CONSTITUTIONAL LAW I

PERKINS v. CITY OF WEST HELENA: AT LARGE ELECTIONS RESULTING IN VOTE DILUTION—A SUBTLE DISCRIMINATION AGAINST MINORITY VOTERS

INTRODUCTION

The right to vote has traditionally been recognized as a fundamental interest under the equal protection clause of the fourteenth amendment.[1] In addition, the fifteenth amendment specifically expanded the right of sufferage to blacks.[2] In *Reynolds v. Sims*,[3] the United States Supreme Court recognized that every citizen has an "inalienable right to full and effective participation in the political processes of his State's legislative bodies."[4]

Minority groups have challenged election schemes that directly or indirectly exclude them from exercising their right to vote in violation of the equal protection clause of the fourteenth amendment and the voting rights protection of the fifteenth amendment.[5] Some of the first incidents of citizens struggling to exercise their right to an effective vote arose in cases dealing with apportionment, *i.e.*, the equal representation of districts in proportion to their population.[6] Early voting rights cases culminated into the "one person, one vote" principle.[7]

Under this principle, election districts must be made nearly equal in population so that each person's vote has substantially the same weight as any other person's vote, regardless of the district in which the vote is cast.[8] Although the one person, one vote

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1. *See, e.g.*, Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); U.S. CONST. amend. XIV, § 1. "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

2. U.S. CONST. amend. XV, § 1. "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race, color, or previous condition of servitude."

3. 377 U.S. 533 (1964).

4. *Id.* at 565. *Cf.* Avery v. Midland County, 390 U.S. 474, 479-80 (1968) (the standard of *Reynolds* was extended to local governments).

5. *See generally* cases cited in L. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 13-1 - 13-15 (1978).

6. *Id.* at § 13-2.

7. Gray v. Sanders, 372 U.S. 368, 382 (1963) (Stewart, J., concurring) ("Within a given constituency, there can be room for but a single constitutional rule — one voter, one vote.").

8. Chapman v. Meier, 420 U.S. 1, 22 (1975) (although mathematical exactness is not required, there must be substantial equality of population among various districts); Reynolds v. Sims, 377 U.S. 533, 577 (1964) ("The Equal Protection Clause

principle may insure voting equality, it ignores the right of representational equality.[9] For example, gerrymandered[10] or multimember[11] districts fulfill the one person, one vote requirement of *Reynolds*,[12] yet they deny many voters a chance for an effective voice in the political process.[13]

Most litigation dealing with the cancelling out of minority voting strength has involved multimember election schemes.[14] Under a multimember election system, residents of an area, which may

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requires that a State make an honest and good faith effort to construct districts . . . as nearly of equal population as is practicable."

9. *See* L. TRIBE, *supra* note 5, at § 13-7 (fair and effective representation imports more than the mere right to cast a vote that will be weighed as heavily as other votes cast in the election). *See also* Reynolds v. Sims, 377 U.S. 533, 565-66 (1964) (Chief Justice Warren stated "the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment."); Zimmer v. McKeithen, 485 F.2d 1297, 1303 (5th Cir. 1973) (en banc) (fair representation includes the concept that one man's vote should equal another man's vote and an election scheme must not operate to cancel out the voting strength of a minority), *aff'd on other grounds sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976).

10. BLACK'S LAW DICTIONARY 618 (5th ed. 1979). Gerrymandering is the process of dividing an area into political subdivisions "with such a geographical arrangement as to accomplish an ulterior or unlawful purpose, . . . for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines." *See* Gomillion v. Lightfoot, 364 U.S. 339 (1960). In *Gomillion*, the Supreme Court reinstated a complaint that sought to hold unconstitutional an act of the Alabama legislature that changed the shape of the city boundaries of Tuskegee into an irregular 27-sided figure. The plaintiffs alleged that this redistricting plan, while affecting no white voters, excluded all but four or five of the city's 400 black voters from voting in the elections. *Id.* at 341. The Court found that if these allegations were proven, the plan denied blacks the right to vote in violation of the fifteenth amendment. *Id.* at 346-48. *See generally* Note, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. CHI. L. REV. 398 (1974) (discussion of how gerrymandering results in denial of fair and effective representation in the political process).

11. Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 358 (1976) (a multimember district or at-large system calls for the election of all the representatives by all of the voters, and each voter casts a ballot for as many representatives as there are positions).

12. 377 U.S. 533 (1964).

13. *See generally* Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 669-70 (1972) (multimember legislative districts present the problem of fair, rather than arithmetically equal, representation). Sickels, *Dragons, Bacon Strips and Dumbells — Who's Afraid of Reapportionment?*, 75 YALE L.J. 1300 (1966) (discusses how districts may comply with mathematical requirements of equal representation while disregarding fair representation through the process of gerrymandering).

14. White v. Regester, 412 U.S. 755, 765 (1973) (the Supreme Court, acknowledging that multimember districts are not per se unconstitutional, sustained a district court finding that certain multimember districts in two Texas counties were invalid); Whitcomb v. Chavis, 403 U.S. 124, 128-29 (1971), (involved allegations that a county's multimember state election district illegally minimized the voting powers of a black group); Burns v. Richardson, 384 U.S. 73, 88 (1966) (multimember districts

be divided into several districts, elect two or more representatives for the entire area on an at-large basis.[15] Multimember election systems tend to dissipate the voting strength of minority voters.[16] A minority group may have enough voting strength to elect a representative from a single-member district, but be outvoted by a white majority when the districts are combined under a multimember system.[17] For example, under a single-member system in which there are four equally populated districts, each district is entitled to elect one representative. The votes in each district are counted independently to determine the winner in that district. Under a multimember system, the voters cast one vote for each seat to be filled. The votes of all voters in the multimember district are combined to determine the winners.[18]

FACTS AND HOLDING

Constitutional standards by which multimember districts are to be evaluated are unsettled. In *Perkins v. City of West Helena*,[19] the Eighth Circuit faced a challenge to the West Helena, Arkansas at-large[20] system of electing aldermen.[21] The plaintiffs, a group of black citizens of West Helena, alleged that the at-large election scheme was adopted and maintained for the purpose of diluting black voting strength in violation of the Voting Rights Act of 1965[22] and the fourteenth and fifteenth amendments.[23] The plaintiffs also contended that the four city wards should be reapportioned because the population in the four wards was not substantially equal, as required by Arkansas law.[24]

The City of West Helena has been governed since 1920 by a

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were subject to a constitutional challenge upon a showing that the electoral system operated to minimize the voting strength of a racial minority).

15. *See* L. TRIBE, *supra* note 5, at § 13-8. *See also* Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 670 (1972).

16. Whitcomb v. Chavis, 403 U.S. 124, 158-159 (1971).

17. L. TRIBE, *supra* note 5, at § 13-8.

18. Comment, *City of Mobile v. Bolden: A Setback In the Fight Against Discrimination*, 47 BROOKLYN L. REV. 169-70 n.3 (1980).

19. 675 F.2d 201 (8th Cir. 1982), *aff'd*, 103 S. Ct. 33 (1982).

20. *See* Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 358 (1976) (an at-large system is one in which the votes of the voters in each district are combined to elect all the representatives in the combined district).

21. 675 F.2d at 202.

22. 42 U.S.C. § 1973 (1976). "No voting . . . practice, or procedure shall be imposed or applied by any State or political subdivision to deny . . . the right of any citizen of the United States to vote on account of race or color . . .." *Id.*

23. 675 F.2d at 203.

24. *Id.*

council of eight aldermen. Candidates for the position of alderman must reside in the ward from which they seek election. There are two positions in each of the four wards, and all candidates are required to specify the seat for which they are running. Rather than providing for four single-member districts, each of which would elect two aldermen, all candidates are elected on an at-large basis with the entire multimember district voting for two candidates from each ward.[25] The electoral system includes an "anti-single shot" requirement, *i.e.*, any ballot not containing one vote for each seat is voided.[26] Candidates must receive a plurality of votes to win. Despite a history of "racial bloc" voting,[27] only three black candidates have been elected to the city council. In all three cases, the black candidates ran against at least two white candidates, thereby resulting in a split of the white vote, and on head-to-head re-election, each of the black candidates was defeated by white candidates.[28]

The Eighth Circuit held that West Helena's at-large electoral system was maintained intentionally to limit the opportunity of blacks to participate effectively in the political process in violation of the fourteenth and fifteenth amendments and the Voting Rights Act of 1965.[29] This article discusses the issues involved in analyzing a vote dilution claim—the constitutional basis of a vote dilution claim, the requirement of discriminatory intent, and the evidence needed to establish proof of discriminatory intent.

BACKGROUND

In an effort to determine whether the plaintiffs established a vote dilution claim, the Eighth Circuit first looked to the United States Supreme Court decision in *City of Mobile v. Bolden*.[30] In that case, Mobile's at-large system of electing city commissioners was challenged. Black voters of Mobile alleged that the election scheme diluted black voting strength in violation of the Voting

25. *Id.*

26. *See* City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980). Single shot voting enables a minority group to win some at-large seats if it concentrates its votes behind a limited number of candidates and if the vote of the majority is divided among a number of candidates. In an at-large election in which each voter is able to cast two or more votes, black voters would have a chance to elect a minority candidate by voting for that candidate alone, while white votes could be split among several white candidates. *See also* note 109 and accompanying text *infra*.

27. Comment, *City of Mobile v. Bolden: A Setback In the Fight Against Discrimination*, 47 BROOKLYN L. REV. 169, 173 n.12 (1980) ("racial bloc" voting is the tendency of members of a racial group to vote in a similar manner).

28. 675 F.2d at 203.

29. *Id.* at 217.

30. 446 U.S. 55 (1980).

Rights Act of 1965 and the fourteenth and fifteenth amendments.[31] The United States District Court for the Southern District of Alabama[32] and the Fifth Circuit Court of Appeals[33] agreed that the system was unconstitutional. In an extremely divided opinion, the Supreme Court reversed the finding of the lower courts.[34]

The plurality decision,[35] with two Justices concurring,[36] held that Mobile's at-large system of elections did not dilute black voter strength in violation of the Constitution.[37] However, three dissenting Justices disagreed with the plurality and believed that the at-large system violated the fourteenth and fifteenth amendments.[38] The plurality found that a vote dilution claim can only be brought under the fourteenth amendment.[39] In contrast, three Justices specifically found that such a claim may be brought under both the fourteenth and fifteenth amendments.[40]

Traditionally, the United States Supreme Court has consistently required proof of discriminatory effect upon a minority group to show that a multimember voting scheme was unconstitutional.[41]

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31. *Id.* at 58.

32. Bolden v. City of Mobile, 423 F. Supp. 384, 402 (S.D. Ala. 1976).

33. Bolden v. City of Mobile, 571 F.2d 238, 242 (5th Cir. 1978).

34. 446 U.S. at 80.

35. 446 U.S. at 58 (1980) (joining in Justice Stewart's opinion were Justices Powell and Rehnquist and Chief Justice Burger).

36. *Id.* at 80, 83. Justice Blackmun agreed that the factual findings supported a holding of illegal vote dilution but concurred in the result because he believed the lower court remedy inappropriate under the circumstances. Justice Blackmun stated, "I am inclined to agree with Mr. Justice White that, in this case, 'the findings of the District Court amply support an inference of purposeful discrimination.' " *Id.* at 80. Justice Stevens concurred in the judgment of the plurality employing a test that focused on "the objective effects of a political decision rather than the subjective motivation of the decisionmaker." *Id.* at 90.

37. *Id.* at 65. Both the plurality and dissenting opinions of the *Bolden* Court agreed that the constitutional standard of § 2 of the Voting Rights Act was identical to the protection afforded by the fifteenth amendment and added nothing to the fifteenth amendment claim. *Id.* at 60-61, 105 n.2. *See* note 22 and accompanying text *supra*.

38. "Even accepting the plurality's premise that discriminatory purpose must be shown, I agree with Mr. Justice Marshall and Mr. Justice White that the appellees have clearly met that burden." *Id.* at 94 (Brennan, J., dissenting).

"Because I believe that the findings of the District Court amply support an inference of purposeful discrimination in violation of the Fourteenth and Fifteenth Amendments, I respectfully dissent." *Id.* at 103 (White, J., dissenting).

Justice Marshall felt that vote dilution decisions require only a showing of discriminatory impact under the fourteenth and fifteenth amendments. *Id.* at 104-05 (Marshall, J., dissenting).

39. *Id.* at 64-66.

40. *Id.* at 84, 102, 125-26 (Stevens, J., concurring) (White, J., dissenting) (Marshall, J., dissenting).

41. *See* White v. Regester, 412 U.S. 755, 766 (1973) (*quoting* Whitcomb v. Chavis, 403 U.S. 124, 149-50 (1971) (to establish a discriminatory effect, the minority group must show its members "had less opportunity than did other residents in the dis-

However, in *Bolden*, the plurality reiterated an additional requirement for proving the unconstitutionality of such a system.[42] The plurality stressed that any state action neutral on its face must be motivated by a discriminatory purpose before it can be held violative of the fourteenth and fifteenth amendments.[43] A plaintiff must prove that the disputed plan was "conceived or operated as a purposeful device to further racial . . . discrimination."[44] Therefore, a simple showing of discriminatory effect is not enough to establish the unconstitutionality of a voting scheme.[45] Because blacks in Mobile registered and voted without hinderance, the plurality held that the at-large system produced no denial of their right to vote under the fifteenth amendment.[46] In regard to the fourteenth amendment, the plurality held the system constitutional due to the lack of discriminatory purpose.[47]

ANALYSIS

Constitutional Basis of a Vote Dilution Claim

In *Perkins*,[48] the Eighth Circuit concluded that a plaintiff may bring a vote dilution claim under both the fourteenth[49] and fifteenth[50] amendments. The *Bolden* plurality specifically stated that a claim of vote dilution cannot properly be brought under the

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trict to participate in the political processes and to elect legislators of their choice.")).

42. 446 U.S. at 66.

43. *Id.*

44. *Id.* (*quoting* Whitcomb v. Chavis, 403 U.S. 124, 149 (1971)).

45. *Id.* at 67-69. *But see*, Note, *City of Mobile v. Bolden: Voter Dilution And New Intent Requirements Under The Fifteenth And Fourteenth Amendments*, 18 HOUS. L. REV. 611, 613 (1981) (although concurring in the plurality opinion, neither Justice Blackmun nor Justice Stevens fully accepted the idea that a successful equal protection claim of vote dilution must prove racially discriminatory intent).

46. 446 U.S. at 62 (1980).

47. *Id.* at 74.

48. 675 F.2d 201 (8th Cir. 1982).

49. *Id.* at 205. *See also* Lodge v. Buxton, 639 F.2d 1358, 1372 (5th Cir. 1981) (a plaintiff may bring a vote dilution claim attacking an electoral system on the grounds that it violates the fourteenth amendment), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

50. 675 F.2d at 205. *See also* Washington v. Finlay, 664 F.2d 913, 919 (4th Cir. 1981) ("Claims of racially discriminatory vote dilution exist under both the fifteenth amendment and the Equal Protection Clause of the fourteenth amendment"), *cert. denied* 102 S. Ct. 2933 (1982). United States v. Uvalde Consol. Indep. School Dist., 625 F.2d 547, 552 (5th Cir. 1980) (the holding of the *Bolden* Court, that the fifteenth amendment prohibits purposefully discriminatory voting schemes, was approved by a majority of the court), *cert. denied*, 451 U.S. 1002 (1981). *But see* McMillan v. Escambia County, 635 F.2d 1239, 1242 n.9 (5th Cir. 1981) (adopting the plurality view of the *Bolden* Court that vote dilution violates only the fourteenth amendment), *cert. dismissed sub nom.* Jenkins v. City of Pensacola, 102 S. Ct. 17 (1981).

fifteenth amendment.[51] Recognizing that the plurality in *Bolden* found the fifteenth amendment to prohibit only official action denying blacks the right to register and vote,[52] the Eighth Circuit determined that a majority of the Court believed the fifteenth amendment actually protects more than this mechanical right.[53] According to the court, five Justices in *Bolden* indicated that the fifteenth amendment also protects against vote dilution limiting the effective, not just technical, access of blacks to the political process.[54] Justices Stevens, White and Marshall concluded that a vote dilution claim is a proper fifteenth amendment cause of action. The Eighth Circuit summarily decided that while Justices Brennan and Blackmun "did not expressly state their views on the issue," they were in agreement with Justices Stevens, White and Marshall.[55]

The Fifth Circuit Court of Appeals has also addressed the question of whether the fifteenth amendment grants an independent cause of action in vote dilution claims, but has been unable to reach a consensus on this issue. In *Lodge v. Buxton*,[56] a Fifth Circuit panel concluded that a plaintiff may bring a vote dilution claim on the grounds that it violates the fifteenth amendment.[57] The *Lodge* panel found that a majority of Justices in *Bolden* were of the opinion that a vote dilution claim is proper under the fifteenth as well as the fourteenth amendment, even though access to the ballot is not directly affected. Three dissenting Justices in *Bolden* specifically stated that the fifteenth amendment encompasses vote dilution cases. According to the Fifth Circuit panel, Justice Blackmun agreed with the substantive questions presented in Justice White's dissent and thereby became the fourth member of the Court to approve of an expansive reading of the fifteenth amendment.[58] The *Lodge* court then pointed out Justice Stevens' concurrence, which stated: "I disagree with Mr. Justice Stewart's conclusion for the plurality that the fifteenth amendment applies only to practices that directly affect access to the ballot and hence

51. 446 U.S. at 64-65.

52. *Id.*

53. 675 F.2d at 206. The *Perkins* court was also of the opinion that "the Supreme Court has interpreted the Fifteenth Amendment as providing protection to the entire electoral franchise, and not just the official right to register and vote." *Id.* at 207 n.7.

54. *Id.* at 206.

55. *Id.* at 206 n.6.

56. 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

57. 639 F.2d at 1372.

58. *Id.*

is totally inapplicable to the case at bar."[59] Justice Stevens was "satisfied that such a structure . . . may be challenged under the fifteenth amendment."[60] Thus, the *Lodge* panel concluded that five Justices believed the fifteenth amendment creates a right of action in vote dilution cases.[61] In a recent Supreme Court decision affirming the Fifth Circuit's holding in *Lodge*, the Court declined to express its view on the application of the fifteenth amendment to that case.[62]

Approximately one month before the *Lodge* decision, another Fifth Circuit panel decided a case in direct conflict with *Lodge*. In *McMillan v. Escambia County*,[63] the Fifth Circuit held that vote dilution violates only the fourteenth amendment.[64] The plaintiff in *McMillan* alleged violations of both the fourteenth and fifteenth amendments. Unlike the *Lodge* panel, the *McMillan* panel said "that because Justices Brennan and Blackmun expressed no view as to the appropriate amendment under which to analyze a vote dilution claim, the majority view is unknown."[65] It stated that only Justices Stevens, Marshall and White had indicated vote dilution was a proper fifteenth amendment claim.[66]

Although the Eighth Circuit in *Perkins* failed to set forth a rationale for its interpretation of *Bolden* in finding fifteenth amendment protection in vote dilution claims, the court in *Lodge* expressly supported its decision. Contrary to the expressed plurality's conclusion in *Bolden*, the Eighth Circuit, joining the Fifth Circuit's panel decision in *Lodge*, found that vote dilution is a proper claim under both the fourteenth and fifteenth amendments.[67]

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59. *Id.* at 1372-73 (*quoting Bolden*, 446 U.S. at 84 n.3).

60. *Id.* at 1373 (*quoting Bolden*, 446 U.S. at 84).

61. *Id.* at 1373. *See also*, Washington v. Finlay, 664 F.2d 913, 919 n.3 (4th Cir. 1981) (the Fourth Circuit concluded that a majority of the *Bolden* court believed vote dilution claims existed under the fifteenth amendment), *cert. denied* 102 S. Ct. 2933 (1982).

62. Rogers v. Lodge, 102 S. Ct. 3272, 3276 n.6 (1982). The Supreme Court noted that Justices Stevens, White and Marshall disagreed with the *Bolden* plurality's basis for setting aside the fifteenth amendment. In comparison, the *Perkins* court determined that Justices Brennan and Blackmun were in disagreement with the plurality. *See* note 55 and accompanying text *supra*.

63. 638 F.2d 1239 (5th Cir. 1981), *cert. dismissed sub nom.* Jenkins v. City of Pensacola, 102 S. Ct. 17 (1981).

64. *Id.* at 1243 n.9.

65. *Id.*

66. *Id.*

67. 675 F.2d at 205, 206 n.6.

The Requirement of Discriminatory Intent

The next issue addressed by the court in *Perkins* was whether discriminatory intent must be shown to establish a claim of unconstitutional vote dilution. The court concluded that discriminatory intent must be established under the fourteenth amendment,[68] but left unanswered the question of whether such intent must be shown under the fifteenth amendment.[69]

The *Perkins* court noted that only the plurality in *Bolden* would not recognize a vote dilution claim under the fifteenth amendment.[70] However, in spite of its refusal to recognize such a claim, the *Bolden* plurality stated that discriminatory intent is generally required to establish a fifteenth amendment cause of action.[71] The *Perkins* court stated that Justices Marshall and Brennan believed discriminatory intent was unnecessary to establish a claim of vote dilution and proof of discriminatory impact alone was sufficient.[72] The court interpreted Justice Stevens' objective standard as not requiring an examination of intent in vote dilution cases.[73] According to the court, Justices White and Blackmun did not expressly indicate whether proof of discriminatory purpose was necessary.[74] Because the plaintiffs in *Perkins* had established discriminatory intent, the Eighth Circuit found it unnecessary to address the issue of whether discriminatory intent is necessary under the fifteenth amendment.[75]

However, when faced with the question of whether proof of intent to discriminate must be established under a fifteenth amendment vote dilution claim, the Fourth Circuit Court of Appeals found discriminatory intent a necessary element.[76] In *Washington*

68. *Id.* at 207. *See also* Washington v. Finlay, 664 F.2d 913, 919 (4th Cir. 1981), *cert. denied* 102 S. Ct. 2933 (1982) (a racially discriminatory purpose must be shown in a vote dilution claim brought under the fourteenth amendment); Lodge v. Buxton, 639 F.2d 1358, 1362-63 (5th Cir. 1981) (discriminatory intent is a necessary element of a fourteenth amendment vote dilution claim), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

69. 657 F.2d at 207 n.8.

70. *Id.*

71. *Id.* As Justice Stevens stated in his concurring opinion, it is "difficult to understand why, given this position [that the fifteenth amendment is inapplicable to vote dilution cases] he [Justice Stewart] reaches out to decide that discriminatory purpose must be demonstrated in a proper fifteenth amendment case." 446 U.S. at 62.

72. 675 F.2d at 207 n.8. *Bolden*, 446 U.S. 55, 94, 125-26 (1980) (Brennan, Marshall, J.J., dissenting).

73. 675 F.2d at 207 n.8.

74. *Id.*

75. *Id.*

76. Washington v. Finlay, 664 F.2d 913, 919 (4th Cir. 1981), *cert. denied* 102 S. Ct. 2933 (1982).

v. Finlay,[77] the court determined that a majority of the *Bolden* Court required proof of discriminatory intent to establish such a claim.[78] In *Washington*, the plaintiffs challenged an election system in Columbia, South Carolina under both the fourteenth and fifteenth amendments.[79] The court determined that the *Bolden* plurality required intent to discriminate under both amendments.[80] The Fourth Circuit went on to state, "[i]t appears that Justices White and Blackmun concur in that view, though the latter only assumed it for purposes of his special concurrence in the result."[81] The court found Justice Stevens' view to be "uncertain" because it was so different from the plurality and dissenting opinions.[82]

The Court of Appeals for the Fifth Circuit, in *Lodge v. Buxton*,[83] also concluded that a vote dilution claim under the fourteenth or fifteenth amendment requires proof of discriminatory intent.[84] The court stated, "[a]n even less disputable principle, after *Bolden*, is that a plaintiff challenging an at-large voting system must prove that the system was created or maintained for the purpose of limiting the access of or excluding Blacks from effective participation in that system."[85]

The court in *Perkins* did not speculate as to what its decision would be if faced with the issue of requisite intent in vote dilution claims brought under the fifteenth amendment. The court's interpretation of the six opinions in *Bolden* varies somewhat from that of the Fourth Circuit in *Washington* and the Fifth Circuit in *Lodge*. In light of both the *Washington* and *Lodge* opinions, the Eighth Circuit would probably require discriminatory intent in fifteenth amendment vote dilution claims. Unlike the *Washington* court, which viewed Justices White and Blackmun's opinions as requiring discriminatory intent, the *Perkins* court determined that the two Justices made no express decision as to this issue. While the *Washington* court interpreted Justice Stevens' opinion on this issue as being uncertain, the *Perkins* court interpreted his opinion as not requiring an inquiry into intent. However, even under the Eighth Circuit's interpretation, this still results in a 4-2-3 plurality

77. *Id.* at 913.
78. *Id.* at 919 n.4.
79. *Id.* at 916.
80. *Id.* at 919 n.4.
81. *Id.*
82. *Id.*
83. 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).
84. *Id.* at 1373.
85. *Id.*

in favor of an intent requirement. Thus, if faced with a vote dilution claim in which discriminatory intent could not be established, the Eighth Circuit, in the absence of a new directive from the Supreme Court, would be likely to find it not violative of the fifteenth amendment.

Evidence Necessary to Establish Proof of Discriminatory Intent

After establishing the necessity of proving discriminatory intent in a fourteenth amendment challenge, the court in *Perkins* outlined the types of evidence necessary to prove such intent.[86] The court chose to use the relevant criteria set forth in *Zimmer v. McKeithen*[87] and *Arlington Heights v. Metropolitan Housing Development Corp.*[88] in determining whether intent to discriminate existed.[89] The court discussed six major factors which gave direct or circumstantial evidence that West Helena's election system was being maintained for a discriminatory purpose.[90] Those six factors were: (1) lack of minority access to the political process; (2) lack of responsiveness of elected officials to minority interests; (3) discriminatory impact of the election system; (4) history of discrimination; (5) administrative history; and (6) mechanics of the voting system.[91]

In analyzing these factors, the court first looked at access of minority voters to the political process in West Helena.[92] The court found that blacks had been unable to campaign effectively in the city because of racial discrimination and had been denied the chance to speak to white business groups. The court also recognized that blacks were underrepresented on municipal boards and commissions. In addition, feelings of inferiority among blacks, due to illiteracy and lower economic conditions, kept some from voting. According to the court, all of these factors were impediments to

86. 675 F.2d at 209-216.

87. 485 F.2d 1297, 1304-05 (5th Cir. 1973) (en banc) (a multimember system of elections is violative of constitutional rights where it dilutes the impact of the votes of minority residents), *aff'd on other grounds sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976).

88. 429 U.S. 252, 269-70 (1977) (a housing development corporation was denied permission to build racially integrated housing in Arlington Heights. The court, requiring proof of racially discriminatory intent to show violation of the fourteenth amendment, found that no such intent was present here).

89. 675 F.2d at 208, 209.

90. *Id.* at 209-16. The court set forth nine specific factors to be examined in determining whether discriminatory intent exists. For discussion purposes, the author grouped the factors into six major categories.

91. *Id.*

92. *Id.* at 209.

the minority's access to the political process.[93]

The second factor examined by the court was the responsiveness of elected officials to minority interests.[94] It was found that city services provided for blacks were inferior to those provided for whites. Some black areas of the city lacked street paving, sufficient drainage systems, adequately maintained parks and sewer and water service.[95] As additional evidence of lack of responsiveness, the court found that the city council voted to draft an ordinance providing for election by wards, but only after blacks boycotted white businesses. It was later revealed that more votes were needed to draft such an ordinance, but the city council failed to revote on the issue.[96] It was also noted that the city council refused requests by blacks to reapportion West Helena's wards even though three-fourths of the population are in two predominantly black wards and one-fourth resides in two all-white wards.[97] This evidence was considered to be "probative" of the finding that West Helena's election system was being maintained for a discriminatory purpose.[98]

The discriminatory impact of the election system is the third relevant factor to discern.[99] The court found that although blacks make up forty percent of the population of West Helena, only three blacks have been aldermen since 1917. The court also noted that if single member ward voting was allowed, blacks could possibly elect aldermen from the two city wards in which blacks make up a majority.[100]

The fourth factor the Eighth Circuit looked to was history of discrimination in West Helena.[101] Although past discrimination does not prove that a system is being motivated by a discriminatory purpose,[102] according to the court it is relevant to the extent that it affects present participation in the election system. In 1895, Arkansas restricted the right of blacks to vote by use of a poll tax. A "whites only" primary was utilized by the Democratic Party un-

93. *Id.* at 209-10.
94. *Id.* at 210.
95. *Id.*
96. *Id.* at 213. The city council, by a four to three vote, agreed to draft an ordinance that would allow election of aldermen by single wards. Not until after the vote was taken did the city attorney tell the council that a majority of five votes was needed to draft the ordinance. *Id.*
97. *Id.* at 215.
98. *Id.* The court felt that the "one man, one vote" principle is still important in at-large election systems. *Id.* at 215 n.16.
99. *Id.* at 212.
100. *Id.* at 213. *See* text at note 18 *supra*.
101. 675 F.2d at 211.
102. *Id.* *Bolden*, 446 U.S. 55, 74 (1980).

til 1944.[103] The court found that these past discriminatory laws continue to discourage blacks from voting.[104]

The court then looked to administrative history as the fifth factor evidencing discriminatory intent.[105] Although multimember ward elections are said to promote the concerns of the general community rather than local interests,[106] this rationale was not advanced by any aldermen who supported at-large voting.[107] On the contrary, testimony of a white alderman revealed that "he opposed election by ward because black voters predominate [in] his ward they would not elect him to represent them."[108]

Finally, the Eighth Circuit looked at the mechanics of the voting system in West Helena to find evidence of discriminatory purpose.[109] Several provisions of Arkansas law effectively prohibit single-shot voting by black citizens.[110] For example, suppose there are six white candidates and one black candidate and each voter must cast four votes. The prohibitions would force blacks to vote for three white candidates, thereby diluting black voter strength and helping to defeat black candidates. Also, candidates must reside in the ward from which they seek election and they must run for a particular "seat" within a ward. According to the court, these factors increase the likelihood that West Helena's electoral system is being maintained for a discriminatory purpose.[111]

The *Perkins* court concluded its analysis of West Helena's electoral system by balancing the city's interest in maintaining the system, against the discriminatory impact the system had on blacks.[112] After considering all of the relevant criteria, the Eighth Circuit determined that the at-large system was maintained for the purpose of limiting the opportunity of blacks to participate effec-

103. 675 F.2d at 211. The Supreme Court found the primary unconstitutional. Smith v. Allwright, 321 U.S. 649 (1944).

104. *Id.*

105. *Id.* at 213.

106. *See* Note, *Ghetto Voting and At-Large Elections: A Subtle Infringement Upon Minority Rights*, 58 GEO. L.J. 989, 989 (1970) (historically, it appears that multimember districts with at-large elections were developed specifically to sacrifice minority interests in favor of "good government," and were implemented in many American cities as a progressive reform).

107. 675 F.2d at 214.

108. *Id.*

109. *Id.* at 211.

110. *Id.* at 212. *See* ARK. STAT. ANN. § 19-1002.7 (1980) (candidates must reside in the ward from which they seek election); ARK. STAT. ANN. § 19-1002.6 (1980) (candidates must designate the seat for which they are running); ARK. STAT. ANN. § 19-1004 (1980) (terms for each of the two aldermen running from each ward are staggered). *See* note 26 and accompanying text *supra*.

111. 675 F.2d at 212.

112. *Id.* at 215.

tively in the political process.[113]

Although the Eighth Circuit examined several factors in finding a discriminatory purpose, the court failed to provide a precise set of criteria which, if met, would establish a finding of discriminatory intent. Instead, it stated that no set of factors is dispositive of the issue and that all factors must be considered to determine whether an electoral system was maintained with intent to discriminate.[114] The factors set forth in *Perkins* are not unique to the Eighth Circuit. Other courts have supplied tests which consider all the surrounding circumstances rather than a conclusive set of criteria.

In *Zimmer v. McKeithen*,[115] the Fifth Circuit set out primary factors to consider in exploring unconstitutional vote dilution:

> When a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particular interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made.[116]

The court also noted that large election districts, anti-single shot voting provisions and majority vote requirements enhanced proof of discriminatory intent. Under *Zimmer*, the existence of vote dilution is established upon proof of the existence of an aggregate of these factors.[117] The plurality in *Bolden*, however, rejected these factors as being conclusive of discriminatory intent.[118]

In *Lodge v. Buxton*,[119] a Fifth Circuit panel attempted to reconcile *Bolden* with the Fifth Circuit's previous decision in *Zimmer*. According to the court in *Lodge*, the *Zimmer* criteria are not dispositive of discriminatory intent but merely indicative. The criteria are not exclusive, and even if all of the *Zimmer* factors are established, discriminatory intent cannot necessarily be inferred, absent a showing of unresponsiveness of public officials.[120] A "totality of the circumstances" must be considered in examining the

113. *Id.* at 216.

114. *Id.* at 209.

115. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd on other grounds sub nom.* East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976).

116. *Id.* at 1305.

117. *Id.*

118. 446 U.S. at 72-73.

119. 639 F.2d 1358 (5th Cir. 1981), *aff'd sub nom.* Rogers v. Lodge, 102 S. Ct. 3272 (1982).

120. *Id.* at 1375, 1375 n.35.

issue of discriminatory intent.[121]

The *Lodge* court began its analysis by stating that the *Zimmer* criteria should be applied only to the extent that they are relevant, and to the extent that they are not relevant, other criteria may be employed.[122] In examination of the Fifth Circuit's analysis in *Lodge*, the Supreme Court found that application of this legal standard was proper.[123] These factors considered in *Lodge* included proof of unresponsiveness of commissioners to the needs of blacks, past discrimination, depressed socio-economic condition of blacks, access of blacks to the political process, and a majority vote requirement coupled with at-large elections.[124]

In *Bailey v. Vining*,[125] a Georgia federal court utilized the same analysis used by the court in *Lodge*. In *Bailey*, black citizens of Putnam County, Georgia claimed that the system for electing the city's mayor and commissioners was unconstitutional. In determining that blacks were denied equal access to the political process,[126] the court noted that the *Zimmer* criteria are not exhaustive and "similar" factors may also be considered.[127]

In a case involving a vote dilution claim, a different Fifth Circuit panel, in *McMillan v. Escambia*, concluded that *Zimmer* had been discredited.[128] The panel, instead, relied on the *Arlington Heights* requirements in finding proof of discriminatory intent.[129]

In *Arlington Heights*,[130] the United States Supreme Court enumerated factors that should be the focus in finding discriminatory intent. That case did not involve a question of unconstitutional vote dilution, but one of zoning.[131] The Supreme Court required proof of discriminatory intent to show a violation of the fourteenth amendment.[132] The factors to be considered include history of discrimination, specific events leading up to the issue, departure from

121. *Id.* at 1375.
122. *Id.* at 1373.
123. Rogers v. Lodge, 102 S. Ct. 3272, 3277-78 (1982), *reh'g denied* Rogers v. Lodge, 103 S. Ct. 198 (1982).
124. *Id.* at 1376-80 (in addition to the articulated *Zimmer* criteria, the court considered the socio-economic condition of blacks).
125. 514 F. Supp. 452 (M.D. Ga. 1981).
126. *Id.* at 463.
127. *Id.* at 459 n.6 (the court did not articulate what "similar" factors may be considered).
128. 638 F.2d 1239, 1248 (5th Cir. 1981), *cert. dismissed sub nom.* Jenkins v. City of Pensacola 102 S. Ct. 17 (1981). The court cited *Bolden* as discrediting the *Zimmer* criteria. *Id.* at 1243.
129. *Id.* at 1245.
130. 429 U.S. 252 (1977).
131. *Id.* at 254.
132. *Id.* at 265.

the normal procedures, and administrative history.[133] Thus, in light of *Lodge* and *McMillan*, the Fifth Circuit is in conflict as to the proper criteria necessary for discerning discriminatory intent.[134]

The Eighth Circuit in *Perkins* agreed with the approach taken by the Fifth Circuit in *Lodge*. This approach focused on the *Zimmer* criteria to the extent that they are relevant, but also noted that the absence or presence of some, or all, of the criteria is not conclusive of the discriminatory intent issue.[135] The *Perkins* court also called for consideration of the *Arlington Heights* factors in determining whether intent to discriminate exists.[136] Thus, the *Perkins* court embraced all the criteria set forth in *Lodge* and *McMillan*. No strict set of factors has been found to be conclusive on proof of discriminatory intent. The Eighth Circuit's conclusion that a totality of the circumstances must be considered sheds little light on exactly what must be established in proving that an electoral system has been created or maintained with the intent to discriminate against a minority. Conversely, the totality of circumstances test will allow the court sufficient discretion to find discriminatory intent even where a system has been purposely constructed in order to avoid a finding of discriminatory intent under a well-defined test. Under the standard set forth, lower courts must examine the factual findings of each case in light of all relevant circumstances.

CONCLUSION

In determining whether an at-large election scheme was created or maintained intentionally to deprive black voters of their right to participate effectively in the political process, lower federal courts are left "adrift on unchartered seas."[137] Although the Eighth Circuit declined to determine whether discriminatory intent must be shown under the fifteenth amendment, its conclusion that such intent must be established under the fourteenth amendment is in accord with a majority of the court in *Bolden*.

In contrast, the actual criteria to examine in finding discriminatory intent is not as explicit. The direct and circumstantial evidence examined by the *Perkins* court led to the conclusion that West Helena's electoral system was being maintained for a dis-

133. *Id.* at 267-68.
134. *See* text at notes 122-124 *supra*.
135. 675 F.2d at 209.
136. *Id.*
137. 446 U.S. at 103 (White, J., dissenting).

criminatory purpose. The factors set forth in *Perkins* are helpful in ascertaining discriminatory intent, but potential litigants must be aware that all relevant criteria must be examined carefully and no specific set of factors will be considered conclusive to the question of discriminatory intent.

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