



Summer 6-1-1995

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Recommended Citation

John A. Earnhardt, *Challenging Episodic Practices Under Section 2 of the Voting Rights Act: Critical Analysis of Ortiz v. City of Philadelphia Office of the City Commissioners Voter Registration Division*, 52 Wash. & Lee L. Rev. 1065 (1995).

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Challenging Episodic Practices Under
Section 2 of the Voting Rights Act: Critical
Analysis of *Ortiz v. City of Philadelphia*
Office of the City Commissioners
Voter Registration Division

John A. Earnhardt*

We wish we knew exactly what a plaintiff must prove in order to prevail under the Voting Rights Act.

— Richard A. Posner¹

Section 2 of the Voting Rights Act of 1965 (Act) is the major statutory prohibition against voting-related discrimination.² Designed to enforce the Fourteenth and Fifteenth Amendments of the United States Constitution, the Act covers a vast range of activities that affect voting.³ Section 2 of the Act is the mechanism through which plaintiffs may challenge a practice or structure that discriminates against minorities.⁴ Section 2 lawsuits most commonly challenge the drawing of a particular political district and claim that the challenged "structure" dilutes the voting strength of minori-

* I wish to thank Professor Allan Ides for his valuable suggestions and Professor Laura Fitzgerald for her encouragement and enthusiasm for this project. Special thanks go to Barbara Earnhardt, whose unwavering belief in her children supports all my efforts.

1. *Barnett v. Daley*, 32 F.3d 1196, 1201 (7th Cir. 1994).

2. SENATE COMM. ON THE JUDICIARY, VOTING RIGHTS ACT EXTENSION, S. REP. NO. 417, 97th Cong., 2d Sess. 30 (1982) [hereinafter S. REP. NO. 417], reprinted in 1982 U.S.C.C.A.N. 177, 207; see also *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986) (holding that § 2 prohibits all forms of voting discrimination and is not limited to vote dilution claims).

3. See S. REP. NO. 417, *supra* note 2, at 30, reprinted in 1982 U.S.C.C.A.N. at 207 (reporting on scope of amended § 2 of Voting Rights Act).

4. See *id.* at 2, reprinted in 1982 U.S.C.C.A.N. at 179 (reporting that amended § 2 prohibits voting practices that result in discrimination).

ties.⁵ Courts typically refer to such cases, which constitute the vast majority of section 2 litigation, as "vote dilution" claims. However, section 2 also applies to discriminatory behavior that affects voting and access to the political process, even though that behavior does not involve permanent structural barriers like those that arise in the vote dilution context.⁶ Courts refer to such actions, which represent a small portion of reported section 2 litigation, as "episodic" practices.⁷

In *Ortiz v City of Philadelphia Office of the City Commissioners Voter Registration Division*,⁸ the United States Court of Appeals for the Third Circuit considered a section 2 challenge to the application of Philadelphia's nonvoting purge statute.⁹ The facts of *Ortiz* and the court's treatment of the plaintiffs' section 2 claim present important questions for future section 2 plaintiffs that challenge episodic practices and inform the discussion of various models for the section 2 cause of action.

In Part I, this Note briefly discusses the importance of voting, the history of minority disenfranchisement in America, and congressional responses to this disenfranchisement. Part II.A analyzes the Voting Rights

5. See generally *Chisom v Roemer*, 501 U.S. 380 (1991) (holding that § 2 applies to judicial elections); *Thornburg*, 478 U.S. 30 (holding that § 2 vote dilution claim requires evidence of racial bloc voting).

6. See *Thornburg*, 478 U.S. at 45 n.10 (holding that § 2 does not apply only to vote dilution claims, but prohibits all forms of voting discrimination); S. REP. NO. 417, *supra* note 2, at 30, *reprinted in* 1982 U.S.C.C.A.N. at 207 (explaining that § 2 applies to episodic practices). Section 2:

prohibits practices which, while episodic and not involving permanent structural barriers, result in the denial of equal access to any phase of the electoral process for minority group members.

If the challenged practice relates to such a series of events or episodes, the proof sufficient to establish a violation would not necessarily involve the same factors as the courts have utilized when dealing with permanent structural barriers. [T]he ultimate test would be whether, in the particular situation, the practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their choice.

Id.

7. The Voting Rights Act expressly outlawed a number of common episodic practices, including literacy tests, good moral character tests, and poll taxes. Voting Rights Act of 1965, 42 U.S.C. §§ 1973b & 1973h (1988). Examples of modern episodic practices include: treatment of voters at polling places, location of polling places, registration procedures, and application of purge statutes.

8. 28 F.3d 306 (3d Cir. 1994).

9. See *Ortiz v. City of Phila. Office of the Comm'rs Voter Registration Div.*, 28 F.3d 306, 314 (3d Cir. 1994) (holding that § 2 requires evidence that challenged practice caused minorities to be unable to elect their chosen representatives).

Act of 1965 and the early federal court decisions interpreting the Act. Part II.B examines the 1982 amendments to section 2 of the Voting Rights Act. Part II.C analyzes important cases defining section 2 protection after the 1982 amendments. Part III critically analyzes *Ortiz*. Part IV examines various models for section 2 causes of action challenging episodic practices. Part V concludes that the law is unclear with regard to what constitutes a cognizable prima facie case challenging episodic practices under section 2. Part V then proposes that courts recognize a bright-line distinction between the proof necessary in episodic practice cases and that necessary in vote dilution cases.

I. Voting and Minority Disenfranchisement in America

One cannot overstate the importance of assuring individuals the right to vote.¹⁰ Courts often proclaim that voting for the candidate of one's choice is the essence of a democratic society.¹¹ Restrictions on that right therefore strike at the heart of representative government.¹² Historically, disenfranchisement has prevented minority voters from influencing elections.¹³ Commentators suggest that this lack of political influence has reduced governmental accountability to minority groups.¹⁴ Thus, fair and open political

10. See generally *Harman v Forssenius*, 380 U.S. 528 (1965) (holding that Virginia requirement that voters either pay poll tax or file certificate of residence violated Twenty-Fourth Amendment); *Yick Wo v Hopkins*, 118 U.S. 356 (1886) (discussing importance of voting as fundamental political right preservative of all other rights).

11. See *Shaw v Reno*, 113 S. Ct. 2816, 2822 (1993) (holding that plaintiffs stated Equal Protection claim because North Carolina redistricting plan was so irrational on its face that it could only have been motivated by race) (citing *Reynolds v Sims*, 377 U.S. 533, 555 (1964) (defining basic vote dilution principle)); *Harman*, 380 U.S. at 537 (discussing importance of voting as fundamental civil right); see also Morris, *Black Participation and The Distribution of Public Benefits*, in THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION CONFERENCE 164, 171 (1981) (reporting on causes of lower black voter turnout).

12. See *Harman*, 380 U.S. at 537 (discussing importance of voting) (citing *Reynolds v Sims*, 377 U.S. 533, 555 (1964)). See generally ARISTOTLE, POLITICS, Book II (Earnest Barker trans., 1946) (discussing participation and democracy). Aristotle wrote that "[i]f liberty and equality, as is thought by some, are chiefly to be founded in democracy, they will be best attained when all persons alike share in the government to the utmost." *Id.*

13. Cf. Morris, *supra* note 11, at 168 (reporting that blacks make up only 11% of United States population, but are concentrated so as to make possible formulation of cohesive black agenda). Four factors explain low black voter turnout: (1) structural or procedural devices that discourage voting, (2) black perceptions of futility due to past exclusion from voting, (3) socioeconomic characteristics of the black population, and (4) political styles within the black community. *Id.* at 171.

14. See Steve Barber et al., Comment, *The Purging of Empowerment: Voter Purge*

processes are critical to increasing the political influence of minorities and to improving government's responsiveness to minority concerns.

Traditionally, minorities in America have faced numerous obstacles to their exercise of the right to vote.¹⁵ Although blacks enjoyed unprecedented political empowerment during Reconstruction, this power quickly eroded as states developed methods of minimizing the political influence of minority citizens.¹⁶ Voter registration, for example, developed in the late nineteenth century as an effort to disenfranchise both Southern blacks and new immigrants to the Northern states.¹⁷ Throughout the South, beginning in the late nineteenth century, use of the grandfather clause, good moral character tests, and literacy tests had a devastating impact on minority exercise of the franchise.¹⁸

Laws and the Voting Rights Act, 23 HARV C.R.-C.L. L. REV 483, 485 (1988) (connecting governmental accountability to group's ability to influence elections).

15. See S. REP. NO. 417, *supra* note 2, at 5, reprinted in 1982 U.S.C.C.A.N. at 182 (discussing history of discrimination in voting); Bass, *Election Laws and Their Manipulation to Exclude Minority Voters*, in THE RIGHT TO VOTE: A ROCKEFELLER FOUNDATION CONFERENCE 1, 3 (1981) (reporting that First Reconstruction Act of 1867 required former Confederate states to guarantee universal male suffrage before being readmitted to Union); Barber et al., *supra* note 14, at 484 (recognizing that after gaining franchise, blacks encountered numerous obstacles in exercising that right).

16. See Mississippi State Chapter, Operation PUSH v Allain, 674 F Supp. 1245, 1251-52 (N.D. Miss. 1987) (detailing history of registration and other voting procedures used to deny blacks right to vote in Mississippi); United States v Louisiana, 225 F Supp. 353, 368-69 (E.D. La. 1963) (recounting Louisiana's adoption of grandfather clause to disenfranchise black voters); Peter R. Teachout, *Louisiana Underlaw*, in SOUTHERN JUSTICE 57, 61 (Leon Friedman ed., 1965) (reporting that black registered voters in Louisiana outnumbered white registered voters almost 2 to 1 during Reconstruction); Barber et al., *supra* note 14, at 486 (reporting that during Reconstruction black registered voters in Louisiana outnumbered white registered voters due to disenfranchisement of Confederate veterans and newfound opportunity for blacks to register); see also Gunn v United States, 238 U.S. 347, 363-67 (1915) (holding grandfather clause unconstitutional).

17. See *Voting Rights Act: Runoff Primaries and Registration Barriers: Hearings on the Voting Rights Act of 1965 and its 1982 Amendment Before the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 2d Sess. 136 (1985) (testimony of Lani Guinier, Voting Rights Litigation Project, NAACP Legal Defense & Education Fund); Barber et al., *supra* note 14, at 485 (recognizing enactment of registration laws as attempt to disenfranchise minorities); see also J. MORGAN KOUSSER, THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF A ONE-PARTY SOUTH 1880-1910 48 (1974) (examining disenfranchising effect of Southern registration laws).

18. See United States v Louisiana, 225 F Supp. at 363-81 (recounting history of disenfranchisement of blacks in Louisiana). Literacy requirements were particularly effective at disenfranchising blacks due to the lingering effects of slavery Barber et al., *supra* note 14, at 486 n.17. For example, slave codes had forbidden slave literacy and did not provide sufficient educational opportunities for blacks. *Id.* Additionally, literacy tests were not administered fairly, and officials often allowed illiterate whites to vote by meeting property

These efforts effectively eliminated minority political participation before coming under attack during the civil rights movement.

Efforts to disenfranchise blacks increased in the South in response to *Brown v Board of Education*¹⁹ in 1954, as politicians continued to fear the unrealized potential of black political participation.²⁰ In response to the continued disenfranchisement of minorities, Congress enacted a series of civil rights statutes designed to facilitate minorities' ability to vote.²¹ These statutes allowed private parties to challenge discriminatory practices.²² This legislative activity culminated in the passage of the Voting Rights Act of 1965.²³

II. The Voting Rights Act of 1965

A. Early Application of the Act

Congress intended for the Voting Rights Act to address America's history of discrimination and the accumulated effects of that discrimination.²⁴ After the Act became law, federal courts heard numerous vote dilution cases and

value exceptions. *Id.* Registrars often aided whites by correcting errors on their registration applications while eliminating blacks based on similar errors. *Id.* at 486-87; *see generally* *United States v McElveen*, 180 F Supp. 10 (E.D. La.) (discussing disproportionate disenfranchisement of black voters in Louisiana), *aff'd sub nom.* *United States v Thomas*, 362 U.S. 58 (1960).

19. 347 U.S. 483 (1954).

20. *See* DAVID J. GARROW, *PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965* 9-10 (1978) (discussing white resistance to civil rights movement in South); *see also* Teachout, *supra* note 16, at 64 (reporting Southern efforts to disenfranchise minority voters).

21. *See* Barber et al., *supra* note 14, at 487-89 (discussing series of civil rights statutes that Congress passed between 1957 and enactment of Voting Rights Act of 1965). After civil rights statutes creating a private right of action to challenge discriminatory barriers to voting failed to facilitate increased black registration, Congress recognized that "the burden of overthrowing a state or political subdivision's obstructionist voting process could not rest upon the individual." *Id.* Barber concludes that "[t]he futility of case-by-case litigation led Congress to shift the responsibility for voting rights enforcement to the Department of Justice." *Id.* at 489; *see also* S. REP. NO. 417, *supra* note 2, at 4-6, *reprinted in* 1982 U.S.C.C.A.N. at 181-83 (discussing history of civil rights statutes and Voting Rights Act of 1965).

22. *See* Barber et al., *supra* note 14, at 488 (noting congressional recognition of futility of private enforcement of voting rights and congressional support for Department of Justice enforcement).

23. 42 U.S.C. §§ 1973-1973bb (1988).

24. The express congressional purpose of the Voting Rights Act was "not only to correct an active history of discrimination but also to deal with the accumulation of discrimination." 111 CONG. REC. 8295 (1965) (statement of Sen. Javits).

actively protected minority voting rights.²⁵ Section 2 of the Act addresses episodic practices.²⁶ Section 2 provides in part:

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 color²⁷

The legislative history and expansive language of section 2 illustrate that the Voting Rights Act applies to all forms of discrimination, including episodic practices.²⁸ Section 2 necessarily applies to all forms of voting discrimination because amended section 2 provides protection commensurate with the Fourteenth and Fifteenth Amendments.²⁹

Even after enactment of the Voting Rights Act, states had broad power to regulate the conduct of federal and state elections.³⁰ Nevertheless, federal courts developed a number of important principles for evaluating state elec-

25. See generally *East Carroll Parish Sch. Bd. v Marshall*, 424 U.S. 636 (1976) (holding that plaintiff must show evidence of discrimination in context of totality of circumstances to prevail under § 2); *White v Regester*, 412 U.S. 755 (1973) (holding that minority voters must show evidence that political processes are not equally open to prevail under § 2); *Whitcomb v Chavis*, 403 U.S. 124 (1971) (upholding federal court's power to order redistricting); *Hadley v Junior College Dist.*, 397 U.S. 50 (1970) (holding that unequal treatment was harmful in any election regardless of officials selected); *Allen v State Bd. of Elections*, 393 U.S. 544 (1969) (holding that change to at-large voting scheme was within purview of § 5 preclearance); *Burns v Richardson*, 384 U.S. 73 (1966) (holding that districting scheme did not violate Equal Protection Clause); *South Carolina v Katzenbach*, 383 U.S. 301 (1966) (holding that courts should give Voting Rights Act broad interpretation); *Zimmer v McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (finding that at-large election scheme diluted minority voting), *aff'd on other grounds sub nom. East Carroll Parish Sch. Bd. v Marshall*, 424 U.S. 636 (1976) (per curiam). *But cf. Wells v Edwards*, 409 U.S. 1095 (1973) (holding that one person, one vote principle did not apply to judicial elections).

26. 42 U.S.C. § 1973(a) (1988); see *Barber et al.*, *supra* note 14, at 517 (discussing § 2's application to episodic practices).

27. 42 U.S.C. § 1973(a).

28. See S. REP. NO. 417, *supra* note 2, at 30, *reprinted in* 1982 U.S.C.C.A.N. at 207 (discussing application of Voting Rights Act); see also *Thornburg v Gingles*, 478 U.S. 30, 45 n.10 (1986) (holding that § 2 prohibits all forms of voting discrimination, not just vote dilution claims).

29. See *Chisom v Edwards*, 839 F.2d 1056, 1061 (5th Cir.) (holding that § 2 covers judicial elections), *cert. denied*, 488 U.S. 955 (1988).

30. See *Roudebush v Hartke*, 405 U.S. 15, 25 (1972) (upholding Indiana's power to conduct recount of ballots in Senate election to guard against irregularity and error); *Oregon v Mitchell*, 400 U.S. 112, 125 (1970) (holding that states have broad power to regulate state elections except when limited by Fourteenth, Fifteenth, Nineteenth, or Twenty-Fourth Amendments to Constitution).

toral practices. For example, the Supreme Court established a "one person, one vote" principle based on the view that the right to exercise the franchise freely preserves other basic rights.³¹ The Court also applied strict scrutiny to alleged infringement of the right to vote,³² but refused to find the use of multimember districting schemes unconstitutional *per se*.³³ The Supreme Court held that section 2 required only a showing that a challenged procedure produced an invidious result.³⁴ The proper standard in section 2 cases, explained the Court, was whether the districting scheme *was designed to have or did in fact have* an invidious effect on minority voting rights.³⁵ Additionally, the Supreme Court later made clear that the fact that minorities are not represented proportionally does not in itself constitute invidious discrimination or a constitutional violation.³⁶ Finally, in the leading vote dilution cases, the Supreme Court did not focus on the existence of an intent to discriminate.³⁷

The Supreme Court departed from this established precedent in *City of Mobile v Bolden*.³⁸ In *Bolden*, the Court determined that evidence of dis-

31. See *Reynolds v Sims*, 377 U.S. 533, 562 (1964) (defining basic vote dilution principle).

32. See *id.* (defining basic vote dilution principle).

33. See *Fortson v Dorsey*, 379 U.S. 433, 439 (1965) (holding that multimember district did not on its face violate Fourteenth Amendment); *cf.* *Rogers v Lodge*, 458 U.S. 613, 616-17 (1982) (holding that at-large electoral system was maintained with discriminatory intent); *City of Mobile v Bolden*, 446 U.S. 55, 66 (1980) (holding that Fourteenth Amendment violation requires showing of discriminatory intent); *White v Regester*, 412 U.S. 755, 765-66 (1973) (holding that minority voters must show evidence that political processes are not equally open to prevail under § 2); *Whitcomb v Chavis*, 403 U.S. 124, 142 (1971) (finding that district court could order redistricting to comply with Voting Rights Act).

34. See *Burns v Richardson*, 384 U.S. 73, 88 (1966) (holding that plaintiff can prevail under § 2 by showing invidious result of challenged practice).

35. *Id.* at 89. The language of the opinion clearly established that § 2 plaintiffs could prevail in either of two ways. *Id.* Plaintiffs could elect to show evidence that the electoral practice was designed to discriminate, or plaintiffs could forego proof of intent and show the discriminatory result of the challenged practice. *Id.* See generally *Abate v Mundt*, 403 U.S. 182 (1971) (holding that multimember districting schemes will be struck down if they result in impairment to minority voting strength); *Harris v Siegelman*, 695 F. Supp. 517 (M.D. Ala. 1988) (discussing establishment of § 2 violation based on either intent or results).

36. See *White v Regester*, 412 U.S. 755, 764 (1973) (holding that there is no right to proportional representation); *Whitcomb v Chavis*, 403 U.S. 124, 149 (1971) (holding that no evidence of discriminatory intent is required for plaintiffs to prevail under § 2).

37. See *Nevett v Sides*, 571 F.2d 209, 232 (5th Cir. 1978) (Wisdom, J., concurring) (explaining operation of intent in *Fortson v Dorsey*, 379 U.S. 433, 439 (1965), and *Burns v Richardson*, 384 U.S. 73, 88 (1966)).

38. 446 U.S. 55 (1980).

criminatorial intent was a necessary element of a Fourteenth or Fifteenth Amendment violation.³⁹ The *Bolden* Court found that because Congress intended for section 2 to provide protection commensurate with the Fifteenth Amendment, a section 2 violation must necessarily include discriminatory intent.⁴⁰ *Bolden* was a clear departure from the established "totality of the circumstances" analysis⁴¹ and provoked an immediate congressional response.⁴²

B. 1982 Amendments to the Voting Rights Act

In response to *Bolden*, Congress amended section 2 to make clear that plaintiffs need not prove discriminatory intent to succeed in challenging an electoral practice.⁴³ Amended section 2 restores the pre-*Bolden* legal

39 *City of Mobile v Bolden*, 446 U.S. 55 (1980) (plurality opinion) (holding that plaintiffs failed to show discriminatory intent necessary to establish Fourteenth or Fifteenth Amendment violation). In *Bolden*, the Supreme Court considered a challenge under § 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments to Mobile's at-large system of electing its governing three member Commission. *Id.* at 58-59. The district court held that the Mobile system violated the Fourteenth and Fifteenth Amendments, and the Fifth Circuit affirmed. *Id.* The Supreme Court found plaintiffs' § 2 claim irrelevant because the effect of § 2 is not different than that of the Fifteenth Amendment. *Id.* at 60-61. After reviewing a number of cases involving the right to vote, the Court concluded that discriminatory intent is a necessary element of any Fifteenth Amendment violation. *Id.* at 61-65. The Supreme Court next reviewed numerous cases involving Equal Protection claims and concluded that discriminatory intent is a necessary element of any violation of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 65-74. Finally, the Court discussed but rejected Justice Marshall's argument that discriminatory impact is sufficient to establish a violation in vote dilution cases. *Id.* at 75-80. Therefore, the Supreme Court reversed and remanded the case to the Court of Appeals for the Fifth Circuit for further proceedings. *Id.* at 80.

40. *Id.* at 61-65. This conclusion reflects the holdings of two important cases involving racial discrimination in employment. See generally *Village of Arlington Heights v Metropolitan Hous. Dev. Corp.*, 429 U.S. 252 (1977) (holding that proof of discriminatory intent is required to establish Fourteenth Amendment violation); *Washington v Davis*, 426 U.S. 229 (1976) (holding that plaintiff must prove discriminatory intent to establish Fourteenth Amendment violation); see also Paul Brest, *Forward: In Defense of the Anti-Discrimination Principle*, 90 HARV L. REV 1, 24-25 (1976) (discussing Supreme Court cases reaffirming that evidence of disproportionate racial impact alone does not trigger strict scrutiny); *infra* notes 170-74 and accompanying text (discussing Title VII cases).

41. S. REP. NO. 417, *supra* note 2, at 19, reprinted in 1982 U.S.C.C.A.N. at 196.

42. See *id.* at 26-27, reprinted in 1982 U.S.C.C.A.N. at 203-05 (discussing impact of *Bolden* and need to amend § 2). Obviously, the *Bolden* decision affected numerous voting rights cases making their way through the courts. *Id.* In the wake of *Bolden*, plaintiffs virtually stopped bringing new vote dilution suits. *Id.*

43. *Id.* at 27, reprinted in 1982 U.S.C.C.A.N. at 205. Plaintiffs may elect to establish a § 2 violation either with evidence of discriminatory purpose or under the pre-*Bolden* results

standard governing voting rights litigation⁴⁴ and provides in part:

[a] violation [of section 2] is established if, based on the totality of the 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 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.⁴⁵

Amended section 2 employs the "results" test⁴⁶ and the factors articulated in *White v Regester*⁴⁷ and *Zimmer v McKeithen*.⁴⁸ Congress intended that

standard. *Id.*

44. See *Thornburg v Gingles*, 478 U.S. 30, 43-44 (1986) (discussing Senate Report No. 417); see also S. REP. NO. 417, *supra* note 2, at 15, reprinted in 1982 U.S.C.C.A.N. at 192 (noting that § 2 violation is based on totality of circumstances).

45. Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973b (1988).

46. S. REP. NO. 417, *supra* note 2, at 28, reprinted in 1982 U.S.C.C.A.N. at 205-07. The typical factors used in applying the results test include: (1) the extent of any history of official discrimination that affected minority access to the democratic process; (2) the extent of racially polarized voting; (3) the use of large election districts, majority vote requirements, anti-single shot provisions, or other voting procedures that enhance the opportunity for discrimination against minorities; (4) the extent to which minorities have been excluded from any candidate slating process; (5) the extent to which discrimination in education, employment, and health has hindered the effective participation of minorities in the political process; (6) whether political campaigns have been characterized by overt or subtle racial appeals; (7) the extent to which minorities have been elected to public office; (8) whether elected officials lack responsiveness to the particularized needs of minority communities; and (9) whether the policy underlying the challenged practice is tenuous. *Id.* at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07. These factors, while often being the most relevant ones, are not exclusive and other factors may be relevant in some cases. *Id.*

47. 412 U.S. 755, 767 (1973). In *White*, the Supreme Court considered a constitutional challenge to the 1970 Texas legislative reapportionment plan. *Id.* at 756. At the outset, the Court held that in the interest of judicial economy and pursuant to 28 U.S.C. § 1253 it had jurisdiction over the appeal in this case. *Id.* at 759-61. The Court held that the district court erred in finding that a 9.9% population differential made out a prima facie Equal Protection violation under the Fourteenth Amendment. *Id.* at 761-64. However, the Supreme Court affirmed the district court's decision that required the redrawing of the multimember districts at issue into single-member districts. *Id.* at 765-67. Concluding that the district court's findings represented a blend of history and an intensely local appraisal of the effect of the multimember districts, the Supreme Court declined to disturb the findings. *Id.* at 766-70.

48. 485 F.2d 1297 (5th Cir. 1973). In *Zimmer*, the Fifth Circuit considered whether an at-large voting scheme can dilute black voting strength when blacks constitute a majority of the population but a minority of the registered voters. *Id.* at 1300. First, the court held that the district court's reliance on population statistics, to the exclusion of all other factors, accorded such statistics impermissible weight. *Id.* at 1302-03. Next, the Fifth Circuit distinguished the one man, one vote principle from the vote dilution principle. *Id.* at 1303. Popu-

courts not apply the factors of the results test mechanically, but rather apply the factors in view of the totality of the circumstances.⁴⁹

Amended section 2 is the major statutory device to combat discrimination in voting procedures and incorporates the extensive case law that developed around the results test.⁵⁰ While most recent section 2 litigation involves challenges to structural practices or vote dilution cases, the earlier case law applying the results test is particularly important in determining the proper analytic framework for current section 2 cases challenging episodic practices.⁵¹ Nevertheless, any evaluation of amended section 2 requires discussing two important vote dilution cases.

C. Court Application of Amended Section 2

*Thornburg v Gingles*⁵² was the first Supreme Court case to interpret amended section 2.⁵³ The *Thornburg* Court emphasized that a section 2

lation, according to the court, properly measures equality in apportionment cases, but access to the political process measures equality in the vote dilution context. *Id.* Therefore, the Fifth Circuit held that the district court erred in applying a per se rule that vote dilution claims could not be found where blacks constitute a population majority. *Id.* at 1304. The court next discussed the typical factors that may contribute to finding a vote dilution violation. *Id.* at 1305. Despite evidence showing some success of black candidates and the lack of evidence showing government insensitivity to minority interests, the Fifth Circuit concluded that the at-large election scheme resulted in vote dilution. *Id.* at 1305-07. Finally, the court noted that its preference for single-member districts may yield where the use of such districts jeopardizes significant nondiscriminatory interests and where multimember districts afford greater opportunities for minorities than would single-member districts. *Id.* at 1307-08. Therefore, the Fifth Circuit reversed and remanded to the district court for further proceedings. *Id.* at 1308-09.

49. S. REP. NO. 417, *supra* note 2, at 29, reprinted in 1982 U.S.C.C.A.N. at 207.

50. *Id.* at 30, reprinted in 1982 U.S.C.C.A.N. at 207.

51. See *infra* notes 196-208 and accompanying text (discussing cases involving § 2 challenges to episodic practices).

52. 478 U.S. 30 (1986).

53. *Thornburg v Gingles*, 478 U.S. 30, 34 (1986) (construing for first time amended § 2 of Voting Rights Act). In *Thornburg*, the Court considered a challenge under § 2 of the Voting Rights Act to the use of multimember districts in North Carolina. *Id.* at 35. After plaintiffs brought suit, Congress amended § 2 to make clear that a § 2 violation could be established with evidence of discriminatory effect alone. *Id.* Under amended § 2, discriminatory intent is not required, and the relevant legal standard is the results test. *Id.* Furthermore, the Court found that the typical factors probative of a § 2 violation outlined by *White* and *Zimmer* should guide lower court application of the results test. *Id.* at 36-37. The Court then held that the use of multimember districts generally will not violate § 2 unless bloc voting along racial lines usually will prevent minorities from electing their preferred representative. *Id.* at 48-61. The Court found that racially polarized voting referred only to a

claim rests on the convergence of historical and social factors with a challenged voting structure to deny minorities an equal opportunity to elect representatives of their choice.⁵⁴ However, the Supreme Court devoted much of the opinion to defining legally significant bloc voting and developed a tripartite test to identify such voting.⁵⁵ The Court rejected the argument that statistical evidence must show that race was the primary factor in voter choice and held that racially polarized voting refers to voting correlated with race, not caused by race.⁵⁶ Thus, section 2 plaintiffs do not have to establish a causal link between historical and socioeconomic factors and voting practices.⁵⁷

*Chisom v Roemer*⁵⁸ held that amended section 2 applied to judicial elections.⁵⁹ However, the *Chisom* Court also concluded that section 2 cre-

correlation between voter race and the election of certain candidates. *Id.* at 74. Therefore, § 2 plaintiffs need not prove discriminatory intent or causation to establish racial bloc voting. *Id.* Additionally, the Court held that a § 2 violation was not foreclosed merely because some minority candidates had experienced electoral success. *Id.* at 74-77. The Court established that an ultimate finding of vote dilution based on the totality of the circumstances is a factual finding reviewable under the clearly-erroneous test of Rule 52(a) of the Federal Rules of Civil Procedure. *Id.* at 78-79. Because the district court appropriately considered the totality of the circumstances with regard to all but one of the challenged districts, the Supreme Court affirmed in part and reversed in part the district court judgment. *Id.* at 80.

54. See *Thornburg*, 478 U.S. at 36-37; Andrew P. Miller & Mark A. Packman, *Amended Section 2 of the Voting Rights Act: What Is the Intent of the Results Test?*, 36 EMORY L.J. 1, 66 (1987) (concluding that *Thornburg*'s emphasis on racial bloc voting may be inconsistent with congressional intent in amending § 2); see also *Nash v Blunt*, 797 F. Supp. 1488, 1496 (W.D. Mo. 1992) (stating that *Thornburg* protects right to elect and not right to influence).

55. See *Thornburg*, 478 U.S. at 50-51 (discussing importance of bloc voting to § 2 vote dilution claim). The *Thornburg* Court's test requires three elements for demonstration of racial bloc voting: (1) the minority is large and compact enough to constitute a majority in a single-member district, (2) the minority is politically cohesive, and (3) the white majority votes as a bloc to defeat the minority-preferred candidate. *Id.*, see also Miller & Packman, *supra* note 54, at 65 (concluding that *Thornburg*'s emphasis on racial bloc voting may be inconsistent with congressional intent in amending § 2); Dotti C. Venable, Note, *Chisom v Roemer: One Step Forward, Two Steps Back*, 21 STETSON L. REV. 985, 1008-09 (1992) (discussing *Thornburg* Court's emphasis on racial bloc voting).

56. See *Thornburg*, 478 U.S. at 63 (holding that results test requires correlation between voting and race).

57. See *id.* at 64-65 (holding that § 2 plaintiffs need not establish causal link between socioeconomic factors and minority voting practices).

58. 501 U.S. 380 (1991).

59. *Chisom v Roemer*, 501 U.S. 380, 398-400 (1991). In *Chisom*, the Court considered a challenge under § 2 of the Voting Rights Act to Louisiana's system of electing state supreme court justices from multimember districts. *Id.* at 385. The Court reviewed the history of the 1982 amendments to § 2 and concluded that Congress chose not to exclude judicial

ated only one cause of action.⁶⁰ Justice Scalia wrote a strong dissent,⁶¹ arguing that section 2 created only one right but two causes of action to vindicate that right.⁶² Part IV of this Note illustrates that the *Chusom* holding has particular significance for plaintiffs challenging episodic practices under section 2.⁶³ By finding only one cause of action, the Court made claims based on a loss of influence possible because that loss of influence necessarily interferes with the ability to elect.⁶⁴

III. Critical Analysis of Ortiz

A. Background

In *Ortiz v City of Philadelphia Office of the City Commissioners Voter Registration Division*,⁶⁵ the United States Court of Appeals for the Third Cir-

elections from § 2 protection. *Id.* at 393-96. The Court held that the language of § 2 does not create two separate and distinct rights, but rather creates one cause of action to challenge discriminatory voting practices. *Id.* at 396-98. The Court concluded that "representatives" in § 2 referred to winners of representative elections and thus encompassed the election of judges. *Id.* at 398-400. Additionally, the Supreme Court earlier had held § 5 applicable to judicial elections, and the Court concluded that Congress did not intend that the scope of coverage differ between §§ 5 and 2. *Id.* at 401-02. Finally, the Court rejected defendant's argument that because the Supreme Court earlier rejected constitutional challenges to state judicial elections, such elections were immune from vote dilution claims. *Id.* at 402-03. The Court found this argument unpersuasive because § 2 was enacted to provide broad protection for voting rights that were not adequately protected by the Constitution. *Id.* at 403. *See Venable, supra* note 55, at 1012-14 (discussing *Chusom's* finding that judges are representatives).

60. *See Chusom*, 501 U.S. at 396-98 (holding that courts must read language of § 2 conjunctively); *see also infra* notes 185-92 and accompanying text (criticizing *Ortiz* court's application of *Chusom*).

61. *See Chusom*, 501 U.S. at 404-17 (Scalia, J., dissenting) (arguing that § 2 creates one right but two causes of action).

62. *Id.* at 409

If both conditions must be violated before there is any § 2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis 'elect representatives of their choice' would be entirely without § 2 protection [A] protected class that with or without the practice will be unable to elect its candidate can be denied equal opportunity to 'participate in the political process' with impunity

Id.

63. *See infra* notes 193-253 and accompanying text (discussing various models for § 2 cause of action challenging episodic practices).

64. *Cf. Chusom*, 501 U.S. at 396-98 (discussing proper reading of § 2 of Voting Rights Act); *Venable, supra* note 55, at 1014-18 (concluding that decision in *Chusom* decreases likelihood of minority success in vote dilution actions).

65. 28 F.3d 306 (3d Cir. 1994).

cuit considered a section 2 challenge to Pennsylvania's voter purge statute.⁶⁶ This statute allows the registrar to remove from the registration list voters who fail to vote for two years.⁶⁷ The statute establishes procedures for determining which voters to remove and requires the registrar to give notice of the impending purge, by mail, to each voter prior to his or her removal from the registration list.⁶⁸ The legislature passed this statute to ensure the integrity of elections by reducing fraudulent registrations.⁶⁹

66. *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 307 (3d Cir. 1994) (holding that § 2 requires evidence that challenged practice caused minorities to be unable to elect their chosen representatives). Counsel for both parties conceded that this appears to be the only case considering whether a nonvoting purge law violates § 2 of the Voting Rights Act as amended in 1982. *Tucker v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, No. 91-6681 (E.D. Pa. Oct. 29, 1991) (memorandum and order denying preliminary injunction); Brief of Appellees at 41-42, *Ortiz* (93-1634).

67. 25 PA. CONS. STAT. ANN. § 623-40 (1994) (amended 1976).

68. *Id.* Section 623-40 provides:

During each year, the commission shall cause all of the district registers to be examined, and in the case of each registered elector who is not recorded as having voted at any election or primary during the two calendar years immediately preceding, the commission shall send to such elector by mail, at his address appearing upon his registration affidavit, a notice, setting forth that the records of the commission indicate that he has not voted during the two immediately preceding calendar years, and that his registration will be cancelled if he does not vote in the next primary or election or unless he shall, within ten days of the next primary or election, file with the commission, a written request for reinstatement of his registration, signed by him, setting forth his place of residence. A list of the persons to whom such notices shall have been mailed shall be sent promptly to the city chairman of the political party of which the electors were registered as members. At the expiration of the time specified in the notice, the commission shall cause the registration of such elector to be cancelled unless he has filed with the commission a signed request for reinstatement of his registration as above provided. The official registration application card of an elector who has registered may qualify as a reinstatement of his registration or a removal notice. The cancellation of the registration of any such elector for failure to vote during the two immediately preceding calendar years shall not affect the right of any such elector to subsequently register in the manner provided by this act.

Whenever the registration of an elector has been cancelled through error, such elector may petition the commission for the reinstatement of his registration not later than the tenth day preceding any primary or election, and after a hearing on said application, if error on the part of the commission is proved, the commission shall reinstate the registration of such elector.

Id.

69. See *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 824 F. Supp. 514, 517 (E.D. Pa. 1993) (discussing Pennsylvania legislature's intent in passing

Each January, a computer search by the voter registration division identifies those voters who have failed to vote in a primary or general election within the last two years.⁷⁰ The voter registration division then mails an "intent to purge notice" to voters identified by this search.⁷¹ The notice explains that the registrar will purge the voter from the registration list if the voter does not vote in the next election or submit a written request for reinstatement.⁷² Prior to the 1991 election, the registrar slated 193,000 (21%) of Philadelphia's registered voters for removal from the registration list pursuant to the Pennsylvania statute.⁷³

B. The District Court Opinion

Plaintiffs⁷⁴ brought suit in the United States District Court for the Eastern District of Pennsylvania challenging the validity of the Pennsylvania law under section 2 of the Voting Rights Act and the First and Fourteenth Amendments to the United States Constitution.⁷⁵ Plaintiffs contended that

voter purge law).

70. *Id.* at 518.

71. *Id.* The "intent to purge notice" reads as follows:

Our Records indicate you have failed to vote for the last two years. As required by law, we will cancel your Registration, unless you vote in the next Primary or Election or File with this Commission a written request for Reinstatement (10) days prior to the next Primary or Election, signed by you, giving your present residence. This is the only notice you will receive

Id.

72. *Id.*

73. *Ortiz v City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 307 (3d Cir. 1993).

74. Plaintiffs included Philadelphia City Councilman Angel Ortiz, Project VOTE, and Service Employees International Union Local 36, which represents janitorial employees in the City of Philadelphia, 60% of whom are members of a minority group. *Ortiz*, 824 F Supp. at 516.

75. *Id.* (holding that PA. CONS. STAT. ANN. § 623-40 does not violate § 2 of Voting Rights Act). Most cases challenging voter purge laws have done so on constitutional grounds or for failure of officials to comply with statutorily mandated procedures. However, voter purge laws generally have passed constitutional muster. *See generally Hoffman v Maryland*, 928 F.2d 646 (4th Cir. 1991) (upholding constitutionality of Maryland voter purge law); *Brier v Luger*, 351 F Supp. 313 (M.D. Pa. 1972) (finding purge nondiscriminatory despite evidence that 83% of those purged were Democrats); *Williams v Osser*, 350 F Supp 646 (E.D. Pa. 1972) (upholding constitutionality of Pennsylvania purge law); *Williams v Osser*, 326 F Supp. 1139 (E.D. Pa. 1971) (refusing to enjoin purging of voters pursuant to Pennsylvania statute); *Duprey v Anderson*, 518 P.2d 807 (Colo. 1974) (upholding Colorado voter purge law); *Barber et al.*, *supra* note 14, at 514-17 (reviewing cases holding that

the voter purge law had a disparate impact on minority voters, that discrimination in voting was endemic to the political process in Philadelphia, that minorities faced discrimination in housing and employment, and that city officials had demonstrated a lack of responsiveness to minority concerns.⁷⁶ The City of Philadelphia (the City) acknowledged that the voter purge statute had a disproportionate impact on minorities, but argued that the plaintiffs had to prove more to establish a section 2 violation.⁷⁷ Additionally, the City argued that the voter purge law did not *cause* unequal access to the political process.⁷⁸

After reviewing the history of the Voting Rights Act, the district court considered the application of section 2 to the Pennsylvania voter purge law.⁷⁹ The court noted that although voters did not often make section 2 challenges to episodic practices, the legislative history of the Voting Rights Act indicated an intent that section 2 apply to all voting-related discrimination.⁸⁰ The district court closely examined the *Thornburg* Court's decision, but declined to rule that the plaintiffs had to satisfy the *Thornburg* tripartite test⁸¹ in order to establish a section 2 episodic practices violation.⁸² The parties and the court agreed that the challenge to the Pennsylvania voter purge statute was distinguishable from the challenge to the structural practice present in *Thornburg*.⁸³ Therefore, the court evaluated the plaintiffs' claim based on

application of purge laws violated state or local statute). *But see generally* Michigan State UAW v Austin, 198 N.W.2d 385 (Mich. 1972) (holding that voter purge law violated Michigan state constitution).

76. *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 824 F Supp. 514, 519 (E.D. Pa. 1993) (holding that Pennsylvania nonvoting purge law did not violate § 2 of Voting Rights Act).

77. *Id.*

78. *Id.*

79. *Id.* at 521.

80. *See id.* at 521-22 (holding that Pennsylvania nonvoting purge law did not violate § 2 of Voting Rights Act). The court wrote that:

The scope of the statute therefore includes all electoral practices that deny minority voters equal opportunity to participate in any phase of the political process and to elect candidates of their choice, even if the challenged practice is episodic rather than involving a permanent structural barrier infringing upon the right to vote.

Id. at 522 (citing S. REP. NO. 417, *supra* note 2).

81. *See supra* notes 52-57 and accompanying text (discussing tripartite *Thornburg* test for determining legally significant bloc voting).

82. *Ortiz*, 824 F Supp. at 523.

83. *See id.* (recognizing distinction between episodic practices and vote dilution). The

the Senate factors⁸⁴ rather than using the *Thornburg* tripartite test.⁸⁵

Moreover, the district court noted that it was free to consider other factors not mentioned in Senate Report 417 that also indicate a section 2 violation.⁸⁶ The court then held that plaintiffs additionally must establish that the voter purge law *caused* the alleged discriminatory result.⁸⁷ Although the plaintiffs acknowledged that *Thornburg* required a showing that the challenged structure (multimember district, redistricting plan, etc.) was responsible for the inability of minority voters to elect their preferred candidates, they argued that only section 2 vote dilution cases require proof of causation.⁸⁸ The district court rejected this argument as

court stated:

I am not persuaded that the analysis outlined in *Thornburg* governs the voting rights issue presently under consideration. *Thornburg* involved a vote dilution claim challenging the use of multi-member districts, whereas plaintiffs' claim alleges that the voter purge law precludes otherwise eligible minority voters from exercising their right to vote and participate in the political process. Naturally, in the context of a vote dilution claim, plaintiffs should be required, as a threshold matter, to demonstrate the *Thornburg* standard because those factors directly address the ultimate issue in the case: namely, whether the use of a multi-member district denies minority voters equal access to the political process and the ability to elect their representatives of choice.

It simply is not clear that the *Thornburg* pre-conditions are relevant to the plaintiffs' challenge that the voter purge law violates § 2. This conclusion does not reflect the view that *Thornburg* is only applicable to vote dilution claims: it merely reflects my view that *the Thornburg factors, while probative in the context of vote dilution cases, are peripheral issues bearing limited relevance to the plaintiffs' claim presently before the Court.*

Id. (emphasis added) (citations omitted).

84. See *supra* notes 43-49 and accompanying text (discussing typical factors probative of vote dilution).

85. See *supra* note 55 and accompanying text (discussing tripartite *Thornburg* test for determining legally significant bloc voting).

86. *Ortiz*, 824 F. Supp. at 524 (citing S. REP. NO. 417, *supra* note 2); see also *Gomez v. City of Watsonville*, 863 F.2d 1407, 1413 (9th Cir. 1988) (holding that Senate factors are not exhaustive).

87. *Ortiz*, 824 F. Supp. at 524. "[P]laintiffs must *additionally* establish that the voter purge law *caused* minority voters to experience unequal opportunity to participate in the political process and to elect their preferred representatives." *Id.* (emphasis added).

88. *Id.* The court complained that plaintiffs cited no cases supporting the contention that a plaintiff need not prove causation in a challenge to an episodic practice. *Id.* Furthermore, the court concluded that plaintiffs had relied erroneously on Senate Report 417, which stated that

disproportionate educational, employment, income level, and living conditions arising from past discrimination tend to depress minority political participation.

inapposite.⁸⁹ The court concluded that

implicit in any finding that a challenged electoral procedure violates section 2 is the conclusion that the electoral procedure *is the dispositive force* depriving minorities of equal access to the political process, and that *in the absence of such a procedure*, minorities would not be deprived of equal access to the political process and the ability to elect their candidates of choice.⁹⁰

The court went on to find that section 2 required evidence of causation to establish a violation even when the plaintiffs could show that the purge law operated with a disparate impact on minority voters in Philadelphia.⁹¹ As the district court explained the law, a section 2 plaintiff challenging an episodic practice did not have to meet the three-part causation test of *Thornburg*, but did have to prove a causal link between the challenged practice and minority access to the political process.⁹²

At trial, the plaintiffs produced statistical evidence that demonstrated the disparate impact of the purge law on minority voters.⁹³ The evidence showed that in 1990, the registrar purged minority voters at a rate approxi-

Where these conditions are shown, and where the level of black participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socioeconomic status and the depressed level of political participation.

S. REP. NO. 417, *supra* note 2, reprinted in 1982 U.S.C.C.A.N. at 207 n.114 (citations omitted). This language, concluded the court, makes clear that no causal link between socioeconomic factors and political participation rates need be established. *Ortiz*, 824 F Supp. at 525. On the other hand, the court found that this language did not address whether causation must be established between the challenged practice and the disenfranchisement of minority voters. *Id.*

89. *Ortiz*, 824 F Supp. at 525.

90. *Id.* at 524 (emphasis added).

91. *Id.* at 525-26. The court wrote:

Although the Court recognizes that in cases involving discriminatory effect as opposed to discriminatory intent, there is always an emphasis upon demonstrating a statistically significant impact, this emphasis is not a substitute for establishing that based upon the totality of the circumstances, the challenged electoral procedure is responsible for the minority groups' inability to participate in the political process and elect their representatives of choice.

Id. at 526.

92. *See id.* at 525-26 (concluding that statistical disparity in purge rates alone is not sufficient evidence of causation to establish § 2 violation).

93. *Id.* at 526. Plaintiffs relied on ecological regression analysis and extreme case analysis provided by Dr. Allan Lichtman, Professor of History at The American University, College of Arts and Sciences, in Washington, D.C. *Id.* at 526-27

mately 38% higher than white voters.⁹⁴ Generally, the registrar purged 27% of Latinos, 25.8% of African-Americans, and 17.3% of white registrants.⁹⁵ After adjustment for reregistration, the law removed 20.8% of minority voters from the registration list compared to 13.2% of white voters.⁹⁶ The district court accepted the plaintiffs' data and concluded that the purge law clearly had a disproportionate impact on African-American and Latino voters.⁹⁷

The district court next considered Philadelphia's history of discrimination in registration, voting, and political participation, as well as the effect of this discrimination on minority participation in the democratic process.⁹⁸ The court made extensive findings of fact regarding the existence of racially polarized voting in Philadelphia, limited minority access to candidate slating processes, and the extent to which minorities bear the effects of discrimination in education, housing, health care, employment, and income.⁹⁹ The court also considered the number of political campaigns that have contained racial appeals¹⁰⁰ and the number of minorities elected to office in Philadelphia.¹⁰¹ Finally, the court found that Philadelphia officials had not addressed some of the particularized needs of minority voters.¹⁰² However, despite these findings, the district court denied the plaintiffs' request for injunctive relief.¹⁰³ The decision rested primarily on the court's holding that evidence of disparate impact is insufficient to make out a section 2 violation unless a plaintiff can show a causal link between the challenged practice and minority access to the political process.¹⁰⁴

94. *Id.* at 527. For a summary of Dr. Lichtman's findings, see Table 2 in the district court opinion and the accompanying discussion. *Id.* at 527-28.

95. *Id.* at 528.

96. *Id.* Dr. Lichtman studied voter registration data covering 1989-1991. For a more complete discussion of Dr. Lichtman's findings, see *id.* at 526-31, which discusses the disproportionate impact of Pennsylvania's nonvoting purge statute on minority voters in Philadelphia.

97. *Id.* at 530. In fact, studies have documented that voter purge laws have a disparate impact on minority voters. See THE UNITED STATES COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER, 83-95 (1975) (discussing impact of purge laws).

98. See *Ortiz*, 824 F. Supp. at 531 (discussing Philadelphia's failure to provide adequate bilingual voting information).

99. *Id.* at 533-36.

100. *Id.* at 536-37.

101. *Id.* at 537-38.

102. *Id.* at 538.

103. *Id.* at 539.

104. *Id.*

C. *The Third Circuit Court of Appeals Opinion*

On appeal to the Third Circuit, the plaintiffs abandoned their claims under the United States Constitution and state law and challenged only the district court's denial of their section 2 claim.¹⁰⁵ The plaintiffs argued that the district court erred in holding that the plaintiffs failed to prove that the voter purge law *caused* the removal of minorities from the registration lists at higher rates than white voters.¹⁰⁶ At the outset, the court of appeals established that clear error is the standard of review employed in voting rights cases.¹⁰⁷ Next, the court reviewed the history of the Voting Rights Act and the 1982 amendments to section 2.¹⁰⁸ Also, the court examined the Supreme Court's decision in *Thornburg* and Senate Report 417 on amended section 2.¹⁰⁹

Following this background, the Third Circuit framed the issue as whether the district court erred by including causation in the totality of the circumstances analysis.¹¹⁰ Quoting language from *Thornburg*,¹¹¹ the court concluded that section 2 requires some causal connection between a challenged voting practice and minority access to the political process.¹¹² The Third Circuit cited cases from three other circuits¹¹³ to support its holding that

105. See *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 308 n.3 (3d Cir. 1994) (holding that Pennsylvania's voter purge law does not violate § 2 of Voting Rights Act). Although plaintiffs based their claims on the 1991 election, their claims were not moot because they were "capable of repetition yet evading review." *Id.* (quoting *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975)).

106. *Ortiz*, 28 F.3d at 308.

107. See *id.* at 308-09 (discussing proper standard of review in voting rights cases). The standard that a district court applies to determine whether a challenged practice has a discriminatory effect is a question of law subject to plenary review. *Id.* at 309; accord *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1116-17 (3d Cir. 1993) (holding that clearly erroneous standard does not give district courts unfettered discretion in § 2 cases because underlying legal analysis is subject to plenary review).

108. *Ortiz*, 28 F.3d at 309; see also *supra* notes 24-51 and accompanying text (discussing legislative history of Voting Rights Act and 1982 amendments to § 2).

109. *Ortiz*, 28 F.3d at 309-10; see also *supra* notes 52-57 and accompanying text (discussing *Thornburg* Court's interpretation of amended § 2).

110. *Ortiz*, 28 F.3d at 310.

111. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). "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." *Id.*

112. *Ortiz*, 28 F.3d at 310.

113. See *id.* at 310-11 (discussing § 2 cases from other circuits). The court cited *Salas v. Southwest Tex. Junior College Dist.*, 964 F.2d 1542 (5th Cir. 1992) (holding that use

plaintiffs must demonstrate a causal connection between a challenged voting practice and a discriminatory result to prevail under section 2.¹¹⁴ In fact, the court characterized the plaintiffs' contention to the contrary as without merit.¹¹⁵

The court of appeals reviewed, but did not disturb, the district court's findings of fact.¹¹⁶ The Third Circuit downplayed the lower court's use of the "dispositive force" language¹¹⁷ and found instead that this phrase meant only a legally dispositive cause.¹¹⁸ The court reiterated the importance of ensuring the right to vote in a democratic society, but found that in the instant case, the state was not responsible for depriving minorities of the right to elect their chosen representatives.¹¹⁹ Instead, the court concluded that historical factors caused lower minority turnout.¹²⁰ In addition, the court explained that purge statutes are a legitimate means by which to prevent voter fraud.¹²¹ Thus, the court concluded that the City purged minorities more often than whites only because minorities voted less often.¹²²

of at-large electoral system did not violate § 2 of Voting Rights Act); *Irby v Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989) (holding that Virginia's appointive system for selecting school board members did not violate § 2 of Voting Rights Act), *cert. denied*, 496 U.S. 906 (1990); *Wesley v Collins*, 791 F.2d 1255 (6th Cir. 1986) (holding that Tennessee's felon disenfranchisement law did not violate § 2 of Voting Rights Act); *see also infra* notes 207-08 and accompanying text (discussing *Ortiz* court's use of these § 2 cases).

114. *Ortiz*, 28 F.3d at 310-11.

115. *Id.* at 312 (stating that "[plaintiffs'] argument to the contrary is without legal foundation, devoid of endorsement in existing caselaw and the legislative history of § 2 of the Voting Rights Act, and is not supported by evidence.").

116. *Id.* at 312-13.

117. *See Ortiz v City of Phila. Office of the City Comm'rs Voter Registration Div.*, 824 F. Supp. 514, 524, 539 (E.D. Pa. 1993) (holding that Pennsylvania's nonvoting purge law did not violate § 2 of Voting Rights Act despite disparate impact on minority voters).

118. *Ortiz*, 28 F.3d at 313 n.11.

119. *Id.* at 313.

120. *Id.* at 313 n.12; *see supra* notes 52-57 and accompanying text (discussing *Thornburg*).

121. *Ortiz*, 28 F.3d at 314 (citing *Hoffman v Maryland*, 928 F.2d 646, 649 (4th Cir. 1991) (upholding constitutionality of Maryland's nonvoting purge law)); *see also Rosario v Rockefeller*, 410 U.S. 752, 761 (1973) (recognizing states' interest in preserving integrity of electoral process); *Barilla v Ervin*, 886 F.2d 1514, 1523-24 (9th Cir. 1989) (noting states' legitimate interest in preventing voter fraud).

122. *See Ortiz*, 28 F.3d at 313-14 (holding historical and socioeconomic factors irrelevant to plaintiffs' § 2 claim).

The Third Circuit next discussed the Supreme Court's *Chisom* decision.¹²³ The *Ortiz* court found that *Chisom* requires a section 2 plaintiff to show that minorities had less opportunity to participate in the political process and to elect their chosen representatives.¹²⁴ The court held that the plaintiffs could not satisfy these requirements because there was no evidence of inability to elect officials.¹²⁵ Therefore, the court concluded that the plaintiffs did not prove *both elements* of a section 2 cause of action because they failed to establish causation.¹²⁶ The court of appeals focused next on the fact that all of those purged under the Pennsylvania law previously had registered to vote.¹²⁷ The court reasoned that those purged had overcome the socioeconomic disadvantages discussed at length by the plaintiffs and the dissent.¹²⁸ In light of this conclusion, the court found the societal disadvantages suffered by minorities in Philadelphia irrelevant to the plaintiffs' section 2 claim.¹²⁹

The Third Circuit rejected the suggestion that the City must prove the need for the voter purge law.¹³⁰ However, even if required to consider the

123. *Id.* at 314.

124. *Id.* (citing *Chisom v Roemer*, 501 U.S. 380, 397 (1991) (holding that § 2 creates only one cause of action)); *see supra* notes 215-21 and accompanying text (discussing *Ortiz* court's misapplication of *Chisom*).

125. *See Ortiz*, 28 F.3d at 315 (holding that Pennsylvania's nonvoting purge law did not violate § 2 of Voting Rights Act despite evidence of law's disparate impact on minority voters).

126. *Id.* at 315.

127. *See id.* at 315-16 (holding historical and socioeconomic factors irrelevant because Pennsylvania's nonvoting purge law operated only on those who previously registered to vote).

128. *Id.*

129. *See id.* at 316 (holding that Pennsylvania's nonvoting purge law did not violate § 2 of Voting Rights Act despite evidence of law's disparate impact on minority voters). The court stated:

The societal disadvantages cited by the plaintiffs and the dissent just are not relevant. They are not relevant because they could not have diluted voting by a registrant or voter who had already registered and/or voted. [T]he record reveals no link between the societal conditions and factors recited by the dissent and the electoral practice (i.e. the purge law) challenged by *Ortiz*.

Id.

130. *See id.* (holding that purge laws are legitimate means of preventing voter fraud). The dissent's argument that the City should establish the need for the purge law is based on Senate Report 417, which provides: "[P]urging of voters could produce a discriminatory result if fair procedures were not followed, or if the *need* for a purge *were not shown* or if opportunities for re-registration were unduly limited." S. REP. NO. 417, *supra* note 2, at 30

need for the voter purge, the court believed that the purge statute served an important and legitimate state interest — prevention of electoral fraud.¹³¹ Finally, the court criticized both the plaintiffs' and the dissent's focus on the societal disadvantages of minority Philadelphians on the ground that such factors were relevant only to registration procedures.¹³²

D The Dissenting Opinion

Judge Lewis dissented, initially stating that despite significant progress, the discrimination prohibited by the Voting Rights Act continues to damage the integrity and effectiveness of government.¹³³ The dissent argued that the district court erred by not finding a violation of section 2 of the Voting Rights Act.¹³⁴ First, the dissent reviewed Philadelphia's administration of the voter purge statute and plaintiffs' expert testimony regarding its impact on minority voters.¹³⁵ Second, Judge Lewis reviewed the district court's factual findings.¹³⁶ Third, the dissent chronicled the history of the Voting Rights Act and several major cases interpreting section 2 of the Act.¹³⁷ Against this background, Judge Lewis concluded

n.119, reprinted in 1982 U.S.C.C.A.N. at 208 (emphasis added) (citations omitted). The dissent also drew an analogy between episodic practices and Title VII disparate impact law, which allows plaintiffs in an employment discrimination case to show less discriminatory alternatives to refute defendant's business justifications. *Ortiz*, 28 F.3d at 333-34 (Lewis, J., dissenting).

131. *Ortiz*, 28 F.3d at 316.

132. *See id.* at 317 (arguing that societal disadvantage is relevant to registration, but not to reregistration). The *Ortiz* court stated: "When, if ever, a claimant mounts an attack against Philadelphia's voter registration provisions, then and only then will it be the time to assess the legality of such procedures in light of the societal disadvantages highlighted by the dissent." *Id.*

133. *Id.* (Lewis, J., dissenting).

134. *See id.* at 319 (arguing that majority misapplied § 2 of Voting Rights Act).

135. *Id.* at 319-20. To put the disparate impact of the nonvoting purge law in perspective, the dissent quoted the testimony of Dr. Lichtman:

[I]f the black [purge] rate in 1991 had been as low as the white rate, about 28,000 fewer black registrants would have been [slated for purging] in 1991. Conversely, if the white purge rate in 1991 had been as high as the black rate, about 41,000 more white registrants would have been [slated for purging] in 1991.

Id. at 320 n.2.

136. *Id.* at 320-21, *see supra* notes 93-102 and accompanying text (discussing district court's findings of fact).

137. *Ortiz*, 28 F.3d at 321-22 (Lewis, J., dissenting); *see supra* notes 24-42 and accompanying text (discussing passage of Voting Rights Act and judicial interpretation of

that courts must take a functional, practical, and realistic approach to voting rights cases.¹³⁸ In the dissent's view, the *Thornburg* Court identified the essence of a section 2 claim as whether the challenged practice or structure interacts with social and historical conditions to cause unequal political opportunities for minority groups.¹³⁹

The dissent accepted as unassailable the proposition that section 2 plaintiffs must show a causal connection between the challenged practice or structure and discriminatory results.¹⁴⁰ However, the dissent argued that the majority's approach required that plaintiffs demonstrate more than just a causal link.¹⁴¹ The majority mandated that plaintiffs establish that the challenged practice was the principal cause of the discriminatory result.¹⁴² This requirement, according to Judge Lewis, misinterpreted the legislative history and relevant case law concerning section 2.¹⁴³ A proper application of the law, argued the dissent, requires only that the challenged practice be a *contributing cause* of the discriminatory result.¹⁴⁴ In the dissent's view, a challenged practice violates section 2 if it interacts with other external conditions to produce a discriminatory result.¹⁴⁵

The City did not defend the district court's dispositive force language at oral argument, but rather suggested that, despite this error, the district court applied the correct standard.¹⁴⁶ The dissent agreed that the district court understood the correct standard, but was troubled that the *Ortiz* majority did not qualify its support for the dispositive force lan-

§ 2).

138. *Ortiz*, 28 F.3d at 322 (Lewis, J., dissenting).

139. *Id.*, see also *Thornburg v Gingles*, 478 U.S. 30, 47 (1986) (defining § 2 cause of action following 1982 Amendments to Voting Rights Act).

140. *Ortiz*, 28 F.3d at 322-23 (Lewis, J., dissenting).

141. *Id.* at 323.

142. *Id.* The dissent focused on the district court's statement that the § 2 challenge failed because plaintiff did not show that "the purge law [was] the *dispositive force* in depriving minority voters of equal access to the political process." *Ortiz v City of Phila. Office of the City Comm'rs Voter Registration Div.*, 824 F.Supp. 514, 539 (E.D. Pa. 1993) (emphasis added). Plaintiffs argued that this language incorrectly stated the standard for § 2 cases. *Ortiz*, 28 F.3d at 313 n.11. However, the Third Circuit concluded that in the context of the entire opinion, dispositive force meant a cause that is "legally dispositive." *Id.* The court of appeals did not elaborate further on the meaning of a legally dispositive cause and left future plaintiffs with considerable uncertainty regarding the prima facie § 2 case.

143. *Ortiz*, 28 F.3d at 323 (Lewis, J., dissenting).

144. *Id.*

145. *Id.*

146. *Id.*

guage.¹⁴⁷ This construction of section 2 led to the majority's conclusion, which was shocking to the dissent, that the social, economic, and historical disadvantages found by the district court were irrelevant in the absence of a "legally dispositive" causal link.¹⁴⁸ The dissent stated that the majority's position, if honestly appraised, required that a challenged practice *actually cause* the other circumstances that might contribute to a discriminatory result.¹⁴⁹ The dissent argued that the challenged practice need only *interact with* other circumstances to cause a discriminatory result.¹⁵⁰ On this basis, the dissent contended that the majority erred in its construction of section 2 and in its conclusion that a searching analysis of the reasons why minorities vote less often was unnecessary.¹⁵¹

147 *Id.* at 323 n.7 The dissent explained the majority's reasoning:

[W]hile black and Latino voters have turned out in lower numbers, the purge law did not cause that statistical disparity. And because the plaintiffs have not shown that the purge law itself has prevented members of minority groups from voting, they have failed to prove the kind of causation that the majority reads § 2 to require. Under this construction, a challenged voting law is permissible unless it is entirely responsible for the abridgment of plaintiffs' political opportunities; if other factors interact with the challenged law to bring about such a discriminatory result — absent proof that those factors are themselves products of the law — no violation of § 2 has occurred.

Id. at 323-24; *see supra* notes 117-22 and accompanying text (discussing *Ortiz* court's requirement that plaintiffs show legally dispositive causal link between voter purge law and higher rates of minority purging).

148. *Ortiz*, 28 F.3d at 324 (Lewis, J., dissenting).

149 *Id.* at 325. Relying on *Thornburg v Gingles*, 478 U.S. 30, 47 (1986), the dissent stated that the majority's construction of § 2 is "an unsupported and insupportable distortion of the Voting Rights Act with which I could not disagree more strongly." *Ortiz*, 28 F.3d at 325 (Lewis, J., dissenting).

150. *Ortiz*, 28 F.3d at 325 (Lewis, J., dissenting).

151. *Id.* at 327 The dissent made much of the majority's simple explanation that the law purged blacks and Latinos at higher rates simply because they vote less often. The majority's approach does not require any further inquiry into the reasons for the law's effect. Therefore, the dissent wrote:

So, if the majority is right, Congress and the Supreme Court — by relieving plaintiffs of the need to prove a causal connection between discrimination and socioeconomic disadvantage, on the one hand, and lower participation rates, on the other — have effectively immunized non-voting purge laws from § 2 challenges. Such laws cannot be responsible for the disparate impact they have when, as a matter of law, discrimination and disadvantage are at least principally to blame. Clearly, though, Congress and the Supreme Court have done no such thing

Id. at 326.

The dissent believed that *Mississippi State Chapter, Operation PUSH v Allan*¹⁵² (*PUSH I*) closely paralleled *Ortiz* and applied the correct construction of section 2 to episodic practices.¹⁵³ In *PUSH I* the district court found that Mississippi's registration procedures interacted with inequality in the availability of transportation and the occupational status of blacks to reduce black registration rates.¹⁵⁴ This disparate impact, the *PUSH I* court found, resulted in minorities having less opportunity to participate in the political process and thus constituted a section 2 violation.¹⁵⁵ The Fifth Circuit affirmed *PUSH I* in *Mississippi State Chapter, Operation PUSH v Mabus*¹⁵⁶ (*PUSH III*). The *PUSH* courts examined the interaction of the challenged practice with social, economic, and historical factors.¹⁵⁷ The *Ortiz* dissent argued that the *PUSH* courts

152. 674 F Supp. 1245 (N.D. Miss. 1987).

153. *Mississippi State Chapter, Operation PUSH v Allan*, 674 F Supp. 1245, 1263-68 (N.D. Miss. 1987) [hereinafter *PUSH I*] (finding that Mississippi's dual registration system violated § 2 of Voting Rights Act but that remedial legislation cured violations), *aff'd sub nom.* *Mississippi State Chapter, Operation PUSH v Mabus*, 932 F.2d 400 (5th Cir. 1991) [hereinafter *PUSH III*]. In *PUSH III*, the Fifth Circuit considered a challenge to *PUSH I*'s finding that Mississippi's dual registration procedures violated § 2 of the Voting Rights Act and to *PUSH II*'s approval of the Mississippi Legislature's proposed remedy *PUSH III*, 932 F.2d at 401-02. The court found that no cases specifically defined the remedial powers of the federal courts in episodic cases, but that vote dilution cases provided appropriate guidance. *Id.* at 406. Therefore, the Fifth Circuit found that district courts must accept a legislative plan if it does not violate the Voting Rights Act or the Constitution. *Id.* at 407. Although the remedy might have been broader, the court concluded that the district court did not abuse its discretion in approving the legislative remedy *Id.* Nevertheless, the court went on to find that the legislative plan was not racially motivated and did not show discriminatory intent merely because the Mississippi legislature rejected two more expansive proposals. *Id.* at 408-09. With regard to the original § 2 violation, the court recounted Mississippi's long history of efforts to reduce the political participation of minorities. *Id.* at 402. The court found that blacks had less access to transportation and were employed in jobs that would not allow them to leave during the workday *Id.* at 403. The Fifth Circuit affirmed the district court's application of the Senate factors in evaluating plaintiffs' § 2 claim. *Id.* at 405. Additionally, the Fifth Circuit held that *Thornburg* did not require a county-by-county analysis of voting patterns to determine a violation of § 2. *Id.* at 409-10. Finally, the court of appeals concluded that the district court's finding of a 25% disparity between black and white registration rates was not clearly erroneous. *Id.* at 410-12. Thus, the Fifth Circuit affirmed the district court with regard to both its acceptance of the legislative remedy and its original finding that Mississippi's dual registration procedures violated § 2. *Id.* at 412-13.

154. *PUSH I*, 674 F Supp. at 1268.

155. *Id.*

156. 932 F.2d 400 (5th Cir. 1991) (finding that Mississippi's dual registration system violated § 2 of Voting Rights Act but that remedial legislation cured violations).

157. *Id.* at 403.

correctly understood that whether the challenged practice caused the social, economic, and historical factors at play in Mississippi was irrelevant to a section 2 challenge.¹⁵⁸ In fact, those conditions obviously were not a product of the challenged law. Nonetheless, the *PUSH* courts did not require any showing that the registration procedures at issue in that case *alone caused* the lower registration rates of blacks.¹⁵⁹

The dissent also relied on the reasoning of the Eleventh Circuit in *United States v Marengo County Commission*¹⁶⁰ to illustrate the majority's misapplication of section 2.¹⁶¹ Not unlike the *Ortiz* majority, the district court in *Marengo* concluded that lower black registration rates were attributable to "apathy," rather than to the practice that the plaintiffs challenged.¹⁶² However, the Eleventh Circuit rejected this reasoning and found that section 2 did not require the plaintiffs to prove that the challenged practice *singularly caused* the lower registration rate of blacks.¹⁶³ The *Ortiz* dissent endorsed this reasoning and cited other cases that contradict the *Ortiz* majority's construction of section 2.¹⁶⁴

158. *Ortiz v City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 328 (3d Cir. 1994) (Lewis, J., dissenting).

159. *Id.* at 328 n.13.

160. 731 F.2d 1546 (11th Cir. 1984).

161. See *United States v Marengo County Comm'n*, 731 F.2d 1546, 1563-74 (11th Cir. 1984) (holding that county's at-large election system violated § 2). In *Marengo*, the Eleventh Circuit considered a § 2 challenge to Marengo County's at-large system for electing county commissioners and school board members. *Id.* at 1552. First, the court held that even though the litigation began in 1979, § 2 as amended in 1982 should apply to the case. *Id.* at 1553-55. Second, the Eleventh Circuit found that amended § 2 was based on the enforcement clauses of both the Fourteenth and Fifteenth Amendments. *Id.* at 1555. Therefore, the court rejected defendants' assertion that a vote dilution claim is not cognizable under amended § 2. *Id.* at 1555-56. Third, the Eleventh Circuit held that § 2's results test was an appropriate use of Congress's power to enforce the Fourteenth and Fifteenth Amendments. *Id.* at 1556-63. The court declined to find a § 2 results violation and elected to remand because the district court directed its inquiry only to whether the plaintiffs demonstrated discriminatory intent. *Id.* at 1563. To clarify the proper legal standards applicable to the case, the court explained in detail how to apply the results test of § 2. *Id.* at 1563-74. Finally, the Eleventh Circuit concluded that Marengo County's at-large election system had a discriminatory result at the time the case was tried, but remanded the case to give both parties an opportunity to update the record. *Id.* at 1574-75.

162. *Id.* at 1568.

163. *Ortiz*, 28 F.3d at 328 (Lewis, J., dissenting) (citing *Marengo*, 731 F.2d at 1568-75).

164. *Ortiz*, 28 F.3d at 329 n.14 (Lewis, J., dissenting). For further discussion of those cases contradicting the *Ortiz* majority's construction of § 2, see *infra* notes 193-253 and accompanying text (discussing alternative models for § 2 causes of action challenging episodic practices).

The dissent distinguished a case relied on by the majority, *Salas v Southwest Texas Junior College District*.¹⁶⁵ The *Ortiz* majority, contended the dissent, took out of context the Fifth Circuit's statement that plaintiffs were not entitled to section 2 relief merely because their class turned out to vote in lower numbers.¹⁶⁶ The *Ortiz* majority failed to appreciate that the Hispanic plaintiffs in *Salas* constituted a majority of the electorate in that district.¹⁶⁷ Therefore, the *Salas* court found that the plaintiffs in that case failed to satisfy the *Thornburg* three-part threshold test for vote dilution claims¹⁶⁸ because no evidence showed that white bloc voting prevented Hispanics from being elected.¹⁶⁹ In the *Ortiz* dissent's view, the statement of the *Salas* court was thus understandable.

Next, the dissent suggested that Title VII disparate impact law provided an appropriate model for deciding section 2 challenges to episodic

165. 964 F.2d 1542 (5th Cir. 1992).

166. *Ortiz*, 28 F.3d at 329 (Lewis, J., dissenting) (citing *Salas*, 964 F.2d at 1556). In *Salas*, the Fifth Circuit considered Hispanic voters' challenge under § 2 of the Voting Rights Act to an at-large districting scheme. *Salas*, 964 F.2d at 1543. The district court found that Hispanics comprised a majority of registered voters in the district. *Id.* at 1544. However, finding that plaintiffs did not establish legally significant bloc voting, the district court denied plaintiffs' § 2 claim. *Id.* at 1545. The Fifth Circuit recounted many of the district court's findings of fact before discussing the issues on appeal. *Id.* at 1544-46. First, the Fifth Circuit held that plaintiffs were not precluded from bringing a vote dilution challenge merely because they were members of a class that constituted a majority of registered voters. *Id.* at 1547. The court found that the totality of the circumstances analysis should apply in any vote dilution case and reviewed the development of these objective criteria, as well as general voting rights principles. *Id.* at 1547-51. The court discussed the *Thornburg* threshold test for determining legally significant bloc voting, but concluded that it did not displace the totality of the circumstances analysis. *Id.* at 1552-54. Underlying both the *Thornburg* tests and the totality of the circumstances analysis, the court concluded, is an inquiry into causation — whether the given practice is responsible for the discriminatory result. *Id.* at 1554. The Fifth Circuit held that the district court's findings of fact satisfied the totality of the circumstances analysis. *Id.* at 1555. Because these findings of facts were not clearly erroneous, the Fifth Circuit affirmed the judgment of the district court denying plaintiffs' § 2 vote dilution claim. *Id.* at 1556.

167. See *Ortiz*, 28 F.3d at 329 (Lewis, J., dissenting) (discussing *Salas*, 964 F.2d at 1555).

168. See *supra* notes 54-57 and accompanying text (discussing *Thornburg* preconditions to vote dilution challenge).

169. See *Ortiz*, 28 F.3d at 329 (Lewis, J., dissenting) (discussing *Salas*, 964 F.2d at 1555). Interestingly, the *Salas* court went on to find that even though the Hispanic plaintiffs represented a class constituting a majority of the electoral district in question, a showing that minority bloc voting, in this case white bloc voting, prevented Hispanics from electing their chosen representatives might still be possible if other factors interacted with the white bloc voting to frustrate Hispanic electoral success. *Salas*, 964 F.2d at 1555-56.

practices like that at issue in *Ortiz*.¹⁷⁰ Both Title VII and section 2 employ results tests to determine violations of the rights of protected classes.¹⁷¹ In Title VII cases, if a plaintiff shows a disparate impact on minorities, the burden shifts to the employer to show that business necessitates the practice.¹⁷² In section 2 cases, however, a plaintiff must establish the discriminatory result of a challenged law or practice and often will attempt to establish that the practice is unnecessary.¹⁷³ In short, a local or state government defendant in a section 2 case bears no burden of proof, while a Title VII employer defendant must prove the business necessity of the challenged practice.¹⁷⁴ The dissent argued that section 2 cases should follow the Title VII model that requires defendants to establish the necessity of the challenged practice once plaintiffs show a disparate impact on minorities.¹⁷⁵ Because neither the majority nor the district court considered the plaintiffs' evidence of less discriminatory alternatives, the dissent would have remanded the case.¹⁷⁶ In the dissent's view, to determine the necessity of the Philadelphia practice, the district court should have addressed the question of whether effective less discriminatory alternatives existed.¹⁷⁷

170. See *Ortiz*, 28 F.3d at 333 (Lewis, J., dissenting) (citing cases articulating important principles of Title VII disparate impact law): The dissent principally relied on *Griggs v Duke Power Co.*, 401 U.S. 424 (1971), a Title VII case, which in turn relied on *Gaston County v United States*, 395 U.S. 285 (1969), a Voting Rights Act case, to explain Title VII protection of discrimination in disparate impact suits. *Ortiz*, 28 F.3d at 333 (Lewis, J., dissenting); see *infra* notes 226-37 and accompanying text (discussing Title VII model for prima facie § 2 case).

171. *Ortiz*, 28 F.3d at 334 (Lewis, J., dissenting); see *supra* notes 43-51 and accompanying text (discussing § 2 results test); see generally 42 U.S.C. § 2000e-2(K)(1)(A)(i) (Supp. V 1993) (articulating Title VII results test).

172. See *Ortiz*, 28 F.3d at 333-34 (Lewis, J., dissenting) (citing *Griggs*, 401 U.S. at 431-32 (articulating concept of business necessity)); see also *Dothard v Rawlinson*, 433 U.S. 321, 329-32 (1977) (finding for plaintiffs after defendant failed to establish business necessity); cf. 42 U.S.C. §§ 2000e-2(k)(1)(A) & (C) (1988) (codifying *Griggs* business necessity standard).

173. Reply Brief of Plaintiffs-Appellants at 22-25, *Ortiz* (No. 93-1634). For example, the *Ortiz* plaintiffs attempted to establish that less discriminatory alternatives were available to achieve the City's legitimate objective of preventing voter fraud. *Id.* The availability of less discriminatory alternatives, in plaintiffs' view, showed that the City's method of purging voters caused the disproportionate impact on minority voters. *Id.*

174. See generally Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at 42 U.S.C. §§ 1973-1973bb (1988)).

175. *Ortiz*, 28 F.3d at 334 (Lewis, J., dissenting).

176. *Id.*

177. *Id.* at 335.

The *Ortiz* dissent next addressed the burden of reregistration on purged minority voters and suggested that the majority erred in its consideration of the issue by taking a formalistic rather than a functional view of political participation.¹⁷⁸ Judge Lewis argued that the opportunity to reregister should not alter the basic section 2 analysis simply because reregistration is within the control of minority voters.¹⁷⁹ The dissent compared reregistration to "race-neutral literacy tests."¹⁸⁰ Although the *Ortiz* majority conceded that race-neutral literacy tests were discriminatory, they argued that reregistration was different from such tests.¹⁸¹ However, the *Ortiz* dissent contended that reregistration necessarily requires literacy and other skills.¹⁸² The dissent concluded that courts must employ a functional approach when examining the practice of voting.¹⁸³ In that light, registration and reregistration both present substantial obstacles to voting.¹⁸⁴

Finally, the dissent discussed the majority's application of the Supreme Court's holding in *Chisom*¹⁸⁵ and concluded that the majority misread the Court's decision.¹⁸⁶ According to the dissent, the *Ortiz* majority concluded that the plaintiffs failed to show that minorities had experienced difficulty electing their representatives of choice, and thus failed to satisfy both elements of a section 2 cause of action.¹⁸⁷ However, the *Ortiz* dissent pointed out that the section 2 language to which the *Chisom* Court referred must be read *conjunctively rather than disjunctively*.¹⁸⁸ In fact, Justice

178. *Id.* at 336-40.

179. *Id.* at 337

180. *Id.*

181. *Ortiz*, 28 F.3d at 313.

182. *Ortiz*, 28 F.3d at 337 (Lewis, J., dissenting).

183. *Id.*

184. *Id.* at 340. The dissent wrote that: "As a general matter, doing something twice is more difficult than doing something once, [and] registering twice is harder, and will occur less frequently, than registering once." *Id.* at 338 n.31. Additionally, the dissent referred to the legislative history of the National Voter Registration Act (the Motor Voter Act), Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 42 U.S.C. §§ 1973gg to 1973gg-10, (Supp. V 1993)), to support the dissent's view that reregistration operates as an obstacle to political participation. *Ortiz*, 28 F.3d at 339 (Lewis, J., dissenting).

185. *See supra* notes 58-64 and accompanying text (discussing *Chisom*).

186. *Ortiz*, 28 F.3d at 345-46 (Lewis, J., dissenting).

187. *Id.* at 344; *see infra* notes 218-21 and accompanying text (discussing importance of *Ortiz* court's misapplication of *Chisom*).

188. *Ortiz*, 28 F.3d at 345 (Lewis, J., dissenting).

Scalia raised precisely this issue in his dissent in *Chisom*.¹⁸⁹ Believing that the right to participate was distinct from the right to elect, Justice Scalia favored a disjunctive reading of the language of section 2.¹⁹⁰ However, the Supreme Court majority, reasoning that abridgement of the right to participate inevitably impairs the ability to elect, rejected Justice Scalia's interpretation and adopted the conjunctive reading.¹⁹¹ Therefore, the opportunity to participate and the opportunity to elect are inextricably linked.¹⁹² The dissent was correct; the *Ortiz* majority did misconstrue *Chisom*.

IV Alternative Models for Section 2 Plaintiff's Prima Facie Case

A. The Negative Converse-Chisom Model

The *Ortiz* majority, before considering the impact of any historical or social factors on voting patterns in Philadelphia, required plaintiffs to satisfy two prima facie elements: (1) less opportunity to participate in the political process, and (2) less opportunity to elect representatives of their choice.¹⁹³ The plaintiffs' evidence that the City purged blacks and Hispanics more often than whites was not enough, in the majority's view, to establish a causal link between the nonvoting purge law and "both elements

189 See *Chisom*, 501 U.S. at 407-10 (Scalia, J., dissenting) (discussing conjunctive, as opposed to disjunctive, reading of § 2).

190. See *id.* at 409 (criticizing majority's construction of § 2).

191. *Ortiz*, 28 F.3d at 345 n.38 (Lewis, J., dissenting) (citing *Chisom*). Answering the concerns raised in Justice Scalia's dissent, Justice Stevens wrote for the *Chisom* Court that:

Any abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election. As the statute is written, however, the inability to elect representatives of their choice is not sufficient to establish a violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process. The statute does not create two separate and distinct rights. Subsection (a) covers every application of a qualification, standard, practice, or procedure that results in a denial or abridgment of "the right" to vote. The singular form is also used in subsection (b) when referring to an injury to members of the protected class who have less "opportunity" than others "to participate in the political process and to elect representatives of their choice." It would distort the plain meaning of the sentence to substitute the word "or" for the word "and." Such radical surgery would be required to separate the opportunity to participate from the opportunity to elect.

Chisom, 501 U.S. at 397 (citations omitted).

192. See *Ortiz*, 28 F.3d at 344-46 (Lewis, J., dissenting) (discussing *Chisom*).

193. *Ortiz*, 28 F.3d at 314-15.

of a section 2 cause of action."¹⁹⁴ Therefore, the *Ortiz* court found historical and social factors irrelevant to the plaintiffs' case.¹⁹⁵ The majority's construction of a section 2 cause of action consists of the following elements:

1. Is the challenged practice a legally dispositive cause of the reduced minority opportunity
 - (a) to participate in the political process, and
 - (b) to elect their chosen representatives?
2. If so, does this legally dispositive cause (the challenged practice) interact with historical and socioeconomic indicators of discrimination to reduce minority opportunity
 - (a) to participate in the political process, and
 - (b) to elect their chosen representatives?

There are a number of problems with this approach. First, this model is unlike the approach that other federal courts have taken in section 2 cases involving episodic practices.¹⁹⁶ For example, in *Brown v Dean*¹⁹⁷ the United States District Court for the District of Rhode Island required very little evidence of causation.¹⁹⁸ The plaintiffs in *Dean* pro-

194. *Id.* at 315.

195. *Id.* The majority explained why socioeconomic factors were irrelevant to its § 2 analysis:

[T]he individuals to whom the purge law applies apparently have surmounted and overcome the societal disadvantages which [plaintiffs] emphasize, and have registered to vote at least once if not more often. Conversely, if individuals have never registered and have never voted, the purge law still could not be applied to them because, as stated, the purge law affects only those who have once registered to vote.

The societal disadvantages cited by the plaintiffs and the dissent just are not relevant. They are not relevant because they could not have diluted voting by a registrant or voter who had already registered and/or voted.

Id. at 315-16 (citations omitted).

196. *Cf. Mississippi State Chapter, Operation PUSH v Mabus*, 932 F.2d 400, 405 (5th Cir. 1991) (upholding district court's conclusion that application of Senate factors indicated that Mississippi's registration procedures resulted in lower registration rate of blacks); *Harris v Siegelman*, 695 F Supp. 517, 528 (M.D. Ala. 1988) (requiring that plaintiffs show that lower minority voting level is "in some measure attributable" to challenged practice); *Brown v Dean*, 555 F Supp. 502, 504-05 (D.R.I. 1982) (finding that city's location of polling places interacted with lower rates of minority automobile ownership and lack of public transportation to deter minority voting in violation of § 2).

197. 555 F Supp. 502 (D.R.I. 1982).

198. *See Brown v. Dean*, 555 F Supp. 502, 504 (D.R.I. 1982) (finding that location of

duced testimony at trial regarding the lack of public transportation and the low rate of minority ownership of automobiles.¹⁹⁹ This evidence, combined with the lower registration rate of minorities in Rhode Island, was sufficient for the court to conclude that the location of the polling places had an impact on minority voting.²⁰⁰

*Harris v Siegelman*²⁰¹ involved a section 2 challenge to the mistreatment of minority voters at Alabama polling places.²⁰² The plaintiffs in *Harris* asserted that this treatment resulted in lower minority registration and

polling places interacted with socioeconomic factors to cause burden on minority voting in violation of § 2). In *Dean*, the court considered a challenge brought by representatives of a class of black voters under 42 U.S.C. § 1983, § 2 of the Voting Rights Act, and the Fourteenth and Fifteenth Amendments to the location of a polling place. *Id.* at 503. The court found that many members of the plaintiff class were elderly and lacked access to automobiles. *Id.* at 504. The court thus concluded that the location of the polling place was a substantial deterrent to voting by members of the plaintiff class. *Id.* The court noted the Supreme Court's finding that location of polling places directly affects a person's ability to vote and comes within the ambit of § 2 protection. *Id.* at 505 (discussing *Perkins v Matthews*, 400 U.S. 379 (1971)). The court found that the plaintiff sustained her burden of establishing a likelihood of success on the merits and therefore granted a preliminary injunction against use of the challenged polling place. *Id.* at 505-06.

199. *See id.* at 504 (finding that minorities in Rhode Island had less access to automobiles than did whites).

200. *See id.* at 506 (holding that location of polling places was constitutionally deficient).

201. 695 F Supp. 517 (M.D. Ala. 1988).

202. *See Harris v Siegelman*, 695 F Supp. 517, 527-29 (M.D. Ala. 1988) (holding that mistreatment of minorities at Alabama polling places violated § 2). In *Harris*, plaintiffs representing all black citizens in Alabama brought a challenge under § 2 of the Voting Rights Act to the mistreatment of black voters at polling places throughout the state and to the method of appointing poll officials. *Id.* at 520. The court earlier issued a preliminary injunction requiring most Alabama counties to appoint more black poll officials. *Id.* at 521. Despite a court-approved settlement with regard to most of the defendants, the plaintiffs continued to pursue § 2 claims against the Governor and the Attorney General. *Id.* The court recounted Alabama's history of efforts to reduce the political participation of minorities. *Id.* at 522-26. Finding that plaintiffs established that racial discrimination was a motivating factor behind Alabama's policy and that the practice continued to have adverse effects, the court concluded that plaintiffs established a § 2 "intent" claim. *Id.* at 526. The court found that the results claim presented in this case was different from the vote dilution claim in *Thornburg*, but concluded that the *Thornburg* approach was helpful. *Id.* at 528. Because the evidence established that black citizens were reluctant to register and vote due to the discriminatory Alabama policies, the court found that plaintiffs also established a "results" claim. *Id.* at 528-29. Thus, the court declared that the mistreatment of voters at polling places and the method of selecting poll officials violated § 2. *Id.* at 526-27. Therefore, the court enjoined the state from further enforcement of the policies and ordered the state to submit proposals designed to eliminate the present effects of this discriminatory conduct. *Id.* at 529-30.

voting.²⁰³ The court required that the discriminatory result alleged be *in some measure attributable* to the challenged practice.²⁰⁴ Concluding that mistreatment at polling places *contributed to* the reluctance of minorities to register and vote, the *Harris* court found a section 2 violation without any additional evidence of causation.²⁰⁵

The *Ortiz* majority borrows too heavily from section 2 cases involving vote dilution claims, especially *Thornburg* and *Chisom*, for its reasoning and authority. The court does this notwithstanding the district court's express finding that the *Ortiz* facts were distinguishable from cases involving vote dilution.²⁰⁶ In addition, the majority relies on only two episodic practice cases in reaching its result.²⁰⁷ While the *Ortiz* court made mention of the results in those episodic cases, it did not apply the same analytical framework.²⁰⁸

Additionally, the court mischaracterized the plaintiffs' claim and argument. The court wrote that the plaintiffs took the untenable position that causation was not an element in a section 2 cause of action.²⁰⁹ The plain-

203. *Id.* at 527-29.

204. *Id.* at 529.

205. *Id.* at 528-29.

206. See *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 824 F. Supp. 514, 523 (E.D. Pa. 1993) (recognizing distinction between vote dilution and episodic practices); see *supra* notes 79-85 and accompanying text (reviewing district court's discussion of episodic practice/vote dilution dichotomy).

207. See *Ortiz v. City of Phila. Office of the City Comm'rs Voter Registration Div.*, 28 F.3d 306, 310-11 (3d. Cir. 1994) (discussing other § 2 cases). The *Ortiz* court cited *Irby v. Virginia State Bd. of Elections*, 889 F.2d 1352 (4th Cir. 1989), *cert. denied*, 496 U.S. 906 (1990), and *Wesley v. Collins*, 791 F.2d 1255 (6th Cir. 1986).

208. *Ortiz*, 28 F.3d at 310-11. The *Wesley* court wrote that "[i]t is well-settled, however, that a showing of disproportionate racial impact alone does not establish a *per se* violation of the Voting Rights Act." *Wesley*, 791 F.2d at 1260-61. However, the court went on to write that evidence showing a disproportionate racial impact "directs the court's inquiry into the *interaction* of the challenged legislation 'with those historical, social and political factors generally probative of dilution.'" *Id.* at 1261 (emphasis added). In *Irby*, the court believed that the facts implicated § 5 of the Voting Rights Act, rather than § 2. *Irby*, 889 F.2d at 1357. The court reluctantly addressed the relevance of § 2 and wrote that

we will refrain from holding Section 2 inapplicable here. The situation is one calling for us to eschew *dictum* although, *seen in the light of the instant case*, it appears more probable than not that Section 2 is not applicable to appointive offices. Congress clearly believed that the choice between an elective and an appointive scheme implicated Section 5 of the Voting Rights Act.

Id.

209. *Ortiz*, 28 F.3d at 312.

tiffs' briefs do not indicate that the plaintiffs made any such argument.²¹⁰ Furthermore, the majority contradicted its own assertion that the plaintiffs claimed that no causal connection was necessary in a section 2 episodic practices case. The majority wrote that it read the entire complaint to allege that the purge statute caused the disparate purge rates.²¹¹ Thus, the majority believed that the plaintiffs alleged that the purge law caused the disparate impact and wrote their entire complaint to support this view, but the majority also believed that the plaintiffs inconsistently argued that no causal link need be established. In fact, the plaintiffs did claim that they need not establish any causal nexus *between historical and social factors and voting practices* in Philadelphia.²¹² *Thornburg* expressly supports this interpretation of section 2 and clearly establishes that plaintiffs do not have to prove a causal link between the Senate factors and voting practices.²¹³ *Thornburg* requires courts to presume that the causal link exists.²¹⁴ Thus, the *Ortiz* majority, rather than the plaintiffs, misunderstood the relationship between historical factors, socioeconomic evidence, causation, and the resulting effect on voting practices.

The *Ortiz* majority's construction of *Chisom* is also troubling. Their treatment of *Chisom* is curious given that the Supreme Court, in response to concerns raised by Justice Scalia's dissent, expressly held that section 2

210. See Reply Brief of Plaintiffs-Appellants at 4-5, *Ortiz* (No. 93-1634) (arguing that district court erred in its construction of § 2). Plaintiffs did not suggest that a § 2 plaintiff does not have to establish a causal connection between a challenged practice and a discriminatory result. *Id.* Plaintiffs wrote:

[We] do not argue that statistical disparity in the impact of the non-voting purge on the franchise alone is sufficient to establish liability. Rather [we] argue that where there are reasonable, less discriminatory alternatives to a non-voting purge that non-voting purge, as here, violates section 2. [L]ess discriminatory alternatives not only provide the measure for determining the denial of equal political opportunity resulting from Philadelphia's non-voting purge, they also demonstrate that this non-voting purge causes, in conjunction with the circumstances in Philadelphia, a denial to Latino and African-American voters of an equal opportunity to participate in the electoral process and elect representative of their choice.

Id.

211. *Ortiz*, 28 F.3d at 314. The majority wrote that "[a]s we read *Ortiz's* complaint, the entire document is drawn to allege that Pennsylvania's purge statute 'caused' the disparate purge rates between Philadelphia's white and minority communities." *Id.*

212. Reply Brief of Plaintiffs-Appellants at 16-17, *Ortiz* (No. 93-1634).

213. See *Thornburg v Gingles*, 478 U.S. 30, 64 (1986) (holding that legally significant bloc voting refers to correlation between race and voting).

214. *Id.*

creates only one cause of action and must be read conjunctively²¹⁵ Nevertheless, the *Ortiz* majority's misunderstanding of the *Chisom* rule — that burdening of political participation necessarily impairs the ability to elect and thus violates section 2 — caused it to apply the negative converse of the *Chisom* rule — that without impairing the ability to elect, a challenged practice cannot violate section 2.²¹⁶ This "no harm, no foul" approach is wholly inconsistent with the objectives of the Voting Rights Act.²¹⁷

The *Ortiz* majority's construction of *Chisom* is significant because a section 2 plaintiff might well establish that an electoral practice burdened the right of minorities to participate in the electoral process, yet not show that the challenged practice prevented the election of minority candidates.²¹⁸

215. See *Chisom v. Roemer*, 501 U.S. 380, 397 (1991) (holding that right to participate and right to elect are inextricably linked).

216. A challenged structure or practice violates § 2 if minorities have (A) less opportunity to participate in the political process and (B) less opportunity to elect their chosen representatives. S. REP. NO. 417, *supra* note 2, at 30, reprinted in 1982 U.S.C.C.A.N. at 207. *Chisom* held that this language be read conjunctively. *Chisom*, 501 U.S. at 397. However, the Court went on to hold that if A is established, then B necessarily is established. *Id.* Thus, the *Chisom* rule is "if A, then B." The converse of this rule would be "if B, then A." Relying on evidence of the political success of black candidates in Philadelphia, the *Ortiz* court concluded that plaintiffs had not shown less opportunity to elect their chosen representatives and had thus failed to establish both elements (A and B above) of a § 2 claim. *Ortiz*, 28 F.3d at 314-15. The *Ortiz* rule is "if not B, then not A." Therefore, I refer to the majority's construction of § 2 as the "negative converse" of *Chisom*.

217. Cf. *Chisom*, 501 U.S. at 407-10 (Scalia, J., dissenting) (discussing implications of conjunctive reading of § 2). Justice Scalia wrote regarding the relationship between the right to participate and the right to elect that "[i]f both conditions must be violated before there is any § 2 violation, then minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis 'elect representatives of their choice' would be entirely without § 2 protection." *Id.* at 409. Justice Scalia pointed out that the *Chisom* Court's construction of § 2 might make lawful discriminatory conduct that reduced the influence of minorities without preventing the election of minority candidates (a "no harm, no foul" approach). The *Chisom* Court responded that Justice Scalia's concerns "rest on the erroneous assumption that a small group of voters can never influence the outcome of an election." *Chisom*, 501 U.S. at 397 n.24. This discussion makes clear that both the majority and the dissent in *Chisom* did not contemplate a no harm, no foul approach to § 2 of the Voting Rights Act. Fearing such an approach from the majority's conjunctive reading of § 2, Justice Scalia dissented. Believing that a conjunctive reading of § 2 did not prevent minorities from challenging merely the loss of influence as opposed to the inability to elect, the *Chisom* Court dismissed Justice Scalia's concerns. Thus, the entire *Chisom* Court agreed that practices that reduce minority influence may violate § 2 without actually preventing the election of minority candidates.

218. See *Ortiz*, 28 F.3d at 345 n.38 (Lewis, J., dissenting) (discussing importance of proper application of *Chisom*). It seems clear that a case establishing a burden on the right

In such a situation, the *Ortiz* majority's reading of *Chisom* would require that the court dismiss the case because the plaintiff would not have established "both elements of a section 2 claim."²¹⁹ On the other hand, under a proper application of *Chisom*, plaintiffs have established a section 2 cause of action because the right to participate is inseparable from the right to elect.²²⁰ Thus, the significance of a conjunctive, rather than a disjunctive, reading of *Chisom* is critical to voting rights plaintiffs.²²¹

Finally, by disregarding historical and socioeconomic factors and finding that lower minority turnout alone explains the disproportionate impact of the purge law, the *Ortiz* court simply blames the victims of discrimination for its results. In so holding, the majority ignores the text of section 2,²²² the instructions of Senate Report 417,²²³ the guidance of section 2 cases,²²⁴ and the lingering effect of past racial discrimination.²²⁵

to participate without establishing difficulty electing minority candidates would violate § 2 under a proper reading of *Chisom*. "[N]ot one member of the [*Chisom*] Court was willing to adopt a construction of § 2 under which a measure that operated to abridge a group's opportunity to participate, but that did not itself prevent that group from electing representatives, would be permissible." *Id.*

219 See *Ortiz*, 28 F.3d at 315. The *Ortiz* majority simply misapplied *Chisom*. However, a proper application of *Chisom* might not change the result in this case. In fact, it appears that the majority would reach the same result under a proper reading of *Chisom* because they reasoned that the nonvoting purge law did not cause a burden on political participation of minorities. Under the majority's reasoning, the law purged minorities more often simply because they voted less often. *Id.* at 313-14. Therefore, plaintiffs did not satisfy what the majority referred to as the two elements of a § 2 cause of action because the nonvoting purge law had no legally significant effect on minority voting. *Id.* The purge law did not cause minorities to participate less. Rather, the fact that minorities participated less caused the purge statute to operate against them. *Id.* Such a result appears inconsistent with the legislative history of § 2 and the limited case law on episodic practices.

220. See *id.* at 344-46 (Lewis, J., dissenting) (criticizing majority's application of *Chisom*).

221. *Contra* Venable, *supra* note 55, at 1018 (concluding that decision in *Chisom* decreases likelihood of minority success under § 2).

222. 42 U.S.C. § 1973 (1988). "A violation [of § 2] is established if, based on the totality of the circumstances, it is shown " *Id.* (emphasis added).

223. S. REP. NO. 417, *supra* note 2, at 27, reprinted in 1982 U.S.C.C.A.N. at 205. "Plaintiffs must either prove [discriminatory] intent, or, alternatively, must 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." *Id.* (emphasis added) (citations omitted).

224. See *Thornburg v Gingles*, 478 U.S. 30, 43 (1986) (discussing 1982 Amendments to § 2 of Voting Rights Act). "[Section] 2 has been violated where the 'totality of the circumstances' reveal " *Id.* (emphasis added). "[A] court must assess the impact of the contested structure or practice on minority electoral opportunities 'on the basis of objective

B. The Title VII Disparate Impact Model

The *Ortiz* dissent advocated that Title VII disparate impact cases serve as the model for voting rights cases.²²⁶ The dissent argued that the Supreme Court's reliance on a voting rights case in *Griggs v Duke Power Co.*,²²⁷ a Title VII case,²²⁸ supports this analogy.²²⁹ This disparate impact model would require defendants to show a compelling reason for a challenged

factors. Senate Report 417 specifies factors which typically may be relevant to a § 2 claim." *Id.* at 44 (emphasis added).

225. See *Harris v Siegelman*, 695 F Supp. 517, 526 (M.D. Ala. 1988) (holding that mistreatment of voters at polling places violated § 2 of Voting Rights Act). Regarding the continuing effects of past discrimination, the court wrote:

Because, for most of this century and the last, black citizens were prohibited by the state from participating in the political process, many of them lost interest in the political process and were not concerned with the nuts and bolts of the process. This state-fostered attitude was then passed on through the family structure, from generation to generation, with the result that many black children even today lack interest in politics.

Id.

226. *Ortiz*, 28 F.3d at 333-34 (Lewis, J., dissenting); see *supra* notes 170-77 and accompanying text (discussing dissent's position that courts model § 2 cases after Title VII disparate impact cases).

227. 401 U.S. 428 (1971).

228. See *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (finding that even in absence of discriminatory intent, employer must establish business necessity of challenged practice). In *Griggs*, the Supreme Court considered whether an employer is prohibited by Title VII of the Civil Rights Act of 1964 (Title VII) from requiring a high school education or passage of a standardized intelligence test as a prerequisite to employment. *Id.* at 425-26. The Court found that neither standard significantly related to job performance, that both requirements had a disproportionate impact on blacks, and that white employees previously filled the jobs in question. *Id.* The Court found that the plain language of Title VII indicated congressional intent to remove barriers that formerly favored white employees and to achieve equality in employment opportunities. *Id.* at 429-30. However, Title VII does not guarantee a job to any person regardless of their qualifications. *Id.* at 430. Nonetheless, the evidence in *Griggs* showed that current employees who did not meet the new requirements continued to perform satisfactorily and, in fact, gained promotions. *Id.* at 431-32. In view of this evidence and the fact that the defendant adopted the new standards without any study of their relationship to job performance, the Supreme Court found that the defendant failed to establish the business necessity of the requirements. *Id.* The defendant argued that § 703(h) of the Civil Rights Act specifically permitted professional development tests. *Id.* at 433. However, the Court held that the Equal Employment Opportunity Commission's conclusion that § 703(h) permitted only job related tests comported with congressional intent. *Id.* 433-36. Therefore, the Supreme Court found that regardless of the employer's intent, the challenged job requirements violated Title VII. *Id.* at 436.

229. *Ortiz*, 28 F.3d at 333-34 (Lewis, J., dissenting).

practice if plaintiffs could establish a disparate impact on minority voters.²³⁰ Thus, this model creates a rebuttable presumption that a section 2 violation exists whenever the plaintiffs show a disparate impact. The Title VII model contains the following elements:

1. Do historical and socioeconomic factors indicate a history of discrimination?
2. If so, according to *Thornburg*, presume a causal link between this history of discrimination and current voting patterns.
3. Does the challenged practice operate with a disparate impact on minority voters? (plaintiff's burden of proof)
4. Is the challenged practice necessary to achieve valid elections? (defendant's burden of proof)

This approach places a significant burden squarely on the shoulders of state and local government defendants in section 2 cases.²³¹ A plaintiff's burden is much lighter within this framework. Presenting evidence that shows a history of discrimination in housing, education, and employment, among other things, is not difficult for minority plaintiffs because the existence of such past discrimination is well documented and, more importantly, well accepted. Similarly, the burden to produce disparate impact evidence on section 2 plaintiffs is also low. Any voting practice that affected minorities differently than whites might satisfy this threshold requirement.

Voting rights litigation would become, under a Title VII model, almost entirely dependent on social science data. Quite possibly, common, well-accepted, and well-intentioned practices might fall victim to a section 2 challenge and a subsequent settlement because the cost of proving the necessity of the practice might be prohibitive to some local governmental units. For example, assume that a social science study showed that higher numbers of minorities would vote if a city conducted voting on Mondays rather than Tuesdays. The government would then bear the cost of showing that Tuesday voting was necessary to ensure valid elections. This showing would involve significant government resources and thus encourage state and local governments to settle less important claims. In short, this burden

230. See *id.* at 334 (suggesting that § 2 litigation be modeled after Title VII disparate impact law).

231. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified at U.S.C. §§ 1973-1973bb (1988)). Section 2 provides 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 . . ." *Id.* (emphasis added).

shifting would give too much power to plaintiffs interested in frustrating the administration of local government.

However, the analogy between Title VII and section 2 is not without support.²³² A few courts have relied on Title VII cases in Voting Rights Act cases and vice versa.²³³ However, these courts have mixed the doctrines only in discussing the history of discrimination.²³⁴ Additionally, the legislative history of section 2 indicates that Congress did not intend for the Title VII model to apply in the voting rights context.²³⁵ Congress passed the Voting Rights Act and the Civil Rights Act only one year apart. Congress created a disparate impact model in the employment context, but chose not to do so in the voting rights context.²³⁶ Instead, Congress explicitly created

232. See *Barnett v. Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994) (discussing Title VII of Civil Rights Act of 1964 and § 2 of Voting Rights Act of 1965). In a § 2 challenge to Chicago's redistricting plan, Judge Posner wrote regarding the use of intent in § 2 cases:

[Intent] could still be usable to prove a violation that could not be inferred from a discriminatory effect. That is the difference between disparate treatment and disparate impact as theories of violation of Title VII of the Civil Rights Act of 1964 — the former requiring proof of intentional discrimination, the latter merely proof of an unreasonable though not necessarily an intended discriminatory effect — and the dichotomy may have a parallel in the Voting Rights Act.

Id.

233. Cf. *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-31 (1971) (finding that even in absence of discriminatory intent, employer must establish business necessity of challenged practice); *Barnett*, 32 F.3d at 1202 (citing Title VII law to explain proof necessary for § 2 challenge under Voting Rights Act).

234. Cf. *Griggs*, 401 U.S. at 430-31 (discussing history of discrimination against minorities in education). The *Griggs* Court cited *Gaston County v. United States*, 395 U.S. 285 (1969), a voting rights case, in discussing the history of discrimination against minorities in education. *Griggs*, 401 U.S. at 430. The *Gaston* Court analyzed the lingering effects of the inferior educational opportunities available to minorities during segregation. *Id.*

235. Cf. S. REP. NO. 417, *supra* note 2, at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205 (discussing the operation of amended § 2). "Plaintiffs must *either* prove [discriminatory] intent, *or, alternatively*, must show [discriminatory] results." *Id.* (emphasis added) (citations omitted). This language indicates congressional intent that results and intent claims represent the exclusive methods of establishing a violation of § 2. The last factor that Congress enumerated in Senate Report 417 arguably allows courts to consider a Title VII "lack of business necessity" type of argument from § 2 plaintiffs. The Senate Report notes that "[a]dditional factors that in some cases have had probative value as part of *plaintiffs'* evidence [include] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.* at 29, *reprinted in* 1982 U.S.C.C.A.N. at 207 (emphasis added). Thus, while Congress intended courts to consider the policy needs underlying a challenged practice, Senate Report 417 makes clear that plaintiffs bear this burden of proof.

236. See S. REP. NO. 417, *supra* note 2, at 27, *reprinted in* 1982 U.S.C.C.A.N. at 205

a disparate results model.²³⁷ Had it intended for courts to adopt a Title VII framework when analyzing section 2 cases, Congress easily could have adopted such a model.

C. *The Ortiz Plaintiffs' Model*

In *Ortiz*, both in the district court and before the Third Circuit, the plaintiffs built their case around elements that the majority did not recognize as proof of a section 2 violation.²³⁸ The plaintiffs attempted to establish a history of discrimination in Philadelphia, the disparate impact of the nonvoting purge law, and the existence of effective, less discriminatory alternatives to the Philadelphia procedure.²³⁹ The plaintiffs offered to establish that Philadelphia could achieve its legitimate objective of preventing voter fraud by utilizing other methods that operate without the discriminatory result of the current procedure.²⁴⁰ Thus, the plaintiffs' model includes the following elements:

1. Does examination of the Senate factors indicate a history of discrimination?
2. If so, according to *Thornburg*, presume a causal link between this history of discrimination and current voting patterns.
3. Does the challenged practice interact with the history of discrimination established in step 1 to operate with a disparate impact on minority voters?
4. Are there effective, less discriminatory alternatives to the current practice?

This model is balanced and reflects the approach followed by courts generally in section 2 episodic practice cases.²⁴¹ For example, in *Harris v*

(writing that intent and results claims are exclusive method of establishing § 2 violation).

237. See *Barnett v Daley*, 32 F.3d 1196, 1202 (7th Cir. 1994) (discussing intent requirement of Equal Protection Clause). The court wrote that "effects are all that matter under the [Voting Rights] Act." *Id.*

238. Cf. Reply Brief of Plaintiffs-Appellants at 1, *Ortiz* (No. 93-1634) (outlining plaintiffs' construction of § 2 cause of action challenging episodic practices).

239. *Id.*

240. *Id.* at 22-25.

241. Cf. *Mississippi State Chapter, Operation PUSH v Mabus*, 932 F.2d 400, 404-05 (5th Cir. 1991) (upholding district court's conclusion that application of Senate factors indicates that Mississippi's registration procedures result in lower registration rate of blacks); *Harris v. Siegelman*, 695 F. Supp. 517, 528 (M.D. Ala. 1988) (requiring that plaintiffs show that lower minority voting level is "in some measure attributable" to challenged practice);

*Siegelman*²⁴² the district court made extensive findings regarding the Senate factors and Alabama's history of discrimination.²⁴³ Both *Harris* and *Brown v Dean*²⁴⁴ required very little evidence of causation.²⁴⁵ In fact, the *Dean* Court wrote that under section 2 the issue was whether the challenged practice may have the effect of inhibiting minority voting.²⁴⁶ Certainly part three of the plaintiffs' model comports with the view that the challenged practice need only interact with other factors to cause a discriminatory result in violation of section 2. Therefore, part three satisfies the low causation requirements of *Harris* and *Dean*. Additionally, part four of the plaintiffs' model is not unlike the approach taken by the *PUSH* courts.²⁴⁷ In that challenge to Mississippi's dual registration procedures, the existence of less discriminatory alternatives obviously influenced the Fifth Circuit's treatment of the plaintiffs' section 2 claim.²⁴⁸ Thus, the *Ortiz* plaintiffs' model blends the approaches of several section 2 cases challenging episodic practices.

This model appears most consistent with the legislative history of the Voting Rights Act. The first and fourth parts of the plaintiffs' model are similar to several factors enumerated in Senate Report 417.²⁴⁹ Part one of the plaintiffs' model requires examination of the Senate factors. Such an examination is precisely how Congress intended courts to analyze section 2 cases.²⁵⁰ Additionally, the last factor enumerated in Senate Report 417

Brown v. Dean, 555 F. Supp. 502, 505 (D.R.I. 1982) (finding that city's location of polling places interacted with lower rates of minority automobile ownership and lack of public transportation to deter minority voting in violation of § 2).

242. See *supra* notes 201-05 and accompanying text (discussing *Harris*).

243. See *Harris*, 695 F. Supp. at 521-26 (recounting Alabama's history of efforts to reduce political participation of minorities).

244. See *supra* notes 197-200 and accompanying text (discussing *Dean*).

245. Cf. *Harris*, 695 F. Supp. at 529 (requiring that plaintiffs show that lower minority voting level is attributable in part to challenged practice); *Brown*, 555 F. Supp. at 504 (finding that socioeconomic factors interacted with city's location of polling places to reduce minority voting in violation of § 2).

246. *Brown*, 555 F. Supp. at 505.

247. Cf. Mississippi State Chapter, Operation PUSH v Mabus, 932 F.2d 400, 407-09 (5th Cir. 1991) (holding that less discriminatory legislative plan did not violate § 2).

248. *Id.*

249. See S. REP. NO. 417, *supra* note 2, at 28-29, reprinted in 1982 U.S.C.C.A.N. at 206-07 (discussing typical factors probative of § 2 violation).

250. See *id.* at 29 n.118, reprinted in 1982 U.S.C.C.A.N. at 207 (discussing use of enumerated Senate factors in § 2 cases). Senate Report 417 states that the typical factors are not a mechanical test, but "require the court's overall judgment, based on the totality of the circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is 'minimized or cancelled out.'" *Id.*

supports the fourth part of the plaintiffs' model.²⁵¹ The plaintiffs believed that an examination of reasonable, less discriminatory alternatives appropriately measured equality.²⁵² Similarly, Senate Report 417 suggests that evidence showing the tenuous nature of the policy underlying a challenged practice is probative of a section 2 violation.²⁵³ These two inquiries overlap. Determining the reasonableness of an alternative plan necessarily requires that courts examine the state interest supporting the original challenged practice. Thus, the plaintiffs' model is a supportable interpretation of both Senate Report 417 and section 2 episodic practices cases.

V Conclusion

One might question the importance of *Ortiz* to future voting rights litigation²⁵⁴ in light of passage of the National Voter Registration Act (the Motor Voter Act).²⁵⁵ This Act prohibits nonvoting purge statutes in all federal elections.²⁵⁶ States can continue to enforce nonvoting purge laws, however, with respect to state elections, although such a practice would require that registrars maintain two registration lists.²⁵⁷ Thus, given the high cost of maintaining separate registration lists for federal and state elections,

251. Cf. *id.* at 29, reprinted in 1982 U.S.C.C.A.N at 207 (discussing importance of policy underlying practice challenged under § 2).

252. See Reply Brief of Plaintiffs-Appellants at 4, *Ortiz* (No. 93-1634) (arguing that less discriminatory alternatives establish causation in § 2 cases). Plaintiffs wrote that:

There must be a measure of equal political opportunity and that measure is always provided by proof, as here, of reasonable, less discriminatory alternatives. Just as the less discriminatory alternatives of majority non-white single-member districts in the context of a challenge to a discriminatory multimember district election system provides the measure of equal political opportunity by which to determine liability, here, the less discriminatory alternative of [a] mail purge system as well as other systems provide the measure of equal political opportunity by which to determine liability. Plaintiffs' proof here of less discriminatory alternatives demonstrates a denial of equal political opportunity.

Id.

253. See S. REP. NO. 417, *supra* note 2, at 29, reprinted in 1982 U.S.C.C.A.N. at 207 (finding that tenuous nature of policy underlying challenged practice is probative of § 2 violation).

254. See *Ortiz*, 28 F.3d at 335 (Lewis, J., dissenting) (discussing impact of *Ortiz*).

255. National Voter Registration Act, Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 42 U.S.C. §§ 1973gg to 1973gg-10 (Supp. V 1993)).

256. 42 U.S.C. § 1973gg-6(b) (Supp. V 1993).

257. See *Ortiz*, 28 F.3d at 346 n.40 (Lewis, J., dissenting) (discussing impact of Motor Voter Act).

the Motor Voter Act will effectively eliminate the use of nonvoting purge statutes. However, as the *Ortiz* dissent indicated, the elimination of nonvoting purge laws does not lessen the importance of this case.²⁵⁸ Because purge laws are merely one type of voting practice, the majority's erroneous construction of section 2 will misdirect future efforts to apply properly the Voting Rights Act.²⁵⁹ In short, the Motor Voter Act will neither diminish the precedential effect of *Ortiz* nor clarify the uncertainty surrounding section 2.

Among the three models for the section 2 cause of action challenging episodic practices illustrated by *Ortiz*, the courts should adopt the plaintiffs' disparate impact model. The *Ortiz* majority's model is simply an insupportable interpretation of section 2. On almost no conceivable basis could plaintiffs satisfy the *Ortiz* court's stringent threshold requirements in an episodic practices case. The Title VII model, on the other hand, is more favorable to section 2 plaintiffs — probably too favorable. By shifting much of the burden from plaintiffs to defendants, the Title VII model's proposed cure is worse than the disease. Such burden shifting creates an incentive for frivolous suits and threatens to make section 2 litigation too dependent on social science data. Thus, the plaintiffs' model represents the most fair and balanced approach to the difficult problems presented by section 2 challenges to episodic practices. However, regardless of which approach the courts adopt, *Ortiz* makes apparent both the uncertainty that exists concerning the elements of a plaintiff's section 2 cause of action and the need for courts to address the issue.

At the very least, the disagreement between the majority and the dissent over the language from *Salas* illustrates the difficulty inherent in attempting to apply vote dilution standards to cases involving episodic practices.²⁶⁰ Because the facts giving rise to the two actions are so dissimilar,²⁶¹ courts should recognize a bright-line distinction between the proof necessary in the vote dilution context and that necessary in the context of episodic practices. Although no court has explicitly employed a vote dilution/episodic practices

258. *Id.* at 346.

259. *See id.* at 335 n.26 (discussing importance of *Ortiz*).

260. *Cf. Ortiz v. City of Phila.* Office of the City Comm'rs Voter Registration Div., 824 F. Supp. 514, 523 (E.D. Pa. 1993) (distinguishing episodic practices and vote dilution); *Harris v Siegelman*, 695 F. Supp. 517, 528 (M.D. Ala. 1988) (same).

261. *See Ortiz*, 28 F.3d at 331-32 (Lewis, J., dissenting) (discussing difference between episodic practices and vote dilution). Judge Lewis wrote that "this is not a vote dilution case, and I have already explained why the factors that are most relevant in that context are of little if any relevance here." *Id.* at 341.

dichotomy, such a distinction would remove much confusion regarding a plaintiff's prima facie case.

Justice Cardozo lectured on the judicial process and considered the responsibility of judges when faced with confusion in the law. Cardozo wrote that:

[L]ogic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired. One of the most fundamental social interests is that law shall be uniform and impartial. There must be nothing in its action that savors of prejudice or favor or even arbitrary whim or fitfulness. [The judge] legislates only between gaps. He fills the open spaces in the law. [W]ithin the confines of these open spaces and those of precedent and tradition, choice moves with a freedom which stamps its action as creative. The law which is the resulting product is not found, but made.²⁶²

When Judge Posner, one of our most respected jurists, proclaims, "[w]e wish we knew exactly what a plaintiff must prove in order to prevail under the Voting Rights Act,"²⁶³ it becomes apparent that the law is in dire need of clarification.

262. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 112-16 (1921) (citations omitted).

263. *Barnett v Daley*, 32 F.3d 1196, 1201 (7th Cir. 1994).