RUN-OFF ELECTIONS AND THE VOTING RIGHTS ACT: WHITFIELD V. THE DEMOCRATIC PARTY OF ARKANSAS

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INTRODUCTION

1990 marked the 25th anniversary of the Voting Rights Act of 1965.1 Long regarded as the nation's most successful civil rights statute,2 the Voting Rights Act and its amendments have brought the blessings of democracy to a generation of Americans. The Voting Rights Act has eliminated poll taxes, literacy tests, reshaped election districts, replaced many at-large election schemes with district elections and has helped eliminate other electoral structures which have historically suppressed minority electoral power and participation.3

Throughout the Old South, since the enactment of the original Voting Rights Act in 1965, most of the state-wide stalwarts of hardline segregation have been swept out of office and replaced with Governors and Senators of the "New South" who hold markedly more progressive racial attitudes. The political power of African Americans has even caused the few surviving political figures from the segregationist South to significantly alter their racial philosophies.

Perhaps Virginia is the most symbolic example of the revolutionary electoral progress for black candidates made possible in part by the Voting Rights Act. Once the seat of the confederate government, the Old Dominion elected Douglas Wilder first as its Lieutenant Governor, and then as the nation’s first elected black governor. The same year Doug Wilder won election to the Virginia Statehouse, the people of New York City elected their first black mayor, David Dinkins, to do what many call the "toughest job in America." In 1991, a record 7370 African Americans serve in elected office.4

In spite of the spectacular progress in the past quarter century,

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4. Id.; see also Williams, From Voting Rights to Economic Empowerment, 18 Focus, Aug. 1990, at 2.
Black, Hispanic, and Asian Americans are still under-represented in elected and appointed office. In many parts of the nation, impediments to minority electoral participation still remain. Some are remnants of past discrimination and others are new creations of subtle, quiet forms of disadvantage.

The United States Court of Appeals for the Eighth Circuit considered one of the most interesting, perplexing, and possibly most important Voting Rights cases in the modern era in *Whitfield v. Democratic Party of Arkansas*.[5] In *Whitfield*, the Eighth Circuit considered whether the Arkansas run-off primary law violated the Voting Rights Act. This Article examines that case and focuses on whether the Arkansas run-off election law violates section 2 of the Voting Rights Act of 1965. This Article concludes that while not the entire cause of discriminatory effect, the Arkansas run-off election law is an impediment to full electoral participation by black citizens of Phillips County, Arkansas in violation of Section 2 of the Voting Rights Act. Although the United States Supreme Court denied the Whitfields' petition for certiorari challenging the Arkansas run-off election law,[6] the question as to whether run-off elections violate the Voting Rights Act is far from answered and will certainly be before the Supreme Court in the near future.

**FACTS**

Sam and Linda Whitfield, along with several other black voters in Phillips County, Arkansas, challenged the run-off election laws in the state of Arkansas, arguing that the election statute violated the United States Constitution and section 2 of the Voting Rights Act of 1965.[7] Arkansas law requires a run-off or general nominating election when the party primary fails to nominate a candidate for office with more than 50% of the votes cast.[8] The United States District Court for the Eastern District of Arkansas held that the Arkansas law did not violate the United States Constitution or the Voting Rights Act.[9] The United States Court of Appeals for the Eighth Circuit affirmed the district court on the constitutional issue, but reversed and remanded the case with regard to the Voting Rights Act issue.[10] A motion for rehearing en banc was granted and, sitting en banc, the Eighth Circuit affirmed the original district court opinion

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5. 890 F.2d 1423 (8th Cir. 1989).
on an equally divided vote in a per curiam opinion. The Whitfields filed a petition for certiorari to the United States Supreme Court. The Supreme Court asked the Solicitor General to file an amicus curiae brief on behalf of the Justice Department. However, the Supreme Court denied the petition for certiorari on February 25, 1991.

THE DISTRICT COURT DECISION

On October 22, 1986 Sam and Linda Whitfield, along with several registered voters of Phillips County, Arkansas, sought to bring a class action suit on behalf of all black voters in Arkansas to challenge the state's run-off primary and run-off general election laws on the grounds that the statutes violated the fourteenth and fifteenth amendments to the United States Constitution and section 2 of the Voting Rights Act. Sam Whitfield had run for the office of County Judge, where he won by a plurality in the May primary, and Linda Whitfield similarly had won a plurality victory for the office of Circuit Clerk. Both lost in the subsequent run-off election when they each faced the white candidate who had finished second in their initial primary.

In contrast, according to the Whitfields' complaint, white candidates who have finished first in the preferential primary have always finished first in the run-off election. In 1986 and 1988, four black candidates finished first in the first primary and two finished second. In each instance, white candidates prevailed in the subsequent run-off election.

In his decision, Judge Eisele, the District Court Judge for the Eastern District of Arkansas, reviewed the history of the Arkansas primary run-off statute dating back to the 1930s. While questioning the wisdom of the run-off requirement being placed in the state constitution, out of reach of the legislature, the court was "convinced that there was no racially discriminatory purpose or intent in the primary run-off enactments" and that the laws were not instituted or

15. Id.
16. Id. at 9.
18. Id. at 9 n.5.
maintained for racially discriminatory purposes. The court noted that the primary run-off laws could not "at that time have had any discriminatory racial effect since blacks could not run for office, vote, or otherwise participate in Democratic primaries."20

The purpose of the primary run-off laws was, according to the court, "not a tenuous policy to conceal some racial animus but, rather, a 'bedrock ingredient of democratic political philosophy.'"21 The court maintained that the evidence in the Whitfield case and the literature revealed that the absence of the run-off system is not noticed by the citizenry until a "bizarre result" occurs. In a footnote, the court compared the situation to the Electoral College, where as long as the candidate elected "usually or almost always has a majority of the popular vote, people do not get too agitated about the system."22 The court went on to write that the "concept of 'majority-rule' dominates our national mind."23 In concluding its discussion of the dismissal of the constitutional challenge to the run-off rule, the district court noted that there are "compelling, obvious reasons, completely unrelated to race, for states to opt for run-off elections."24 In another footnote, the court further speculated that "under our republican form of government, the concept of plurality rule for general elections might itself be suspect constitutionally."25

In reviewing the statutory claim, the court held that "Plaintiffs must show a violation of [section 2], i.e., that the run-off procedure was imposed or applied by the State of Arkansas in a manner which results in a denial or abridgement of the right of any citizen to vote on account of race or color" and the plaintiffs "must show, among other things, some causal connection between the runoff requirement and the lack of 'minority electoral success.'"26

The district court noted that "in recent years there has been a much greater effort to register blacks," that black volunteer registrars have been deputized, and that "the registration level of voting age blacks in some of the contested areas is equal to, or approaching, that of voting age whites."27

The court also extensively quoted the work of Professor Harold Stanley which found in part that "whether run-offs are racially dis-

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20. Id.
21. Id.
22. Id. at 1373 n.2.
23. Id. at 1373.
24. Id. at 1373-74.
25. Id. at 1370 n.1.
26. Id. at 1375.
27. Id.
criminatory has yet to be determined. Firm evidence to address critical questions is lacking."28 After discussing several instances of electoral success among black Americans including the election of Douglas Wilder to the office of Lt. Governor of Virginia and Harold Washington to the office of mayor in Chicago, Professor Stanley was quoted by the court as finally concluding "that the runoff election is not racially discriminatory."29

While the court refrained from adopting the rationale of the United States Court of Appeals for the Second Circuit in Butts v. City of New York30 which ruled that section 2 does not apply to run-off elections for single member offices, the court expressed "serious doubt" whether "as a matter of law" the run-off election could be "deemed to be a device capable of making the political processes leading to nomination less open to participation by blacks than to others or capable of resulting in blacks having less opportunity than others to participate in the political process and to elect representatives of their choice."31 Stating that "the voting age populations of blacks and whites in Phillips County [are] equal for practical purposes", and the faith in the "one person, one vote rule," the court ruled that "as a matter of law, that the undisputed population figures . . . are not such as will permit the plaintiffs to challenge the primary run-off law of the state of Arkansas as a violation of Section 2 of the 1965 Voting Rights Act, as amended."32

The district court then proceeded to individually consider the "Senate Report Typical Factors" and noted that the evidence presented under the Senate factors would be "practically the same" if the plaintiffs were asking the court to invalidate a run-off or popular election challenge.33 With regard to the specific seven Senate Report factors, the court found: (1) "a long history of racial discrimination;"34 (2) "extreme racial polarization in voting in Phillips County;"35 (3) that while the State maintains "majority vote" requirements, Phillips County has not in the recent past "used any . . . discrimination-enhancing voting practices;"36 (4) no evidence of can-

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28. Id. at 1377 (quoting STANLEY, Runoff Primaries and Black Political Influence, in BLACKS IN SOUTHERN POLITICS 259 (1987)).
30. 799 F.2d 141 (2d Cir. 1985).
32. Id. at 1381.
33. Id. at 1382.
34. Id. at 1383.
35. Id.
36. Id. at 1383-34.
that blacks in Phillips County bear the effects of discrimination which are more "devastating" in Phillips County due to dire economic circumstances, but that the effects of past discrimination do not "in any legally significant way, hinder the 'opportunity' or . . . ability of blacks to participate effectively in the political process."38 (6) that there was no evidence of "significant, overt or subtle racial appeals," but that in recent years, race played a "central role" in county politics.39 (7) that "[n]o black candidate has been elected to any county-wide office" in Phillips County, although one black candidate was elected to office from a predominantly white jurisdiction within the county and that blacks have won justice of the peace races in single member districts.40 Regarding the two additional Senate Report factors, the court found that there was little evidence of the responsiveness of elected officials to the needs of black citizens. Concerning the "tenuousness" of the state purpose, the court again referred to Professor Stanley, and concluded that the "evidence suggests that plurality-win statutes or rules promote racial polarization and separation. Run-off provisions promote communication and collaboration among the various constituencies by which coalitions are built."41 The court implied that voter apathy was the true cause of lack of electoral success among black candidates.42

The court dismissed the Whitfields' constitutional claims because the plaintiffs did not show racially discriminatory purpose in the enactment or maintenance of the run-off statutes. Their statutory claims were dismissed because the court found that section 2 of the Voting Rights Act did not apply to the run-off election, given the demographics of Phillips County and the manner in which the run-off elections operated. The court also found that assuming section 2 would apply, there was insufficient proof that run-off elections resulted in blacks "having less opportunity . . . to participate in the political process or to elect candidates of their choice."43

THE EIGHTH CIRCUIT THREE JUDGE PANEL

The Whitfields' appeal of the district court decision was heard by a panel of three judges.44 Quoting the Supreme Court in Rogers v.

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37. Id. at 1384. Candidate slating is a practice in which the party endorses and/or supports a group or "slate" of candidates to run as the party's designees in an election.
38. Id.
39. Id. at 1385.
40. Id.
41. Id. at 1386.
42. Id. at 1385.
43. Id. at 1387.
44. Whitfield v. Democratic Party of Ark., 890 F.2d 1423 (8th Cir. 1989). Nebraska's Judge Beam wrote the majority opinion for the three judge panel. Judge
Lodge, the panel noted that:

in order for the Equal Protection Clause to be violated, 'the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose' [and that the] ultimate issue in a case alleging unconstitutional dilution of the votes of a racial group is whether the voting scheme under attack exists because it was intended to diminish or dilute the political efficacy of that group.46

The panel agreed with the district court on the Whitfields' constitutional claims, holding that:

discriminatory legislative intent has not been adequately established, given the time frame and political background of amendment 29. While the legislators may have enacted more recent statutes which continue to advocate primary runoffs, they were mandated to continue the use of runoffs by the state constitution and voter tendencies present in Arkansas. The district court's conclusion that discriminatory intent was not proved is not clearly erroneous.47

On the statutory claim, the panel majority rejected the contention of the Arkansas Democratic Party that section 2 of the Voting Rights Act does not apply to run-off elections. The majority decided that section 2 "was not meant to apply only to cases challenging at-large election schemes and districting matters."48 The panel noted that the legislative history and the United States Supreme Court emphasized the application of the law to "all voting rights discrimination," "to any phase of the electoral process," and any voting qualification or prerequisite to voting, or "any standards, practices or procedures."49 The panel majority also recognized that both the legislative history and the Supreme Court have "recognized majority vote requirements as 'potentially dilutive electoral devices.' "50

The panel majority rejected the district court contention that section 2 did not apply to Phillips County because the populations of voting age blacks and whites in Phillips County were essentially equal.51 The panel concluded as a matter of law "that a numerical

Hanson, a United States District Judge from Iowa sitting by designation joined in the opinion and filed a concurring opinion. Senior Circuit Judge Bright filed a dissent.

45. 458 U.S. 613 (1982).
46. Whitfield, 890 F.2d at 1425-26 (quoting Rogers, 458 U.S. at 617).
47. Whitfield, 890 F.2d at 1426-27.
48. Id. at 1427.
50. Whitfield, 890 F.2d at 1427-28 (quoting Thornburg, 478 U.S. at 56).
51. Whitfield, 890 F.2d at 1428.
analysis of the voting age population in a particular geographic area does not automatically preclude application of section 2 to a challenged voting practice used in that area.\footnote{Id.}

As to the district court's third rationale for rejecting the Whitfields' challenge, namely, that if section 2 were to apply, the plaintiffs had not proven that based on the totality of circumstances the run-off law resulted in discrimination against blacks in Phillips County, the panel majority also disagreed with the district court's analysis.\footnote{Id.} The majority concluded that rather than apply the "results" test required by the statute, the district court had used a "combined analysis of the discriminatory intent" and the "cause and effect relationship," circumventing "the true issue"—whether the run-off law results in the black citizens of Phillips County having "less of an opportunity to participate in the political process and elect representatives of their choice."\footnote{Id. at 1429.}

The panel majority reviewed the application of several factors delineated by the Senate\footnote{See infra notes 120-23 and accompanying text.} to be used in the determination of whether a section 2 violation had occurred. The panel disagreed with the district court conclusion that the Senate Report factors "more logically support proof relating to 'intent' issues than 'cause and effects' issues."\footnote{Whitfield, 890 F.2d at 1430 (quoting Whitfield, 686 F. Supp. at 1382).} The panel majority also concluded that "the factors set forth by the Senate Report are to be used primarily as proof of a section 2 violation under the results test."\footnote{Whitfield, 890 F.2d at 1430.} In addition, the panel majority rejected the contention that the Whitfields had not met their burden of proof of showing a "causal connection between the runoff requirement and the lack of minority electoral success" concluding that "but for" the run-off primary, four black candidates would have been the Democratic Party's nominee.\footnote{Id.}

Judge Beam explained that two factors established a "causal connection" between the run-off law and the diluted voting power of the minority citizens. The majority opinion stated:

First, the plaintiffs have proved that the majority vote requirement has impaired their ability to elect a candidate because blacks of voting age, although they are numerous in Phillips County, fail to turn out at the polls in numbers sufficient to meet a majority vote requirement. Second, the plaintiffs have established, through proof of Senate factors,
that the political climate of Phillips County has caused the low voter participation, because "[o]nce lower socio-economic status of blacks has been shown, there is no need to show the causal link of this lower status on political participation."59

The panel majority held that the district court had imposed an "improper burden of proof" as to causal relationships by discounting the effects of discrimination and ability to participate in the electoral process and by assuming that "lack of motivation caused lower turnout."60 The panel found that the evidence supported the conclusion that black voters in Phillips County were not apathetic. This conclusion was drawn because black turnout at some run-off elections did not drop off as significantly as white participation.61

In a footnote, the panel majority drew a distinction between the Whitfield case and the Butts case by noting that New York operated a closed primary system which allowed only registered party members to vote in their party primary while the Arkansas system permits "cross-over" voting, a point which was not addressed by the parties in briefs or oral arguments.62

Finding that a section 2 violation had been established, the panel remanded the case to district court to fashion a remedy, limited to within the borders of Phillips County, to correct the violation of the Voting Rights Act.

Concurring with the majority opinion, Judge Hanson concluded with "no doubt" in his mind that "the primary run-off requirement dilutes the votes of Phillips County blacks in a manner proscribed by the Voting Rights Act."63 However, he expressed concern about a remedy which fragments state law and suggested that racial difficulties in Phillips County can "only be truly 'solved' by time, patience, and most importantly, education."64

Senior Circuit Court Judge Bright rallied around the sanctity of majority rule and filed a dissent finding that "[r]un-off primaries serve a basic principle of representative government: majority rule."65 Expressing concern that plurality vote rules may encourage "racial polarization," the dissent noted that "none of the authority cited . . . supports a conclusion that section 2 applies to run-off primaries standing alone" and cited the Butts decision as agreeing with the

59. Id. at 1431 (quoting United States v. Dallas County Comm'n, 739 F.2d 1529, 1537 (11th Cir. 1984)).
60. Whitfield, 890 F.2d at 1431.
61. Id. at 1431.
62. Id. at 1432 n.3.
63. Id. at 1434 (Hanson, J., concurring).
64. Id. (Hanson, J., concurring).
65. Id. (Bright, J., dissenting).
district court.\textsuperscript{66}

The Eighth Circuit Court of Appeals granted the defendant's motion for a rehearing. Upon a rehearing en banc, before a ten judge panel, the Eighth Circuit Court of Appeals affirmed the district court decision by an equally divided vote in a per curiam opinion.\textsuperscript{67}

THE PETITION FOR CERTIORARI

On August 30, 1990 the Whitfields filed a petition for certiorari with the United States Supreme Court. The appeal was based solely on the issues relating to section 2. The petition posed the question of whether section 2 prohibits the use of a run-off primary requirement in a county where blacks constitute 47% of the voting age population; where black candidates who win the initial primary are always defeated in the run-off election by the white candidate who finished second; where black citizens were historically disenfranchised on account of race; and where blacks continue to suffer disproportionately from the legacy of past discrimination and where voting patterns are characterized by extreme racial bloc voting.\textsuperscript{68} The Whitfields also challenged the district court's per se rule that section 2 does not apply where "black citizens constitute a majority of the population but not a majority of the voting age population."\textsuperscript{69}

The United States Supreme Court asked the Solicitor General to file an amicus curiae brief on behalf of the Justice Department in the case.\textsuperscript{70} The amicus curiae brief of the United States advised against granting certiorari even though it acknowledged that the United States is challenging applications of majority vote requirements under Section 2 of the Voting Rights Act and has evaluated majority vote requirements under the preclearance provisions of section 5 of the Voting Rights Act.\textsuperscript{71} The Solicitor General cited the limited consideration of the issue by the lower courts, the present lack of substantial disagreement among the circuits, and the inability of the en banc court of appeals to issue an opinion as counseling against review.\textsuperscript{72}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1436-37 (Bright, J., dissenting).
\item Whitfield v. Democratic Party of Ark., 902 F.2d 15 (8th Cir. 1990).
\item Petition for Writ of Certiorari at 1.
\item Id. at ii. The Whitfields also asked that the court consider whether the state executive branch officials, who certify election results are proper parties for the plaintiffs to challenge on a violation of section 2. This issue is somewhat beyond the scope of this Article.
\item Brief for the United States as Amicus Curiae at 8-9, Whitfield v. Clinton (U.S. 1990) (No. 90-383).
\item Id. at 9.
\end{enumerate}
\end{footnotesize}
The Solicitor General averred that the district court in *Whitfield* had erred on the issue of standing, noting that the “district court was wrong to hold that black voters were too numerous in Phillips County to maintain a Section 2 challenge.”

The United States also expressed disagreement with the district court’s “reservations” about the applicability of section 2 to run-off elections. The Solicitor General noted, however, that the district court had addressed the Whitfields’ claims using the totality of circumstances test. The Solicitor General expressed “significant doubt” that the district court properly applied the totality of circumstances test to the *Whitfield* facts, but concluded that such a factual issue did not “warrant further review” by the Supreme Court. Furthermore, the United States suggested that since the only precedential opinion in the *Whitfield* case was the district court opinion, the issue would benefit from “‘further study’ in the lower courts ‘before it is addressed by... [the Supreme] Court.’”

The Supreme Court apparently agreed with the recommendations of the United States. Certiorari was denied on February 25th, with Justice Blackman voting to hear the *Whitfield* case.

In spite of the Supreme Court action, *Whitfield* merits careful review and study. The issue of section 2 of the Voting Rights Act and run-off elections is far from settled by the Supreme Court’s action on the Whitfields’ petition for certiorari. The Solicitor General appropriately noted that nothing in the Supreme Court’s decisions “preclude a finding that a majority vote rule, under the totality of the circumstances, may operate to dilute the vote of a protected class in violation of Section 2.” Sooner or later, the Supreme Court will confront this most interesting issue.

**BACKGROUND**

**PHILIPPS COUNTY, ARKANSAS**

Arkansas has had a long history of racial discrimination, a fact acknowledged in the *Whitfield* decisions by the district court and the Circuit Court Panel. In the past, literacy tests, poll taxes, segregated polling places, “white only” Democratic primaries, and at-large elections were used in Arkansas to produce a discriminatory election

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73. *Id.* at 10.
74. *Id.* at 10.
76. *Brief for United States* at 13.
Phillips County is one of the "delta" counties along the Mississippi River in the south central part of Arkansas. Blacks represent 16.3% of the total population in the state of Arkansas. According to the 1980 census, the population of Phillips County was 46.3% white and 52.94% black. However, the voting age population of the county is nearly reversed with 52.2% white and 47% black eligible voters.

White citizens of Phillips County are generally poor and black citizens are generally very poor. A special three judge district court panel which considered a state senate and house redistricting case affecting Phillips County noted the disparity between black and white citizens in the Arkansas Delta. In Phillips County for example, according to the 1980 census, per capita income was $6299 for white citizens and $2336 for black citizens. Just under 12% of white families and 53.6% of black families lived below the poverty level in Phillips County. In addition, 10.9% of the white families and 30.5% of the black families did not have a telephone and 9% of the white families and 42% of the black families did not own a car. In Phillips County, 58.3% of the white residents graduated from high school as compared to only 22.9% for black residents.

In terms of election practices, the district court in Whitfield maintained that "at least since 1965, there have been no legal barriers to black participation in the political processes of the state." The district court further noted that in "in recent years there has been a much greater effort to register blacks" and that "black citizens of Phillips County do not still face harassment or intimidation in registering, or in voting, or in running for office." The Eighth Circuit panel observed, however, that racial bloc voting is the "norm" in Phillips County and that "[n]o black candidate has been nominated for or elected to a county-wide or city-wide office or to a state legislative position from Phillips County since the turn of the century."

THE ARKANSAS RUN-OFF ELECTION LAW

In 1986 and 1988, four black candidates for county offices in Phil-

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78. Whitfield, 890 F.2d at 1424.
79. Id. at 1424.
80. Id. at 1424 n.1.
81. Id.
83. Id.
84. Whitfield, 686 F. Supp. at 1375.
85. Id.
86. Whitfield, 890 F.2d at 1424.
lips County won the initial primary election but failed to garner a majority in the general or run-off nominating election. The central issue in the Whitfield case is whether the Arkansas run-off election laws dilute the voting strength of black citizens in Phillips County in violation of section 2 of the Voting Rights Act.

Amendment 29 of the Arkansas Constitution states that only names of candidates nominated by a convention of an organized political party, by petition "or by a majority of all the votes cast for candidates for the office in a primary election shall be placed on the ballots in any election." The state law also requires a run-off election in the event a candidate does not receive a majority in the general election.

THE VOTING RIGHTS ACT SECTION 2: THE RESULTS TEST

The fifteenth amendment to the United States Constitution provides in part that 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."

Early efforts to protect voting rights of black Americans such as the Enforcement Act of 1870 proved largely unsuccessful against stubborn and entrenched racism, especially in southern states. Effective congressional activism on Civil Rights did not begin until the post-World War II era. In 1957, Congress enacted the Civil Rights Act which created the Civil Rights Commission and authorized the United States Attorney General to initiate actions to enforce citizens' rights to register and vote. The Civil Rights Act of 1960 required local and state officials to keep election records, gave the Attorney General the authority to inspect those records to determine whether there were "patterns and practices" of voting discrimination and to order the registration of citizens where such pattern or practice existed. In addition, federal courts could order the appointment of "voting referees" to register voters.

87. Id.
90. U.S. Const. amend. XV, § 1.
Landmark Civil Rights legislation followed the tragic assassination of President John F. Kennedy. A growing civil rights movement and sympathy for the Kennedy legislative agenda gave President Johnson the political leverage to defeat southern opposition and enact major Civil Rights legislation. With regard to voting rights, the Civil Rights Act of 196494 prohibited the discriminatory application of any tests or standards to minority voters, established a presumption of literacy, and expedited judicial procedures in voting rights cases.95

On the heels of the Civil Rights Act of 1964, the Voting Rights Act of 1965 added an administrative process to the case by case judicial enforcement of previous statutes.96 Jurisdictions which had employed “tests or devices” such as literacy, morals, character, or educational requirements as a precondition of voting and had less than 50% of the voting age population registered or voting in the 1964 election97 were required to “pre-clear” voting law changes with the U.S. Department of Justice.98 Jurisdictions could “bail out” of coverage after a five year period of good behavior.99 The Act also authorized the Attorney General to send Federal examiners to register voters, and election observers to monitor elections;100 prohibited the poll tax;101 and established criminal offenses for denying voting rights and for election fraud.102

The 1965 Act also included a provision, section 2, which was based on the fifteenth amendment. Section 2 provides in part that “[n]o voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color.”103

In 1970, the Congress updated the so-called “bail out” provisions, adjusted and extended the section 5 pre-clearance formula to include the 1968 elections, and lengthened the good behavior period to qualify for “bail out” to ten years. The law also extended the ban on

97. Id. at § 4.
98. Id. at § 5. This is commonly referred to as the pre-clearance provision of the Act.
99. Id. at §§ 4, 5.
100. Id. at §§ 6, 8.
101. Id. at § 10.
102. Id. at §§ 11, 12.
103. Id. at § 2.
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"tests and devices" for an additional five years and attempted to establish an eighteen year old voting age.\textsuperscript{104}

In 1975, the Congress again updated the pre-clearance formula, extended the good behavior period for "bail out" to seventeen years, added English-only balloting in certain jurisdictions to the list of prohibited "tests or devices" and made permanent the nationwide prohibition of "tests and devices."\textsuperscript{105}

Initially, litigation based on the Voting Rights Act focused on the application of the section 5 pre-clearance provisions. However, in 1980 the United States Supreme Court considered the application of section 2 to an Alabama at-large election law in \textit{City of Mobile v. Bolden}.\textsuperscript{106} The Court found that section 2 "was intended to have an effect no different from that of the Fifteenth Amendment itself" and that "action by a State that is racially neutral on its face violates the Fifteenth Amendment only if motivated by a discriminatory purpose."\textsuperscript{107}

The decision set off a firestorm in the Civil Rights community. Civil Rights organizations including the Leadership Council on Civil Rights and the NAACP maintained that the intent test in \textit{Bolden} represented a dramatic departure from the congressional intent\textsuperscript{108} of the Act as well as a departure from previous vote dilution cases such as \textit{White v. Regester}.\textsuperscript{109} While section 2 was permanent law, the "pre-clearance" provisions of the act were scheduled to expire August 6th, 1982. The \textit{Bolden} decision and impending sunset of the key provisions of the Act gave the Congress an opportunity to reassess section 2.\textsuperscript{110}

In 1982, the Congress extended the section 5 pre-clearance provisions; adopted new procedures to allow jurisdictions to "bailout" of the section 5 regime; extended language assistance provisions; added a section to govern assistance to the blind, the disabled, and those unable to read or write; and amended section 2.\textsuperscript{111}

In response to the \textit{Bolden} decision, members in both houses of Congress proposed legislation to amend section 2 to incorporate an

\textsuperscript{104} The United States Supreme Court ruled that the federal government could not mandate an eighteen year old voting age for state elections in \textit{Oregon v. Mitchell}, 400 U.S. 112 (1970). In response, the Congress passed and the states ratified the 26th Amendment. See U.S. CONST. amend. XXVI.


\textsuperscript{106} 446 U.S. 55 (1980).

\textsuperscript{107} Id. at 61, 62.


\textsuperscript{110} See 1981 CONG. Q. ALMANAC 415.

\textsuperscript{111} S. REP. NO. 417 at 2-3, 1982 U.S. CODE CONG. & ADMIN. NEWS at 178.
explicit "results" test, which would make it unnecessary to determine a jurisdiction's discriminatory intent in order to prove a violation. By June of 1982, with the enactment of the Civil Rights Amendments Act of 1982, Congress ultimately overturned the Bolden decision on the necessity to prove intent in a section 2 claim. Under the new section 2, however, intent could still be used to establish a violation of the Voting Rights Act.\textsuperscript{112}

The previous year, the House of Representatives had overwhelmingly approved the Voting Rights Amendments Act.\textsuperscript{113} The Senate was gridlocked by a filibuster on the motion to proceed to consideration of the legislation.\textsuperscript{114} Opponents charged that continuation of the pre-clearance provisions were unfair to southern states and that a section 2 results test would establish a right to proportional representation. A breakthrough came when Senator Robert Dole, with the support of Senators Charles Mathias and Edward Kennedy unveiled compromise section 2 language which melded the House "results" test with language from White v. Regester along with a proviso that nothing in the provision established a right to proportional representation. The new and present section 2 reads:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . 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: \textit{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.\textsuperscript{115}

In explaining the Dole-Kennedy-Mathias compromise, Senator Dole

\textsuperscript{112} Id. at 17-44, 1982 U.S. CODE CONG. & ADMIN. NEWS at 194-221.
\textsuperscript{114} See 1981 CONG. Q. ALMANAC 415 and 1982 CONG. Q. ALMANAC 373.
wrote that "it was imperative to make it unequivocally clear that plaintiffs may base a violation of Section 2 on a showing of discriminatory 'results'... If a voting practice or structure operates today to exclude members of a minority group from a fair opportunity to participate in the political process, the motives behind the actions of officials which took place decades before is of the most limited relevance."\(^{116}\) Regarding the proportional representation proviso, the Senator continued by stating that "[c]itizens of all races are entitled to have an equal chance of electing candidates of their choice, but if they are fairly afforded that opportunity, and lose, the law should offer no redress."\(^{117}\)

To further explain the new section 2, the Senate Judiciary Committee Report stated that under the "results" test:

the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than [make] a determination about the motivations which lay behind its adoption or maintenance. . . . Section 2 protects the right of minority voters to be free from election practices, procedures or methods, that deny them the same opportunity to participate in the political process as other citizens enjoy.

If as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice, there is a violation of this section.\(^{118}\)

The Senate Judiciary Committee further explained that a violation could be established by showing "a variety of factors, depending upon the kind of rule, practice, or procedure called into question."\(^{119}\) Drawing in part from the Fifth Circuit Court of Appeals case *Zimmer v. McKeithen*,\(^{120}\) the Committee listed the following seven typical factors which could establish a violation of section 2:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has


\(^{117}\) Id., 1982 U.S. CODE CONG. & ADMIN. NEWS at 364 (additional views of Senator Robert Dole).

\(^{118}\) Id. at 27-28, 1982 U.S. CODE CONG. & ADMIN. NEWS at 205-06.

\(^{119}\) Id. at 28, 1982 U.S. CODE CONG. & ADMIN. NEWS at 206.

\(^{120}\) 485 F.2d 1297 (5th Cir. 1973).
used unusually large election districts, *majority vote requirements*, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.\textsuperscript{121}

The Committee also identified two additional factors which have “probative value” as part of the evidence to establish a section 2 violation:

[1] 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; [and]
[2] 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.\textsuperscript{122}

For convenience, these factors will be referred to as the “7+2 Senate Report factors.” The Committee identified the above factors as often being the most relevant ones, but noted that “in some cases other factors will be indicative of the alleged *dilution*.”\textsuperscript{123}

On the Senate floor, opponents were successful in delaying action on the bill, but once the debate began in earnest, no amendments affecting section 2 were adopted and the House of Representatives adopted the Senate version of the Voting Rights Amendments Act without debate and by unanimous consent.

**VOTING RIGHTS ACT LITIGATION**

*Jeffer v. Clinton*

To put the *Whitfield* decisions into perspective, it is helpful to consider the ruling in a subsequent related case, *Jeffer v. Clinton*.\textsuperscript{124}

\textsuperscript{121} S. REP. NO. 417 at 28-29, 1982 U.S. CODE CONG. & ADMIN. NEWS at 206-07 (emphasis added).
\textsuperscript{122} Id. at 29, 1982 U.S. CODE CONG. & ADMIN. NEWS at 207.
\textsuperscript{123} Id. (emphasis added).
In that case, a special three judge district court ruled by a two to one vote that the Arkansas 1981 apportionment plan for State Assembly and Senate seats violated section 2 of the Voting Rights Act. 125

In Jeffers, the majority dismissed an argument of the defense which suggested that under the plain language of section 2, plaintiffs must show "two separate things: (1) that they have less opportunity to participate in the political process; and (2) that they have less opportunity to elect representatives of their choice." 126 The argument of the defense was based on the proposition that simply proving that there was an inability to elect representatives of their choice was not enough to win a section 2 case. The majority found that the argument failed to "reckon with the present effects of past racial discrimination, much of it official and governmental." 127 Citing Smith v. Clinton, 128 another Arkansas section 2 redistricting case, the majority took judicial notice of "a history of racial discrimination in the electoral process in Arkansas," making it unnecessary to prove this anew in each voting rights case and found the "the history of discrimination has adversely affected opportunities for black citizens in health, education, and employment. The hangover from this history necessarily inhibits full participation in the political process." 129

The majority held that a showing of less opportunity to elect candidates of their choice would establish a claim that there was less opportunity to participate. The majority explained that "in the context of section 2 . . . it is a combination of abilities (abilities to use the elective franchise) that we are comparing. If I can vote at will but never elect anyone, my political ability is less than yours. Elections, and winning them, are the whole point of voting." 130

Judge Eisele filed two dissenting opinions. The first opinion filed in response to the panel's decision to proceed on the merits of the case stated that the defense of laches should apply to the Jeffers case. The second opinion evaluated the merits of the Jeffers case and represented a virtual attack on the current application of the amended section 2 of the Voting Rights Act. Judge Eisele quoted extensively from Dr. Abigail Thernstrom's 1987 book, Whose Votes Count? Affirmative Action and Minority Voting Rights, a work which criticizes the 1982 section 2 amendments and maintains that ef-

125. Id. at 217. Circuit Judge Arnold, sitting by designation, wrote the opinion and was joined by Judge Howard. Judge Eisele, the District Judge in the Whitfield case, filed two dissenting opinions.
126. Id. at 204.
127. Id.
130. Id.
forts to give “maximum weight” to black ballots “implies an entitlement to proportionate ethnic and racial representation” and that “voting rights has become another immensely complex affirmative action issue.”  

Judge Eisele raised the republican form of government guarantee found in Article 4 of the United States Constitution as a limitation on section 2 cases, suggesting that the majority had overstepped its constitutional limits by the redistricting order and instead enforced “group affirmative rights” and in effect required proportional representation. The Eisele dissent also discussed the three judge panel determination in Whitfield and rhetorically asked, “are not some things ‘off limits’ or ‘non-negotiable’ in our political system?” 

The dissent engaged in a lengthy point by point discussion and rebuttal of the relevance of the Senate Report factors, essentially accepting the test put forward by the defense in Jeffers which would limit the application of section 2 only to cases where legal barriers to voting or registration must first be established. Judge Eisele concluded that:

[the courts have run amuck. They have ignored the clear language of Section 2 opting instead to search for some mandate in perceived legislative intent, improperly converting Section 2 into a mandate for proportional representation — directly contrary to congressional intent. Apparently, there is no one willing to say, “No, stop!” or even, “At least, think before you proceed down this path.”]

As an addendum to his dissent, entitled “The Eight Circuit Reversal in Whitfield: Same Problem; Same Result,” Judge Eisele reacted further to Judge Beam’s majority opinion in Whitfield, arguing that it turned the meaning of section 2 “on its head” converting an equal opportunity law into an “affirmative action” statute. He further suggested that courts have “elevated the Senate factors to statutory status — a status Congress did not give them.” 

In a separate opinion filed six months later the same three judge panel ruled on the plaintiffs’ constitutional challenge to the Arkansas

131. Id. at 227-28 (Eisele, J., dissenting).
132. Id. at 232 (Eisele, J., dissenting). Judge Eisele asked:
Are there any constitutional provisions which protect certain voting or election standards, practices or procedures . . . from effective challenge under Section 2? . . . [S]hould federal courts in handling Section 2 challenges be sensitive to potential constitutional limitations or problems beyond those contained in the Fifteenth Amendment? It is my view that they should be.

Id.

133. Id. at 233 (Eisele, J., dissenting).
134. Id. at 278 (Eisele, J., dissenting).
135. Id. at 285 (Eisele, J., dissenting).
The panel held that Arkansas had "committed a number of constitutional violations of the voting rights of black citizens" and that the state had "systematically and deliberately enacted new majority-vote requirements for municipal offices, in an effort to frustrate black political success in elections traditionally requiring only a plurality to win." As a remedy, the panel made any future majority vote requirement legislation subject to pre-clearance by the United States Justice Department and required that the 1990 reapportionment not take effect until plaintiffs had an opportunity to review and challenge the plan in court.

Citing the Eighth Circuit Court of Appeals en banc decision in Whitfield, the district court panel in Jeffers emphasized that the issue of whether run-off primaries reduce minority political opportunity in violation of section 2 was not before the court. The Jeffers majority did, however, agree with the district and circuit courts in Whitfield that the majority run-off election law in primary elections was not established or maintained for racial reasons.

With regard to general election run-off elections for municipal and county offices, instituted in 1973, 1975, 1983, and 1989 following the success of several black candidates in municipal and county elections, the majority did find constitutional violations. The majority observed:

Devotion to majority rule for local offices lay dormant as long as the plurality system produced white officeholders. But whenever black candidates used the system successfully — and victory by plurality has been virtually their only chance at success in at-large elections in majority-white cities — the response was swift and certain.

The panel concluded that the laws were an attempt to close off black political victory and were a "systematic and deliberate attempt to reduce black political opportunity" and replaced a "system in which blacks could and did succeed, with one in which they certainly [could not]."

In his dissent, Judge Eisele again invoked the republican form of government provision of the United States Constitution and identified the four relevant run-off statutes as "sacred ground" protected.

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136. Jeffers v. Clinton, 740 F. Supp. 585 (E.D. Ark. 1990). The first opinion dealing with the statutory issues was expedited because time was of the essence in light of the then impending 1990 elections. See Jeffers, 730 F. Supp. at 199.
138. Id.
139. Id. at 594.
140. Id. at 594-95.
141. Id.
142. Id. at 595.
from "any attack by our United States Constitution."[143] The dissent further speculated that at

some point in our national life ... the states will be required to operate their governments under majority rule principles to give meaning and validity to the 'one person-one vote' principle and to carry out the 'Republican Form of Government' guarantee, and to make clear for once and for all that The People Rule.[144]

Butts v. City of New York

The leading case which considers a section 2 challenge based solely on a run-off primary for a single member district is Butts v. City of New York.[145] In that case, the United States Court of Appeals for the Second Circuit overturned a district court decision declaring that the New York law requiring a run-off primary between the two highest vote getters for certain city elections where the covered candidate did not win 40% of the initial primary vote violated the equal protection clause of the fourteenth amendment to the United States Constitution and the Voting Rights Act.[146]

New York City adopted a 40% run-off primary rule in 1972 in the wake of the 1969 mayoral race when Mario Proccacino, a conservative "law and order" candidate, won the Democratic nomination for mayor with 33% of the vote.[147] The other candidates, Herman Badillo and Robert Wagner, split the vote of the party mainstream.[148] Proccacino lost the general election to Mayor John Lindsay, the nominee of the Liberal and Independent parties.[149] The legislation creating the 40% run-off rule was portrayed as a response to the "fluke" Proccacino nomination and won the support of all five black and hispanic assemblymen and Senator Garcia, an hispanic senator from New York City.[150]

The Reverend Calvin Butts and Ms. Digna Sanchez challenged the 40% run-off law as representatives of a class of black and hispanic voters in New York City.[151] After an eight day trial, with extensive evidence, the district court enjoined the operation of the 40% run-off law finding that the law violated section 2 of the Voting

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143. Id. at 610 (Eisele, J., dissenting).
144. Id. at 610-11 (Eisele, J., dissenting) (emphasis in original).
146. Id. at 151.
147. Id. at 143.
148. Id.
149. Id.
150. Id. at 144.
151. Id.
Rights Act and the fourteenth amendment to the Constitution. The district court applied the "totality of circumstances" test of the Voting Rights Act and found that the 40% run-off rule diminished the ability of minorities to participate in the political process. On the constitutional claim the district court found "ample" direct evidence of discriminatory intent.

On appeal, the circuit court addressed the constitutional claim first, ruling that the district court finding of discriminatory intent was "clearly erroneous." The circuit court criticized the district court for placing too much emphasis on the legislative statements made by the opponents of the bill and not sufficient emphasis on the statements made by the proponents of the bill. The court found that the 40% threshold, codified in the legislation, was related to the 33% victory margin of Proccacino and was not a "diabolic" effort to set the threshold above the combined strength of black and hispanic voters in New York.

On the voting rights claim, the majority stated that its "central disagreement with the district court's interpretation of the Voting Rights Act concerns the kind of electoral arrangements that can violate the Act." While recognizing that run-off requirements "can exacerbate the unfair effect of at-large voting for a multi-member body," the court could "not take the concept of a class's impaired opportunity for equal representation and uncritically transfer it from the context of elections for multi-member bodies to that of elections for single-member offices." The majority went on to say that there "can be no equal opportunity for representation within an office filled by one person."

The court stated that:

so long as the winner of an election for a single-member office is chosen directly by the votes of all eligible voters, it is unlikely that electoral arrangements for such an election can deny a class an equal opportunity for representation. . . . [A] run-off election requirement in such an election does not deny any class an opportunity for equal representation and therefore cannot violate the Act.

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152. Id. at 145.
153. Id.
154. Id. The district court concluded that the measure was really aimed at Herman Badillo's near victory in the 1969 mayoral race.
155. Id. at 145, 147-48.
156. Id. at 147.
157. Id. at 148.
158. Id.
159. Id.
160. Id. at 149.
The court concluded that the 40% run-off law did not trigger an analysis under section 2 of the Voting Rights Act because the "Act is concerned with the dilution of minority participation and not the difficulty of minority victory."161

As a second rationale, the circuit court held that the 40% run-off law had not "had any negative effect on any minority candidate," questioning in a footnote whether section 2 can be violated in the absence of a discriminatory result.162 As a final step, the court reviewed the district court application of the "objective factors" of the totality of circumstances test. The court stated that there was "slim proof" of past discrimination and only isolated incidences of racial appeals. The court recognized mitigating factors such as mail registration which encouraged minority voter participation and minority electoral success. The court found that there was a legitimate state motive behind the run-off scheme and therefore characterized the district court's finding of discriminatory intent to be clearly erroneous.163 The court concluded by writing that "even if the objective factors test were to be applied, we note that we have serious doubts regarding the district court's finding that the run-off law violates Section 2 when considered in the totality of circumstances."164

Judge Oakes dissented, writing that he would have found that the law had a discriminatory effect and therefore violated section 2 of the Voting Rights Act.165 After reviewing the Senate Report factors, the dissent noted that "the district court's findings as to these points . . . speak for themselves, are supported by the evidence, and cannot be deemed clearly erroneous."166 Because the district court findings were not clearly erroneous, Judge Oakes stated that he was "obliged to approach the section 2 question from the factual premises of the district judge."167 That left him with the "interesting and difficult" question of whether the Voting Rights Act applied only "to at-large elections or elections for multi-member bodies, or can there be 'less opportunity . . . to participate in the political process' when that process involves an election for a single-member office?"168

The dissent drew the distinction between the majority's emphasis on "minority opportunity for representation" and the emphasis of the Senate Report on minority opportunity to participate, noting that

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161. Id.
162. Id. at 149 n.5.
163. Id. at 151.
164. Id.
165. Id. (Oakes, J., dissenting).
166. Id. at 153 (Oakes, J., dissenting).
167. Id. at 154 (Oakes, J., dissenting).
168. Id. at 154-55 (Oakes, J., dissenting).
nothing in the legislative history of the Voting Rights Act indicated an intent by Congress to rule out the consideration of run-off primaries in section 2 cases. In conclusion, the Butts dissent found that the New York 40% run-off primary law "discourage[s] minority candidates from seeking office" and in so doing "lessens the chances for success of those who choose to run" in violation of section 2 of the Voting Rights Act.

DISSCUSSION

The Whitfield case is perplexing because it seemingly pits two highly held American values — "majority rule" and "equal opportunity" — against each other. It is well settled that a run-off primary in conjunction with a multi-member at-large voting scheme can be vulnerable to a section 2 challenge. In Whitfield, the run-off election alone is the challenged structure. In redistricting cases, courts can compare alternative voting plans to determine whether one plan dilutes minority voting power when compared to other options. In an at-large election case, the court can compare the at-large scheme to a districting scheme to determine whether there is vote dilution.

The run-off election law in a single member district is somewhat more difficult to conceptualize because, as district court Judge Eisele pointed out in Whitfield, the presence or absence of the run-off alone, of course, may affect the number of candidates seeking a particular office.

Ten states, all southern, including Arkansas, have run-off election laws. On August 9, 1989 the United States Department of Justice filed suit against the state of Georgia challenging its run-off election law under the Voting Rights Act.

The cases of Whitfield, Butts v. City of New York, and Jeffers v. Clinton raise important questions about the scope and applica-

169. Id. at 157 (Oakes, J., dissenting).
170. Petition for Writ of Certiorari at 5, Whitfield v. Clinton (U.S. Aug. 31, 1990) (No. 90-383). The states with run-off primaries are Alabama, Arkansas, Florida, Georgia, Louisiana, Mississippi, North Carolina, South Carolina, Texas and Oklahoma. Portions of all of these states are subject to pre-clearance under § 5. The Louisiana system is very different from other states with run-off primaries. In Louisiana there is an open primary where Democrats and Republicans compete in a single primary election. If no candidate scores 50% there is a run-off general election between the first and second place candidates. In these cases, two Democrats or two Republicans or a Republican and Democrat can face each other in the general election. If a candidate scores 50% in the primary election, that candidate is elected. Therefore, in Louisiana, the run-off primary is the general election.
172. 779 F.2d 141 (2d Cir. 1985).
tion of section 2, the appropriate regard for the 7+2 Senate Report factors, as well as the application of the "totality of circumstances" test.

THE SCOPE OF SECTION 2

The majority in Butts ruled that section 2 did not apply to single member districts or to cases where the challenged electoral device has not yet had a negative effect on a minority candidate. Similarly, the district court in Whitfield dismissed the Whitfields' challenge to the general election run-off rules because there had not yet been a black candidate injured by those rules.

As Judge Beam appropriately observed in the Whitfield panel decision, the clear legislative language and history of section 2 do not indicate any intention to make any electoral requirements immune from the statute as a matter of law. Virtually any voting device is within the scope of section 2 consideration. The statute speaks of "no voting qualification," "prerequisite," "standard," "practice," or "procedure" being imposed which results in a denial or abridgement of the right to vote. Furthermore, the Senate Committee Report clearly states that section 2 prohibits "all voting rights discrimination."

With specific regard to run-off elections, the legislative history frequently references majority vote requirements, and the United States Supreme Court and others have identified majority vote requirements as being a "potentially dilutive" electoral device.

The contention by the Butts majority and the Whitfield district court that section 2 cannot apply to cases where a minority candidate has not yet been harmed by the challenged procedure inappropriately narrows the scope of section 2. Laying aside the evidentiary burden involved a violation can, in theory, be shown even in cases where a minority member has not sought election. In Thornburg v. Gingles, the first post-amendment section 2 case considered by the Supreme Court, Justice Brennen observed that the "race of the candidate per se is irrelevant to racial bloc voting analysis. . . . Under 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important"

174. Butts, 779 F.2d at 148, 149 n.5.
and "only the race of the voter, not the race of the candidate, is relevant to vote dilution analysis."179

The district court in Whitfield appears to have moved prematurely to dismiss the plaintiffs' challenge to the Arkansas general election run-off law, particularly in light of the finding by the three judge district court majority in Jeffers that the Arkansas municipal and county general election statutes were "passed for the purpose of suppressing black political success."180 Likewise, the majority view in Butts that the New York run-off rule did not have any "negative effect on any minority candidate"181 runs contrary to the Gingles analysis because it places primary attention on candidates rather than voters.

Similarly, a relatively equal population of black and white voters should not create a per se rule against the application of section 2 to a challenged electoral law. The statute does not speak of applying solely to relative minorities in a particular jurisdiction; rather, it speaks of "denial or abridgement of the right [to vote] of any citizen . . . on account of race or color."182 If the run-off election results in the electoral system being less open to blacks than to whites, or if the challenged system dilutes black voting strength, then it should be irrelevant whether black citizens comprise a statistical majority in Phillips County. The central issues in section 2 cases concern whether or not the electoral system is open, or whether the system dilutes voting strength as a result of the interaction of the challenged device with the local circumstances.

Just as there are no per se violations of section 2, there should be no per se exclusions from the scrutiny of section 2.183 Determining that an electoral law is vulnerable to a section 2 challenge, however, does not mean that it is easy to establish a violation using the "results" test.

APPLYING SECTION 2

The Supreme Court viewed the application of the amended section 2 for the first time in Gingles, a 1986 case challenging a North Carolina legislative districting plan. The court noted that the Senate Committee Report espoused a "flexible, fact-intensive test" limited in three ways: (1) there may not be per se violations; plaintiffs "must

179. Id. at 67-68 (emphasis in original).
181. Butts, 778 F.2d at 149.
demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process;" (2) an allegedly dilutive electoral device and lack of proportional representation alone does not establish a violation and (3) racial bloc voting cannot be assumed, it must be proved.\textsuperscript{184}

According to the court in \textit{Gingles}, the "essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives."\textsuperscript{185}

The Senate Committee Report explained that the new section 2 was designed to "make clear that plaintiffs need not prove a discriminatory purpose . . . in order to establish a violation."\textsuperscript{186} Under the amended section 2, plaintiffs need either to prove intent or "show that the challenged system or practice, in the context of all the circumstances in the jurisdiction in question, results in minorities being denied equal access to the political process."\textsuperscript{187}

An early Supreme Court vote dilution case quoted by the Senate Committee Report, \textit{Reynolds v. Sims},\textsuperscript{188} gives insight into the concerns of the Congress in amending section 2. The Court in \textit{Reynolds} noted that:

\begin{quote}
[t]here is more to the right to vote than the right to mark a piece of paper and drop it in a box or the right to pull a lever in a voting booth. The right to vote includes the right to have the ballot counted . . . . It also includes the right to have the vote counted at full value without dilution or discount . . . . That federally protected right suffers substantial dilution . . . [where a] favored group has full voting strength . . . [and] [T]he groups not in favor have their votes discounted.\textsuperscript{189}
\end{quote}

The Senate Committee elaborated that the standard under the new section 2 is "whether minorities have equal access to the process of electing their representatives. If they are denied a fair opportunity to participate . . . the system should be changed, regardless of what may or may not be provable about events which took place decades ago."\textsuperscript{190}

The difficulty with the \textit{Whitfield} case is the question of whether

\begin{footnotesize}
\begin{enumerate}
\item 184. \textit{Gingles}, 478 U.S. at 46.
\item 185. \textit{Id.} at 47.
\item 186. \textit{S. REP. No. 417} at 27, 1982 U.S. CODE CONG. & ADMIN. NEWS at 205.
\item 187. \textit{Id.}
\item 188. 377 U.S. 533 (1964).
\item 189. \textit{Id.} at 555 n.29 (quoting South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).
\item 190. \textit{S. REP. No. 417} at 36, 1982 U.S. CODE CONG. & ADMIN. NEWS at 214.
\end{enumerate}
\end{footnotesize}
the run-off election law operated to dilute minority voting strength. Justice O'Connor, in her concurring opinion in Gingles, noted that:

Although § 2 does not speak in terms of "vote dilution," . . . proof of vote dilution can establish a violation . . . . The phrase "vote dilution," in the legal sense, simply refers to the impermissible discriminatory effect that a multimember or other districting plan has when it operates "to cancel out or minimize the voting strength of racial groups."¹⁹¹

In most cases, courts have looked to the 7+2 Senate Report factors to prove vote dilution.

THE APPROPRIATE WEIGHT FOR THE SENATE COMMITTEE REPORT

The majority in the Whitfield circuit court panel decision concluded that the Senate report factors are "to be used primarily as proof of a section 2 violation."¹⁹² Judge Eisele in his Whitfield opinion and in his dissents in Jeffers challenged the relevance of the Senate report factors, maintaining that proof of the factors "have no real or scientific relevance to the particular challenge being made under Section 2."¹⁹³

It is appropriate to consider the extent to which Congress relied on material in committee reports, and necessarily the extent to which any court should rely on such legislative history. While by and large committee reports represent an excellent source of insight into true congressional intent, it is important to remember that committee reports are prepared after a committee completes action on a reported bill, that they are occasionally unavailable until immediately before or in some cases contemporaneous with House or Senate consideration of a reported bill and, most importantly, committee reports do not generally reflect changes which may have been made by amendments considered on the floor of the House and Senate or floor statements, or colloquies which may contradict or clarify the intent expressed in the report.¹⁹⁴

A careful review of the Senate debate on the Voting Rights Amendments Act leads to the conclusion that the committee report cannot and must not be easily dismissed. The committee report is very informative for several reasons: there were no significant amendments adopted in the Senate which affected the language of section 2; discussion of the report was very much a part of the Senate

¹⁹². Whitfield, 890 F.2d at 1430.
¹⁹⁴. Where there is a conference between the House and the Senate on a bill, the Statement of Managers, often referred to as the Conference Report, is another critical source of legislative intent. However, the same caution should apply.
debate; opponents and proponents frequently referred to the report and quoted extensively from the report; and the House of Representatives approved the Senate bill without amendment or conference.

The Senate Committee Report was very much at issue during the Senate debate. Early in the debate, Senator Jesse Helms, when filibustering the motion to proceed to the Voting Rights Act Amendments, taunted his colleagues by stating that "there [were] not 10 Senators, if that many, who have read the report."\(^{195}\)

In spite of Senator Helms’s rhetorical assertion, there can be no doubt that the Congress was placed on full notice of the importance and relevance of the Committee Report. For example, Senator Kennedy on the Senate floor stated that:

> it is imperative for those judges who read the legislative history of this particular measure to understand, that this proposal, which is known as the Mathias-Dole-Kennedy proposal speaks for itself. If there is any question about the meaning of the language, we urge the judges to read the report for its meaning or to listen to those who were the principal sponsors of the proposal, not to Senators who fought against this proposal and who have an entirely different concept of what a Voting Rights Act should be.\(^{196}\)

While Congress did not intend to elevate the Senate factors to statutory status, the Congress certainly did intend for the Senate report to give guidance as to the specific meaning and application of the statutory language.

The Senate factors are faithfully recited in many if not most amended section 2 voting rights cases; however, courts would err to attempt to apply the Senate Report factors in a mechanical manner or to limit their investigation solely to the 7+2 Senate Report factors. The committee report specifically warned that "[w]hile these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution . . . . [T]here is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other."\(^{197}\) Furthermore, in a footnote, the Committee explained that the factors should not be used as a "mechanical 'point counting' device" and that "the failure . . . to establish any particular factor, is not rebuttable evidence of non-dilution."\(^{198}\) The report directs courts to exercise their "overall judgement," based on whether minority voting


\(^{196}\) Id. at S. 13675 (June 15, 1982) (statement of Sen. Kennedy).

\(^{197}\) S. REP. NO. 417 at 29, 1982 U.S. CODE CONG. & ADMIN. NEWS at 207.

\(^{198}\) Id. at 29 n.118, 1982 U.S. CODE CONG. & ADMIN. NEWS at 207 n.118.
strength is "minimized or canceled out."\textsuperscript{199}

A Totality of Circumstances Test

Having frequently referred to the amended section 2 as creating a "results" test, it is more appropriate to describe section 2 as fostering a "totality of circumstances" analysis. The object of section 2 is an electoral system which is equally open to all citizens regardless of race. The 7+2 Senate Report factors essentially measure the overall openness of a political system. The Senate factors do not necessarily establish the causal relationship between a challenged electoral structure and the lack of openness.

When the district court in \textit{Whitfield} assumed that Section 2 would apply, Judge Eisele concluded that the Senate Report factors were a "distraction" and "have no tendency to prove, or disprove" the proposition that run-off elections make the political process not equally open to participation.\textsuperscript{200} At one point when considering changes in polling places, the district court asks "What does that tell us about the effect of run-off elections?" and answers, "Nothing."\textsuperscript{201}

A court, however, is not asked to look solely at the challenged electoral device. As the Court in \textit{Gingles} advised, the essence of a section 2 claim is that the challenged electoral law \textit{interacts} with local conditions to produce an inequality of opportunity.\textsuperscript{202} The totality of circumstances test asks the court to look at both the challenged procedure and its interaction with local factors. The Senate Report, quoting \textit{White v. Regester}\textsuperscript{203} explained, "the question whether the political processes are 'equally open' depends upon a searching practical evaluation of the 'past and present reality.'"\textsuperscript{204} To answer Judge Eisele's question as to what changing polling places tells about the effect of run-off elections, where there are impediments to participation, such as frequently changing polling places, the electoral device interacts with the uncertain polling locations making it difficult enough to win one election, let alone win two elections.

If a court avoids a careful study of the interaction of the challenged procedure with the local conditions and history, the purpose of section 2 is undermined. Congress called on the courts to use their "overall judgement" to examine the local impact of election laws, devices, and structures. Certainly if it were clear to Congress that any

\begin{footnotesize}
\begin{itemize}
\item 199. \textit{Id.}
\item 201. \textit{Id.} at 1385.
\item 202. \textit{Gingles}, 478 U.S. at 47.
\item 203. \textit{412 U.S. 755 (1973).}
\end{itemize}
\end{footnotesize}
given procedure in and of itself diluted voting strength, it would certainly have prohibited that procedure just as it prohibited poll taxes and literacy tests. Congress wanted the courts to conduct an intensely local factual finding.

In conducting the examination, courts should look to "pro and con" factors when evaluating the "totality of circumstances." During the Senate debate, Senator Howell Heflin, former Chief Justice of the Alabama Supreme Court, stated that Senator Dole's section 2 compromise allowed "for an equitable decision based on a multitude of factors involved in the present and past practices within a community [which] . . . has a now application but allows for consideration of yesterday factors as well as present good faith efforts to remedy past mistakes if the yesterday factors touch on the new result."

In Jeffers, Judge Eisele's dissent quotes the court's conclusion in Gingles that the Senate Report factors "are supportive of, but not essential to, a minority voter's claim." Judge Eisele concluded that "evidence relating to these factors cannot alone support a vote dilution claim." A more appropriate conclusion would be that failure to prove the Senate Report factors alone will not end a claim, and that in some cases proof of all Senate factors may not necessarily prove a claim. Again, what is needed is a careful examination of the local conditions and the interaction of the challenged device with those conditions.

In Whitfield, the district court apparently looked to the Senate factors to provide a causation test. The Senate Report factors were meant to be a barometer of electoral openness, not a mathematical equation for causation. The electoral process is a complex web of interactions. Electoral systems consist of legal structures, customary practices, and behavioral actions and reactions. No thread alone weaves an open or closed electoral system. Certainly, plaintiffs must establish that there is a causal relationship between a challenged electoral law and the impermissible discrimination in the system; however, if plaintiffs were required to show that the challenged device alone causes a lack of electoral openness or even a lack of electoral success, as Judge Eisele suggested, few if any section 2 cases could be proved. Pursuant to the rational of Gingles, a showing of interac-

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205. See supra notes 107-19 and accompanying text.
206. 128 Cong. Rec. S. 14135 (June 17, 1982) (statement of Sen. Heflin). The Senator did suggest that a court could take into account "an apathetic approach toward exercising the right to vote in some communities." Id.
tion which produces dilution should be sufficient to establish a violation of the Voting Rights Act.

Since a challenge to the run-off election alone in a single member district does not fit nicely into the test for multi-member districting set forth in Gingles, it may be useful to look at the application of section 2 in a given case as posing two questions: (1) based on objective factors, is the electoral system equally open to all citizens regardless of race? and (2) does the challenged device interact with local facts or law characteristics to dilute minority vote strength in a way not fully compensated by other mitigating factors?

APPLYING THE "TOTALITY OF CIRCUMSTANCES" TEST TO Whitfield

Part One: Openness

The district court in Whitfield essentially found that five of the seven Senate Report Factors had been established. Perhaps the most important factor discussed by the district court, was the finding of "extreme racial polarization in voting in Phillips County."209

The United States Court of Appeals for the Eleventh Circuit identified racial bloc voting as the "keystone of a [vote] dilution case."210 The court also quoted the Fifth Circuit Court of Appeals in observing the obvious importance of racial bloc voting because "in the absence of racially polarized voting, black candidates could not be denied office because they were black."211 The Senate Committee Report advised that "[i]n the context of such racial bloc voting, and other factors, a particular election method can deny minority voters equal opportunity to participate meaningfully in elections."212

In Rogers v. Lodge,213 the United States Supreme Court noted that "[v]oting along racial lines allows those elected to ignore black interests without fear of political consequences, and without bloc voting the minority candidates would not lose elections solely because of their race."214 Accordingly, the finding of racial bloc voting should weigh heavily in the "totality of circumstances."

The district court's contention in Whitfield asserting that, aside from the majority vote rules, Phillips County had not used "any discrimination-enhancing voting practices," is undermined by a finding in the Jeffers case. The court in Jeffers found that section 2 of the

210. United States v. Marengo County Comm'n, 731 F.2d 1546, 1566 (11th Cir. 1984).
211. Id. (quoting Nevitt v. Sides, 571 F.2d 209, 223 n.16 (5th Cir. 1978)).
212. S. REP. NO. 417 at 33, 1982 U.S. CODE CONG. & ADMIN. NEWS at 211.
214. Id. at 623.
The Voting Rights Act was violated by the state legislative redistricting practices in areas with black populations, including Phillips County.\textsuperscript{215} The majority in \textit{Jeffers} specifically found that in the 1986 primary election a very large polling place in the black community was moved to another location without giving personal notice to voters or posting notice of the change on the door of the old polling place. The only notice was published in the newspaper which was of little help to those who did not subscribe to the paper or were unable to read. While the \textit{Jeffers} majority did not find a racially discriminatory purpose, it did find the action to be insensitive to poor voters.\textsuperscript{216} Evidence at trial in \textit{Whitfield} indicated that at one 98% black precinct, polling places were changed five times in two years.\textsuperscript{217}

Judge Eisele's opinion in \textit{Whitfield} dismissed the Senate Report factors and focused on causation. The district court implied that apathy “frustration, futility or ennui” was the reason why black community lacked electoral success, rather than the run-off election law.\textsuperscript{218} Apathy can certainly be considered; however, given the long history of electoral discrimination, the perceived “apathy” factor in the \textit{Whitfield} case was more likely the fruit of past discrimination. Judge Beam, writing for the three judge panel in the \textit{Whitfield} appeal, rebutted the apathy charge by noting that white participation in the run-off election dropped more significantly than did black voter participation.\textsuperscript{219} It is just as plausible that if there were apathy and frustration in Phillips County, it was due to the fact that the electoral structure operated to guarantee victory for white candidates. There was evidence in the \textit{Whitfield} case which suggested some misunderstanding among black voters as to the significance of a plurality win in the primary election. The confusion lead to a reaction among others that voting would be futile because the “white folks” were just going to take the election away from the black plurality victors.\textsuperscript{220} The essential purpose of the Voting Rights Act was to make black votes count and to eliminate the very frustration, futility, and ennui produced by a system closed to full minority participation.

The findings of the \textit{Jeffers} majority coupled with the Senate Committee Report factors support the conclusion that the political system in Phillips County, Arkansas was not, and currently is not, equally open to minority participation. The next relevant question to

\textsuperscript{215} \textit{Jeffers}, 730 F. Supp. at 217.
\textsuperscript{216} \textit{Jeffers}, 740 F. Supp. at 595.
\textsuperscript{218} \textit{Whitfield}, 686 F. Supp. at 1375, 1384.
\textsuperscript{219} \textit{Whitfield}, 890 F.2d at 1431.
\textsuperscript{220} Petition for Writ of Certiorari at 19 n.8.
ask: do the majority vote requirements, which are part of the electoral system, interact with local conditions in a way that dilutes minority voting strength in Phillips County?

Part Two: Interaction, Dilution and Mitigation

The interaction and causation elements are the most perplexing aspect of the Whitfield case. The struggle is between Judge Beam's conclusion that, but for the run-off election, black candidates in Phillips County would have been the Democratic nominees for county offices, and Judge Eisele's faith in the run-off election protecting a fundamental right of majority rule.

Judge Eisele contended that the existence of the run-off election itself would influence the number of candidates running. There is no guarantee that fewer white voters will run in Phillips County if the run-off is eliminated. Absent some convincing scientific rather than speculative evidence, the uncertainty of change should not be weighed in the balance. Both speculations cancel each other out. However, the fact that the system has worked to prevent the nomination of black candidates in two election cycles does at least establish a causal connection.

Where there is an open system, a run-off election can operate to advance legitimate public interests without diluting minority voting strength. In Nebraska, for example, following the 42 vote victory of Governor E. Benjamin Nelson in the Democratic primary, it was suggested that Nebraska consider instituting a run-off primary.221 Given Nebraska's history, it is unlikely that if such a statute were enacted, it would be vulnerable to a section 2 attack, primarily because the near victory of Gene Crump, a black candidate for Attorney General, dispels any concern about racial bloc voting given Nebraska's relatively small minority population.

Where there is racial bloc voting combined with a history of racial discrimination, a run-off election can operate in different manner then in an open electoral situation. Judge Eisele suggested in Whitfield and Jeffers that run-off elections perpetuate the principle of one person, one vote. More accurately, run-off election laws essentially create a system of one person, two ballots. Theoretically, a candidate can receive the highest number of ballots cast between the primary and run-off elections and lose because he or she did not receive the highest number of ballots in the run-off election. The evil of racial bloc voting, is that individual candidates seemingly become irrelevant to the election and there are only white and black votes. In a case

221. Omaha World-Herald, June 25, 1990 at 9. These suggestions seem primarily related to the arduous ordeal of Nebraska's antiquated recount procedures.
like *Whitfield*, virtually all the black ballots count once in the election cycle, because the single black candidate advanced to the run-off. A significant number of white votes count twice, because all the white votes which went to candidates other than the white run-off candidate can now go to the surviving white candidate. Viewing the primary as a cycle rather than two single elections, the vote diluting potential of the run-off is clear where there is racial bloc voting.

The 1986 Election Cycle

<table>
<thead>
<tr>
<th></th>
<th>Preferential Primary</th>
<th>Run-off Election</th>
<th>Total Ballots</th>
</tr>
</thead>
<tbody>
<tr>
<td>County Judge</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>A.Y. &quot;Al&quot; Gordon</td>
<td>3280</td>
<td>+ 4599</td>
<td>= 7879</td>
</tr>
<tr>
<td>Kenneth Stoner</td>
<td>3146</td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Sam Whitfield</td>
<td>3406</td>
<td>+ 3340</td>
<td>= 6746</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>9832</strong></td>
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<td><strong>7939</strong></td>
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<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Edith Whitted</td>
<td>2168</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Alice Kelly Johnson</td>
<td>1581</td>
<td></td>
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</tr>
<tr>
<td>Wanda McIntosh</td>
<td>2352</td>
<td>+ 4473</td>
<td>= 6825</td>
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<tr>
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<td>3546</td>
<td>+ 3449</td>
<td>= 6995</td>
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<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td>*Marvin Jarrett</td>
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<tr>
<td>Kay Benz</td>
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<td><strong>TOTAL</strong></td>
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<tr>
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<td>DeWitt F. Aebly</td>
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<tr>
<td>Ronald Rose</td>
<td>1133</td>
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<tr>
<td>Ken Becker</td>
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<td>+ 4103</td>
<td>= 7009</td>
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1988 Election Cycle

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<th>Run-off Election</th>
<th>Total Ballots</th>
</tr>
</thead>
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<td></td>
</tr>
<tr>
<td>Kenneth Stoner</td>
<td>2083</td>
<td>+ 4839</td>
<td>= 6922</td>
</tr>
<tr>
<td>*Sam Whitfield</td>
<td>3465</td>
<td>+ 3439</td>
<td>= 6904</td>
</tr>
<tr>
<td>Jim Howe</td>
<td>2059</td>
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<td></td>
</tr>
<tr>
<td>Laymon Piercy</td>
<td>1670</td>
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<td></td>
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<tr>
<td><strong>TOTAL</strong></td>
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<tr>
<td>Circuit Clerk</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Wanda McIntosh</td>
<td>5237</td>
<td></td>
<td></td>
</tr>
<tr>
<td>*Linda Whitfield</td>
<td>3942</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>9179</strong></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

* = Black candidate

In 1986, Linda Whitfield and Mary Helen Stephens both received more ballots between the two elections than the victor under the run-off primary. Mary Helen Stephens also received more votes in the first election than the winning total in the run-off election.

Source: Kay Benz, Phillips County, Arkansas County Clerk.

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222. In *Whitfield*, it is a question of black and white votes. In a generic sense it is a question of dominant and subordinate votes.
The Whitfield petition for certiorari maintains that due to racial bloc voting, white politicians in Phillips County were able to conduct a white primary among white voters in the first election with the white candidate able to attract all the white votes in the run-off election to defeat the black candidate. John Dunne, the Assistant United States Attorney General for Civil Rights, characterized a run-off election by stating that a run-off election is "really an electoral steroid for white candidates" giving "white candidates an extraordinary power" and having "a demonstrably chilling effect on the intent and willingness of blacks to be candidates for office."224

A long history of discrimination in past elections will discourage minority participation. That, of course, is the purpose of electoral discrimination. Past discrimination can explain lower voter registration and turn out. The Whitfields' alleged, for example, that "many poor and less educated black citizens in Phillips County were unaware of their political rights; they still believed that they must pay a poll tax to be entitled to vote."225 The Eleventh Circuit in Marango rejected a similar assertion of "apathy" by a district court because evidence was lacking that the alleged "apathy" was unconnected to racial discrimination.226 The difficulties of a second campaign to gain nomination can be enhanced by the effects of past discrimination. The Fifth Circuit also observed that "Congress was concerned not only with present discrimination, but with the vestiges of discrimination which may interact with present political structures to perpetuate a historical lack of access to the political system."227

The district court in Whitfield placed extreme importance on the state interest in assuring "majority rule."228 Accepting the premise that majority rule is a core democratic value, it is questionable whether run-off elections actually produce anything close to majority rule. In Phillips County, turnout in run-off primaries has always been lower than in the initial election.229 In the four elections which create the basis for the Whitfield challenge, each winning candidate won with less than 50% of the total votes cast in the initial elec-

225. Petition for Writ of Certiorari at 17.
228. It may be fair to conclude that the district court's emphasis of "majority rule" as a principle to trump proof of vote dilution is itself a back door "intent" test. Rather than require plaintiffs to prove discriminatory intent, if there is proof of an especially good purpose like "majority rule," the district court effectively provides an intent based affirmative defense.
Perhaps the greatest injustice in the operation of the run-off election in Phillips County occurred when the winning white candidate won the run-off election with fewer votes than the number of votes scored by the black plurality winner in the initial election.

With regard to advancing the cause of majority rule, it is especially interesting to note that a recent study by the General Accounting Office, the auditing arm of Congress, ranked Arkansas 39th in voter turnout in the 1988 general election. Forty-seven percent of citizens of voting age cast their votes in the 1988 general election. No state using a run-off election system ranked above 27th place in voter turnout. Even if run-off elections are intended to promote majority rule, in states where they are used, they apparently do not. General election figures tend to represent the maximum amount of voter participation in any given state. The participation in primaries and run-offs would be significantly lower.

While run-off elections are a political way of life, they are not an essential part of American representative democracy representing "sacred ground." Run-off elections are not used in 40 states and are a relatively recent invention. In Georgia, for example, the run-off primary law was enacted when it became evident that congressional passage of the 1965 Voting Rights Act was imminent. Run-off elections are also not an essential part of representative democracy in Arkansas. In an unrelated case, the Arkansas Supreme Court ruled that run-off elections for statewide general elections violated the Arkansas Constitution. The challenged Arkansas primary run-off law itself does not require a primary and run-off for nomination. Candidates can be nominated by convention or petition at the discretion of the political party. As for the "republican form of government guarantee," recent jurisprudence on Article IV Section 4 of the United States Constitution is very slim. However in 1849, the United States Supreme Court determined that the enforcement of the guar-

230. Id. at 15.
231. UNITED STATES GENERAL ACCOUNTING OFFICE, VOTING: SOME PROCEDURAL CHANGES AND INFORMATIONAL ACTIVITIES COULD INCREASE TURNOUT 26-27 (Nov. 1990) [hereinafter GENERAL ACCOUNTING OFFICE]. Northern and Western States ranked highest in voter participation. Minnesota lead the nation with an impressive 66.5% turnout in 1988. Nebraska ranked a respectable 14th with 56.7% participation.
232. An exploration of the many possible definitions of "majority rule" is beyond the scope of this Article, suffice it to observe that American voter turnout is "low and declining." Our nation ranks 20th among the world's 21 industrialized democracies. 52.6% of the voting age population participated in the 1980 elections compared to 94% in Italy. General Accounting Office at 17. If the United States's electoral participation approached that of Italy, the concept of majority rule would rest on much firmer ground.
antee of a republican form of government rests with the President and the Congress.\textsuperscript{235}

In \textit{Jeffers}, the majority found that the general election run-off requirements for municipal and county offices had discriminatory effect by replacing "a system in which blacks could and did succeed, with one in which they almost certainly cannot."\textsuperscript{236} The majority also found discriminatory intent.\textsuperscript{237} While intent is not essential to a section 2 case, it can establish a violation, and indirect evidence of intent can be relevant to the "totality of circumstances." In this regard, the \textit{Jeffers} and \textit{Whitfield} decisions may have too easily dismissed evidence of discriminatory intent regarding the creation and maintenance of the run-off primary system. In light of the \textit{Jeffers} conclusion that the extension of the run-off system to county and municipal offices was done with discriminatory intent, it does seem incongruous to hold that because the electoral system of the 1930s was so effective in its total exclusion of black electoral participation, the enactment and maintenance of one of the elements of that discriminatory system presumptively free of racial motivation.

The district court's suggestion that run-off elections foster communication and build coalitions between the races, runs contrary to the court's own finding of racial bloc voting. Indeed, if race is a primary concern in elections in Phillips County, there is little evidence of inter-racial coalition. In fact, a defensible conclusion is that the coalition building is that which is done among white candidates to defeat black candidates.

A very strong state interest or other mitigating factors which encourage participation may be able to overcome the dilutive effects of an electoral device; however, such factors in \textit{Whitfield} are subject to serious question. Given the totality of circumstances and information presently available, it does appear that the run-off election laws, as they operate in Phillips County, Arkansas violate section 2 of the Voting Rights Act. To fully support such a conclusion, it is necessary to distinguish the \textit{Whitfield} case from the \textit{Butts} case.

\textbf{Distinguishing Whitfield and Butts}

In retrospect, it is now somewhat easier to evaluate the result in the \textit{Butts} case, which upheld New York City's 40% run-off election

\textsuperscript{235} Luther v. Bolden, 48 U.S. (7 How.) 1, 42 (1849). The Court stated that "it rests with Congress to decide what government is the established one in a State . . . as well as its republican character." \textit{Id.} at 42. See also \textit{The Constitution of the United States} 894-95 (Library of Congress).

\textsuperscript{236} \textit{Jeffers}, 740 F. Supp at 595.

\textsuperscript{237} \textit{Id.}
law especially, in light of David Dinkins's success in the New York City Democratic primary and general election. There are, however, significant factual differences between the Whitfield and Butts cases: the New York City run-off operates on a 40% threshold rather than a 50% threshold; New York City has a very different history with regards to racial discrimination in elections compared to Arkansas; New York City has a closed primary and Arkansas has an open primary; New York City, although strongly democratic, does have an active, well-financed Republican Party organization while Phillips County is presently a one party jurisdiction; and perhaps most importantly, the Butts decision predates the Gingles case.

Although only discussed in a footnote by the Whitfield panel majority, the “open” nature of the Arkansas primary is a critical distinction between the New York and Arkansas systems. In New York only registered Democrats can vote in the Democratic primary. In Arkansas, voter registration is not by party. Voters request a Democratic or Republican ballot on election day. When there is a run-off election in Arkansas, an individual who voted in the initial Republican primary is barred from voting in the Democratic run-off, but a person who did not vote in either primary could vote in either run-off.

From today’s perspective, it may be fair to say that the Butts majority produced the right result using the wrong analysis. The preferable approach for the Butts majority would have been to find that the factual determination of dilution by the district court was “clearly erroneous,” as the majority did not hesitate to do with regard to the district court conclusion of intent.

As has been discussed, the ruling that section 2 does not, as a matter of law, apply to single-member districts or to cases where the challenged electoral device had not yet had any negative effect on a minority candidate, lacks foundation in the legislative history. Conceptually, the dissent in Butts took the correct approach. The dissent rejected arguments which limited on a per se basis the application of section 2 and considered the case on a factual basis applying the “clearly erroneous standard” to the district court finding of fact. The dissent appropriately drew the distinction between the majority’s emphasis on the opportunity for “representation” and the statute and legislative history’s emphasis on “opportunity to participate.”238 The majority in the Butts case applied the “clearly erroneous” test to the district court determination of discriminatory intent, but for an unexplained reason did not do so as to the issue of dilution.239

238. Butts, 779 F.2d at 155 (Oakes, J., dissenting).
239. See id. at 148-51.
ity in Butts expressed doubts that the New York 40% run-off law violated section 2 when the totality of circumstances were considered, but did not strictly apply the "clearly erroneous" standard to the factual issue of vote dilution.\textsuperscript{240}

Simply put, Phillips County, Arkansas is not New York City. The facts distinguish Butts and Whitfield.

REMEDY

In his addendum to his dissent in Jeffers, Judge Eisele objected to the remedy of the panel majority in the Whitfield case, which was limited to Phillips County.\textsuperscript{241} However, it was the early ruling of the district court itself which limited the Whitfield challenge and evidence to Phillips County. In this case, a remedy solely in Phillips County would have been appropriate because the evidence at trial was limited by the district court to Phillips County. Elimination of the run-off election in Phillips may not be the only remedy available, although it does provide the most direct relief.

CONCLUSION

While the United States Supreme Court chose not to take up the Whitfield case, the Court must eventually scrutinize run-off election laws in single-member districts under section 2 of the Voting Rights Act. The Solicitor General may have successfully persuaded the Supreme Court to wait for a more procedurally and factually clear case, such as the Justice Department-initiated case in Georgia, to rule on the issue. It is unfortunate that the Court chose not to hear the Whitfield case. The Court could have provided great guidance to courts reviewing future run-off election challenges and other less than obvious vote dilution cases and could have disavowed court created per se immunities from section 2 scrutiny. If future courts rely on per se rules, such as those created in the Butts majority and the Whitfield district court opinions, those courts will be allowed to glance away from the difficult facts and interactions which Congress

\textsuperscript{240} Id. The Supreme Court in Gingles reaffirmed its past precedents which treat "the ultimate finding of vote dilution as a question of fact subject to the clearly-erroneous standard." Gingles, 478 U.S. at 78. The Court, quoting from the Senate Report, found that the statute and the legislative history clearly instruct trial courts to consider the "‘totality of the circumstances’ and to determine, based ‘upon a searching practical evaluation of the ‘past and present reality,’ ‘whether the political process is equally open to minority voters.’" The Court continued that "the application of the clearly-erroneous standard to ultimate findings of vote dilution preserves the benefit of the trial court’s particular familiarity with the indigenous political reality. . . ." Id. at 79.

\textsuperscript{241} Jeffers, 730 F. Supp. at 284 (Eisele, J., dissenting).
wanted courts to scrutinize. It has been frequently suggested that
the elimination of run-off election laws will simply strengthen the
Republican party in the south as white Democrats switch parties to
challenge black Democrats. It may happen, but is not likely to have
as much effect as many expect. The principles of the Democratic
Party are strong enough to hold southern workers and farmers re-
gardless of color. If the weakening of the Democratic Party in the
south is the price for fuller participation in the electoral process, it is
an acceptable price to pay.\footnote{242}

The ultimate conclusion on the vote diluting effect of the run-off
primary is arguably a close call. In this regard, the remarks of Ar-
kansas's own United States Senators during the 1982 Voting Rights
Amendments debate are most appropriate. Both are eloquent repre-
sentatives of the "New South." Senator Dale Bumpers asked "[d]o
we believe that protecting the right to vote is so important that we
are willing to resolve ambiguities in favor of those in the protected
class?"\footnote{243} Senator David Pryor quoted Alexis de Tocqueville who
wrote that the "further electoral rights are extended, the greater is
the need for extending them; for after each concession the strength
of democracy increases, and its demands increase with its
strength."\footnote{244} Opening the electoral system more fully to minority
voters and candidates will only further strengthen our great Ameri-
can democracy.

The debate on section 2 which Judge Eisele attempted to ignite
in the \textit{Whitfield} district court decision has already taken place in the
Senate Judiciary Committee and on the floor of the Senate. The con-
cerns and the fears of proportional representation were raised
throughout the congressional debate.\footnote{245} To require that any person
of any race have a fair opportunity to compete for elective office is
not proportional representation, but is the primary purpose of the
Voting Rights Act.

Over the years, Congress has approached electoral reform in
stages. First, the barriers to registration and voting were struck
down, then other clear and obvious sources of discrimination such as
literacy tests and poll taxes were identified and prohibited. With the
1982 amendments to section 2, Congress sought to eliminate the last

\footnote{242. Although beyond the scope of this Article, it should be noted that run-off
primaries themselves have taken a toll on the Democratic Party's electoral success. In
Florida, for example, a divisive run-off election for the 1988 Senate nomination paved
the way for victory in the general election for Republican Connie Mack.}
\footnote{243. 128 CONG. REC. S. 14312 (June 18, 1982) (Statement of Sen. Bumpers).}
\footnote{244. \textit{Id.} at S. 14311 (statement of Sen. Pryor).}
\footnote{245. The views of Dr. Thernson, in the book so extensively quoted by Judge Eisele,
are also not that different from the issues raised by the Senate Committee Report and
the opponents of the Voting Rights Act Amendments.}
vestiges of past discrimination and passed the torch to the judiciary to exercise its judgement on a case by case basis to guide electoral systems out of shadowed corners of unfairness and discrimination.

In dealing with run-off elections, we are not dealing with "majority rule." Almost universally where run-off elections are used, majorities do not even vote. As a slogan, Judge Eisele's call for making it clear once and for all, that the people rule has a great deal of appeal. Unfortunately, under current circumstances, for about half of the people of Phillips County, Arkansas there is little opportunity to be among those who will rule.

In Arkansas, as in the south and throughout the nation, there has been revolutionary change in the years since the enactment of the Voting Rights Act. Judge Eisele himself is an alumnus of the progressive Republican administration of Governor Winthrop Rockefeller which sought and won the support of black voters and forever changed politics in Arkansas for the better. In spite of the dramatic progress of the last 20 years, more needs to be done. There can be little "sacred ground" on a terrain spoiled by decades of racial discrimination. If in traversing that terrain the courts do "run amuck," Congress will step in, just as it did in responding to the Bolden case.246

While the Whitfields' challenge is based on the run-off election laws, the totality of the circumstances test puts the entire electoral system of Phillips County under scrutiny. It is an electoral system which is not yet fully open to minority participation. The run-off election may not be the entire cause of the discriminatory effect, but it is one of the impediments to full participation. Although not part of the evidence in the Whitfield case, the 1990 election returns for county offices in Phillips County did not change the premise of the Whitfield case. If the run-off primary is eliminated there is no certainty that more black candidates facing white opponents will be elected in Phillips County, Arkansas. If the run-off law is maintained, at least for the foreseeable future, it is likely that black candidates facing white candidates in Phillips County, Arkansas will be defeated.

Congress and the courts are powerless to change individual attitudes or to force a black person to vote for a white person or a white person to vote for a black person. What Congress and the courts can do is remove those structures which make a black ballot weaker than a white ballot. Where there is racial bloc voting and a history of racial discrimination, the run-off primary can create unequal ballot strength in violation of the Voting Rights Act.

246. See supra notes 106-12 and accompanying text.