influence minority participation has had on municipal policymaking. Their conclusions on the question of interracial cooperation have been mixed. In progressive communities, such as Berkeley, California, they have found that negotiation and cooperation among groups have increased, in some cases to the point where minority representatives are continuously involved in the governing coalition in city government.258 In other localities, such as the strife-ridden city of Gary, Indiana, there is virtually no cooperative interaction among groups, notwithstanding the fact that several of these municipalities have elected some black officials. Still other areas, such as Oakland, California and some parts of Boston, have seen interracial cooperation give rise to durable coalitions that have produced small but promising changes in municipal policy, through, and sometimes without, the election of minority representatives.259 These urban studies have also

Justice Department or the district court for the District of Columbia before implementation. See id. § 5, 79 Stat. at 439, (codified as amended at 42 U.S.C. 1973c (1982)). This latter change was intended to prevent ingenious officials from inventing new ways to disenfranchise minority citizens. Although there were numerous challenges to these provisions, see, e.g., Katzenbach v. Morgan, 384 U.S. 641 (1966); South Carolina v. Katzenbach, 383 U.S. 301 (1966), and considerable evasion of them, see Days & Guinier, Enforcement of Section 5 of the Voting Rights Act, in Minority Vote Dilution 168-69 (C. Davidson ed. 1984), their effect on minority exclusion was pronounced. More than one million black citizens were added to the voting rolls between 1965 and 1972. See Senate Report, supra note 4, at 6, 1982 U.S. Code Cong. & Admin. News at 183.


259 See id. at 67-72 (discussing Stockton, San Jose, Hayward, Daly City, and Vallejo, Ca.); E. Greer, supra note 237, at 111-60 (discussing Gary, Indiana); Bush, Black Enfranchisement, Jesse Jackson and Beyond, in The New Black Vote, at 37-40 (R. Bush ed. 1984) (discussing black, Hispanic, and white cooperation on Mel King campaigns and subsequent neighborhood efforts in Boston); id. at 43-46 (discussing black-led, multi-ethnic coalescence around jobs and peace agenda in Oakland). These examples raise the important point that cooperative interaction among racial groups need not be limited to minority efforts to gain access to the dominant governing coalition, though this may be the fastest way to achieve gains in policy influence. Minority voters can take the lead in establishing new, interracial coalitions that can then at-
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probed the relationship between such cooperation and minority political
effectiveness, as measured by indicators such as a sustained voice in poli-
cymaking. Several studies have found a correlation between cooperative
interaction and sustained substantive influence for minorities or have de-
termined that such cooperation is a more accurate predictor of minority
influence than the number of representatives elected by a particular mi-
nority group.260

The latter finding relates closely to the argument that the election of
minority candidates is the only way to overcome the effect of polarization
and the disadvantages attributable to historic discrimination. According
to this argument, the election of minority representatives facilitates inter-
action between minorities and others at the legislative level, and en-
hoods grass-roots minority participation by creating a sense of
empowerment and connection with minority officials.261 Under this
view, any approach to section 2 that does not give central place to the
election of representatives trades these certain benefits for something far
less sure.

Increasing the number of minority representatives undoubtedly cre-
ates opportunities for greater interaction among racial groups in the leg-
islature and in municipal government.262 White officials can no longer be
totally insulated from representatives of minority groups. Collegiality re-
quires, moreover, that they give a hearing to the interests articulated by
minority officials. Yet the gains from such a strategy have their limits. If
one looks for cases in which these formal opportunities at the govern-

tempt to reform the existing municipal policy agenda.

235, at 121-22; see also Alkalimat & Gills, supra note 171, at 77-83 (black-led, multi-ethnic
collections produced drive for voter registration and groundswell of support for reform can-
didate for mayor without having attained substantial representation in Chicago city govern-
ment). These studies make the assimilationist assumption that it is a good thing for minority
groups to enter the political mainstream, and become indistinguishable (in terms of their par-
ticipation, if not their substantive commitments) from other groups in society. Scholars such
as Frances Fox Piven and Richard Cloward have criticized assimilationism as a cooptative
strategy used by opponents of political change to diffuse the radical force of movements for
social change. See F. Piven & R. Cloward, Poor People's Movements: Why They Succeed,
How They Fail (1979). I would argue that assimilation is beneficial only to the extent it means
participation in the political system. If a group is outside the system, that group does not
regularly have the opportunity to be heard in deliberations on distributions of social benefits or
social change. However, as progressive black scholars have recently begun to point out, partic-
ipation in the dominant political system, need not mean acceptance of the substantive assump-
tions or arrangements of power within that system. See Jennings, Boston: Blacks and
used "as a tool," to mobilize and unite citizens of diverse backgrounds who share an interest in
altering the dominant substantive agenda. Id.

261 See notes 268-70 infra.

262 See L. Cole, supra note 235, at 222 (black elected officials sensitize white associates by
their presence).
mental level resulted in mutual acceptance and actual collaboration, the record is less than impressive. Some minority officials have gained access to the governing coalitions of their municipalities, contributing influentially to enacted policies, but in other areas they have remained marginal participants, or contestants in a battle to the death with recalcitrant white officials.

The presence of minority officials and the formal opportunity for interaction appear to be necessary, but not sufficient, conditions for minority influence in political decision-making. In Gary, Indiana, Mayor Hatcher, who is black, found his efforts to achieve reform in law enforcement and public housing thwarted by his failure to gain the acceptance and support of the largely white police force and the local financial community. In San Francisco, Sacramento, and San Jose, during the 1970s, black and Hispanic representatives were elected but had little impact on policy, as dominant groups pursued strategies involving cooption rather than collaboration. Clearly, minority representation must be accompanied by mutual acceptance and exchange with nonminority officials before it can be translated into tangible political gains.

The election of minority or minority-supported representatives also has important effects at the grass-roots level. It has already proved to be a crucial aid to political morale, by demonstrating to minority voters that defeat is no longer inevitable, and that there is someone in the government who will respond to their interests. As minority voters come to believe that the government is open to their preferences and ideas, they will be more likely to participate in a variety of ways. Yet it is less certain that these benefits are transformed with any frequency into real re-

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264 See id. at 67-69 (describing political developments in Stockton and San Jose, Ca.); L. Cole, supra note 235, at 156-60 (role of black officials not particularly important). But see H. Walton, Black Politics: A Theoretical and Structural Analysis (1972) (blacks and whites on local governing bodies rarely form opposing voting blocs).

265 See E. Greer, supra note 257, at 111-60 (black mayor thwarted in efforts at reform by police officials, city council members, and other officials). This may be increasingly true as many municipal issues, such as transportation, come to be controlled by regional public authorities, many of which are dominated or controlled by suburban whites who are unaccustomed to dealing with the interests of members of minority groups. See The New Black Politics: The Search for Political Power 209-20 (1982) (public authorities pose new problems for black representatives and interest groups).

266 See E. Greer, supra note 257, at 119-32, 145-60.


268 See L. Cole, supra note 235, at 110-18, 221-23; J. Conyers & W. Wallace, Black Elected Officials 6-7 (1976). Occasionally this perception proves illusory. See id. at 137 (some black officials elected by coalitions including whites may feel obligation to satisfy white constituents).
ceptivity and cooperation between groups. If representatives are perceived as tokens, or if they are several but treated as marginal, or if minority voters find no acceptance or willingness to collaborate outside their neighborhood or minority-dominated district, they may become disillusioned with, rather than encouraged by, the political opportunities that exist. If, on the other hand, minority voters begin to seek out other like-minded participants, either during a campaign or in response to a non-electoral issue, such groups not only can strengthen the hand of minority elected officials, but can also remain a durable resource for future political efforts. In Oakland and Berkeley, California, for example, a coalition of black, Hispanic, and white voters came together on a jobs and peace agenda, through the efforts of the Peace and Justice Organization. Not only has this coalition provided on-going support for such progressive officials as Representative Ron Dellums and John George, Chairman of the Alameda County Board of Supervisors, but the group has conducted a highly successful voter registration campaign, and remained strong and organized through the defeats of several of its candidates for local office.

This point was captured poignantly in the first episode of Blackside's recent television documentary 'Eyes on the Prize,' where court officials presiding at the trial of Emmett Till were startled to discover that the "nigger outside... [who] says he's a congressman" was actually United States Representative Charles Diggs. J. Williams, Eyes on the Prize: America's Civil Rights Years 51 (1986). The revelation that a black person could hold one of the highest offices in the land did not, however, produce any noticeable effect on the conduct of any of the white people involved in the trial. See id.

The contemporary record of cooperation is mixed. Some white participants fail to draw the appropriate conclusions from the election of black representatives. A few whites interviewed viewed the election of black officials with relief, as it seemed to relieve them of the burden of having to try to understand the ineluctably divergent attitudes and positions of black voters. See L. Cole, supra note 235, at 112 ("Not only 'should they have someone of their own race they can call upon when they need help. Also it's difficult many times for white people to understand the blacks' philosophies. They differ from ours, and you have to be involved to a great extent with the blacks before you understand their philosophy.'").

On the other hand, many black elected officials report that they have "won over" their white constituency during their incumbencies. See J. Conyers & W. Wallace, supra note 268, at 148. Empirical evidence suggests that most black incumbents are re-elected with more white support than they enjoyed during their first election campaign, suggesting the power of representation to erode some barriers to interactive politics. See L. Cole, supra note 235, at 4-5.

Some political observers argue that this has been the pattern for blacks in New York City. Although blacks have elected several candidates to city offices, the failure of these representatives to penetrate the governing coalition of the city or to achieve major policy initiatives has resulted in low morale and infighting within the black community, rather than active participation. See R. Crain, Politics of School Desegregation: Comparative Case Studies of Community Structure and Policy-Making 26 (1968); Blacks in New York: The Anguish of Political Failure, N.Y. Times, Mar. 31, 1987, at B1.

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See Bush, Oakland: Grassroots Organizing Against Reagan, in The New Black Vote 317, 336-55 (R. Bush ed. 1984); see also Alkalimat and Gills, supra note 171, at 55, 68-105 (minority-led group including Hispanics and whites coalesced over seven local issues and be-
MINORITY POLITICAL PARTICIPATION

The election of minority representatives is a crucial first step toward a nondiscriminatory political process. But before minorities can participate effectively in that process, members of racial and language groups must be willing to share their perspectives, and, where appropriate, embrace those of other groups. Because the second development does not always follow from the first, the generation of cooperative political behavior must become an independent objective of voting rights enforcement. This goal appears to set a stiff task for enforcement; as decades of anti-discrimination law have demonstrated, it is easier to replace public structures than to alter private behavior. Yet, in the area of voting rights, there is a relationship between public structures and private behavior that can help direct enforcement efforts. Districting arrangements can perpetuate discrimination and its effects or, if carefully conceived, can ameliorate them. One key to the beneficial power of districting lies in the relationship between electoral power and political influence—a relationship not fully grasped by proponents of the polarization objection. Not only are influence and interaction essential components of what we have designated the “ability to elect,” but the desire to elect the candidates of one’s choice can spur increased interaction among racial groups, under a properly drawn set of district lines.

Interactive participation, as noted above, is based on a willingness to articulate one’s interest and to discuss or negotiate concerning the positions of others. In most cases, the seriousness with which others consider one group’s preferences depends upon the merits of the position, the vehemence with which it is pressed, the power of each group to affect outcomes or confer advantages on other groups, and a variety of other factors. Where there has been a history of discrimination against a particular group, however, other groups are likely to devalue or neglect

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272 Of course the community organizing and multi-racial coalescence that occurred in Oakland, Berkeley, Chicago, and Boston are crucial goals that can and should be pursued independently of voting rights enforcement. My point, however, is that such coalescence is so important to the long-range political effectiveness of minority voters that it should become a primary object of voting rights enforcement as well.

273 See text accompanying notes 88-100 supra.

274 See text accompanying notes 216-18 supra.

275 See R. Browning, D. Marshall & D. Tabb, supra note 257, at 50 (willingness of white Democrats in Berkeley to take black demands seriously was function of liberal political predilections of city and party, and narrow electoral margin of white Democrats); id. at 63-65 (reluctance of Oakland whites to respond to minority demands was function of small size of minority population, radical character of minority demands and tactics, and nonprogressive position of city residents on issues of race).
an articulated position simply because of its source. District lines cannot, of course, act directly on this tendency. But because most participants share the desire to prevail in electoral contests, such lines can provide incentives for cooperation and participation. Where a minority group constitutes so small a portion of a district that white groups can neglect it without any peril to their electoral chances, white voters may be inclined to pursue an exclusive, non-interactive strategy. Where a minority group is of sufficient size that it cannot be ignored without risking electoral outcomes, white voters will be more inclined to coalesce with that group. Redrawing district lines to create groups of minority voters with such potential influence can help break the cycle of mutual avoidance that has characterized polarized politics.

If we concede the polarization hypothesis, we risk not only oversimplification, but also reliance on a remedy that is not sufficient, in and of itself, to make minorities effective political participants. It is better to recognize that inter-group cooperation is both necessary and possible, and to use the relationship between electoral power and political influence to create a new approach to section 2. This is the subject to which I now turn.

III

INTERACTIVE PARTICIPATION AND SECTION 2

Section 2 proscribes voting schemes that "result in" the denial of equal participational opportunity, on the basis of race. As the preceding discussion demonstrated, the participational opportunities which section 2 embraces should include not only the opportunity to vote in general elections but to participate in all of the predicate activities that precede and follow the vote. We must next consider how electoral schemes can "result in" the denial of these participational opportunities.

Any direct impairment of minority participation in these predicate activities would obviously violate section 2. An ordinance that requires party caucuses to be held at a location that is inaccessible to the minority

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276 Social psychologists report that even by the time people have reached the age of 11 or 12, they have learned to evaluate comments or suggestions from others less on the basis of their quality, than on the basis of characteristics attributed to the speaker, such as high intellectual capability or low social status. See, e.g., Cohen, The Desegregated School: Problems in Status Power and Interethnic Climate, in Groups in Contact: The Psychology of Desegregation 72, 78 (1984) (school children in game-playing exercise credit the suggestions of others according to listener's view of speaker's characteristics, such as racial status or reading ability). This can sometimes cause listeners to devalue the contributions of racial minorities. Id. at 79.

277 See Senate Report, supra note 4, at 15-16, 192-93 (stating that amendments to § 2 seek to restore pre-Bolden standard, proscribing laws or procedures that "had the result of denying a racial or language minority an equal chance to participate in the electoral process").

278 See text accompanying notes 216-18 supra.
population of a municipality, for example, would constitute a viola-
tion.\textsuperscript{279} Similarly, an enactment that restricts the times for voting would also “result in” the denial of equal participational opportunity.\textsuperscript{280}

My discussion, however, focuses primarily on districting schemes. The way in which a districting scheme might result in the denial of such participational opportunities is not immediately clear. \textit{Thornburg v. Gingles} suggests that districting schemes may produce such results by effecting an improper division of the local population. They create an arrangement under which minority voters cannot predictably elect the candidate of their choice.\textsuperscript{281} As the foregoing analysis made clear, however, this concept of discriminatory effects must be revised to include the broader range of participatory activities that are entitled to protection under section 2.\textsuperscript{282}

A districting arrangement can directly affect election results in only a limited number of ways. It can prevent minority group members from voting\textsuperscript{283} or it can render the aggregate of minority votes inadequate to produce an electoral victory.\textsuperscript{284} In contrast, the ways in which districting can affect interactive participation are numerous and more difficult to detect.\textsuperscript{285} Because interactive participation is not an all-or-nothing proposition, a districting arrangement can impair it in varying degrees of severity. Moreover, because so many factors affect expression and influence in the political process, a districting arrangement will frequently act in combination with other variables to produce a change in interactive participation.

One important such variable is discrimination. Discrimination can alter interactive participation by influencing the inclination of minority participants to express themselves or the willingness of other participants

\textsuperscript{279} Brown v. Dean, 555 F. Supp. 503, 505 (D.R.I. 1982).
\textsuperscript{280} Garcia v. Guerra, 744 F.2d 1159, 1164 (5th Cir.), cert. denied, 471 U.S. 1065 (1984) (right to vote is abridged if date set for election effectively prevents persons from exercising their right to vote); Bishop v. Lomenzo, 350 F. Supp. 576, 585 (E.D.N.Y. 1972) (early closing of registration violated Voting Rights Act).
\textsuperscript{281} 478 U.S. 30, 49 (1986).
\textsuperscript{282} See text accompanying notes 216-18 supra.
\textsuperscript{283} See Gomillion v. Lightfoot, 364 U.S. 339, 341 (1960) (act that excluded minority population from municipality by redrawing city boundaries deprived them of right to vote in its elections).
\textsuperscript{284} See \textit{Gingles}, 478 U.S. at 49.
\textsuperscript{285} This is why judicial language evincing a concern for the “effectiveness” of the minority vote beyond its relation to electoral victory, see, e.g., White v. Regester, 412 U.S. 755, 768-69 (1973), is puzzling and inadequately explained. Within the paradigm of voting as the sole participatory activity of the political process, effectiveness can refer only to the power to elect. Yet when the concept of participation (or, metaphorically, the “vote”) is extended to include interactive forms of participation as well, it becomes possible to talk about “effectiveness” in a variety of ways, many of which are not directly related to general election victory. See text accompanying notes 216-18 supra.
to consider minority participants' perspectives and to collaborate with them. Districting arrangements can thus affect interactive participation by perpetuating or exacerbating the participatory effects of entrenched discrimination.

A multi-member or at-large district, for example, may surround a core of disadvantaged minority voters with a ring of affluent white suburbanites, placing the minority group within a district where it constitutes only twenty-five or thirty percent of the population. The scheme denies equal participational opportunity to the minority voters not simply because they are outnumbered and will not predictably control the outcome of any legislative contests. In winner-take-all electoral politics, being outnumbered is not a cause for complaint: there is always going to be some group that fails to marshall the adequate numbers and does not attain the outcome of its choice. But in interactive politics, a group without a numerical majority can still influence elections or policies—and thereby perpetuate its voice in the system—by coalescing with others.\(^{286}\) It may fail in some contests, but it will successfully assert its influence in others. However, minority voters in a multi-member district or minority voters who are vastly outnumbered in a single member district cannot rely on this crucial fallback position. The present effects of past discrimination prevent them from influencing or coalescing with white voters in ways that will preserve their voice in the politics of the district.\(^{287}\) Multi-member districting may further exacerbate this disadvantage because these discriminatory effects limit minority influence with respect to more than one representative in a district. District lines that permit or worsen the failures of influence that arise from discrimination thus further dilute the political power of minority voters.

Revising our notion of a "discriminatory effect" is only the first step in developing an approach to section 2 that encourages interactive partic-

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\(^{286}\) See Davis v. Bandemer, 478 U.S. 109, 133 (1986). In Davis, the Court refused to find a violation of the equal protection clause merely because an apportionment scheme made it difficult for the Democrats to elect a representative of their choice. The Court reasoned that the power to influence the political process is not limited to winning elections. Rather, the group that votes for a losing candidate is usually adequately represented by the winning candidate and has an opportunity to influence that candidate. The elected candidates would not ignore the interests of the disproportionately underrepresented group as long as that group had an opportunity to participate in party deliberations and in the slating and nomination of the candidates, had an opportunity to register and vote, and thus, had a chance to secure the attention of the winning candidate. Id.

\(^{287}\) The lingering effects of past discrimination can make white voters resistant or insensitive to minority perspectives, and can make minority voters reluctant to exchange views with others that they may perceive as hostile or indifferent to their interests. For a fuller examination of the ways in which the present effects of past discrimination prevent minority voters from influencing or coalescing with other voters, see notes 315-21 and accompanying text infra.
ipation. It is also necessary to consider how an expanded concept of participational opportunity might affect the determination of liability under the statute and the implementation of remedies. In the next Section, I will describe several ways in which enforcement under section 2 might be adjusted to accommodate and encourage interactive politics.

A. Finding a Violation of Section 2

1. The Totality of the Circumstances Test and Impairment of Political Opportunity

The first means of enhancing interactive participation under section 2 is to target its impairment in evaluating violations. In practical terms, this means redirecting the totality of the circumstances test. The current approach to that test, in the wake of *Thornburg v. Gingles*, is the subject of considerable judicial disagreement. One may draw, however, several connecting threads from the tangle of conflicting opinions. Most courts still aspire to some sort of totality of the circumstances inquiry—a balancing of the factors elaborated in the Senate Report, rather than a precise formula for determining outcomes—but, after *Gingles*, some of these "circumstances" are more probative than others. Evidence of racially polarized voting is now crucial, and the past electoral performance of the plaintiff group has gained importance. A third essential element in establishing a violation is demonstrating that the plaintiff group, which is incapable of prevailing in a challenged multi-member district, is nonetheless large and compact enough to constitute a majority within a single member district. Although this standard is sometimes employed as a threshold test and sometimes considered to be the central element in the totality of the circumstances inquiry, this factor has, in most cases, become a sine qua non of a section 2 violation.

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288 See White v. Regester, 412 U.S. 755, 765-67 (1973) (test involves consideration of disparate factors such as history of discrimination against minority group, use of electoral devices to exacerbate such discrimination, and minority group's economic status).


290 See text accompanying notes 58-61 supra.

291 In at least one case, Collins v. City of Norfolk, 816 F.2d 932 (4th Cir. 1987), a circuit court has held that the functional approach taken by the *Gingles* Court placed these two factors in a position of overriding importance within the totality of the circumstances test. Id. at 936-37; see also Jackson v. Edgefield County, South Carolina School Dist., 650 F. Supp. 1176, 1200 (D.S.C. 1986) (minority electoral success and racial polarization in voting are "two most important Senate Report factors").


293 See *Collins*, 816 F.2d at 938 (presence of severely polarized voting or sustained minority
The first way to revise the totality of the circumstances inquiry is to remove this limitation on the class of eligible plaintiffs. The requirement that plaintiffs constitute a majority in hypothetical single member districts rigidifies the notion of participational opportunity, particularly where courts use this requirement as a threshold or standing inquiry. It suggests that those groups that could not constitute such a majority have a less valid claim to relief. Such a suggestion is incompatible with a broad, interactive notion of participation.

It is possible to imagine a plaintiff group in the multi-member district described above, in which the district lines exacerbate the effects of discrimination, that is nonetheless too small or too diffuse to constitute a majority even in a sub-area of the challenged district. This group of plaintiffs is deprived of its ability to interact with and influence others in the political process just as surely as a group of plaintiffs capable of making the showing, even though it might have to combine with others in order to secure an electoral triumph. Yet under the current case law, the small or diffuse group would not be entitled to relief. An approach to section 2 that is based on an extended notion of the political process, in which election is a consequence of influence rather than unrelated to it, should protect these groups as well.

The totality of circumstances test might also be restructured to emphasize those variables most closely related to interactive participation.

success weighs very heavily in ultimate determination although totality of circumstances test is overriding standard); Buckanaga v. Sisseton Indep. School Dist., 804 F.2d 469, 473 (8th Cir. 1986) (racially polarized voting key element of vote dilution case); Martin, 658 F. Supp. at 1202 (same); McNeil v. City of Springfield, 658 F. Supp. 1015, 1019 (C.D. Ill.) (focus of test is racially polarized voting), appeal dismissed, 818 F.2d 565 (7th Cir. 1987).

Even if we assume that the Court intends to consider the possibility of an “ability to influence” claim, see Thornburg v. Gingles, 478 U.S. 30, 46 n.12 (1986), the Court in Gingles does not determine that this category of plaintiffs is entitled to prevail on one.

See text accompanying notes 215-17 supra.

See text accompanying notes 285-86 supra.

This was precisely the situation most of the plaintiffs faced in Martin, 648 F. Supp. at 1203-04.

See id. at 1203-05. This single district majority requirement affects not only members of racial minorities, such as the black voters in Martin, who may not be numerous enough to constitute a majority in a single member district, it also poses a particular danger to language minorities—such as Hispanic, Korean, and Vietnamese voters—who often do not experience the same residential segregation as blacks, and who may therefore be too widely scattered to meet the requirement. 1980 census figures for 16 major American cities show an "index of dissimilarity" averaging 79 for blacks, while the indices for Hispanics and Asians averaged only 48 and 43, respectively. Farley, The Residential Segregation of Blacks from Whites: Trends, Causes, Consequences, in Issues in Housing Discrimination: A Consultation/Hearing of the United States Commission on Civil Rights 19 (1985). The “index of dissimilarity” is a measure of segregation which takes on its maximum value of 100 when all minorities and whites live in racially homogeneous areas. A minimum value of zero would be achieved if individuals were randomly scattered in their residential areas without regard to race.
Such a focus would reduce the importance of the electoral success of the plaintiff group since electoral success is more concerned with aggregative than interactive participation. Evidence of racially polarized voting would continue to be an important variable; in as much as voting patterns can reflect the process of exchange and coalescence that precedes them, this evidence could indicate the extent to which the political process continued to be marked by the present effects of past discrimination. It would be less central, though, than under the present regime: voting patterns would not be the actual object of inquiry, but a less-than-perfect proxy for measuring a more extended range of political behavior. Yet the availability of such evidence, and its probative value, suggests that it would continue to be relevant in finding a violation.

Courts might also place greater emphasis on those factors listed in the Senate Report that provide direct evidence of impairment of the interactive participation of minority voters. One such factor is the exclusion of members of a minority group from the pre-election choice of a slate of candidates. In fact, plaintiffs might focus more specifically on the exclusion or neglect of minority voters by the two major political parties. Evidence that minority voters are not registering as members of these parties might be evidence of impaired interaction; evidence that minority voters are not being included in or accommodated by party caucuses would provide even stronger support. This evidence is not only directly reflective of the sort of discussion and collaboration that I understand to be the essence of the political process, but it also involves a feature of political participation that courts have been accustomed to

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299 I would agree with Justice Brennan’s analysis in Gingles, however, that the one exception to this rule, where § 2 relief would not be warranted, might be the case where the minority group in question had achieved sustained, substantial electoral successes. It is theoretically possible that such a consistent pattern of victory could be accomplished in the absence of inter-racial cooperation (for example, through a well-constructed system of supermajority districts), but it is not likely.

300 Polarized voting can be a misleading indicator of more extended patterns of participation. It is possible, for example, that minority and nonminority groups would attempt to work toward a coalition, yet vote differently in a general election because their differences over candidates were too great to reconcile. This would produce a pattern of “polarized” voting, yet there might not be polarization in the process as a whole.

301 A plurality of the Court in Gingles held that it would be adequate to demonstrate racially polarized voting by bivariate analysis. This would seem to be an acceptable means of measurement under a revised approach to § 2. Because bivariate analysis is simply being used as a proxy, absolute precision is impossible; moreover, as the plurality observed in Gingles, multi-variate analysis offers only illusory gains in precision, as many of the variables for which it accounts (such as socio-economic status or place of residence) are not actually independent of race. See 478 U.S. at 64. One of the advantages of bivariate analysis is that it is not difficult to obtain the data necessary to perform the analysis. See Grofman, supra note 234, at 77.


scrutinizing since the "white primary" cases.\textsuperscript{304} Another Senate Report factor that may indicate impaired interaction is evidence of legislative unresponsiveness to the needs of the minority group.\textsuperscript{305} In the municipal context, plaintiffs may be able to demonstrate unresponsiveness by evidence of the disparate provision of municipal services.\textsuperscript{306} But in some localities, and in cases involving state and national legislative bodies, this evidence will be more difficult to produce. Defendants are also likely to claim that legislative bodies are responsive to minority needs by pointing to a few specific enactments. In such cases, plaintiffs might attempt to demonstrate that minority officials were not members of the dominant coalitions in such bodies, or that the effective groups with the greatest success in the lobbying body did not include members of minority groups. This evidence could be offered through the expert testimony of social scientists, who have investigated and reported such phenomena in studies such as those discussed above.

Perhaps the most important factor in a revised totality of the circumstances test would be evidence of past discrimination. Although this factor played a central role in many early vote dilution cases both before and after amendment of section 2,\textsuperscript{307} the majority opinion in \textit{Gingles} relegated it to a position of diminished significance.\textsuperscript{308} While some lower courts have perpetuated the prominence of evidence of past discrimination within the totality of the circumstances inquiry,\textsuperscript{309} \textit{Gingles} appears to have eroded its importance in other cases.\textsuperscript{310} Under an interactive approach, this factor would return to a position of primacy because past and present discrimination are crucial deterrents to the kind of discus-


\textsuperscript{305} Senate Report, supra note 4, at 28, 1982 U.S. Code Cong. & Admin. News at 207.

\textsuperscript{306} See, e.g., Hawkins v. Town of Shaw, Mississippi, 437 F.2d 1286 (5th Cir. 1971) (disparities in provision of municipal services to blacks violative of fourteenth amendment).

\textsuperscript{307} See text accompanying notes 31-48 supra.

\textsuperscript{308} See 478 U.S. at 2766 n.15 (evidence of past discrimination is no longer essential to prove minority voter's claim).

\textsuperscript{309} Judges espousing this position have included Judge John Minor Wisdom, who was almost single-handedly responsible for establishing the primacy of this factor in his influential opinions for the Fifth and Eleventh Circuits, see, e.g., League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. School Dist., 812 F.2d 1494, 1497 (5th Cir. 1987) (upholding court ordered redistricting in Texas county with long history of discrimination), and Judge Myron Thompson of the Middle District of Alabama, who has issued several thoughtful and innovative opinions interpreting the Voting Rights Act, see, e.g., Dillard v. Crenshaw County, 649 F. Supp. 289, 293 (M.D. Ala. 1986) (century-old discrimination in Alabama is strong evidence that electoral scheme would result in unequal access to political process).

\textsuperscript{310} See, e.g., McNeill v. Springfield Park Dist., 666 F. Supp. 1208 (C.D. Ill.) (past history of discrimination simply one factor; more importance placed on others including group size and compactness), appeal dismissed, 818 F.2d 565 (7th Cir. 1987); Martin v. Allain, 658 F. Supp. 1183 (S.D. Miss. 1987) (no violation, despite widespread history of discrimination, where plaintiffs did not constitute majority in hypothetical single member districts).
sion and collaboration that constitute full participation.  

Discrimination affects interactive participation in ways that are both numerous and complex. In order for groups to interact in formulating preferences or supporting candidates, each group must have the capacity and inclination to express its preferences, and a willingness to consider, incorporate, or adopt the views of other groups. The present effects of past discrimination can affect both of these conditions.

A legacy of past discrimination can make minority voters reluctant to express their preferences in discussion or negotiation. Decades of de jure or de facto exclusion from the political system may produce a feeling of alienation that makes minority voters reluctant to bring their views to the public forum, even when they are permitted or encouraged to do so. Impoverished educational backgrounds or unemployment that arise from discrimination in other fields may produce a similar effect. Some group members may lack the information or exposure necessary to develop a stake in questions on the public agenda; others may be sufficiently preoccupied with essential matters, such as finding work or feeding their families, that they have little time to devote to political discussion. Minority group members, who have received little from the political system, are unlikely to feel empowered to petition their elected representatives.

Discrimination can also affect the willingness of both minorities and nonminorities to give fair hearing to the perspectives of other groups. Simple racial animus on the part of nonminority voters can produce this effect. But this unwillingness can also affect those possessed less of

311 Aggregative participation itself, such as voting, can be affected by discrimination. First, it can be affected by statutory or informal devices that proscribe or restrict participation in the political process on the basis of race. Such enactments interfere with participation directly while they are in effect, but may continue to affect it indirectly even after they have been struck down. Courts have often held that low registration and turnout rates among minorities are attributable to decades of de jure exclusion from the aggregative forms of political participation. See Ketchum v. Byrne, 740 F.2d 1398, 1413-14 (7th Cir. 1984), cert. denied sub nom. City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985); United States v. Marengo County Comm'n, 731 F.2d 1546, 1568 (11th Cir. 1984). But see The New Black Politics: The Search for Political Power, supra note 265, at 109-31 (low participation may be attributable to non-socioeconomic factors). Aggregative participation can also be affected by forms of discrimination which do not relate directly to the political system. The mediocre education and high unemployment rates that frequently face minorities as a consequence of discrimination have often correlated with lower indices of voter registration and turnout. See Marengo County Comm'n, 731 F.2d at 1568 (poor educational background correlated with lower levels of political participation); S. Rep. No. 227, 97th Cong., 2d Sess. at 29 n.114, reprinted in 1982 U.S. Code Cong. & Admin. News at 207 n.114 (poor living conditions arising from past discrimination tend to depress minority political participation).

312 Marengo County Comm'n, 731 F.2d at 1568.

313 Id.

314 Such a failure to give fair hearing can take the form of an overt refusal to credit the position of the other, but it can also take subtler forms. Professor Lawrence has described
racial animus than a “racially-selective sympathy and indifference.”

Nonminority voters who have been permitted to ignore the views of minorities under a system of at-large voting, for example, may be unaccustomed to deliberating with them, or slow to grasp the benefits of coalescing with them in supporting candidates. Even nonminority voters who have come to accept as a fact of life the educational and socio-economic impoverishment of many minority groups may be reluctant to interact with them. This reluctance may arise not only because they may draw discriminatory inferences from these conditions, but because they fear that such conditions may create preferences on the part of minorities that are irreconcilably different from their own.

The legacy of discrimination may affect the willingness of minority groups to interact as well. Some minority participants who might be inclined to discuss substantive preferences within the group might feel reluctant to engage in deliberations with nonminority voters, whom they may believe are responsible for the creation or perpetuation of their disadvantaged condition. Others may be discouraged by the perceived

several ways in which subtle, submerged prejudice can prevent people from hearing and evaluating accurately the message that is being communicated by a person of another race. See Lawrence, The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism, 39 Stan. L. Rev. 317 (1987). Listeners may resort to stereotypes to fill in gaps of their memory of a conversation; ideas or expressions that are in congruence with the listener’s preconceptions are more likely to be remembered. Id. at 339. Moreover, assessing a minority speaker’s relation to stereotyped expectations may distract a white listener from the message that the other is trying to impart. Lawrence relates the story of a white, middle-aged lawyer interviewing a Harvard-educated, Stanford law student who happened to be Mexican-American. After a short period of conversation, he commented to her, “You speak very good English.” Id. at 341 n.101. One can imagine that he had not focused closely on her reflections concerning the trade doctrine.

See Brest, Foreword: In Defense of the Antidiscrimination Principle, 90 Harv. L. Rev. 1, 7-8 (1976) (term defined as “unconscious failure to extend to a minority group the same recognition of humanity, and hence the same sympathy and care, given as a matter of course to one’s own group”).

See Lawrence, supra note 314, at 335. Lawrence describes the phenomenon of “aversive racism,” which may lead whites who are not overtly racist to avoid contact with blacks or to be “polite, correct, and cold whenever [they] must deal with them.” Id.

See Lawrence, supra note 314, at 339 (individual who holds stereotyped beliefs about “target” will interpret target’s life history and behavior in ways that support beliefs); id. at 373-75 (some whites believe that disadvantages of blacks in socio-economic and educational areas reflect black inferiority).

Compare Gewirtz, Choice in the Transition: School Desegregation and the Corrective Ideal, 86 Colum. L. Rev. 728, 748 (1986) (differences between races seems more daunting to those who have not experienced integration than to those who have) with Lawrence, supra note 314, at 332, 337-39 (prejudiced perception of differences not always corrected by facts because individual’s own emotional investment and societal pressures encourage exaggeration of differences).

Cf. Gewirtz, supra note 318, at 744-45 & n.53. Gewirtz notes that in educational and employment settings, some blacks have tended to avoid situations in which they will encounter reminders of past discriminators or discriminatory treatment.
reserve of nonminority voters. They may feel that there is no point in airing their preferences before an unreceptive audience, or that the unwillingness of nonminority voters to engage with them suggests a gap in their substantive preferences too great to be bridged.

This analysis suggests that past discrimination strongly correlates with the failure of interactive participation. For this reason, evidence of past (or present) discrimination would be an excellent proxy in those cases where direct evidence of impairment is not available. This evidence will also be useful to ferret out "false positives" that may emerge from other indicators, such as evidence of polarized voting. Failures of cooperation may arise from differences among racial groups too great to be reconciled, that are related not to race but, for example, to place of residence, or which may be related to race but are not the product of racial discrimination. If a jurisdiction suffering from the documented isolation of minority voters has been demonstrated to have a potent recent history of past discrimination, however, the presumption should be that this isolation is the result of discrimination, and that the district lines that perpetuate such discrimination are suspect.

A revised totality of the circumstances inquiry would inevitably alter the result of some cases adjudicated under section 2. One such result is the recent decision in *Martin v. Allain*. There, plaintiffs challenged a statewide system of districts for the election of state court judges. The court found that plaintiffs from virtually all districts of the state had suffered a virulent history of discrimination, strong polarization in voting, and impaired minority participation in the political process.

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320 See note 319 supra. Given the cold and distant response produced by "aversive racism," it is not unreasonable for some blacks to feel ambivalent about interracial dialogue.

321 Gewirtz also suggests that blacks may decline to interact with whites because they have internalized certain discriminatory judgments made by whites about their worth. See Gewirtz, supra note 318, at 746-47. This explanation seems more appropriate to the discussion of school desegregation in the 1960s (which forms the first part of Gerwitz's discussion) than it does to a discussion of participational patterns of the 1980s.

322 Some types of interactive participation occur at such a level of informality that it is difficult to measure them at all. Whether minority voters are discussing their substantive preferences among themselves, for example, or whether nonminority party leaders are giving a serious hearing to minority perspectives in formulating a party platform, are facts that are unlikely to be satisfactorily demonstrated through admissible evidence.

323 For example, racial groups of different socio-economic levels might display different attitudes toward proposed municipal expenditures.


325 Id. at 1202.

326 Id. at 1192 (discrimination in political process); id. at 1192-93 (discrimination extending to bar and judiciary); id. at 1194-95 (socio-economic disparities between blacks and whites).

327 Id. at 1193-94.

328 Id. at 1195 (lower education and socio-economic status of black citizens hinders their ability to participate effectively in political process).
Yet the court held that only those plaintiffs who could demonstrate that they were numerous and compact enough to constitute a majority in a single member district established a violation of section 2.\textsuperscript{329} The approach proposed here would not restrict recovery to those who could prove their ability to elect the candidate of their choice in a single member district. Where plaintiffs can make the crucial showing of past discrimination, as well as polarization and depressed participation, they have made a strong case for relief.\textsuperscript{330} Whether or not plaintiffs constitute a majority in a single member district may be relevant to the form of relief granted, but it is not relevant to the finding of a violation.

The proposed approach would sustain the result but alter the rationale in other cases, such as \textit{Jackson v. Edgefield County, South Carolina School District}.\textsuperscript{331} This case involved a challenge to an at-large system for the election of school board members. The court found "a legacy of past racial discrimination that has, to a certain extent, survived and become[ ] institutionalized in the areas of employment, education and . . . basic living conditions."\textsuperscript{332} The court also found minority exclusion from Democratic party politics that historically affected such areas as slating and the selection of precinct workers,\textsuperscript{333} and depressed political participation among minorities.\textsuperscript{334} The court noted, however, that following \textit{Gingles}, such factors were "supportive of, but not essential to" the finding of a violation. Two Senate Report factors—past electoral performance and polarization in voting—and the threshold showing that a group large and compact enough to comprise a majority in a single member district was thwarted by a multi-member district plan were pivotal to the decision.\textsuperscript{335} This Article's proposed approach would base the finding of a violation on a markedly different rationale. Of crucial importance would be the pervasive discrimination against blacks, the depressed character of their political participation, and their exclusion from the activities of the predominant Democratic party. Without these indices of impaired interactive participation, it would be difficult to find a violation. Supporting these factors would be the incidence of racially polarized vot-

\begin{itemize}
\item \textsuperscript{329} Id. at 1203-04. The court traced this requirement to \textit{Gingles}, and described it as the "most relevant" aspect of the "functional" approach to the political process articulated there. Id. at 1203.
\item \textsuperscript{330} Plaintiffs would also have to indicate that there is some relationship between the structure of the districts in question and the perpetuation of the effects of discrimination. How this showing can be made in the multi- and single member district contexts will be discussed in text accompanying notes 354-404 infra.
\item \textsuperscript{331} 650 F. Supp. 1176 (D.S.C. 1986).
\item \textsuperscript{332} Id. at 1201; see id. at 1183-89.
\item \textsuperscript{333} Id. at 1181-83.
\item \textsuperscript{334} Id. at 1180-81.
\item \textsuperscript{335} Id. at 1201 (citing \textit{Gingles v. Thornburg}, 478 U.S. at 46 n.12).
\end{itemize}
The electoral record of the plaintiff group would have little bearing, unless perhaps it demonstrated systematic success; and the ability of the plaintiffs to comprise a majority in a single member district would be irrelevant.

2. "Undiluted" Districts and "Triggers" to Scrutiny

Section 2 is concerned not simply with impairment of political opportunity, but with impairment that is perpetuated by devices such as districting arrangements. A plaintiff must therefore be able to show that the alleged impairment complained of is related to—that is, exacerbated or perpetuated by—a districting scheme. In cases involving multi-member districts, courts usually have accepted this connection as implicit. But, as multi-member districting arrangements are struck down under the Voting Rights Act with greater frequency, courts will increasingly be confronted with cases involving single member districts. In such cases, the relationship between the structure of the district and the perpetuation of discrimination might not be as obvious. Some single member districts make it difficult for minority voters to participate on an equal basis; others are so helpful to minority voters that they have been used to cure section 2 violations. For plaintiffs who want to demonstrate that their districts dilute the minority vote, judges who want to assess such claims, and enforcement officials who want to scrutinize

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337 Gingles may represent an attempt to require plaintiffs actually to demonstrate a causal relationship between the districting arrangement and the dilution alleged, rather than accepting such relationship as implicit. However, as I argued above, the uni-dimensional sort of causation suggested by the "ability to prevail in a single member district" is not consistent with the more complex notions of causation that underlie the statute. See text accompanying notes 58-69 supra.


340 The Supreme Court has not spoken directly on the showing that must be made in the case of single member districts, and it is not clear what inferences can be drawn from Gingles. The majority reserved the question of what standards would apply to a case involving impairment by the mechanism of single member districts. Thornburg v. Gingles, 478 U.S. 30, 46 n.12 (1986); see also id. at 94 (O'Connor, J., concurring) (expressing concern that Gingles standards may be applied subsequently to cases involving districting schemes other than the one considered in Gingles).

341 Single member districts, as well as multi-member districts, may be marred by the "packing" or "fracturing" of minority populations that impair minority participation. See notes 344-47 and accompanying text infra.

districts for potential violations, it is essential to have a clearer idea of the kind of single member districts that perpetuate the effects of past discrimination. Arriving at a description of such districts—which I will refer to as "triggers" to further scrutiny under section 2—provides yet another means of incorporating interactive notions of "political opportunity" into adjudication under the statute.

The few recent cases involving single member districts suggest two kinds of arrangements that tend to dilute minority political power. The first, "fracturing," refers to a scheme that splinters the minority population among a large number of districts. This arrangement is problematic because it deprives the minority group of the electoral majority it might have enjoyed had it been placed within a single district. Fracturing is also threatening to minority political participation because it divides the minority into subgroups so small that they can safely be ignored by the nonminority groups in each district, with all the loss of potential influence that such neglect implies. A second arrangement, "packing," refers to concentrating in a single district a far larger minority population than is necessary to assure electoral victory, thereby depriving the surrounding districts of potentially sizeable minority populations.

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343 I will refer to these suspect arrangements as "triggers" because they may be used by enforcement officials to identify a districting scheme that is likely to constitute a violation. That is, they will "trigger" further scrutiny by enforcement officials. The use of this term highlights one paradigm of enforcement: that in which government or public interest litigators scrutinize districting arrangements for violations. Because it may be easier for outside litigators to identify one of these districting arrangements than to determine whether entrenched discrimination or impaired participation exist, this may be the first factor they investigate in deciding whether to bring an action. The existence of one of these arrangements may also be the determinative factor in deciding whether to bring an action in jurisdictions "covered" by § 5 of the Voting Rights Act, see note 139 supra, or other areas in which the context of past discrimination and impaired participation is well established.

There are, of course, other paradigms of enforcement, such as actions initiated by minority voters themselves. In such an action, litigants may be familiar with circumstances suggesting discrimination or impaired participation, but it should still be necessary for them to demonstrate a "trigger" arrangement to show that these effects are related to the challenged districting arrangement.

344 Fracturing, also referred to as "cracking," has been used as an indicator of dilution in both § 2 and § 5 cases. See Mississippi v. Smith, 541 F. Supp. 1329, 1331 (D.D.C. 1982) (legislature divided predominantly black region into three mostly white districts), appeal dismissed, 461 U.S. 912 (1983); see also F. Parker, supra note 134, at 89-92 (discussing cracking in Norfolk, Va. and Warren County, Miss.).


346 See Wright v. Rockefeller, 376 U.S. 52, 60-61 (1964) (Douglas, J., dissenting) (explaining why bizarre 11-sided district shape approved by majority packed blacks and Puerto Ricans unnecessarily into a single district); Seamon v. Upham, 536 F. Supp. 931, 936-37 (E.D. Tex.) (describing claims of packing and fracturing that ultimately led Attorney General to object to districting plan), vacated on other grounds, 456 U.S. 37 (1982); see also Parker, supra note 134, at 99 (discussing packing in Texas and in Hampton and Newport News, Va.). Plaintiffs in Gingles v. Edmisten also alleged that the redistricting plan proposed by North Carolina packed blacks into a few districts, rather than giving them a plurality in a greater number of
The consequences for the minority voters in surrounding districts are similar to those for voters in fractured districts. The restricted potential for influence resulting from their depleted numbers bodes ill for their meaningful involvement in the political process.347

Yet to say that fracturing and packing should be used as triggers for scrutinizing single member districts may not provide sufficient guidance. It may not always be clear how to recognize a fractured or packed district. How large must the minority population of a district be to be packed? How small must it be to be fractured? Exclusive reliance on numbers is unwise, but these questions point to the need for further con-

347 A third trigger, "stacking," seems less promising under a participation-oriented approach to § 2. Stacking occurs when an area in which minority voters enjoy a majority is joined with an area in which they do not. See Parker, supra note 134, at 96 (discussing stacking in Mississippi and Petersburg, Va.); see also Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965) (early case finding malapportionment and vote dilution through stacking). Stacking makes an appropriate trigger under a performance-oriented approach because it deprives the minority group of the electoral majority it would have had in the first area. See Parker, supra note 134, at 92, 96 (explaining how predominantly black Alabama counties were combined with other, predominantly-white districts to form multi-member, majority-white districts). However, stacking does not necessarily create a minority population so small that it can safely be ignored by nonminority voters. Unless the nonminority-dominated area is so large that the arrangement works to "fracture" the minority population or creates a multi-member district (sometimes two or more representatives may be elected from such a district, although there are other single member districts in the arrangement), stacking will not necessarily deprive the minority population of influence and therefore of motivation to participate in the political process. For example, drawing district lines so that one area with a 90% minority population is combined with a slightly smaller area with a 90% nonminority population in a single member district, might be described by some as stacking, because combining the two areas produces an arrangement that does not permit minority voters predictability to control electoral outcomes in the district. However, as I will argue in the next section, under some circumstances a district constructed in this way would be less likely to defeat a minority-supported candidate than to encourage bi-racial coalitions, and thereby preserve minority influence and motivation to participate. See text accompanying notes 383-93 infra.
ceptual clarification. In order to speak precisely about what kinds of districts dilute minority political power, we need a basis for comparison. We need to develop a picture of the kind of district that would permit minority voters to participate fully in the political process.

*Gingles* did not address the application of section 2 to single member districts. However, the Court did articulate a standard that might be used to develop a notion of undiluted political power for the single member district context, as Justice O'Connor indicated in her concurrence. That baseline is the one employed in the totality of the circumstances test itself: the single member district in which members of a minority group are numerous enough to elect the representatives of their choice—either a simple majority or a supermajority, depending on the Court's construction of the term “numerous enough to elect.” If a districting arrangement fails to create any such districts where an alternative might produce them, that arrangement should be inspected for further evidence of a violation.

This arrangement would indeed be optimal if the goal of voting rights enforcement was to permit minority voters to elect the representatives of their choice. However, if we espouse a broader notion of political opportunity, it requires a second look. While this arrangement permits minorities to elect candidates, it enables them to do so without any collaboration with other racial or language groups. Although districts that produce electoral victories in this fashion may erode the prejudices of nonminority participants and will surely enhance minority power, they will not directly encourage cooperation and contact among groups.

The type of district that offers such encouragement would look slightly different. It would encompass both minority and nonminority groups large enough to have a substantial effect on electoral outcomes. Neither group, if it desired electoral victory, could afford to neglect the

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348 See 478 U.S. at 95 (O'Connor, J., concurring) (minority must have sufficient size, geographical concentration and political cohesiveness in hypothetical single member district to bring successful claim).

349 Id. at 50.

350 It also seems possible that supermajority districts will have a negative effect on intra-group interaction. Group members may feel they have less reason to discuss election-related issues with members of other groups if the outcome is rarely in doubt. There may also be less incentive on the part of group leaders to encourage members to vote. Investigation of “safe” districting arrangements in Democratic and Republican contests also suggests that the absence of competition in “safe” districts permits the controlling group to run candidates who may not be the best it has to offer. ABA Special Committee on Election Law and Voter Participation, Congressional Redistricting (1981). These inter-group effects must, of course, be balanced against the benefits to minorities of electing the representatives of their choice.

351 The type of district I envision might range from a 50%/50% division to a 54%/46% division. It is unlikely that all the districts in the scheme could contain such closely matched populations, but the goal would be to create as many of them as possible.
perspectives of, or opportunities for collaboration with, the other. Racial or language groups that came together out of political necessity might then begin to collaborate by choice, seeing the benefits of interaction and recognizing that some differences between them were not as great as had been anticipated. Participation would become even more attractive to minority voters as they realized that their perspectives were important, not simply to their elected representatives, but to other participants in the political process.

This alternate vision, however, raises an interesting paradox. While electoral power and political influence are conceptually intertwined, in this context they appear to pull in different directions. The district that is optimal for enhancing interaction among racial groups looks different from the district that is optimal for encouraging minority electoral victory. This tension creates a provocative challenge for voting rights enforcement. While it is difficult to imagine proceeding with two views of what is optional in districting, it would be unwise to sacrifice one vision for the other. The election of minority representatives has not been enough to produce reliable gains in long-term political efficacy for minorities. Considered in isolation, it reflects a limited notion of what it means to participate in the political process. Yet the election of minority representatives has been a crucial first step toward incorporating minority voters into the political process, a step that has brought minority participants political self-esteem.

352 While this approach has not been extensively investigated in the voting rights area, encouraging interaction by requiring collaboration on a mutual goal has produced promising results in studies involving schoolchildren of different races. See One Promising Approach, N.Y. Times, May 12, 1987, at C10. Research conducted by Robert Slavin of The Centre for Research on Elementary and Middle Schools of Johns Hopkins University explored teaching methods used to encourage contact and cooperation among children of different races. See Slavin, Cooperative Learning and Desegregation, in Effective School Desegregation: Equity, Quality and Feasibility 225 (W. Hawley ed. 1981). The most successful method, called Student Teams Achievement Divisions (STAD), used interracial teams to perform selected learning tasks. At the completion of a given task, each group received a score that was an aggregate of all individual scores. When the children realized that they needed each individual score to achieve a high group score, they began to cooperate with and assist each other, without regard to racial differences. Id. at 235-39. The analogy is obviously imperfect—children working in school are different from adults lobbying congressmen—but these studies suggest that creating situations in which members of different racial groups must rely on each other to accomplish important goals is a promising means of eroding prejudice and encouraging cooperation. The "team learning" approach has also produced positive results with Hispanic and non-Hispanic children in California, see Weigel, Wiser & Cook, The Impact of Cooperative Learning Experiences on Cross-Ethnic Relations and Attitudes, 31 J. Soc. Issues 219, 239-42 (1975), and with Sephardic and Ashkenazic Jews in Israel, see Sharan, Kussel, Hertz-LaZarowitz, Bejarana, Raviv & Sharon, Cooperative Learning Effects on Ethnic Relations and Achievement in Israel: Junior High School Classrooms, in Learning to Cooperate, Cooperating to Learn 313 (1985).

353 It is also a step that we know how to reproduce, through the proven expedient of the
“political opportunity” and encourage interaction among voters of different racial and language groups, we must do so in a way that does not reverse these gains in minority representation.

I want to consider several ways to address this task in the context in which it will most frequently arise: the remedial stage of litigation. In concluding that discussion, I will offer some suggestions about what sort of districts should constitute baseline measures of undiluted political power and what sort of districts should be seen as triggers to further scrutiny for violations.

B. Remedial Approach

When a court finds a violation of section 2, it orders the relevant authority to produce a new district map, and it retains jurisdiction to approve the proposed arrangement.\(^{354}\) Courts tend to approve plans that eliminate barriers to whatever they regard as optimal participation. The approach that most courts currently favor creates one or more supermajority “safe” districts, in which minority group members comprise at least sixty-five percent of the population.\(^{355}\) This arrangement falls within a category of race conscious remedies that the framers of the Voting Rights Act explicitly anticipated.\(^{356}\) The courts view the supermajority feature as compensating for two present effects of past discrimination that make a simple majority insufficient to insure success: low registration and low voter turnout.\(^{357}\)

The challenge for an enforcement regime that sees beyond the electoral focus is to incorporate districts that encourage interactive participa-


\(^{355}\) *Ketchum*, 740 F.2d at 1413-17; *Edmisten*, 590 F. Supp. at 379-80.


\(^{357}\) In *Ketchum*, Judge Cudahy provided the most comprehensive justification of the supermajority remedy, and derived the 65% figure in precise, mathematical fashion. 740 F.2d at 1413-17. The approach awarded additional population increments of five percent to compensate for low voting age population, low registration, and low voter turnout rates. Id. at 1415. However, the fact that the five percent figures were based on national averages compiled by the Bureau of the Census in 1980, rather than on local statistics, calls the mathematical precision of the remedy into question. See id. at 1413 n.16 (citing Bureau of the Census, U.S. Dept' of Commerce, Statistical Abstract of the United States: 1981, at 25-26, 499 (1981)). Moreover, while the five percent figure is applied uniformly to all racial groups, the census figures indicate that the figures for voter registration and voter turnout are significantly lower for Hispanic voters than for blacks, so that a higher increment than five percent might be necessary to create a supermajority district with a Hispanic population. Id.
tion without sacrificing the representational gains that come from supermajority districts. There are several ways in which this might be done. These methods vary in the extent to which they depart from current remedial practices, and in the risk they pose of compromising representational goals in order to enhance interactive participation. I offer them here not only to highlight their specific advantages, but to provoke discussion about the ways we can incorporate participational goals into voting rights remediation.

The first approach is to maximize the political power of those minority participants not included within the supermajority district(s) by concentrating them within one or two of the remaining districts. Because of the comparatively small size of the minority population in most areas, it is possible to include only one or occasionally two supermajority districts in most districting schemes. Inevitably, many minority voters find themselves outside these “safe” districts, in districts that are dominated by nonminority participants. Under the current remedial approach, courts and districting authorities take no particular steps to protect the political influence of these voters. They tend to be scattered throughout the remaining districts, which are constructed in accordance with geographical factors or political subdivisions. Where plaintiffs have sought a judicial directive that districting authorities “maximize” the political power of these voters by concentrating them within one or two of the remaining districts, courts have uniformly declined to do so. In so doing, they have shrunk from the broad, affirmative connota-

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358 Whether minority voters should be concentrated in one or two of the remaining districts will depend on the circumstances in the affected districts. If there are substantial ethnic or socio-economic cleavages that divide the nonminority population such that they do not necessarily vote as a group, and if a smaller group of minority voters might be perceived as able to influence outcomes, it might be possible to divide these voters between two districts. The same is true under circumstances in which some non-supermajority districts contain members of other racial or language minorities who seem to be likely coalition partners for the minority on whose behalf the remedy is sought. If no such circumstances exist, it might be preferable to concentrate this population in a single district.

359 See Ketchum, 740 F.2d at 1418; Edmisten, 590 F. Supp. at 379.

360 Ketchum, 740 F.2d at 1418-19. Political subdivisions are subsections of districts, such as precincts or wards.

361 See Martin v. Allain, 658 F. Supp. 1183, 1197-98 (S.D. Miss. 1987); Edmisten, 590 F. Supp. at 382-84 (supplemental opinion). In Edmisten, the district court considered both a claim that the remedial plan impaired some plaintiffs’ “ability to influence” and a claim that it “failed to maximize” the political power of the plaintiff. Id. at 374-75. In Martin, the court considered a claim that could have been either an “ability to influence” claim or a “failure to maximize” claim. The court stated:

[P]laintiffs have argued in regard to those districts in which black majority single-member sub-districts cannot be drawn that this court should design single-member districts to raise the black voter percentage by concentrating blacks as much as possible in order to better “influence” the outcome of the election.

658 F. Supp. at 1204. This ambiguous language suggests that the claim had elements of both.
tion of an obligation to "maximize" minority political power, arguing that such an obligation is without theoretical foundation, and citing empirical uncertainty as to whether such concentration would actually enhance the political efficacy of the affected group.  

The goal of enhanced interactive participation provides precisely the necessary theoretical justification for this remedial approach. If the single remedial goal is to encourage the election of minority representatives, there seems to be little purpose to aggregating groups that will, in any case, fall short of an effective majority. But if the goal is not simply electing representatives, but also encouraging political interaction among racial and language groups, such aggregation becomes reasonable. Increasing the size of the minority population within a given district increases the chance that it will have an affect on electoral outcomes. Perceiving this potential influence, nonminority voters, and the elected representatives of the district, will be less likely to neglect the interests of this minority group, and more likely to collaborate with its members in future political efforts.

This approach involves empirical uncertainty only in the sense that social scientists have not yet determined what percentage of a district's population minority voters must constitute to ensure the attention of their white counterparts. The search for a single number would probably be futile, as the percentage would inevitably vary with the socio-political composition of the district. But that size has nonetheless been a reliable, important determinant of the political power of minority groups has been documented too many times to deny. Moreover, implementing this test under these circumstances is a comparatively risk-free enterprise. It does not require that we sacrifice the benefits of supermajority districts, as it concerns only the remaining districts in each arrangement. The maximization of minority political power that this approach involves is a plausible interpretation of a statute that asks officials "not only to correct an active history of discrimination, but also to deal with the accumulation of discrimination." This approach also sanctions a variety of activist, race-conscious remedies.

362 See, e.g., Latino Political Action Comm. v. City of Boston, 784 F.2d 409, 412-14 (1st Cir. 1986); Edmisten, 590 F. Supp. at 383.

363 See, e.g., R. Browning, D. Marshall & D. Tabb, supra note 257, at 133 (size of minority group within municipality is one important determinant of extent of political incorporation of that group, particularly for blacks, although less so for hispanics).


365 The electoral focus in voting rights enforcement has contributed in two ways to make the prospect of "maximizing" minority political power more daunting or unpalatable to judges than it should be. First, because the focus is on electoral representation, and the "maximum" representation that any group could reasonably demand is representation in proportion to its numbers in the population, the obligation to maximize may be associated in the minds of some
As a second part of our approach, we should investigate ways to incorporate into remedial schemes the kind of district that best encourages interactive participation. This type of district, which I will refer to as a "strong plurality" district, contains comparably sized groups of both minority and nonminority voters. Some districts of approximately this configuration will be created simply by consolidating, to the degree possible, those groups of minority voters outside "safe" districts, as such groups may be large enough to constitute upwards of forty percent of an additional district. It may be advisable to create other plurality districts by adopting a more flexible, fact-sensitive approach to the use of the supermajority district.

Section 2 establishes a set of general standards, and counsels an "intensely local" inquiry into the facts of each case. While this fact-sensitivity has, for the most part, been preserved in evaluating alleged violations, it has sometimes been lost in the remedial phase of litigation. Districting authorities, sensing judicial approval of the supermajority approach, have tended to employ it as the remedy of first resort. In many cases, the court creates a supermajority of sixty-five percent in reliance on national indices of registration and turnout among minority voters, without reference to the figures for the group or locality in

judges with the statutorily-proscribed goal of proportional representation. Second, because the electoral focus is premised on the existence of substantial polarization and tends to depict politics as a zero-sum game between minority and nonminority participants, judges may assume that "maximizing" minority political power means decreasing nonminority political power to an equivalent extent. The vision may feed unconscious racist concerns about minority political domination, or it may seem to portend too great a revision of the status quo. If the goal of voting rights enforcement is conceived of not simply as permitting minority participants to elect the candidates of their choice, but as facilitating cooperative, interactive participation by citizens of all groups, these negative connotations of "maximization" do not necessarily follow. Participation is not conceived of solely in representational terms, so demands for proportional representation are less likely to result; moreover, as interracial cooperation increases, politics will become less of a zero-sum game, and enhancing minority political power will not, in itself, weaken nonminority influence. The kind of "maximization" proposed by this Article can be thought of in two ways. First, in the narrow sense, which means maximizing the size of the minority population in one or more districts outside those designated as "safe" districts, and second, in the more important, broader sense, which means maximizing, to the extent possible, the achievement of both representational and participational goals in voting rights enforcement.

366 See, e.g., Latino Political Action Comm. v. City of Boston, 784 F.2d 409, 414 (1st Cir. 1986) (appellants proposed creation of strong minority district with 46% minority population).


368 After the district court found a § 2 violation in McNeil v. City of Springfield, 658 F. Supp. 1015 (C.D. Ill.), appeal dismissed, 818 F.2d 565 (7th Cir. 1987), voters in Springfield, Illinois were presented with a referendum offering three choices for restructuring the local political system. All three alternatives contained a district that was 59% black. See Johnson, supra note 140, at A19; telephone interview with Howard Veal, Chairman of Springfield Urban League (May 15, 1987).
A return to greater flexibility and fact-sensitivity at the remedial phase of litigation might permit districting authorities to include a greater number of districts that encourage collaboration among groups. This approach entails the greater risk that minorities will be unable to elect representatives of their choice than does "maximization," as it would mean using "strong plurality" or perhaps simply majority districts in those circumstances in which authorities would currently be inclined to use supermajority districts. However, there are some contexts in which, with the help of a more fact-specific inquiry, courts may create districts designed to enhance interaction without costs to minority representation.

One way to facilitate this change would be for districting authorities to rely on local figures for registration and turnout, rather than on the national figures that the current remedial approach permits them to use. Although there are undoubtedly some cases in which local figures would not be available, a presumptive requirement that authorities rely on local figures would permit them to proceed, through greater fact-sensitivity, toward interactive goals. If the participation of the plaintiff

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370 White v. Regester, 412 U.S. 755 (1973), which established the standards for evaluating vote dilution claims, now codified in amended § 2, see Senate Report, supra note 4, at 5, 1982 U.S. Code Cong. & Admin. News at 177, called for a fact-sensitive, "intensely local" appraisal of vote dilution claims. Id. at 759.
371 One example of such a district is the newly created 5th district for the Massachusetts state legislature. The district, which was created as a result of a court order to redraw district lines, contains a population that is approximately 44% black, 21% Hispanic, and 35% white; however, given the higher registration rates of white voters in Boston, this means a voting population of approximately 50% black and Hispanic, and 50% white. See Jordan, The Potential in the 5th, Boston Globe, July 2, 1988, at 25. Jordan, a progressive black columnist, notes that while the political alliance that pressed for the redistricting backs a Hispanic candidate, Nelson Merced, the district might elect a black or a white. Jordan states that the best thing about the district is its potential to end voting along racial lines. "Reports are," he states, "that some of the candidates are knocking on doors in the 5th [district] and reaching out to all voters. What is developing in this district is the potential for ... a black-Latino-white coalition among the voters." Id.
372 See Ketchum, 740 F.2d at 1415 (noting that "judicial experience can provide a reliable guide to action where empirical data is ambiguous or not determinative and ... a guideline of 65% of total population (or its equivalent) has achieved general acceptance in redistricting jurisprudence"). Presumably, over time, even national figures would reflect gains in minority turnout and performance. At that point, courts could begin to replace supermajority districts with simple majority districts and ultimately strong plurality districts.
373 Many municipalities maintain detailed records of minority registration and turnout, and, where such information is not available at the municipal level, regional or state figures might be used. Only if there were no way to obtain reliable local figures, could districting authorities use national figures.

The use of a uniform, nationally-derived figure of 65% probably reflects the origin of the supermajority district as an expedient used to gain clearance of districting changes in jurisdictions covered by § 5. See United Jewish Org. v. Carey, 430 U.S. 144, 164 (1977) (approving
group in question was not as depressed as the national norm would predict, districting authorities might use a proportionally smaller supermajority, a simple majority, or even a “strong plurality” district as the centerpiece of their scheme. Such a change would probably not imperil the ability of minority voters to elect the candidate of their choice, but, because the population margin would be smaller, it might encourage minority voters to consider nonminority voters as possible allies in the effort to achieve electoral victory—an effect similar to that produced on nonminority voters by concentrating minority voters in a single non-supermajority district.

Another possibility might be for courts to identify certain types of violations, for which strong plurality districts could be employed as the remedy of first resort. Cases in which plaintiffs could show a combination of the Senate Report factors, but could not constitute a majority in a single member district would be obvious candidates for this approach. Remedial authorities have not had to address these situations in the past, as they do not, under current standards, violate section 2. Under this proposed approach, many areas where minorities do not meet the single member majority standard might nonetheless satisfy enough other Senate criteria to merit relief. Remedial authorities could then redraw district lines so as to take in as many members of the protected group as possible. Depending, of course, on the size and location of the plaintiff group, authorities could construct a district in which minority voters constitute a substantial portion of the population. Like the “maximization” proposal advanced earlier, this approach would concentrate minority voters in a way that makes them too numerous safely to be ignored, thus increasing the incentives for interaction.

It might also be possible to use strong plurality districts in circumstances in which the plaintiff group is sizeable enough to constitute a majority or supermajority, but in which the use of a district with a smaller concentration of minority voters would not predictably undermine plaintiffs’ ability to elect. This approach is not generally employed under the present remedial regime. Given the current focus on the

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374 The other remedial proposals posit different circumstances—those in which the plaintiff group could constitute a majority in one or more single member districts.

375 See text accompanying notes 88-100 supra.

376 See text accompanying notes 364-65 supra.

377 See, e.g., Latino Political Action Comm. v. City of Boston, 784 F.2d 409, 414 (1st Cir. 1984) (rejecting proposed plan creating plurality district by decreasing size of allegedly packed districts). Moreover, on the one occasion I know in which a preference for the type of district I refer to as “strong plurality” has been expressed, the remedy does not seem to have been
electoral success of minority voters, most courts would probably dismiss this approach as "wasting" minority political strength. However, under an approach that views minority political strength as consisting not simply of the power to elect, but also of the opportunity to influence and interact with others, some cautious, preferential use of strong plurality districts would be extremely valuable. Strong plurality districts might be employed, for example, where the minority population was packed or fractured, but where the patterns of polarized voting or the history of discrimination against the group in question were not extreme. Two recent appellate court cases provide an opportunity to consider the application of the strong plurality approach.

In Washington v. Tensas Parish School Board, the Fifth Circuit affirmed the district court's adoption of a reapportionment plan that created three districts with a clear white majority, three districts with a

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378 See text accompanying notes 88-100 supra.

379 Some voting rights litigators and activists have also opposed this approach on the ground that, in the past, such districts have been used—under circumstances of intense polarization and discriminatory conduct—to dilute minority political power. See, e.g., Parker, supra note 134, at 108-11. While this past experience should make us cautious, I would argue that we should not close our minds to the use of such remedies where local conditions indicate they do not pose these risks.

380 See text accompanying notes 347-50 supra.

381 One might argue that, in such a context, a court should not find a violation in the first place. This, of course, would depend on a wider variety of facts than I have outlined here. In general, however, this remedial strategy would need the support of a broad approach to the finding of a violation. Such an approach would allow for the finding of a violation under circumstances where polarization in voting is "moderate," as in the Boston case, rather than "extreme," or in situations where the minority group in question may have succeeded in electing an occasional candidate of its choice. It is fully consistent with my understanding of the statute as a forceful remedial measure, intended to remove all vestiges of discrimination that impair the political power of minorities, as well as with the Supreme Court's opinion in Gingles, to the extent that it holds that the election of minority representatives does not preclude the finding of a violation, and instead demands a close look at all the Senate Report factors. See Thornburg v. Gingles, 478 U.S. 30, 76 (1986).

Although this suggested approach may involve some additional judicial intrusion into the districting process (in both the finding of violations and the supervision of remedies), it has two features that should make it attractive to partisans of a restrained approach to the statute. First, it creates less tension with § 2's prohibition on proportional representation than the supermajority approach does; not all remedial action is designed to result in the election of a minority representative. Second, it encourages minority voters to develop skills that can be used to enhance their influence and encourages white voters to develop attitudes that will permit them to acknowledge this potential influence, rather than obliging minority voters to depend on the judicially-directed placement of district lines for the protection of their political voice.
clear black majority, and one district with a voting age population that was forty-eight percent black and fifty-two percent white.\textsuperscript{384} Black voters in the parish challenged the plan under section 2, arguing that its failure to accord them four “safe” districts when they constituted fifty-four percent of the population of the parish diluted their vote.\textsuperscript{385} In rejecting this claim, Judge Politz stressed the need for deference to the judgment of the district court\textsuperscript{386} and the statutory impropriety of the plaintiffs’ suggestion that they were entitled to proportional representation.\textsuperscript{387} But in the closing section of the opinion, he revealed an additional motivation. Conceding that continued polarization in the contested district six would be likely to produce white representatives, Judge Politz added that

[t]he historical tensions between the races in Tensas parish, albeit ameliorated, have not disappeared. It is the responsibility of both races that those tensions now abate. It is fervently hoped that District Six will provide the occasions for the final rejection of the regrettable legacies of the past and the nurturing of more worthy legacies for the future.\textsuperscript{388}

Judge Politz’s “fervent hope” appears to rest on the possibility of inter-racial cooperation implicit in the strong plurality (or in this case, bare majority) district. Whether this hope reflects an innovative effort to transform participation or a pretext for perpetuating a dilutive arrangement is impossible to determine without a fuller account of life in Tensas Parish. The court states that voting had historically been racially polarized, and that the rate of voter registration for blacks was depressed.\textsuperscript{389} If contemporary polarization proved to be less severe, or if the parish showed some sign of improvement in minority political participation, then the proposed plan might offer an advantageous compromise between representational and interactive goals. However, the potent legacy of discrimination in the parish, and the use of similarly-composed districts throughout the region to produce white electoral victories,\textsuperscript{390}

\textsuperscript{384} Id. at 610-11.
\textsuperscript{385} Id. at 611.
\textsuperscript{386} Id. at 611-12.
\textsuperscript{387} Id. at 612 (§2 negates proposition that any group is entitled to proportional representation).
\textsuperscript{388} Id.
\textsuperscript{389} Id.
\textsuperscript{390} See Kirksey v. Board of Supervisors, 554 F.2d 139 (5th Cir. 1977). In Kirksey, the Fifth Circuit rejected a supervisor's plan that created districts with “bare black population majorities.” Id. at 150. The court noted that “the presence of districts with bare black population majorities not only does not necessarily preclude dilution but, as a panel of this court pointed out, bare population majorities may actually enhance the possibility of continued minority political impotence.” Id. at 150. The court based this conclusion in part on the county's long
should have been reason for caution. Tensas Parish may not yet be ripe for the changes in participation that would vindicate the design of district six.

A more promising context for the use of strong plurality districts was highlighted by Latino Political Action Committee v. City of Boston. Charged with redrawing Boston’s city council and school committee districts, the city had offered, and the district court had adopted, a plan that created two supermajority districts, with approximately eighty-two percent and sixty-six percent black populations. The plaintiffs, residents and organizations seeking to enhance minority political influence, argued that this plan diluted minority political power by packing too many blacks into the “safe” districts. They advocated instead a scheme that reduced the minority population of the “safe” districts and created a new district with approximately forty-three percent minority voters. Although the First Circuit rejected the plaintiffs’ argument on, inter alia, the ground that “the ‘third district’ population is insufficient for a ‘safe’ district,” the facts of the case suggest its promise for the application of strong plurality districts. Not only could the percentage of minorities in the “safe” districts be reduced without imperiling minority control of those districts, but the district court found little recent discrimination in the political process, and only a “moderate” degree of racial polari-
In districts in which there was not an entrenched pattern of polarization between black and white voters, the narrow electoral margin might have encouraged cooperation. Moreover, the fact that the plaintiffs' proposed plurality district contained sizable populations of Asian and Hispanic voters gave the plaintiffs the opportunity to attempt several types of coalescence in order to achieve success at the polls. This kind of remedial pluralism, if applied in carefully selected circumstances, would provide courts with a relatively cost-free opportunity to test the effects of strong plurality districts.

The foregoing discussion suggests two things that are relevant to the identification of trigger single member districts, the issue with which our inquiry into remediation began. First, districts that encourage the election of minority candidates and districts that encourage interactive participation are not polar extremes so much as points on a continuum. Because the interaction-reinforcing effects of strong plurality districts arise from the subjective perception of voters of one group that they cannot afford to ignore voters of another group, an arrangement that might allow one group of voters to elect the representatives of its choice may also encourage them to ally with others in doing so. Just as defining a remedial approach involves not so much a choice of one value over another, but an attempt within certain constraints to maximize both, the baseline or "undiluted" condition that can be used to identify violations is not a single kind of district but includes a range of district types. The optimal districting arrangement is likely to be one in which members of the minority group constitute between forty percent (the lower end of the strong plurality scale) and sixty-five percent (the largest supermajority district). Arrangements that consist largely of districts above or below these percentages should trigger further scrutiny.

However, not every district that deviates from the norm necessarily will be dilutive, so it is important to apply the "intensely local" or factsensitive scrutiny proposed in the preceding discussion. A sixty-percent district might be packed or fractured and a thirty-five percent district might actually be advantageous to minority voters. Judges and en-

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398 Id. at 414.

399 If, as the court’s opinion suggests, the 43% figure includes Asians and Hispanics, a coalition with these groups alone would not guarantee electoral victory. But if, as seems plausible, certain members of these groups were to form alliances with white voters, a coalition formed of black voters and this combined group might be able to secure electoral victory. Such a possibility would give black voters the option of coalescing with white voters (who did not combine with Asian or Hispanic groups) or forming a multiracial or multi-ethnic alliance.

400 See Monroe v. City of Woodville, 819 F.2d 507 (5th Cir. 1987). In this unusual decision, the Fifth Circuit reversed the district court’s grant of summary judgment for defendants on a § 2 claim. Id. at 508. The defendants had argued that, while the totality of the circumstances test established a violation, the plaintiffs were not entitled to relief because black voters
enforcement officials need to look carefully at the individual characteristics of suspicious districts: whether they are of an unusually large size, whether they include a politically divided nonminority population, or whether there are alternative arrangements that would increase the chances for interracial cooperation. Enforcement officials deciding whether to bring a section 2 claim should examine these features when they evaluate a suspicious district under the Senate factors. Plaintiffs attempting to establish a violation should offer evidence concerning the size and racial composition of a district in order to demonstrate that the sub-optimal character of the district perpetuates the effects of past discrimination. In the single member district context, such evidence would be evaluated as part of the totality of the circumstances inquiry. But, contrary to the approach propounded for multi-member districts in Gin-

constituted 60.5% of the voting-age population of the at-large district from which representatives were elected. Id. at 508-09. The Fifth Circuit held that the arrangement most conducive to "political opportunity" for blacks could not be determined by reference to any formula, and the fact that blacks appeared to enjoy a supermajority in the at-large district did not rule out the possibility of a violation. Id. at 510-11. The court remanded for further investigation of alternatives to the challenged arrangement, including single member districts. Id. at 511. The opinion is noteworthy not only for its focus on fact-specific flexibility in the finding of a violation, id. at 510 (citing Ketchum v. Byrne, 740 F.2d 1398, 1415 n.20, 1416 n.21 (7th Cir. 1984)), but also for its implicit suggestion that § 2 imposes an obligation to enhance—if not, indeed, maximize—minority political power in not simply a formal sense, but in a practical sense as well.

Large districts are generally thought to be disadvantageous to minority voters, both because they increase the costs of campaigning for minority candidates and because minority voters would be less likely to be outnumbered in a smaller district. In the government's recent challenge to the municipal districting arrangements of the city of Los Angeles, one issue raised by the Korean intervenors was the size of the city council districts. These intervenors, raising one of the few "ability to influence" claims to date, argued that the unusually large size of the districts impaired their ability to influence other voters within a particular district. See Korean Applicant's Memorandum of Points and Authorities in Reply to Applicant's Motion to Intervene as Plaintiffs at 8-9, United States v. Los Angeles, No. CV 85-7739 (C.D. Cal. settled Oct. 10, 1986). However, the case was settled before the district court had the opportunity to consider this claim. United States v. City of Los Angeles, No. CV 85-7739 (C.D. Cal. settled Oct. 10, 1986).

Political division in the white population would reduce the chances of intense racial polarization and increase the opportunities for even a comparatively small group of minority voters to exert influence by coalescing with others. One example of such nonminority division and minority coalescence that occurred not within a single district, but across an entire city, was the Chicago Democratic mayoral primary in 1983. Most white voters divided their support between Jane Byrne (45%) and Richard Daley, Jr. (44%), while 80% of the black voters, allied with 8% of the white voters, supported Harold Washington. While the race still generated substantial racial antagonism (as well as increased minority registration and turnout), divisions among the white population contributed to Washington's victory. See Alkalimat & Gills, supra note 171, at 98-102. A similar scenario would emerge if two or more minority groups with compatible political interests existed within the district in question. In that case a minority group of small size might be able to assert more influence than would first appear likely.

See text accompanying notes 371-74 supra.
there could be no hard and fast rule about the kind of showing that would be required. In finding a violation, as in devising a remedy, awareness of the interrelated character of representational and participa-
tional goals, and meticulousness in analyzing evidence specific to the challenged district should be the hallmarks of sound enforcement.

CONCLUSION

More than two decades ago, the Supreme Court took one of its most controversial steps into the political thicket with the articulation of the “one person, one vote” principle. Lured by the appeal of quantifiability, the Court identified equipopulous districts as one way to give content to this aspiration. This plausible beginning became a disappointing end as the Court, unwilling to attempt the investigation of political equality that might have qualified or supplemented the rule, insisted on increasingly rigid adherence to mathematical equality. The storm of criticism that greeted this development produced only halting and fragmentary modifications. It would be a grim irony if enforcement efforts under section 2 were to suffer a similar fate. The rigidification of the concept of “political opportunity” can be prevented by a reexamination of the political process, and an attempt to secure its remarkably varied benefits to the members of minority groups. An investigation of the ways that section 2 can promote participational, as well as representational, goals is long overdue.

404 See text accompanying notes 88-100 supra.
408 These cases mostly concerned state legislative reapportionment. See, e.g., Gaffney v. Cummings, 412 U.S. 735, 751 (1973) (Connecticut's apportionment did not violate equal protection clause merely because of “minor deviations from mathematical equality”); Mahan v. Howell, 410 U.S. 315, 328 (1973) (Virginia's reapportionment plan not unconstitutional on grounds that its maximum population percentage variation was not excessive and served valid state goal).