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Electoral Data in Racial-Bloc Analysis: A Solution for Staleness and Special Circumstances Problems

Richard R. Hesp†

Since Congress enacted the 1982 amendments to Section 2 of the Voting Rights Act of 1965 ("VRA"), courts have experienced difficulty interpreting its broad language. The existence of only one major Supreme Court decision interpreting that provision, 

\[ \text{Thornburg v Gingles,} \]

has hindered these efforts. Although the 

\[ \text{Gingles Court} \]

sought to aid judicial interpretation of Section 2, it complicated matters with its plurality opinion and multiple concurrences. The Court stated that one of the most important factors in a Section 2 challenge is "the extent to which voting in the elections of the state or political subdivision is racially polarized." However, it gave only ambiguous instructions on how to rank the probative value of elections in the polarization analysis.

Part I of this Comment discusses the evolution of the VRA, as amended, and the 

\[ \text{Gingles Court's endorsement of the results approach.} \]

Under that analysis, VRA plaintiffs can demonstrate either that government officials operated the electoral system with discriminatory intent or that an electoral structure or practice results in racial discrimination. While the results-based test is intuitively easier to grasp, it is predicated on the difficult task of proving that "a bloc voting majority... usually... defeat[s] candidates supported by a politically cohesive, geographically insular minority group."

Lower courts would experience little trouble determining whether exclusionary voting practices exist if Section 2 litigation

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4 See Nipper v Smith, 39 F3d 1494, 1524 (11th Cir 1994)("Nipper II"), cert denied 1995 WL 05718 (applying results-based test with electorate racial-bias requirement); Id at 1549 (Hatchett dissenting)(applying results-based test with no electorate-bias requirement).

5 Gingles, 478 US at 49 (citations omitted).
were always supported by a large number of contemporary, relevant election results. Unfortunately, this is rarely the case. Under Gingles's "totality of the circumstances" analysis, Section 2 plaintiffs often must prove both that their electoral data is relevant, probative, and accurate, and that the challenged electoral practice or structure intentionally or effectively barred minority participation. Courts have thus needed to determine: (1) the value of stale election results; and (2) whether "special circumstances" can only be used to demonstrate that racial-bloc voting exists in the face of minority success.

Part II of this Comment proposes that legislative intent, judicial opinion, and demographic realities support discounting election data that is more than ten years old. Although some courts have declared that all election results, no matter how old, count equally, others have criticized this approach, arguing that "stale" elections—those past some specified time period—are of little analytical value. This Comment recognizes that demographic reality may require substantial weighing in favor of recent elections. Discounting elections for staleness, however, can reinforce the barriers that have blocked minority access to the electoral process. In response, this Comment proposes that courts faced with few electoral results track general voting trends through exogenous elections, or elections for offices not at stake in the VRA litigation. Inclusion of these elections would help alleviate fears of a decreased number of probative elections.

Part III of this Comment rejects a back-door reintroduction of the abandoned intent test through special circumstances analysis. In Gingles, the Court explained:

[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special

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6 Id at 44 n 8, citing White v Regester, 412 US 755 (1973)(holding disestablishment of multimember districts valid), and Zimmer v McKeethen, 485 F2d 1297 (5th Cir 1973)(finding proof of dilution established via aggregate of multiple factors).

7 See Nipper v Smith, 1 F3d 1171 (11th Cir 1993)("Nipper I") (finding that twenty-year-old election results should be considered); McMillan v Escambia County, 748 F2d 1037 (5th Cir 1984)(holding, in part, that prior election results demonstrated a history of discrimination).

8 See League of Latin American Citizens Council No. 4434 v Clements, 999 F2d 831 (5th Cir 1993)("LULAC II") (criticizing the probative value of dated statistics); Nipper v Chiles, 795 F Supp 1525 (M D Fla 1992)(finding that staleness of election results had a negative effect on their probative value).

9 Citizens for a Better Gretna v City of Gretna, Louisiana, 834 F2d 496, 502-03 (5th Cir 1987)(discussing the need for a flexible standard in vote-dilution claims).
circumstances, such as the absence of an opponent [or] incumbency ... may explain minority electoral success in a polarized contest.\textsuperscript{10}

Thus, special circumstances act like a "wildcard" to show that racial-bloc voting exists despite occasional minority victories.\textsuperscript{11} The standard special circumstances example is an election where a minority sponsored candidate runs unopposed. In that situation, the majority bloc cannot prevent the minority electorate from electing its preferred candidate. However, the Eleventh Circuit has addressed the opposite issue: whether majority-candidate incumbency should be used to discount the existence of racial polarization when a minority candidate loses.\textsuperscript{12} Part III thus concludes that using special circumstances in this manner undermines the \textit{Gingles} results test and should be rejected.

I. \textbf{SECTION 2, AS AMENDED, REQUIRES OBJECTIVE DEMONSTRATION THAT ELECTORAL PRACTICES OR STRUCTURES RESULT IN UNEQUAL MINORITY ACCESS}

In 1965, Congress enacted the \textbf{VRA}\textsuperscript{13} to enforce the Fourteenth and Fifteenth Amendments to the United States’ Constitution as well as Article I, Section 4 of the Constitution.\textsuperscript{14} The VRA’s primary goal was to eliminate any direct discriminatory structure or practice that denied African-American electoral equality.\textsuperscript{15} The VRA concentrated on direct barriers rather than more subtle obstructions to minority equality.\textsuperscript{16} For instance, Section 2 prohibits any electoral practice that discriminates on

\begin{itemize}
  \item \textsuperscript{10} \textit{Gingles}, 478 US at 57.
  \item \textsuperscript{11} Id.
  \item \textsuperscript{12} See Chiles, 795 F Supp at 1525 (holding white incumbency could be used to discount the presence of racial polarization).
  \item \textsuperscript{13} The Voting Rights Act of 1965, Pub L No 89-110, 79 Stat 437, codified at 42 USC § 1973 (1988), states: “No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote on account of race or color or in contravention of the guarantees set forth in section 1973b(f)(2) ... .”
  \item \textsuperscript{14} House Judiciary Committee Report on the Voting Rights Act of 1965, HR Rep No 89-439, 89th Cong, 1st Sess (1965), reprinted in 1965 USCCAN 2437.
  \item \textsuperscript{16} See generally HR Rep No 89-439 (cited in note 14). “To accomplish this objective the bill (1) suspends the use of literacy and other tests and devices in areas where there is reason to believe that such tests and devices have been used and are being used to deny the right to vote on account of race or color . . . .” Id at 1.
\end{itemize}
the basis of race\textsuperscript{17} and Section 4 prohibits the use of literacy tests or similar means to deny the right to vote.\textsuperscript{18} The VRA also included a bailout provision allowing the former Confederate States that were subject to extensive supervision under the VRA to be excluded from its regulations if those states could demonstrate nondiscriminatory electoral practices during the prior five-year period.\textsuperscript{19} The House of Representatives' Judiciary Committee wrote that the "cooling off period" was "both reasonable and necessary to permit dissipation of the long-established political atmosphere and tradition of discrimination in voting because of color in those States and subdivisions...\textsuperscript{20} Congress's acknowledgement in the bailout provision that these states could uncouple themselves from their discriminatory past and facilitate minority access to the electoral process strongly suggests that Congress recognized that old election data could become unrepresentative of an electorate's changing character.

For fifteen years, the Court broadly interpreted the VRA and held that "plaintiffs could prevail by showing that, under the totality of the circumstances, a challenged election law or procedure had the effect of denying a protected minority an equal chance to participate in the electoral process."\textsuperscript{21} This judicially created test was results oriented. A potential VRA plaintiff had to "produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."\textsuperscript{22}

\textsuperscript{17} 42 USC § 1973.
\textsuperscript{18} 42 USC § 1973b.
\textsuperscript{19} HR Rep No 89-439 at 14 (cited in note 14).
\textsuperscript{20} Id.
\textsuperscript{21} Thornburg v Gingles, 478 US 30, 44 n 8 (1986), citing White v Regester, 412 US 755 (1973), and Zimmer v McKeithen, 485 F2d 1297 (5th Cir 1973). See Allen v State Board of Elections, 393 US 544, 569 (1969)("The right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot."); Beer v United States, 425 US 130 (1976)(holding VRA's basic purpose is to rid the country of racial discrimination in voting).
\textsuperscript{22} White, 412 US at 766. See also Whitcomb v Chavis, 403 US 124, 148-50 (1971)(discussing the requirements for vote-dilution challenges).
A. City of Mobile v Bolden Abandoned the Results Test

Despite the established framework described above, the United States Supreme Court adopted a new test in City of Mobile v Bolden. In Bolden, the Court held that in order to be successful plaintiffs had to demonstrate that the electoral practice or structure was "conceived or operated as [a] purposeful device to further racial . . . discrimination." Plaintiffs faced an extraordinary burden under this test, because the test required extensive research into the legislative, political, and social history of the challenged electoral process. Not surprisingly, when the Court applied this new intent-based test to Bolden's facts, it found that the plaintiffs failed to satisfy their burden of demonstrating purposeful discrimination.

B. The VRA Amendments of 1982: Congress Rejected Bolden

In response to Bolden, Congress enacted the 1982 amendments to Section 2 of the VRA "to make clear that a violation could be proved by showing discriminatory effect alone and to establish as the relevant legal standard the ‘results test . . . .’"
Congress replaced the Bolden intent test with one that only required plaintiffs to demonstrate that the contested electoral structure or practice resulted in discrimination against minority participation. If the [Section 2] plaintiff proceeds under the 'results test,' then the court would assess the impact of the challenged structure or practice on the basis of objective factors, rather than making a determination about the motivations which lay behind its adoption or maintenance.

While Congress implicitly acknowledged the effect of time on electoral practices in the VRA’s 1965 enactment, in the 1982 amendments it explicitly “prohibit[ed] practices which, while episodic and not involving permanent structural barriers, result[ed] in the denial of equal access to any phase of the electoral process for minority group members.” Regarding the 1982 amendments, the Senate Judiciary Committee stated, “the question whether . . . political processes are 'equally open' depends upon a searching practical evaluation of the ‘past and present reality.’” The Bolden intent test was inherently unsuited for this endeavor because it diverted courts from “the crucial question of whether minorities have equal access to the electoral process to a historical question of individual motives.

Further, Congress implicitly acknowledged that old electoral practices could become stale when it revamped the bail-out provisions by weighing current performance as more probative than a region’s historical actions. “[T]he Committee bail-out [was] a

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30 The Senate bill that proposed the amendment provided: S. 1992 amends Section 2 of the Voting Rights Act of 1965 to prohibit any voting practice, or procedure [that] results in discrimination. This amendment is designed to make clear that proof of discriminatory intent is not required to establish a violation of Section 2. It thereby restores the legal standards, based on the controlling Supreme Court precedents, which applied in voting discrimination claims prior to the litigation involved in Mobile v Bolden. The amendment also adds a new subsection to Section 2 which delineates the legal standards under the results test by codifying the leading pre-Bolden vote dilution case, White v Regester.

31 Id at 27.
32 See notes 19-20 and accompanying text.
34 Id.
35 Id at 16. “The Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs.” Id.
36 42 USC § 1973b. See also S Rep No 97-417 at 46 (cited in note 25). “The Committee bail-out retains the twofold criteria of the House Bill. First, the jurisdiction must show a ten-year record of full compliance with the Voting Rights Act and the constitutional
recognition that the passage of time, by itself, means very little. In short, the new bailout focuses on criteria more relevant to whether continuing coverage is warranted than does an inquiry that looks only at the jurisdiction's conduct 17 years ago.\(^\text{37}\)

C. *Thornburg v Gingles* Gives Little Assistance with Temporal Guidelines

The Supreme Court applied Congress's results test for the first time in *Thornburg v Gingles*.\(^\text{38}\) The North Carolina General Assembly enacted a legislative redistricting plan for the State Senate and House of Representatives.\(^\text{39}\) The plaintiffs, registered African-American voters, challenged the redistricting scheme on the ground that it impaired African-American citizens' ability to elect representatives of their choice in violation of the Fourteenth and Fifteenth Amendments and Section 2 of the VRA.\(^\text{40}\) In its decision, the Court discussed the proper application of the 1982 amendments to the VRA.\(^\text{41}\) Justice Brennan agreed with the majority report of the Senate Judiciary Committee, which found that the extent to which voting in the elections of the state or political subdivision is racially polarized was a major probative factor in a Section 2 challenge.\(^\text{42}\) Justice Brennan explained that although

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\(^{37}\) Id.

\(^{38}\) 478 US at 30.

\(^{39}\) Id at 34-35.

\(^{40}\) Id at 35.

\(^{41}\) Id at 42.

\(^{42}\) See *Gingles*, 478 US at 37. The Senate Report lists the following "typical factors" relevant to establishing a Section 2 violation:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals;
the Senate Report's enumerated factors were relevant in examining electoral access, the primary factor was that "a bloc voting majority must usually be able to defeat candidates supported by a politically cohesive, geographically insular minority group." The preconditions necessary to demonstrate that a multimember district impairs minority voters' ability to elect representatives of their choice are: the minority group is sufficiently large and geographically compact to constitute a majority in a single member district; the minority group is politically cohesive; and the majority votes sufficiently as a bloc to defeat the minority's preferred candidate in the absence of special circumstances. Justice Brennan reiterated that "courts and commentators agree that racial bloc voting is a key element of a vote dilution claim." Congress's adoption of the results test necessitated the plurality opinion's reliance on proof of racially polarized voting patterns.

Despite this clear mandate to examine racial polarization, Justice Brennan's plurality opinion gives only brief instruction on which elections are most strongly weighted in this analysis. The

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.
Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

44 Gingles, 478 US at 48 n.15.
45 Id at 49 (emphasis added)(citation omitted).
46 Id at 50.
47 Id at 51.
48 Gingles, 478 US at 51.

Id at 55, citing McMillan v Escambia County, Florida, 748 F2d 1037, 1043 (5th Cir 1984); United States v Marengo County Comm'n, 731 F2d 1546, 1566 (11th Cir 1984)(holding that the Constitution does not prohibit a results standard); Nevett v Sides, 571 F2d 209, 223 (5th Cir 1978)(discussing bloc voting); Johnson v Halifax County, 594 F Supp 161, 170 (E D NC 1984)(holding VRA guaranteed African-American citizens the equal opportunity to participate in the political process); James U. Blacksher and Larry T. Menefree, From Reynolds v Sims to City of Mobile v Bolden, 34 Hastings L J 1 (1982)(discussing the evolution of the VRA); Richard L. Engstrom and John K. Wildgen, Pruning Thorns from the Thicket: An Empirical Test of the Existence of Racial Gerrymandering, 2 Legis Stud Q 465, 469 (1977)(discussing methods for estimating degrees of vote dilution); Frank R. Parker, Racial Gerrymandering and Legislative Reapportionment, in Minority Vote Dilution 86-100 (Davidson, 1984); Note, Geometry and Geography: Racial Gerrymandering and the Voting Rights Act, 94 Yale L J 189, 199 (1984)(discussing the impact of the VRA).
Court stated that "a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election." The Court further explained that "[t]he number of elections that must be studied in order to determine whether voting is polarized will vary according to pertinent circumstances." For example, "[w]here a minority group has begun to sponsor candidates just recently, the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." Thus, Gingles indicates that one election may or may not be sufficient to demonstrate racial-bloc voting.

Unfortunately, on its facts Gingles sheds little light on the application of the Court's temporal guidelines in more challenging situations. In Gingles, the Court relied on fifty-three General Assembly primary and general races involving African-American candidates over the course of three election years, all within three years of the original complaint's filing. The Court's failure to elaborate on the probative value of old and recent elections has left the lower courts without any guidance. The Court also offered no extended discussion of special circumstances. The Court stated that special circumstances could include the absence of an opponent or incumbency, but did not fully explore the weight of their impact in the polarization analysis.

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40 Gingles, 478 US at 57. "[A] pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election. . . . . Also for this reason, in a district where elections are shown usually to be polarized, the fact that racially polarized voting is not present in one or a few individual elections does not necessarily negate the conclusion that the district experiences legally significant bloc voting. Furthermore, the success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." Id (citations omitted).

50 Id at 57 n 25.
51 Id.
52 Gingles, 478 US at 60 n 29.
53 Id.
54 Id at 57. "[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest." Id. "This list of special circumstances is illustrative, not exclusive." Gingles, 478 US at 57 n 26.
II. COURTS SHOULD DISCOUNT STALE ELECTION DATA TO REFLECT LEGISLATIVE INTENT AND DEMOGRAPHIC REALITY

The lower courts have interpreted *Gingles* differently. Some courts have read *Gingles* to require a scrutiny of all elections. Others have questioned the validity of analyzing "stale" election data that no longer reflects the electorate's changed political and demographic character.

A. Some Courts Have Rejected Election Weighing to Avoid Penalizing Minority Voters

Some courts have considered all election data in order to avoid penalizing minority groups that have not been represented in any recent election due to low probability of success. In *Nipper v Smith* ("*Nipper I*"), 55 the Eleventh Circuit Court of Appeals held that the "failure to consider the possibility that [African-American] candidates "don't run because they can't win" in weighing such evidence 'would allow voting-rights cases to be defeated at the outset by the very barriers to political participation that Congress has sought to remove.' 56 The court further stated that a contrary approach would "penaliz[e] [minority groups]... because black candidates [had] not run in... the recent past." 57 Citing Fifth and Eleventh Circuit precedent, 58 the *Nipper I* court argued that scarce electoral data had not prevented granting of relief in other Section 2 litigation. 59 However, the court did not state when, if ever, an election would simply be too old to aid an analysis nor did it discuss the issue of weighing.

The Fifth Circuit has also advocated using all elections, no matter how old. In *McMillan v Escambia County*, 60 no minority-sponsored candidates had run in elections between 1970 and the

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55 1 F3d 1171 (11th Cir 1993).
56 Id at 1179, quoting *Westwego Citizens for Better Gov't v City of Westwego*, 872 F2d 1201, 1208 n 9 (5th Cir 1989)(finding that the United States Supreme Court refused to preclude vote-dilution claims where few African-American candidates had sought office under the challenged electoral system).
57 See *Nipper I*, 1 F3d at 1179.
58 Id at 1179, citing *Solomon v Liberty County*, 899 F2d 1012 (11th Cir 1990)(finding that six elections were sufficient to support a voting-rights challenge). See also *Citizens for a Better Gretna v City of Gretna, Louisiana*, 834 F2d 496, 500-03 (5th Cir 1987); *Thornburg v Gingles*, 478 US 30, 82 (1986).
59 *Nipper I*, 1 F3d at 1179, citing *McMillan v Escambia County*, 748 F2d 1037, 1045 (5th Cir 1984); *Gingles*, 478 US at 57 n 25; *Westwego*, 872 F2d at 1208-09, 1209 n 9.
60 748 F2d at 1037.
The court explained that the lack of elections involving minority candidates did not advantage the defendant because the absence of such candidates was a result of the county's racially discriminatory system. Likewise, in *Citizens for a Better Gretna v City of Gretna, Louisiana* the court held that a finding of racial polarization could be substantiated by elections in 1977 and 1979, and exogenous data from 1979 and 1984. The court premised its holding on *Gingles'* view of sparse data: "[W]here a minority group has begun to sponsor candidates just recently the fact that statistics from only one or a few elections are available for examination does not foreclose a vote dilution claim." Thus, the Fifth Circuit maintained that failing to consider the possibility that African-American candidates "don't run because they can't win" in weighing electoral evidence would allow voting rights cases to fail because of the very barriers to political participation that the VRA and its amendments were designed to remove.

The Fifth Circuit also rejected the weighing of elections in *League of United Latin American Citizens, Council No. 4434 v Clements* ("LULAC I"). The court applied the *Gingles* three-pronged test on a county-by-county basis in Texas. In Jefferson County, the court relied on eight judicial elections occurring between 1972 and 1988. The defendants argued that the court should give more weight to the elections which occurred during the 1980s. However, the court disagreed, explaining that "[w]hen a district court is faced with a sparsity of data, it must remain flexible."

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61 Id at 1045.
62 Id. "Nor does the fact that no black ran for the Commission between 1970 and the time this litigation commenced, help defendants. Rather, the lack of black candidates is a likely result of a racially discriminatory system." Id (citations omitted).
63 834 F2d at 496.
64 Id at 502.
66 See *Westwego*, 872 F2d at 1208-09 n 9.
67 986 F2d 728 (5th Cir 1993).
68 Id at 792.
69 Id, citing *Citizens for a Better Gretna*, 834 F2d at 502, and *Gingles*, 478 US at 57 n 25.
B. Other Courts Have Discounted Older Elections Due to Staleness

In contrast, a number of other courts have discounted older elections. In *Nipper v Chiles*, the court examined six elections, four of which were over a decade old. The court declared the older four elections "stale" and of less probative value than the more recent elections. The court emphasized that most other vote-dilution cases usually had at least some elections for the challenged offices occurring "within one or two years of the lawsuit." In this case, the most recent election involving a minority-sponsored candidate occurred approximately six years prior to the filing of the lawsuit. Because of this time lag, the court held that statistical information garnered from the older elections was less reliable.

The Eleventh Circuit has recently engaged in a more sophisticated discussion of these concerns in *Nipper v Smith* ("Nipper II"). There the court stated:

> Although staleness may become a factor when the nature of the electorate or the office at stake has changed significantly during the intervening period . . . [t]here have been no significant structural changes in the system used to elect circuit and county court judges in Florida in the past twenty years, and the electorate . . . has not changed in character since the elections in question took place.

Thus, while the court endorsed rejecting data that had become stale, it considered the data in this case accurate after fifteen years and did not provide a bright-line rule of when such data would become stale.

The Fifth Circuit has also tempered its earlier liberal acceptance of old data. In *League of United Latin American Citizens, Council No. 4434 v Clements* ("LULAC II"), the court reversed

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70 795 F Supp 1525 (M D Fla 1992).
71 Id at 1534.
72 Id.
73 Id, citing Gingles, 478 US 30 (examining elections occurring within three years of filing of the complaint), and Solomon, 899 F2d at 1012.
74 Chiles, 795 F Supp at 1540.
75 Id at 1542.
77 Id at 1538.
78 999 F2d 831 (5th Cir 1993).
its holding in *LULAC I*. Although the court did not explicitly reject the use of older elections, it strongly suggested that "dated statistics" should be discounted because they would have limited utility in a "practical and searching appraisal of contemporary conditions . . . ."79 The dead statistical data supported a conclusion that the evidence was insufficient in light of the "totality of circumstances" to support a finding of racial polarization.80 The court did not discuss *Nipper I*’s argument that discounting would penalize minority voters with the same institutional barriers that traditionally inhibited minority participation.

C. Electoral Data More than Ten Years Old Should be Weighted to Reflect Demographic and Political Realities

Evidence of racial polarization is a critical element of a Section 2 claim,81 therefore, it is purely fortuitous that most courts have not yet faced the question of whether an election is too stale to aid in racial polarization analysis. In regions where minorities are most likely to allege inadequate political participation, minorities are also less likely to be candidates.82

A practical solution to the staleness debate is difficult. A bright-line rule would prevent disparity in application yet would be ill suited to the fact specific scenarios of vote-dilution cases.83 Moreover, any absolute time limit would be arbitrary; why should the time limit be ten years rather than fifteen years?

The practical answer to these concerns is a weighted system in which no election would be disregarded. Instead, older elections would be progressively discounted until their analytical worth was minimal. *Gingles* itself implies that all elections

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79 Id at 891. "The plaintiff's case was further weakened by their use of dated statistics: three of the five indigenous elections they submitted were held in 1972, 1974, and 1978. There is no evidence of a practical and searching appraisal of contemporary conditions in Jefferson County. We have here no more than marginal proof of illegal vote dilution." Id (Internal citation omitted).

80 Id.

81 See *Gingles*, 478 US at 48-49 n 15.

82 See *Nipper I*, 1 F3d at 1179, quoting *Westwego*, 872 F2d at 1209 n 9.

83 See *Gingles*, 478 US at 57-58. "As must be apparent, the degree of racial bloc voting that is cognizable as an element of a § 2 vote dilution claim will vary according to a variety of factual circumstances." Id. "As both amended § 2 and its legislative history make clear, in evaluating a statutory claim of vote dilution through districting, the trial court is to consider the 'totality of the circumstances' and to determine, based 'upon a searching practical evaluation of the "past and present reality" . . . whether the political process is equally open to minority voters. "'This determination is peculiarly dependent upon the facts of each case" . . . and requires 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." Id at 79 (citations omitted).
should be examined, finding that the best evidence of racial polarization is "a pattern of racial bloc voting that extends over a period of time."^{4} Yet the Gingles Court stressed that the polarization analysis required a "searching practical evaluation of the "past and present reality." ...."^{5} This recognition of the potential disparity between past and present electoral realities implicitly acknowledges the potential harm of punishing an innocent electorate for abandoned discriminatory practices. Ignoring the issue of staleness would unfairly value elections that no longer accurately reflect voting trends.

The VRA's language and legislative history provides the primary support for discounting elections. The VRA includes a bailout provision to reward jurisdictions demonstrating electoral desegregation.^{6} That provision facilitated removal of a jurisdiction from Section 5's preclearance requirements.^{7} Initially the VRA required a good behavior period of five years,^{8} but Congress lengthened it to ten years in the 1982 amendments.^{9} This bailout provision focuses on "whether continuing coverage is warranted [in light of present performance instead of relying upon] . . . the jurisdiction's conduct 17 years ago."^{10} Thus, the VRA's legislative history demonstrates Congress's belief that a jurisdiction could uncouple itself from its discriminatory past by demonstrating nondiscriminatory electoral and political practices over a ten-year period. The bailout provision itself does not end the staleness debate, however, because the provision only applies to Section 5's preclearance requirements and not to Section 2 claims.^{11} Yet the bailout provision should be read to demon-

^{4} Id at 57.
^{7} S Rep No 97-417 at 43 (cited in note 25). To comply with the bailout provisions, the jurisdiction must show that for ten years it has not used a discriminatory test or device, failed to obtain preclearance before implementing covered changes in its laws, or enacted changes which were discriminatory and therefore objected to under Section 5. Id at 47. The provision showed Congress's implicit recognition that these jurisdictions were presumed discriminatory at year zero but could expunge themselves of this taint by demonstrating nondiscriminatory voter-eligibility schemes through year ten.
^{8} HR Rep No 89-439 at 15 (cited in note 14).
^{9} S Rep No 97-417 at 46 (cited in note 25).
^{10} Id.
^{11} 42 USC § 1973b(1). See S Rep No 97-417 at 46 (cited in note 25). The bailout provision applies to "jurisdictions that insist on retaining discriminatory procedures or
strate Congress's recognition that current performance should be given more weight in Section 2 litigation.

Judicial treatment of other statistical data in voting-rights cases further supports a weighing process. The most common use of statistical information occurs during redistricting challenges. Plaintiffs in these suits rely on census data to demonstrate the demographic composition necessary to create a single member district with a majority. In *Dickinson v Indiana State Election Board*, a 1990 case, the court refused to rely on 1980 census data.

[We are] concerned that the 1980 census information, upon which the plaintiffs' complaint is founded and upon which any reapportionment would be conducted, is 'stale.' One concern that immediately comes to mind is whether 1980 census information is accurate enough in 1990 to allow the Court to rely on it in fashioning relief.

The Seventh Circuit arrived at a different conclusion in *McNeil v Springfield Park District*. In *McNeil*, plaintiffs challenged the use of 1980 census data, at that point just eight years old, as stale. The plaintiffs principally relied on *Gaffney v Cummings*, which found that the United States census only measures population at a single instant in time and that "[district populations are constantly changing, often at different rates in either direction, up or down." Although the *McNeil* court agreed with the plaintiffs' argument that the census information was probably stale, it stated otherwise inhibit full minority participation . . . ." *Id.*

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*See Dickinson v Indiana State Election Bd.*, 740 F Supp 1376 (S D Ind 1990); *McNeil v Springfield Park District*, 851 F2d 937 (7th Cir 1988).

*Id* at 1376.

*Id* at 1391.

*Id* at 937 (7th Cir 1988).

*Id* at 945.


*McNeil*, 851 F2d at 945, quoting *Gaffney*, 412 US at 746. The *McNeil* court described the United States Census as "more of an event than a process." *Id.* The court further explained that "[s]ubstantial differentials in population growth rates are striking and well-known phenomena." *Id.*

*Id* at 945. "Here the plaintiffs put their finger on a problem that applies not only to voting rights litigation but also to the fairness of presidential elections by the electoral college, districting of the House of Representatives and other political apportionment situations. With a mobile population, the demographic facts may always be a bit stale." *McNeil*, 851 F2d at 945.
that the census data was presumed accurate until a challenger provided "clear and convincing" evidence to "override the presumption." The court placed its faith in the "hard" census data despite recognizing that "populations change constantly." Courts can apply the same argument to election data. Because the census is taken every ten years, the statistical data at worst is only a decade out of date. The question of staleness only arises when the redistricting challenge occurs just before a new census period. Although the McNeil court held that census data would be presumed accurate throughout the ten-year period, it acknowledged that demographic data was extremely volatile. By implication, the McNeil court believed that the census snapshot became increasingly hazy as the decade passed.

However, does the census data become stale because of a change in demographics or simply because a new census is about to be undertaken? In reality, these two possibilities are remarkably similar. A court is naturally reluctant to base a holding on statistical data that may be proven obsolete by an upcoming census. At the same time, the census's periodic nature reveals an underlying sociological and political understanding that the census "measures population at only a single instant in time" and that reliance upon older census data transforms the basis for judicial holdings from "hard" data to "a matter of speculation." This second argument implies that demo-

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100 See id at 946, citing Latino Political Action Comm. v City of Boston, 568 F Supp 1012, 1018 (D C Mass 1985)(finding that Federal census is presumed accurate unless proven otherwise), and Dixon v Hassler, 412 F Supp 1036, 1040 (W D Tenn 1976)(upholding presumptive correctness of the Federal census).
101 McNeil, 851 F2d at 946.
102 Id, citing Gaffney, 412 US at 746.
103 See notes 93-98 and accompanying text.
104 See note 102 and accompanying text. See also Gaffney, 412 US at 746 n 11, citing The U.S. Bureau of the Census, Congressional District Data Book, 93d Cong, Connecticut 7 (1972). "In Connecticut, for example, the population of the State as a whole grew by 19.6% during the 1960's. But the population in the area comprising the Second Congressional District grew by over 28%, while the population in the Fourth District grew by only 11.2%.") Id.
105 See Dickinson, 740 F Supp at 1391. "[T]he Court is concerned that the 1980 census information, upon which the plaintiffs' complaint is founded and upon which any reapportionment would be conducted, is 'stale'. . . . Therefore, it is proper to question whether it is fair or reasonable to require such immense expenditures of time and money to create, for one election, districts whose lines will probably be changed in another year." Id.
106 Gaffney, 412 US at 746.
107 See McNeil, 851 F2d at 946.
108 See Dickinson, 740 F Supp at 1391.
graphic information more than a decade old should be considered less legally significant. Similarly, election results over a decade old should be discounted in favor of more recent results.

Despite differing opinions on the probative value of census data, such data clearly facilitate the staleness analysis. Redistricting claims rely upon proof of voting trends. Plaintiffs must show a politically cohesive group that would represent a majority in a single-member district. Courts' acknowledgment of different population growth rates and rapid demographic shifts applies to general voting trends. If a district's ethnic makeup can change rapidly through divergent population growth, then, assuming the racial groups vote in a politically cohesive manner, the voting patterns can also change rapidly. Neither logic nor practice supports discounting statistics for only one of these related demographic trends.

Using exogenous elections ameliorates the concern that this approach will lead many VRA suits to fail due to excessive discounting of electoral data when minority "candidates "don't run because they can't win." Although courts have generally accepted that exogenous elections carry some weight in polarization analysis, courts have been reluctant to accord such elections dispositive weight in the absence of other relevant data. The census discussion is a useful means for interpreting judicial acknowledgment of demographic change; however, care should be taken to avoid overzealous application. The example does not demand rejection of electoral data more than ten years old. The census presumes that notable demographic change is most practically observed at ten-year intervals. Courts should use that ten-year benchmark as the best date with which to begin their analysis of whether the electoral data continues to reflect an electorate's present reality. Outright rejection of electoral data more than ten years old, however, would violate Gingles explicit instruction to undertake a "searching practical evaluation of the past and present reality. . . ." Gingles, 478 US at 79, quoting S Rep No 97-417 at 30 (cited in note 25).

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110 See LULAC II, 999 F2d at 831; Williams v State Bd. of Elections, 718 F Supp 1324 (N D Ill 1989)(finding that electoral data did not establish vote dilution); Chiles, 795 F Supp at 1525; Nipper I, 1 F3d at 1171; Nipper II, 39 F3d at 1494.

111 Compare Dickinson, 740 F Supp at 1376, with McNeil, 851 F2d at 937.

112 See Gingles, 478 US at 57, 79.

113 Id at 50.

114 See Gaffney, 412 US at 746; Dickinson, 740 F Supp at 1391; McNeil, 851 F2d at 945.

115 Nipper I, 1 F3d at 1179, quoting Westwego Citizens for Better Gov't, 872 F2d at 1209 n 9.

116 See Jenkins v Red Clay Consolidated School District Bd. of Education, 4 F3d 1103, 1134-35 (3rd Cir 1993)(holding exogenous elections could be considered in racial-bloc voting analysis); Citizens for a Better Gretna, 834 F2d at 502.

117 See Citizens for a Better Gretna, 834 F2d at 502. "Although exogenous elections alone could not prove racially polarized voting in Gretna aldermanic elections, the district
erally, courts have most readily accepted exogenous elections when they "reflect local voting patterns." Thus, courts should use exogenous elections when there is sparse electoral data for evaluating the offices at issue. Nevertheless, courts should accord less weight because "exogenous elections [can] not perfectly mirror the population, issues, or election procedures found" in the jurisdiction.

Thus, recognition of the exogenous election data's validity and utility can help temper any negative effects of temporal discounting.

Although older election data should be discounted to avoid penalizing a potentially innocent present-day electorate for a prior electorate's racial polarization, a bright-line rule establishing an appropriate discount factor would contradict Gingles's "totality of circumstances" approach. No single discount value could adequately reflect different electoral periods. For example, 100 percent discounting of old elections might be satisfactory for annual elections of city officials; however, its use with more infrequent elections could be impractical if it routinely eliminated all but one election from the analysis. Also, use of exogenous data requires litigants to analyze the extent to which exogenous electoral factors reflect the electorate at issue. Because older election data must be depreciated to reflect an electorate's changing demographic and political character, the inherently fact-specific depreciation factor should be calculated in light of each case's "totality of circumstances."

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See id at 503. See also Jenkins, 4 F3d at 1134; Westwego, 872 F2d at 1209. "Rather than implying that plaintiffs may never make out a vote dilution claim when there is no evidence from 'indigenous' elections, the Gretna case properly focuses the inquiry on the probative value of the proffered evidence as an indicator of the voting behavior of the relevant polity . . . . [T]he district court should decide whether this evidence qualifies as a sufficiently 'local appraisal' to establish some degree of racial bloc voting . . . and should base its ultimate conclusion upon the strength of that evidence, considered in the context of the 'totality of the circumstances' test." Id.

See id at 502-03.

Citizens for a Better Gretna, 834 F2d at 502-03.

Jenkins, 4 F3d at 1134 (citation omitted).
III. COURTS SHOULD REJECT REINTRODUCTION OF A SPECIAL-CIRCUMSTANCES, DISCRIMINATORY-INTENT TEST

The Gingles Court introduced a “wildcard” into the Section 2 analysis.

[T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest.121

The Court introduced this “wildcard” on the premise that racial-bloc voting can exist despite occasional victories by minority candidates.122 Traditionally this rhetoric has been applied when minority candidates have had electoral success.123 However, the Eleventh Circuit has recently addressed the issue of whether majority-candidate incumbency should lead to discounting the existence of racial polarization when a minority candidate loses.124 Using special circumstances in this manner undermines the Gingles results test and should be rejected.

A. Some Courts Have Applied Special Circumstances Analysis to Minority Candidate Victory and Defeat

The district court in Nipper v Chiles125 abandoned the traditional Gingles reading and held that special circumstances, namely a white candidate's incumbency, could be introduced to explain minority failure.126 The incumbency issue arose from

122 Id.
123 Id. See also Collins v City of Norfolk, Virginia, 883 F2d 1232, 1241 (4th Cir 1989)(cautioning against finding a lack of racially polarized voting where the success of a minority candidate can be attributed to special circumstances), citing Zimmer v McKeithen, 485 F2d 1297, 1307 (5th Cir 1973). “[W]e cannot endorse the view that the success of black candidates at the polls necessarily forecloses the possibility of dilution of the [African-American] vote . . . . [S]uch success might be attributable to political support motivated by different considerations—namely that election of [an African-American] candidate will thwart successful challenges to electoral schemes on dilution grounds.” Zimmer, 485 F2d at 1307.
124 See Nipper v Chiles, 795 F Supp 1525 (M D Fla 1992)(“Chiles”)(holding white incumbency could be used to discount presence of racial polarization).
125 Id.
126 Id at 1542.
two elections.127 The first involved an African-American candidate who challenged an incumbent white judge who had been in office for two years,128 the second involved an African-American candidate who ran against a white incumbent who was a longtime resident of the community.129 The court explained:

In Gingles, the Supreme Court stated that minority electoral success does not foreclose a vote dilution claim if that success can be explained by special circumstances, such as the minority candidate running unopposed, or the fact that the minority candidate ran as an incumbent . . . . The converse of this proposition must also be true. That is, any balanced consideration of a vote dilution claim should also take into account any special circumstances that may explain minority electoral failure in a polarized contest.130

Thus, the court held that the special circumstances factors identified by the Gingles Court should be considered both where minority candidates have been successful and where those candidates have been defeated.131 The court argued that some elections were better understood as the result of strong incumbents rather than racial polarization.132 The district court cited no precedent for its reading of Gingles.

In Nipper II, the Eleventh Circuit Court of Appeals, sitting en banc, held that Nipper I had correctly decided that a successful Section 2 complaint "require[d] more than a mere showing of electoral losses at the polls by minority candidates."133 Indeed, the court found that Section 2 forbids the use of electoral structures that "result[ ] in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color."134 Consequently, VRA plaintiffs could not succeed in litigation unless the elections had resulted in the defeat of minority candidates.135 The court distinguished this "racial bias"136

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127 Id.
128 See Chiles, 795 F Supp at 1542.
129 Id at 1542 n 18-19.
130 Id at 1542 (emphasis added).
131 Id.
127 Chiles, 795 F Supp at 1542.
135 Nipper II, 39 F3d at 1515.
136 Id at 1521.
analysis of the electorate’s voting motivation from the congressionally rejected *Bolden* test on the ground that *Bolden* incorrectly analyzed “the intent of those responsible for erecting or maintaining the challenged scheme.”\(^{137}\) The *Nipper II* court continued:

Not only does the context of . . . the Senate Report clearly indicate what Congress meant by forbidden inquiry into discriminatory intent, but the Committee’s language in other sections . . . demonstrates a congressional desire to retain a basic inquiry into racial bias in the voting community—an inquiry that is qualitatively different from the question whether a challenged election law or procedure was designed or maintained for a discriminatory purpose.\(^{138}\)

The *Nipper II* court held that incumbency is often a determining factor in judicial elections; hence, it is an important factor that necessarily should be considered in judicial vote-dilution litigation.\(^{139}\)

The presence or absence of incumbents in particular races may go a long way toward explaining the pattern of election results presented, thereby aiding in the resolution of the fundamental question of whether the voting community is driven by racial bias that is operating through the challenged at-large election system to dilute the voting strength of minority voters.\(^{140}\)

The court tempered this statement by adding that the analysis should also acknowledge that the white officials were not “established” or “strong” incumbents.\(^{141}\)

B. Rejecting Dual Application of the Special-Circumstances Analysis

The Eleventh Circuit read *Gingles* differently in *Nipper I*. The court began its discussion by highlighting the weak nature of the incumbents.\(^{142}\) One of the white incumbent judges was not

\(^{137}\) Id at 1522 (footnote omitted).

\(^{138}\) Id.

\(^{139}\) *Nipper II*, 39 F3d at 1535.

\(^{140}\) Id at 1539.

\(^{141}\) Id.

\(^{142}\) *Nipper v Smith*, 1 F3d 1171, 1181 (11th Cir 1993)("Nipper I").
even an attorney but had been grandfathered from a period when nonattorneys were permitted to run for county judgeships. Furthermore, the white incumbent had been given the worst ratings in the bar polls of any judge in the circuit, including an "unqualified" rating by 82% of the lawyers polled; the town's only daily newspaper and a public teacher's organization had both endorsed the minority candidate. In the other election, the white incumbent had been appointed to a vacancy and had been an incumbent judge for only 100 days before running in the contested election. Contrary to the district court, the Nipper I court found that "these elections are hardly 'evidence of the power of incumbency.'"

Nipper I's rejection of the district court's reasoning ran deeper than just a review of these particular incumbents' performances.

We interpret Gingles to permit consideration of special circumstances only to explain variations from a usual pattern of racially polarized voting. In other words, special circumstances may explain minority electoral success in a polarized election; however, contrary to the district court's interpretation, the converse is not also true.

The court reasoned that special circumstances could only be used to explain minority success; the Gingles Court only contemplated situations where a minority candidate would succeed despite white-bloc voting. Gingles did not discuss the possibility of applying the special circumstances analysis to elections where minority-sponsored candidates were defeated. The Nipper I court stressed that a contrary reading "turns the [Gingles] Court's language on its head . . . ."

143 Id.
144 Id.
145 Id.
Nipper I, 1 F3d at 1181, quoting Chiles, 795 F Supp at 1542.
147 Nipper I, 1 F3d at 1181.
148 Id.
149 Id., discussing Gingles, 478 US at 57.
Nipper I, 1 F3d at 1181, quoting Williams v State Bd. of Elections, 718 F Supp 1324, 1329 (N D Ill 1989). See also Williams, 718 F Supp at 1329. "We fail to see how the passage from Gingles can intelligibly be read in that way. The Court was referring to circumstances that would allow a minority-preferred candidate to win, notwithstanding a degree of white bloc voting that would normally defeat such a candidate. An example of such a circumstance would be a minority-preferred candidate running unopposed. The
C. Courts Should Reject Dual Application of the Special-Circumstances Analysis

Under Congress's explicit rejection of Bolden's intent test, courts cannot reintroduce an intent requirement. Nipper II, however, does just that, subtly reintroducing an intent requirement in the guise of the special circumstances "wildcard." That is, a racial bias test requires a Section 2 plaintiff to demonstrate that the electorate voted for a white incumbent for racial reasons rather than for work performance. In Nipper II, Judge Joseph Hatchett dissented because he felt the court "[had employed] a strained review of the legislative history and Supreme Court interpretation of Section 2 of the Voting Rights Act." Judge Hatchett continued in dissent: "Yet, despite this searching effort [by the majority], absolutely no authority exists in either the case law, the legislative history, or the language of the Act to . . . impose a racial bias inquiry into Voting Rights Act litigation." An analysis of legislative history and case law demonstrates that the electorate's racial motivation had never been a required basis for a VRA challenge. Instead, because the Supreme Court has upheld the validity of the VRA under the enforcement provisions of the Fourteenth and Fifteenth Amendments, the federal courts have applied the same standards to vote-dilution claims under the Fifteenth Amendment and Section 2. Thus,

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white bloc, regardless of its strength, would have no one else for whom to vote." Id. Nipper I did not comment on whether special circumstances could ever make the probative value of an election too minimal. One other court has interpreted the Gingles language in a manner consistent with Nipper I. See Williams, 718 F Supp at 1329-30.


Id (Hatchett dissenting), citing South Carolina v Katzenbach, 383 US 301 (1966)(holding the VRA to be a valid effectuation of the Fifteenth Amendment); Georgia v United States, 411 US 526 (1973)(discussing Section 5 of the VRA); Briscoe v Bell, 432 US 404 (1977)(holding the VRA to be a valid effectuation of the Fourteenth and Fifteenth Amendments); Rome v United States, 446 US 156 (1980)(finding that the VRA does not exceed Congress's power to enforce the Fifteenth Amendment); Oregon v Mitchell, 400 US 112 (1970)(discussing the limits of Congress's power under the VRA).

Nipper II, 39 F3d at 1549 (Hatchett dissenting), quoting Mobile v Bolden, 446 US 55 (1980)("the language of § 2 no more than elaborates upon that of the Fifteenth Amendment, and . . . it was intended to have an effect no different from that of the Fifteenth Amendment itself"); Frank R. Parker, The Results Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard, 69 Va L Rev 715 (1983)(discussing the 1982 amend-
successful VRA challenges under the Fifteenth Amendment and the VRA targeted only the intentions or consequences of state-enacted voting-rights regimes.

"The racial bias inquiry was only relevant to demonstrate the intent of the legislature in utilizing a particular electoral system that disadvantaged racial minorities."\(^{157}\) The pre-\textit{Bolden} results test, explicitly reinstalled by the 1982 VRA Amendments, did not proscribe individual voter racial discrimination. Rather, that results test prohibited discrimination by state officials that intentionally or effectively disadvantaged minorities.\(^{158}\)

[The electorate racial bias test is] merely a resurrection in different garb of a claim expressly rejected by the Supreme Court in \textit{Thornburg v. Gingles} . . . . ["The] suggestion that the discriminatory intent of individual white voters must be proved in order to make out a § 2 claim must fail for the very reasons Congress rejected the intent test with respect to government bodies."\(^{159}\)

A return to an intent test would have a "decidedly negative impact on the ability of minority voters to end discrimination"\(^{160}\) because of the test's "unacceptably difficult burden."\(^{161}\) It is difficult to conceive how the hardships imposed by an analysis of an electorate's purpose could be more acceptable than the burden imposed by the rejected \textit{Bolden} examination of legislative intent.

The VRA's text and legislative history reject reintroduction of racial-bias analysis. Section 2 unambiguously provides that electoral structures and procedures cannot be used in a manner that "results" in the denial of the right to vote on account of race.\(^{162}\) As the Senate Report accompanying the 1982 Amendments stated:

[I]t is patently [clear] that Congress has used the words "on account of race or color" in the Act to mean "with respect to" race or color, and not to connote any re-

\(^{157}\) \textit{Nipper II}, 39 F3d at 1548 (Hatchett dissenting).

\(^{158}\) Id at 1551 (Hatchett dissenting), citing \textit{Gingles}, 478 US at 30.

\(^{159}\) \textit{Nipper II}, 39 F2d at 1555 (Hatchett dissenting), quoting \textit{Gingles}, 478 US at 71.

\(^{160}\) S Rep No 97-417 at 37 (cited in note 25).

\(^{161}\) Id at 16.

\(^{162}\) \textit{Nipper II}, 39 F3d at 1552 (Hatchett dissenting). "In no manner does this language reference a need to inquire into the racial biases of individual voters." Id.
quired purpose of racial discrimination. Any other arguments based on similar parsing of isolated words in the bill that there is some implied “purpose” component in Section 2, even when plaintiffs proceed under the results standard, are equally misplaced and incorrect.\textsuperscript{163}

Moreover, “a voting practice or procedure which is discriminatory in result, should not be allowed to stand, regardless of whether there exists a discriminatory purpose’...\textsuperscript{164} Requiring an analysis into voter motivation would directly contravene Congress’s express intent and the Gingles Court’s adoption of the results test. Consequently, a racial-bias analysis of special circumstances must be rejected.

CONCLUSION ...

Congress’s adoption of the results test and Gingles’s reliance on evidence of racial polarization requires courts to evaluate election data in Section 2 litigation. Courts should weigh all elections but discount older, staler elections more than ten years old. This discounting is necessary because of demographic changes and the ten-year benchmark suggested by Congress in the VRA bailout provisions and by the courts in census data evaluations. In light of the Gingles “totality of circumstances” requirement, courts should calculate the quantum of discounting required by looking to actual demographic changes. Any fears that such discounting will penalize minority groups is ameliorated by including exogenous elections. Although a court should accord exogenous election data less probative value because such data cannot perfectly mirror the jurisdiction at issue, the data should nevertheless be used to supplement endogenous election results when it reflects local voting patterns.

Similarly, Nipper II’s proposed discounting of minority sponsored candidates’ election failures due to special circumstances should be rejected. Utilization of special circumstances to explain minority failure would effectively reintroduce an intent-based test by enabling Section 2 defendants to argue that white voters were motivated by nonracial incentives when they voted for

\textsuperscript{163} S Rep No 97-417 at 28-29 n 109 (cited in note 25).

\textsuperscript{164} Id at 194 (additional views of Senator Robert Dole). “It should be reemphasized that the ‘results’ test contained in the substitute amendment in no way includes an element of discriminatory purpose... Section 2 should only require plaintiffs to establish discriminatory ‘results’ and... [no] element of purpose should be incorporated into the standard.” Id.
white incumbents. Legislative history demonstrates Congress's desire to eliminate any intent-based test in racial-bloc voting analysis. Moreover, *Gingles* rejected introduction of an electorate's motivation on grounds that it contradicted Congress's explicit instructions that an electoral practice which is discriminatory in result should not be allowed to stand, regardless of whether a discriminatory purpose exists.