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THE CASE OF THE MISSING CASE: HOW NEGLECTING *CHISOM V. ROEMER* LEAVES § 2 OF THE VOTING RIGHTS ACT ANALYTICALLY AT SEA

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In its June 2023 decision involving § 2 of the Voting Rights Act (VRA), *Allen v. Milligan*,[1] the Supreme Court upheld a district court's preliminary injunction that invalidated Alabama's congressional districting plan. The Supreme Court held that the district court "faithfully applied our precedents and correctly determined that, under existing law, [the Alabama congressional districting plan] violated § 2."[2] The Court ordered an additional majority-minority district, based on a theory of vote dilution.[3]

In his opinion for the Court, Chief Justice Roberts asserted that the litigation was "not about the law as it exists," but "about Alabama's attempt to remake our § 2 jurisprudence anew."[4] And,

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1. 143 S. Ct. 1487, 1498 (2023).
2. *Id.* at 1506.
3. *See id.* at 1502-03, 1506.
4. *Id.* at 1506.

relying on "statutory *stare decisis*,"[5] the Court "decline[d] to recast ... § 2 case law."[6] The Court labeled its decision "a faithful application of our precedents" and discounted concerns that its decision "impermissibly elevate[d] race in the allocation of political power."[7]

The case to which the Court in *Allen* pledged allegiance was *Thornburg v. Gingles*,[8] the first Supreme Court case to interpret the 1982 amendment to § 2 of the VRA.[9] Amended § 2(a) bars the imposition of any "standard, practice, or procedure" that "results in a denial or abridgement of the right ... to vote."[10] Although the term "vote dilution" does not appear in § 2, the Court in *Gingles* held that § 2 applied to substantive claims of vote dilution.[11]

Amended § 2(b) explains a "denial or abridgment has occurred ... when, 'based on the totality of circumstances,' a State's electoral system is 'not equally open' to members of a racial group."[12] And, under § 2(b), a system is not equally open if members of one race "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[13] Plaintiffs[14] must demonstrate that electoral "devices result in unequal access to the electoral process."[15] *Gingles* relied on the "elect representatives of their choice" provision of § 2(b) to hold that § 2 is violated under a vote dilution theory[16] where an "electoral

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5. *Id.* at 1515.

6. *Id.* at 1507.

7. *Id.* at 1517. For an explanation that *Allen* did not require the remaking of Voting Rights Act § 2 jurisprudence, see *infra* note 71.

8. 478 U.S. 30 (1986).

9. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2333 (2021) ("This Court first construed the amended § 2 in *Thornburg v. Gingles*, [a] vote-dilution case" (citation omitted)). For an extensive discussion of amended § 2 of the VRA, see James. F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633 (1983).

10. 52 U.S.C. § 10301(a). The way 52 U.S.C. § 10301 spells "abridgement" differs from the Supreme Court's spelling, "abridgment", in *Brnovich* and Chisom v. Roemer. *See infra* text accompanying notes 12 and 62. Merriam-Webster dictionary treats them as alternative spellings. *Abridgment*, MERRIAM-WEBSTER, https://www.merriam-webster.com/dictionary/abridgment [https://perma.cc/M6ZC-9EYN].

11. 478 U.S. at 74-79.

12. *Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting) (quoting 52 U.S.C. § 10301(b)).

13. 52 U.S.C. § 10301(b).

14. *See* Ark. State Conf. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1216 (8th Cir. 2023) (holding that there is no private remedy to enforce § 2 of the Voting Rights Act).

15. *Gingles*, 478 U.S. at 46.

16. *See* Chisom v. Roemer, 501 U.S. 380, 407-08 (1991) (Scalia, J., dissenting).

structure operates to minimize or cancel out [minority voters'] ability to elect their preferred candidates."[17]

Under *Gingles*, there are three prerequisites or thresholds that a plaintiff must establish in order to make out a claim (in other words, there must be a large, geographically compact, politically cohesive minority community faced with racially polarized voting challenges).[18] Once the threshold prerequisites are established, the analysis turns to the actual application of amended § 2 to determine, under the totality of circumstances, "whether the political process is equally open to minority voters."[19]

The Court in *Gingles* treated this "totality of circumstances" analysis as a factual matter[20] and affirmed the trial court under typical "clearly-erroneous" deference to trial court factfinding.[21] There is very little substantive analysis of the underlying "totality of circumstances" doctrine in *Gingles*.[22] And much of the case law post-*Gingles*, including in the recent Alabama case (*Allen*), has focused on the *Gingles* threshold preconditions[23] and whether or how they apply in certain circumstances—for example, whether they apply to single-member districts, not just multi-member districts.[24]

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17. *Gingles*, 478 U.S. at 48.

18. Cooper v. Harris, 581 U.S. 285, 301-02 (2017).

19. Wis. Legislature v. Wis. Elections Comm'n, 142 S. Ct. 1245, 1248 (2022) (per curiam) (quoting *Gingles*, 478 U.S. at 79).

20. *Gingles*, 478 U.S. at 79. VRA § 2(b) was derived from White v. Regester. 412 U.S. 755 (1973). In this case minority communities, Black and Hispanic, were foreclosed from participation in the political process and were thereby deprived of an opportunity to elect their representatives of choice. *Id.* at 765-70; *see* Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1418 (1973) (noting § 2(b) "carried forth the *White v. Regester* test"); *see also Chisom*, 504 U.S. at 397 (holding amended § 2(b) is "patterned after the language used ... in *White v. Regester* and *Whitcomb v. Chavis"* (citations omitted)); Allen v. Milligan, 143 S. Ct. 1487, 1500 (2023) (observing § 2(b) "borrowed language from ... *White v. Regester*").

21. *Gingles*, 478 U.S. at 79; *see also* League of United Latin Am. Citizens (*LULAC*) v. Perry, 548 U.S. 399, 427 (2006) ("The District Court's determination whether the § 2 requirements are satisfied must be upheld unless clearly erroneous.").

22. *Cf. Allen*, 143. S. Ct. at 1532 (Thomas, J., dissenting) ("[The Court has] never succeeded in translating the *Gingles* framework into an objective and workable method of identifying the undiluted benchmark.").

23. *Id.* at 1504-06.

24. *See* Growe v. Emison, 507 U.S. 25, 26 (1993) (holding that the *Gingles* prerequisites apply to vote dilution challenges to single-member districts); *see also* Abbott v. Perez, 138 S. Ct. 2305, 2330-34 (2018) (focusing on the *Gingles* pre-conditions).

But *Gingles* does not address or answer the critical question—whether a claim of *substantive* vote dilution is freestanding, or whether it is contingent on or linked to other *process-based* values as set out in amended § 2(b).[25] As explained in § 2(b), the critical focus of § 2 is that a prerequisite (a "key requirement") for finding a violation of VRA § 2 is that "the political processes leading to nomination and election ... must be 'equally open' to minority and non-minority groups alike."[26] As the Court held in *Brnovich v. Democratic National Committee*, the term "open" means that the political process must be "without restrictions as to who may participate."[27] Justice Kagan's dissent in *Brnovich* echoed the importance—even the centrality—of "the right to an equal opportunity to vote."[28]

This raises the question of the relationship between the two critical provisions in § 2(b) and the twin requirements for establishing a violation of § 2: (1) that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process;"[29] *and*[30] (2) that members of a racial minority have less ability "to elect representatives of their choice."[31]

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25. In *Allen v. Milligan*, for example, plaintiffs' claims were expressed in what appears to be a freestanding form: "Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress." Singleton v. Merrill, 582 F. Supp. 3d 924, 936 (N.D. Ala. 2022). That formulation does not address the pivotal question and even camouflages it by suggesting that § 2 looks to substantive outcomes instead of lack of equal access to the political process that can cause adverse substantive outcomes such as vote dilution. The plaintiffs' formulation derives from *Abbott*. 138 S. Ct. at 2315. The formulation in *Abbott* derives from *LULAC*, which stated the issue under the totality of circumstances analysis as "whether members of a racial group have less opportunity than do other members of the electorate." *LULAC*, 548 U.S. at 425-26. Section 2(b) links opportunity to participate in the political process and ability to elect representatives of choice; inability to elect is actionable but only upon a finding of unequal opportunity to participate in the political process. These claims are not freestanding but are "inextricably linked" and form a "unitary" claim under § 2(b). *See* Chisom v. Roemer, 501 U.S. 380, 397-98 (1991).

26. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337 (2021).

27. *Id.* (internal citations omitted).

28. *Id.* at 2351 (Kagan, J., dissenting).

29. 52 U.S.C. § 10301(b).

30. In her *Brnovich* dissent, Justice Kagan erroneously uses the term "or" instead of "and," which is the statutory term, in relating the two pivotal provisions. *See Brnovich*, 141 S. Ct. at 2358; *see also* Chisom v. Roemer, 501 U.S. 380, 397 (1991) ("It would distort the plain meaning of the sentence to substitute the word 'or' for the word 'and.'").

31. 52 U.S.C. § 10301(b).

Is each provision and requirement separate and distinct? Or are they linked and therefore interdependent?

If the ability "to elect representatives of ... choice" provision, which undergirds the vote dilution claim,[32] is freestanding, then some core value (otherwise undefined) must inform the meaning of the vote dilution concept.[33] After all, one cannot sensibly think about whether something is "diluted" unless one has a benchmark of what an undiluted outcome would be.[34] In every-day terms, it would be impossible to know what it means to serve "watered down" (or diluted) beer without having an understanding (a benchmark) of what non-watered-down beer would be.[35]

The legislative history of § 2's amendment illustrates the concerns about a freestanding vote dilution claim. Disagreement over legislating a benchmark became so pointed that it ultimately earned its own title—the Dole Compromise.[36] Senator Robert Dole, the namesake of the saga, addressed the issue directly, not mincing words: "By the expression of an entitlement to 'elect representatives of their choice,' the amendment provides ... that members of minority groups have a right to register, vote, and to have their vote fairly counted. There is no guarantee of success: Just an equal opportunity to participate."[37] In a public mark-up session, Senator Dole reassured "results" skeptics[38] "that revised Section 2 retained

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32. *See supra* note 16 and accompanying text.

33. STAFF OF S. SUBCOMM. ON CONST. TO S. COMM. ON THE JUDICIARY, 97TH CONG., REP. ON S. 1992 30 (Comm. Print 1982) (highlighting the problem with a results test, as was present in the House version of amended § 2, by explaining, "[t]here is no 'core value' under the results test except for the value of equal electoral results for defined minority groups, or proportional representation. There is no other ultimate or threshold criterion by which a fact-finder can evaluate the evidence before it").

34. *See, e.g.*, Holder v. Hall, 512 U.S. 874, 880-81 (1994) (plurality opinion) (recognizing the need for "a benchmark against which to measure the existing voting practice" and that "where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2").

35. *See* Reno v. Bossier Par. Sch. Bd., 520 U.S, 471, 480 (1997) ("Because the very concept of vote dilution implies—and, indeed, necessitates—the existence of an 'undiluted' practice against which the fact of dilution may be measured, a § 2 plaintiff must also postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.").

36. James F. Blumstein, *Racial Gerrymandering and Vote Dilution:* Shaw v. Reno *in Doctrinal Context*, 26 RUTGERS L.J. 518, 566 (1995).

37. 128 CONG. REC. 14316 (1982) (STATEMENT OF SEN. ROBERT DOLE).

38. *1 Voting Rights Act: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Be-*

the Voting Rights Act's focus on discrimination against the rights of individuals to vote."[39]

Senator Dole maintained this clear position when the amendment reached the Senate floor. He was "asked if revised Section 2 dealt with equal access to the voting process or with election results."[40] Senator Dole's response was definitive: "The focus in section 2 is on equal access, as it should be.... It is not a right to elect someone of their race but it is equal access and having their vote counted."[41] As Senator Dole stated, "the essence of the Dole compromise was to draw a basic distinction between the issue of access to the political process and election results."[42]

In other words, amended § 2 is process-based, not outcome-oriented, at least as a freestanding matter. After revision, § 2 still retained the focus on nondiscrimination against individuals, "on access to the process not on group entitlements to representation based on race."[43] The issue under revised § 2 is "whether or not minorities have 'equal access' to the political process," and "'[e]qual access' does not imply any right among minority groups to be elected

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fore the Subcomm. on the Constitution of the S. Comm. on the Judiciary, 97th Cong. 1332, 1336 (1982) [hereinafter *Blumstein Testimony*] (statement of Prof. James F. Blumstein, Vanderbilt L. Sch.) (noting that the problem with the House's proposed substantive results or effects test "is that it does not make any theoretical sense unless you assume affirmative entitlements based upon race"); *see* Boyd & Markman, *supra* note 20, at 1399 n.255 ("In the view of most critics of the proposed 'results' test, no alternative standard—except for proportional representation—made sense in the context of § 2. In their view, no alternative standard exists short of comparing actual representation of minorities to the representation that they would be ideally 'entitled' under a structure of proportional representation." (citation omitted)). The Dole Compromise (§ 2(b)) was developed and adopted to respond to these criticisms and concerns. *See id.* at 1414-20. I had expressed this set of concerns in testimony that I presented to the Subcommittee: "A substantive effects standard must imply either no theory at all or an underlying theory of some affirmative, race-based entitlements." The opposition to the "purpose" or "intent" standard derived not from a commitment to race-based entitlements but "really comes on the basis of pragmatism, that is, the problem of proof." *Blumstein Testimony*, *supra*, at 1332-33.

39. Blumstein, *supra* note 36, at 568; *see* LULAC v. Perry, 548 U.S. 399, 437 (2006) ("[T]he right to an undiluted vote does not belong to the 'minority as a group,' but rather to 'its individual members.'" (quoting Shaw v. Hunt, 517 U.S. 899, 917 (1996))).

40. Blumstein, *supra* note 36, at 568.

41. 128 CONG. REC. 14133 (1982) (STATEMENT OF SEN. ROBERT DOLE).

42. *Id.* at 14317 (STATEMENT OF SEN. ROBERT DOLE).

43. Blumstein, *supra* note 36, at 568.

in particular proportions: It does not imply a right to proportional representation of any kind."[44]

The text of § 2(b) reflects disconcertment with using outcomes as a freestanding basis for VRA liability under § 2. As part of the Dole Compromise, § 2(b) itself specifically stated that a natural benchmark, racial proportionality, would be disavowed: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population."[45] Not only Congress, but the Supreme Court itself has also shown squeamishness in the face of racial proportionality tests, having rejected maximization of the political influence of Black voters (so-called Max Black) as a benchmark in *Johnson v. De Grandy*.[46]

Though "purpose" or "intent" could have provided such a core value,[47] revised § 2 relied on a "results" test. In the absence of some benchmark as a core value, a results test is analytically at sea. It "draws no bottom line. It requires the consideration of a laundry list of factors, but it never orients the inquiry. It demands a balance, but it provides no scale."[48] A freestanding vote dilution claim, with no

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44. 128 CONG. REC. 14316 (1982) (STATEMENT OF SEN. ROBERT DOLE).

45. 52 U.S.C. § 10301(b). In my testimony, I was skeptical that a statutory disclaimer, such as a proposed anti-proportional representation provision could "get the job done when a willful court has its mind set to do something else." *Blumstein Testimony*, *supra* note 38, at 1338.

46. 512 U.S. 997, 1016-17 (1994). *De Grandy* reinforces the point that the Dole Compromise "confirms what is otherwise clear from the text of the statute, namely, that the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Id.* at 1014, n.11. *De Grandy* also rejected a proposed "safe harbor" against a claim of racial vote dilution for states that achieved racial proportionality. In rejecting that proposal, the Court noted that such a safe harbor "would be in derogation of the statutory text and its considered purpose," which focus on "whether the political processes are 'equally open.'" *Id.* at 1018 (quoting S. Rep. No. 97-417, at 30 (1982). Amended § 2 focused on the openness of the political process; racially proportional electoral outcomes did not and could not insulate a state from a substantive vote dilution claim in the face of putative process-based claims, which relied on challenges to such "reprehensible practices as ballot box stuffing, outright violence, discretionary registration, property requirements, the poll tax, ... the white primary," and other forms of race discrimination. *Id.*; *see also* Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 213, 223 (2023) (illustrating the Supreme Court's growing concern with using racial proportionality as a benchmark for equality, at least in the higher education context).

47. *See Blumstein Testimony*, supra note 38, at 1333 (noting the distinction between "discrimination" and "disadvantage" and the centrality of "'intent" in drawing that distinction).

48. Blumstein, *supra* note 9, at 644-45 (footnote omitted). There is a distinction between a "substantive" effects test and an "evidentiary" effects test. A substantive effects test suggests "an affirmative duty to consider race explicitly in effectuating an aliquot matching

statutory standards, would almost certainly leave judges in the position of developing a substantive benchmark that smacked of racial proportionality or some form of race-based representational entitlement.[49] On the other hand, a process-based analysis, focusing on equal access to the political process, provides an objective benchmark.[50]

As it turns out, the Supreme Court has already confronted these issues. But the Court in *Allen* ignored or disregarded the critical case, *Chisom v. Roemer*, that rejected a freestanding vote dilution approach, contra to the most far-reaching implications of *Gingles*.[51] What was called for in *Allen* was a clarification of the relationship between *Chisom* and *Gingles*, not an exclusive focus on *Gingles*.[52]

Chisom concerned the question of whether VRA § 2 applied to judicial elections. The lower court construed § 2 as providing "two distinct types of protection for minority voters—it protects their opportunity 'to participate in the political process' and their opportunity 'to elect representatives of their choice.'"[53] Since judges

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of a particular benefit to racial criteria." *Id.* at 650. In the voting context, a substantive effects test "would reflect adoption of an affirmative, race-based entitlement to representation; otherwise notions such as ... vote dilution are not understandable." *Id.* at 654. An "evidentiary effects analysis ... offers an attractive alternative that accommodates legitimate concerns about problems of proof with the basic commitment to the principle of nondiscrimination." *Id.* at 658. There is an analogy to the doctrine of *res ipsa loquitur*. "Under res ipsa the underlying theory of liability—negligence—remains the same; a plaintiff, however, can create an inference of negligence without directly showing that the defendant committed the negligent act." *Id.* at 659.

49. *Cf.* LULAC v. Perry, 548 U.S. 399, 437 (2006) (holding that "[t]he role of proportionality" is not to establish an affirmative, race-based claim to proportional representation but to "provide[ ] some evidence of whether 'the political processes leading to nomination or election ... are not equally open to participation'" (quoting 42 U.S.C. § 1973(b))). That is, the focus of analysis under amended § 2 remains on nondiscriminatory access to the political or "electoral" process and the vote dilution that can result from that lack of access. *Id.* at 439-40.

50. *See* Blumstein, *supra* note 9, at 702-03 ("The question is whether courts can resist the impetus towards a [substantive] result-based analysis—whether some analytically sensible way can be found to avoid the Scylla of a pure race-based results approach and the Charybdis of intrusive and standardless judicial oversight of state and local political practices and institutions.").

51. 501 U.S. 380, 396-98 (1991).

52. *Cf.* Allen v. Milligan, 143 S. Ct. 1487, 1504 (2023) (noting "the District Court concluded that plaintiffs' § 2 claim was likely to succeed under *Gingles*" but did not analyze or even consider the impact of *Chisom* on the *Gingles* framework).

53. *Chisom*, 501 U.S. at 396 (quoting LULAC v. Clements, 914 F.2d 620, 625 (5th Cir. 1990)).

were not "representatives," VRA § 2 did not apply to a freestanding vote dilution claim.[54]

The Supreme Court rejected the position of the lower court. It concluded that § 2 embraces a "unitary claim,"[55] not "two separate and distinct rights."[56] The "opportunity to participate and the opportunity to elect" are "inextricably linked";[57] they cannot "be bifurcated into two kinds of claims."[58] The "inability to elect" component, upon which vote dilution claims rest, "is not sufficient to establish a violation [of § 2] unless, under the totality of circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process."[59] Equal access to and equal participation in the political process are critical components to any claim under amended § 2, which "does not separate vote dilution challenges from other challenges brought under the amended § 2."[60]

Chisom rejects a freestanding, independent claim to vote dilution under revised VRA § 2. Under *Chisom*, "Section 2 is violated only if there is racial inequality in terms of opportunity to participate in the political process and that foreclosure of opportunity results in (proximately causes) an inability to elect representatives of one's choice."[61] *Chisom* also explains that, "[a]ny abridgment of the opportunity of members of a protected class to participate in the political process inevitably impairs their ability to influence the outcome of an election."[62] So, where there is an abridgement of the opportunity to participate, where members of a minority group are fenced out of the political process, there could be an adverse effect on the ability of minority voters to elect their choice of candidates in an election.[63] But for purposes of § 2, impairment to the ability to

54. *Id.*
55. *Id.* at 398.
56. *Id.* at 397.
57. *Id.*
58. Hous. Laws.' Ass'n v. Att'y Gen. of Tex., 501 U.S. 419, 425 (1991).
59. *Chisom*, 501 U.S. at 397; *see also* Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971) (focusing on the opportunity to participate in the political process, not on substantive outcomes).
60. *Hous. Laws.' Ass'n*, 501 U.S. at 427.
61. Blumstein, *supra* note 36, at 575.
62. *Chisom*, 501 U.S. at 397.
63. *See, e.g.*, White v. Regester, 412 U.S. 755, 768-69 (1973) (explaining that members of

participate in the democratic process is a prerequisite to making a successful claim. This point was recently reinforced by the Court in the *Brnovich* case, by both the majority opinion and Justice Kagan's dissent.[64]

Interpreting § 2 in a manner consistent with *Chisom* reduces the impetus for developing a substantive, race-based benchmark. Instead, the benchmark is process-oriented or access-oriented, rather than outcomes-focused, explainable by any number of possible causes. Presaging the approach adopted in *Chisom*, this is how the analysis works:[65] "[A] plaintiff must demonstrate a causal relationship between specific 'objective' factors that evidence a faulty political process and the disadvantageous outcome."[66] That is, "to make out a prima facie case, a plaintiff should have to demonstrate foreclosure of the opportunity to participate in the political process, not merely an inability to influence or win an election or an inability to elect [minority] officials."[67]

If there is a nondiscriminatory and "open" process, then racial minorities can be expected to participate on an equal footing in the rough-and-tumble political process. Having an equal opportunity, which does not guarantee success, is all that is required by the Constitution[68] and the VRA.[69] As the Supreme Court has stated,[70] in

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a minority group were effectively denied access to the political process and effectively excluded from political life).

64. Brnovich v. Democratic Nat'l Comm., 141 S. Ct. 2321, 2337-38 (2021) (emphasizing § 2 "is violated only" when the "key requirement" of an "open" political process is breached); *id.* at 2357-58 (Kagan, J., dissenting) (holding that courts under § 2 "are to strike down voting rules that contribute to a racial disparity in the opportunity to vote" and that "a violation is established when, 'based on the totality of circumstances,' a State's electoral system is 'not equally open' to members of a racial group").

65. The approach adopted in *Chisom* was essentially proposed in the immediate aftermath of the enactment of Dole Compromise. *See* Blumstein, *supra* note 9, at 704.

66. *Id.*

67. *Id.*

68. *See* Whitcomb v. Chavis, 403 U.S. 124, 153-55 (1971) (finding where there is equal opportunity to participate in the political process, there is no unconstitutional vote dilution).

69. *See* Johnson v. De Grandy, 512 U.S. 997, 1016-17 (1994) (failing to maximize Black voters' political influence is not actionable as a violation of VRA § 2).

70. The Supreme Court has recognized that, as a constitutional matter, claims of qualitative vote dilution are nonjusticiable because of a lack of standards. Rucho v. Common Cause, 588 U.S. 684, 708-09 (2019). The concerns that undergird *Rucho* correspond to the concerns about core values or benchmarks that surround claims under VRA § 2(b). The approach adopted in *Chisom* responds to these concerns by riveting attention on nondiscriminatory access to the political process and limiting vote dilution claims to

the absence of a race-based lack of opportunity to participate in the political process, "minority voters are not immune from the obligation to pull, haul, and trade to find common political ground."[71]

The *Allen* decision unexplainably does not consider the effect of *Chisom* in channeling *Gingles*' analysis. Under *Chisom*, the problem of identifying a core value and the risk of developing a substantive,

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circumstances where a plaintiff can demonstrate a lack of evenhanded access to the political process as in *Regester* and *Whitcomb*. Chisom v. Roemer, 501 U.S. 380, 397 (1991). An inability to elect representatives of choice is actionable, but only when linked to or traceable to an access-based deficiency. *See id.* That reduces the impetus toward developing a theory of race-based representational entitlements, something that advocates of amended § 2, such as Senator Dole, disavowed. 128 CONG. REC. 14316 (1982) (STATEMENT OF SEN. ROBERT DOLE).

71. *De Grandy*, 512 U.S. at 1020. Eight years after *Gingles*, Justice Thomas (joined by Justice Scalia) sought to limit the scope of coverage of § 2. He would have interpreted the terms in § 2(a)—"standard, practice, or procedure"—so as to exclude from coverage "challenges to allegedly dilutive election methods that we have considered within the scope of the Act in the past." Holder v. Hall, 512 U.S. 874, 892 (1994). (Thomas, J., concurring). Justice Thomas called for "a systematic reassessment of our interpretation of § 2" because of the "gloss" that case law had placed on the statutory text, which was "at odds with the terms of the statute and has proved utterly unworkable in practice." *Id.* As Justice O'Connor pointed out, "*stare decisis* concerns weigh heavily here," and she declined to accept Justice Thomas's "suggestion that we overhaul our established reading of § 2." *Id.* at 885-86 (O'Connor, J., concurring in part and concurring in judgment); *see also id.* at 963-66 (Stevens, J., dissenting) (joined by Justices Blackmun, Souter, and Ginsburg and agreeing with Justice O'Connor on the statutory *stare decisis* point). Justice Thomas's position would have resulted in a categorical exclusion of vote dilution cases from coverage under § 2 as not a "standard, practice, or procedure" covered under § 2(a). *Id.* at 892 (Thomas, J., concurring). In this approach, Justice Thomas's categorical exclusion of coverage of vote dilution cases under § 2 extended beyond the restraints on *Gingles* applied in *Chisom*. Under *Chisom*, § 2 applies to vote dilution considerations, but not in a freestanding manner—only (i) when there is race discrimination that creates a lack of evenhanded opportunity for members of a racial minority group to participate in the political process and (ii) that lack of equal access results in a form of cognizable vote dilution. *See supra* note 70. In *Allen*, the Court declined to engage in the type of "systematic reassessment" that Justice Thomas had called for in his *Holder* concurrence. *See* Allen v. Milligan, 143 S. Ct. 1487, 1506 (2023); *Holder*, 512 U.S. at 892 (Thomas, J., concurring). But in *Allen*, there was no need to engage in that type of broad-based reassessment—only to clarify the interrelationship of *Gingles* and *Chisom*, an issue that the Court in *Allen* did not recognize or address. Therefore, that issue is still open for consideration by lower courts in pending cases. What is called for is a clarification of the doctrine under amended VRA § 2, the relationship between *Gingles* and *Chisom*, not an undoing or redoing of existing doctrine. Ignoring or disregarding a clarifying precedent such as *Chisom* is not honoring *stare decisis*. *Cf.* Groff v. DeJoy, 143 S. Ct. 2279 (2023) (clarifying a statutory term that had long been mis-interpreted by lower courts based on imprecise language in a Supreme Court decision).

race-based entitlement—widely disavowed in the debates surrounding amended § 2—are largely obviated. The vote dilution inquiry remains, but not as a freestanding, substantive principle. Vote dilution that results from racially discriminatory lack of access to the political process is actionable, since VRA § 2 targets race discrimination.[72] A violation of § 2(b) depends upon a process—focused core value—a successful claimant must establish that members of a racial minority "have less opportunity than other members of the electorate to participate in the political process."[73] That was the "deal" contained in the Dole Compromise.

In § 2 cases, courts should rely on analysis under *Chisom*, requiring the parties to address whether there has been a lack of evenhanded opportunity to participate in the political process—a process-based question. Only if plaintiffs can carry this burden should a court examine the question of vote dilution: whether, under the totality of circumstances, the race-based deficiencies in the opportunity to participate in the political process brought about an inability to elect representatives of choice.

72. Rogers v. Lodge, 458 U.S. 613, 622, 624 (1982) (holding unconstitutional an at-large system that was "being maintained for the invidious purpose of diluting the voting strength of the black population").

73. 52 U.S.C. § 10301(b).