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## Racial Gerrymandering and the Voting Rights Act in North Carolina

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# RACIAL GERRYMANDERING AND THE VOTING RIGHTS ACT IN NORTH CAROLINA

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## I. INTRODUCTION

The recent United States Supreme Court decision of *Gingles v. Thornburg*,<sup>1</sup> is the definitive judicial interpretation of the 1982 amendments to the Voting Rights Act.<sup>2</sup> The case involves an individual's right to vote and recognizes political and racial groups' right to equitable representation in the electoral process. The purpose of this article is to examine the *Gingles* in decision in light of

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1. 106 S. Ct. 2752 (1986).

2. 42 U.S.C. §§ 1973, 1973b, & 1973c (1982).

the right to vote in North Carolina. The article first focuses on the history of North Carolina's election laws, which initially secured the right to vote for all its citizens and subsequently restricted the franchise, first directly and later through the use of electoral mechanisms. The article will then examine the legal history of federal court decisions securing mathematical equality in voting power for racial and political minorities prior to the *Gingles* decision. In order to understand this decision, it is important to remember that in the midst of the *Gingles* litigation, Congress amended the Voting Rights Act to ease the plaintiff's burden of proof in demonstrating discrimination under section 2. The article will briefly examine the compromise which Congress made in its amendments and the criticisms of the compromise. After examining the Congressional debate, the article will illustrate the impact of the amendment on the *Gingles* decision and on future section 2 litigation in North Carolina. *Gingles* foreshadows radical reforms in North Carolina election procedures which will have startling effects upon partisan political fortunes in city hall as well as the superior court bench.

## II. HISTORY OF THE RIGHT TO VOTE IN NORTH CAROLINA

### A. State Voting Abuses

The history of the expansion of the right to vote in North Carolina begins in the post-Civil War period when the state legislature passed a series of laws known as "The Black Codes," which defined the legal rights of newly emancipated slaves.<sup>3</sup> As in other Southern states, the right to vote was not among these state-secured rights. Following this enactment, ratification of the fourteenth amendment was submitted to the legislature and rejected in 1866. As a direct result of these actions, Congress enacted a harsh plan of reconstruction, which disenfranchised former opponents and provided for the registration of former slaves.<sup>4</sup> In North Carolina, pro-

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3. An Act Concerning Negroes and Persons of Color or of Mixed Blood, 1866 Pub. Laws of N. C. 99, ch. 40.

4. Military Reconstruction Act of March 2, 1867, ch. 153, 14 Stat. 428. The Act passed over President Johnson's veto and divided the Southern states into five military districts. The commanding officer of each district was charged with protecting persons and property and had the authority to try all offenders before military tribunals when he judged the local courts inadequate. Zeigler, *Reassessment of the Younger Doctrine in Light of the Legislative History of the Reconstruction*, 1983 DUKE L.J. 987, 1009 n.152.

visional Governor William Holden, with the assistance of federal commissioners, began to enroll former slaves by affidavit<sup>5</sup> for the purpose of electing a constitutional convention which first met in early 1868. Its most controversial provision was adoption of the suffrage and eligibility for office provision (now article VI of the present Constitution).<sup>6</sup> This article, which gave all citizens the state constitutional right to vote and hold office, was specifically required by Congress in the Reconstruction Acts as a condition for North Carolina's readmission to the Union.<sup>7</sup> Article VI also provided the opposition with its most potent political argument against the newly proposed constitution.<sup>8</sup>

Following the election of 1868, the Constitution and the fourteenth amendment were ratified in North Carolina and a new general assembly controlled by the Republicans passed the Shoffner Act<sup>9</sup> which allowed the governor to declare martial law in areas of insurrection. After the murders of black office-holders in Alamance and Caswell counties, together with Klan-inspired voter intimidation, Governor Holden declared martial law and suspended the writ of habeas corpus.<sup>10</sup> Following this "Kirk-Holden War,"<sup>11</sup> the Democrats regained control of the legislature in 1870 and succeeded in impeaching and convicting Governor Holden.<sup>12</sup>

Klan activities throughout the South<sup>13</sup> led in part to the pas-

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5. See H. LEFLER & A. NEWSOME, *NORTH CAROLINA, THE HISTORY OF A SOUTHERN STATE* 488-89 (1973).

6. N.C. CONST. of 1868, art. VI, §§ 1 & 4.

7. Reconstruction Act of 1868, ch. 70, 40 Cong. 2d Sess.

8. 1868 CONVENTION JOURNAL, REPORT OF THE COMMITTEE ON SUFFRAGE AND ELIGIBILITY TO OFFICE 232.

9. Passed in December 1869, the Act empowered the governor to place a county under martial law if necessary to protect life and property. H. LEFLER & A. NEWSOME, *NORTH CAROLINA, THE HISTORY OF A SOUTHERN STATE* 496 (1973).

10. This illustrates the seriousness of the situation since North Carolina was the only Southern state not to suspend the writ during the Civil War.

11. The Kirk-Holden War occurred in 1870 and acquired its name when Governor Holden placed Alamance and Caswell Counties under the rule of Colonel George W. Kirk who was aided by approximately 1000 soldiers. As a result, citizens were placed in jails under military arrest and Kirk and Holden refused "to recognize writs of habeas corpus for their release issued by state judges." LEFLER & NEWSOME, *supra* note 9, at 496.

12. LEFLER & NEWSOME, *supra* note 9, at 498.

13. LEFLER & NEWSOME, *supra* note 9, at 497. The Ku Klux Klan was the most effective political weapon in the arsenal of the majority. Its secret meetings, mystic signs, nightly visitations, warnings, whippings, and occasional murders spread terror among the Negroes and their white leaders. The Klan was especially

sage of the fifteenth amendment prohibiting the denial or abridgement of the right to vote.<sup>14</sup> In addition, Congress began investigating Klan-inspired violence in the South, including North Carolina, where 260 Klan "visitations" were documented.<sup>15</sup> These activities led to the passage of federal acts of which part remain in force today: the Civil Rights Act of 1870,<sup>16</sup> the Enforcement Act of 1870,<sup>17</sup> the Force Act of 1870,<sup>18</sup> and the Ku Klux Klan Act<sup>19</sup> (also known as the Anti-Lynching Act). Various violations of these acts led to 981 indictments in Raleigh in 1872.<sup>20</sup>

Following the return of the legislature to Democratic control, another constitutional convention was held in 1875.<sup>21</sup> This body established residency requirements for voting and, most significantly, placed the responsibility for county government in the hands of the legislature rather than allowing for home rule. This insured white Democratic control in eastern North Carolina. By virtue of the constitutional amendments of 1875<sup>22</sup> and a legislative act in 1876,<sup>23</sup> the majority was able to remain in power electorally by a series of election mechanisms to aid and insure its continued control. Democratic legislatures elected Democratic justices of the peace, who chose Democratic election officials. These officials were able to disqualify Republican voters by using technical name, age or residence requirements or enforcing legal regulations for challenging voters.<sup>24</sup> Following adoption of this constitution, the Democrats won both state and national elections in 1876, marking an

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active during election time and was highly effective in deterring Republicans and poorly-educated Negroes from voting. *Id.*

14. *Id.* at 499.

15. *Id.* at 495.

16. Civil Rights Act of 1870, 16 Stat. 140, as amended by Act of 1871, 16 Stat. 433 (current version at 42 U.S.C. §§ 1971(a), 1983, 1985(3) (1982)).

17. Enforcement Act of 1870, ch. 144, 16 Stat. 140.

18. Force Act of 1870, ch. 99, 16 Stat. 433.

19. Civil Rights Act of 1871, 17 Stat. 13.

20. LEFLER & NEWSOME, *supra* note 9, at 499.

21. *Id.* at 500. This constitutional convention was composed of fifty-eight Conservatives, fifty-eight Republicans, and three Independents.

22. N.C. CONST. of 1868, art. VII (1875).

23. An Act to Establish County Governments, 1876-77 Pub. Laws of N.C 226, ch. 141. The Act provided that the general assembly should elect justices of the peace for each township in which any city or incorporated town was located, with an additional justice of the peace for every thousand residents in the city or township. The justices of the peace for each county, who served six-year terms, then met and elected the county board of commissioners for two-year terms.

24. LEFLER & NEWSOME, *supra* note 9, at 543.

end to Reconstruction.<sup>25</sup> Upon the withdrawal of federal troops in 1877, black and minority party activity diminished, and the two-party competition which had divided voters on realistic social, economic and political issues ended. The Republicans in the west lost their ability to select local magistrates and county officials, as did the blacks in eastern North Carolina, since these officials were now selected by the legislature in Raleigh.

During this period, the opposition Republican party trailed the Democratic majority party in statewide elections by slim margins of only 6,000 to 20,000 votes. The division of the state into three parties in the election of 1892 foreshadowed a return to power of the Republicans and Populists by fusion coalitions in 1894. The fusion coalition dealt directly with election law issues calling for "pure election laws," a nonpartisan judiciary, and restoring county self-government.<sup>26</sup> Fusion rule led to increased political activity by blacks due in part to fairer administration of election laws and the return of self-rule to county governments. The increasing role of blacks in state government became a theme of partisan conflict. However, blacks' record of success in elections to the general assembly was never greater than fifteen percent.<sup>27</sup> Fusion success continued in 1896 with the election of Governor Russell whose administration and patronage included the appointment of blacks to minor federal positions. Election law reform during this period introduced the concept of bipartisan county election boards to insure honest elections.<sup>28</sup>

In reaction to the political success of the fusionists, the Democratic party, under the direction of Furnifold M. Simmons, began a white supremacy campaign. In addition to overt racial appeals of the basest kind, an organization of red shirts would parade through black communities and intimidate voters at Republican rallies. These tactics were successful in the election of 1898 and helped place the general assembly back in Democratic control. The majority began a series of election law alterations to end the role of blacks in the election process. Following a proposal adopted in other Southern states known as the "Mississippi Plan," the legislature proposed a literacy test which included an understanding

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25. *Id.* at 500.

26. *Id.* at 550.

27. *Id.* at 551.

28. See N.C. GEN. STAT. § 163-41 (1982); see also *Mullen v. Murrow*, 123 N.C. 733, 31 S.E. 1003 (1898).

clause, a poll tax, and a grandfather clause as state constitutional amendments to be ratified in the election of 1900.<sup>29</sup> In addition, the legislature placed county government back in the hands of state government and required a new registration of voters. In its platform for the election of 1900, the Democratic Party also adopted proposals for a direct statewide primary. The suffrage amendments carried by a vote of 182,217 to 128,285. Thirty-one "white" counties in the central and western part of the state voted against it. The counties with a heavy black population gave the amendment a huge majority. This could mean either that blacks did not vote or that their ballots were counted for the amendment regardless of how they were cast. Precinct registrars were arrested on various charges of misconduct in connection with the election. With the passage of the suffrage amendment, the majority eliminated 50,000 Republican voters from the rolls, confirmed the Democratic dominance of the state and strengthened the one-party system. Blacks ceased to vote in large numbers. In order to compete, the Republican party adopted a similar white supremacy platform and banned blacks from participation in its affairs after 1902.

The changing fortunes of blacks in politics were also mirrored in court decisions. In 1903, the United States Supreme Court held sections of the Force Act of 1870 to be unconstitutional.<sup>30</sup> Subsequent to the first wave of disenfranchisement, along with the adoption of a primary system in North Carolina, a majority vote run-off provision was included in 1915.<sup>31</sup> The use of the grandfather clause continued until overturned in 1915 by the United States Supreme Court.<sup>32</sup> In 1955, in response to increased minority party voting, the legislature enacted the "Jonas" rules for counting crossover votes—rules designed to hinder minority party success.<sup>33</sup> The literacy test and an understanding clause remained a part of North Carolina law well into the 1970s.<sup>34</sup>

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29. N.C. CONST. of 1900, art. VI, § 4. The "grandfather clause" reserved the right to vote to male persons who did not meet the new educational requirements if they had registered according to the old section prior to December 1, 1908.

30. *James v. Bowman*, 190 U.S. 127 (1903).

31. 1915 N.C. Sess. Laws ch. 101.

32. *Guinn v. United States*, 238 U.S. 347 (1915).

33. 1955 N.C. Sess. Laws 750, ch. 812, § 2. The "Jonas Rule" was so named because the state legislature adopted a law requiring the counting of straight party ballot choices in lieu of candidate choice. However, this rule was overturned in *Hendon v. N.C. State Bd. of Elections*, 710 F.2d 177 (4th Cir. 1983).

34. In *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959),

The totality of Democratic dominance remained well into the 1960s until the election of Governor Jim Holshouser and Senator Jesse Helms in 1972. No blacks were elected to the General Assembly until 1970.<sup>35</sup> Only a handful of Republicans were elected to the General Assembly during this period.<sup>36</sup>

Blacks' record of success and the electoral history are important for several reasons. First, it illustrates the history of official voting discrimination which lasted for over 120 years in North Carolina. Second, it illustrates the continual resort to unfair election mechanisms designed by a majority to insure electoral success. Election devices such as the literacy test and the poll tax were adopted at the turn of the century for specific partisan purposes. Although these devices may appear to have been racially or partisanly neutral, their implementation was not. The Reconstruction Congresses in 1870 assumed that the surest way to guarantee blacks equality was to guarantee them the right to vote. Through the use of discriminatory election techniques, this assurance was eliminated.

### *B. Federal Responses*

In the 1950s, with this history in mind, the federal government began to attack electoral mechanisms which impeded the fifteenth amendment guarantee. Modern enforcement of the fifteenth amendment began with passage of the Civil Rights Act of 1957,<sup>37</sup> which empowered the United States Attorney General to litigate to secure voting rights to citizens deprived of the right on the basis of race or color. In addition, the Act established the Civil Rights Commission and empowered it to enumerate discriminatory mechanisms which abridge the right to vote. The Civil Rights Act of

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the United States Supreme Court affirmed a North Carolina Supreme Court decision upholding literacy requirements. *See also* Bazemore v. Bertie County Bd. of Elections, 254 N.C. 398, 119 S.E.2d 637 (1961). The literacy requirement was only recently repealed by the North Carolina General Assembly. N.C. GEN. STAT. § 163-58, repealed by 1985 N.C. Sess. Laws ch. 563, § 3.

35. The first black elected to the general assembly since 1900 was in 1969, when Henry Frye, from Guilford County, was elected to the house. Less than five percent of either chamber was composed of blacks until the election of 1984.

36. Since 1966, Republican party membership in the general assembly has been between five percent and thirty percent in the house, and between two percent and thirty percent in the senate.

37. Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634 (codified as amended at 42 U.S.C. §§ 1971, 1975, 1975a-1975e, 1995 (1982)).



1960<sup>38</sup> granted oversight responsibility to the Attorney General to retain and review state voting statistics in order to establish the presence of a pattern or practice of racial discrimination. If a pattern was established, the Attorney General could attack the practice in court by seeking the appointment of federal registrars to remedy registration inequities. In 1964, as a precursor of the Voting Rights Act, Congress passed Title I of the Civil Rights Act of 1964,<sup>39</sup> which established a presumption of literacy, prohibited local officials from employing new registration devices, and set forth an expedited procedure for judicial resolution of voting rights cases.

Frustrated by the case-by-case approach of judicial resolution of abuses, and the ingenuity of local officials in avoiding the impact of judicial rulings, Congress passed the Voting Rights Act of 1965.<sup>40</sup> The purpose of the Act was to ensure racial and language minority groups, primarily in the South, the right to register to vote in federal and state elections. Congress suspended the use of literacy tests and other devices in any state or political subdivision where such a test or device was in effect on November 1, 1964, and where less than fifty percent of voting age persons were registered for or voted in the 1964 presidential elections.<sup>41</sup> The rationale for this formula or "trigger," was that low voter registration and participation resulted from the use of these tests and devices. Second, to insure that the old devices would not be replaced by new ones, the administrative remedy of section 5 of the Act was devised. This required any county or political subdivision in a "covered" jurisdiction to submit or "preclear" any election-related practice or procedure which it sought to enact or administer if it was different from a practice in force on November 1, 1964. The reviewing authority was to be the United States Attorney General or the United States District Court for the District of Columbia. Forty of North Carolina's one hundred counties were covered by these provisions.<sup>42</sup> In addition, federal examiners could be sent to election

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38. Civil Rights Act of 1960, Pub. L. No. 86-449, 74 Stat. 86 (codified as amended at 42 U.S.C. §§ 1971, 1974-1974e, 1975d (1982)).

39. Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 214 (codified as amended at 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000h-6 (1982)).

40. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1982)).

41. 42 U.S.C. §§ 1973b & 1973c (1982).

42. These counties were: Jackson, Cleveland, Camden, Northampton, Gates, Hertford, Bertie, Chowan, Gaston, Union, Anson, Scotland, Robeson, Wake,

districts for the purpose of increasing registration.

It was not until 1969<sup>43</sup> and 1971<sup>44</sup> that the scope of the Act was reviewed by the United States Supreme Court. The first regulations under the Act providing guidance for state officials were issued on September 10, 1971.<sup>45</sup> The scope of review allowed by these regulations is breathtakingly broad. It includes such changes as abolition of a probate judge's duties,<sup>46</sup> adoption of campaign restrictions on public university personnel,<sup>47</sup> and alterations in precinct boundaries.<sup>48</sup> Because of the slow implementation of the Act and because Congress wanted the Act to have some effect during the 1980 state and federal redistricting procedure, in 1975, Congress extended the Act until 1982.

Through regulatory enactment and judicial interpretation in *Beer v. United States*,<sup>49</sup> the standard for section 5 review was established. The jurisdiction seeking preclearance has the burden of demonstrating to the satisfaction of the reviewing authority that the proposed enactment does not have the effect or purpose of denying or abridging the right to vote on account of race or color. Unlike section 5, section 2 of the Voting Rights Act is nationwide in scope and as originally enacted was to give statutory basis for a litigant to protect his fifteenth amendment guarantees. As originally enacted it merely tracked the fifteenth amendment's guarantee.<sup>50</sup>

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Bladen, Cumberland, Harnett, Lee, Guilford, Rockingham, Caswell, Person, Granville, Vance, Franklin, Halifax, Nash, Edgecombe, Wilson, Wayne, Lenoir, Greene, Pitt, Onslow, Craven, Beaufort, Martin, Washington, Perquimans, and Pasquotank.

43. *Allen v. Bd. of Elections*, 398 U.S. 544 (1969).

44. *Perkins v. Matthews*, 400 U.S. 379 (1971).

45. 28 C.F.R. § 51 (1971).

46. *Huffman v. Bullock County*, 528 F. Supp. 703 (M.D. Ala. 1981).

47. *Dougherty County, Ga., Bd. of Educ. v. White*, 439 U.S. 32 (1978).

48. *Perkins v. Matthews*, 400 U.S. 379 (1971).

49. 425 U.S. 130 (1976).

50. The previous section 2 standards read as follows:

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) of this title.

42 U.S.C. § 1973 (1976).

### III. DEVELOPMENT OF THE FEDERAL GUARANTEE OF EQUAL VOTING POWER AND GROUP VOTING RIGHTS

The evolution of federal case law guaranteeing equal voting power for individuals over the past twenty-five years shows a pattern of greater enfranchisement of classes, and federal judicial protection of the franchise against demonstrable abuses. This pattern has paralleled the development of legislation to guarantee the right to vote. These evolutionary changes have had profound effects in the composition of the North Carolina General Assembly.

Prior to 1964, the general assembly was apportioned on the basis of a county unit system. Each county had at least one house representative, regardless of population, and the balance of twenty members was apportioned roughly on the basis of population. The state senate was similarly apportioned.

The end for this system of apportionment began with the enunciation of the one-person, one-vote standard in *Gray v. Sanders*,<sup>51</sup> which invalidated Georgia's county unit system for nomination of its senatorial candidates. In its decision, the Supreme Court utilized the notion of equal voting power: "Once the class of voters is chosen . . . we see no constitutional way by which equality of voting power may be evaded."<sup>52</sup> The one-person, one-vote concept was first extended to congressional redistricting in *Wesberry v. Sanders*,<sup>53</sup> and then to state legislative reapportionment in *Reynolds v. Sims*.<sup>54</sup> North Carolina's reapportionment system was held constitutionally infirm in *Drum v. Seawell*.<sup>55</sup>

Early in the history of equal voting power litigation, plaintiffs were aware that even though a voter might be accorded an equally weighted vote, the majority party might employ other electoral mechanisms to cancel out votes through one of many kinds of devices which are known as "gerrymandering." Gerrymandering is roughly defined as drawing election districts along lines (often unnatural ones) to achieve partisan advantage or some other unfair objective.<sup>56</sup> *Gomillion v. Lightfoot*,<sup>57</sup> held the use of gerrymander-

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51. 372 U.S. 368 (1963).

52. *Id.* at 381.

53. 376 U.S. 1 (1964).

54. 377 U.S. 533 (1964).

55. 249 F. Supp. 877 (M.D.N.C. 1965), *aff'd.*, 383 U.S. 831 (1966).

56. There are at least twelve different methods identified in political science literature used by a majority to overcome a minority:

(1) Packing the voting strength of a group to insure that much of [its voting strength] is wasted in districts which are won by lopsided mar-

ing devices constitutionally justiciable if it was racially discriminatory.

It was in *Reynolds* that the Court first approved multimember districting as an electoral device which could be utilized by a state legislature and not be mathematically discriminatory. "One body could be composed of single-member districts while the other could have at least some multimember districts."<sup>58</sup> Subsequently,

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gins—in particular, packing [its] strength to a greater extent than is true of the voting strength of a group controlling the district.

(2) Fragmenting or submerging the voting strength of a group to create districts in which that group will constitute a permanent (or near-certain) minority.

(3) Reducing the reelection likelihood of some of a group's incumbents by altering district boundaries to put two or more incumbents from the group into the same district.

(4) Reducing the election (or reelection) likelihood of some of a group's representatives by altering district boundaries to cut up old districts to make it impossible for these incumbents to continue to represent the bulk of their former constituents.

(5) Reducing the election (or reelection) chances of group representatives in marginal/competitive districts by, wherever practicable, reducing that group's voting strength in these districts.

(6) Enhancing the election (or reelection) chances of representatives of the group in control of the [re]districting process by preserving old district lines for its own incumbents to the greatest extent practicable, so as to benefit from name-recognition and other advantages of incumbency status (such as previous campaign organizations and personal-contact networks).

(7) Enhancing the election (or reelection) chances of representatives of the group in control of the [re]districting process by manipulating district boundaries . . . to shore up the controlling group's voting strength in previously marginal/competitive districts.

(8) Manipulating district boundaries so as to create an advantage in the open seats (i.e., seats with no incumbent running) for the group controlling the districting.

(9) Unnecessarily disregarding compactness standards in drawing district lines.

(10) Unnecessarily disregarding city, town, and county boundaries in drawing district lines.

(11) Unnecessarily disregarding communities of interest in drawing district lines.

(12) Unnecessarily disregarding equal population standards in drawing district lines.

Grofman, *Criteria for Districting: A Social Science Perspective*, 33 U.C.L.A. L. REV. 77, 117 (1985).

57. 364 U.S. 339 (1960).

58. 377 U.S. at 577.

in *Fortson v. Dorsey*,<sup>59</sup> the Court refused to invalidate multimember districts which were mathematically equal in population based upon an equal protection attack that Georgia's system of some single and some multimember districts treated voters differently. However, the Court recognized the potential for invidious use of multimember districting and stated, "[i]t might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."<sup>60</sup> *Whitcomb v. Chavis*,<sup>61</sup> presented the first racially based challenge to the multimember districts. Black voters in Marion County, Indiana, were placed in a large, white and predominately Republican multimember county district. They challenged the multimember districting apportionment on the basis of the Court's holding in *Fortson*. The plaintiffs challenged the districting on two grounds. First, multimember districts granted voters residing in these districts greater voting power than in single-member districts because of their ability to weigh a vote or to vote for more combinations of candidates than in similar single-member districts. This was proved by a mathematical equation, which attempted to quantify voting power as the ability to cast a "critical" vote.<sup>62</sup> Although the Court recognized the theory was arithmetically correct, it rejected the challenge on the basis that it did not have any real-life political impact.<sup>63</sup>

The second challenge to multimember districting was the unequal treatment given voters in a multimember district compared to single-member districts. Voters in multimember districts were represented by more legislators (since delegations are elected at-large), and these legislators tended to vote as groups in legislative bodies, which was tantamount to giving the voters who voted for these candidates greater legislative influence.<sup>64</sup> The Court rejected both these claims as unproven, but then examined evidence in the record which might have sustained a challenge, such as the success minorities have had in access to party slating procedures, party political participation, and equal opportunity to register and vote.<sup>65</sup>

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59. 379 U.S. 433 (1965).

60. *Id.* at 439.

61. 403 U.S. 124 (1971).

62. *Id.* at 145-46. A "critical" vote is a tie-breaking vote. *See id.* at 145 n.23.

63. *Id.* at 146.

64. *Id.*

65. *Id.* at 149-53.

After finding the political processes were open to the challengers and, finding no evidence of intentional racial bias in selecting the multimember device, the Court dismissed the challenge, stating that no racial or political minority had a right to be elected in proportion to its population.<sup>66</sup>

The first case of constitutional dimension to find invidious the use of multimember districting was *White v. Regester*.<sup>67</sup> *White* involved a challenge by blacks and Mexican-Americans to the use of multimember districts in Dallas and Bexar Counties, Texas. In *White*, the Supreme Court approved evidentiary criteria which could be used by a challenger to establish lack of equal access to the political process.<sup>68</sup> The case marked a departure from litigation which examined the mathematically discriminatory proofs of vote dilution and replaced these inquiries with an examination of qualitative issues to prove vote dilution. The Supreme Court reviewed the evidence of the history of official discrimination and affirmed the district court.<sup>69</sup>

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66. *Id.* at 160.

67. 412 U.S. 755 (1973).

68. *Id.* at 765-66.

69. The following quote from the Supreme Court's opinion is illustrative of evidence of official discrimination:

With due regard for these standards, the District Court first referred to the history of official racial discrimination in Texas, which at times touched the right of Negroes to register and vote and to participate in the democratic processes. It referred also to the Texas rule requiring a majority vote as a prerequisite to nomination in a primary election and to the so-called "place" rule limiting candidacy for legislative office from a multimember district to a specified "place" on the ticket, with the result being the election of representatives from the Dallas multimember district reduced to a head-to-head contest for each position. These characteristics of the Texas electoral system, neither in themselves improper nor invidious, enhanced the opportunity for racial discrimination, the District Court thought. More fundamentally, it found that since Reconstruction days, there have been only two Negroes in the Dallas County delegation to the Texas House of Representatives and that these two were the only two Negroes ever slated by the Dallas Committee for Responsible Government (DCRG), a white-dominated organization that is in effective control of Democratic Party candidate slating in Dallas County. That organization, the District Court found, did not need the support of the Negro Community to win elections in the county, and it did not therefore exhibit good-faith concern for the political and other needs and aspirations of the Negro community. The court found that as recently as 1970 the DCRG was relying upon "racial campaign tactics in white precincts to defeat candidates who had the overwhelming support

In *Zimmer v. McKeithen*,<sup>70</sup> the Fifth Circuit formulated judicial standards for weighing the factors outlined in *White*:

[W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multimember 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. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot provisions and the lack of provision for at-large candidates running from particular geographical subdistricts. The fact of dilution is established upon proof of the existence of an aggregate of these factors . . . all

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of the black community.”

. . . .

Surveying the historic and present condition of the Bexar County Mexican-American community, which is concentrated for the most part on the west side of the city of San Antonio, the court observed, based upon prior cases and the record before it, that the Bexar community, along with other Mexican-Americans in Texas, had long “suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others.” The bulk of the Mexican-American community in Bexar County occupied the Barrio, an area consisting of about 28 contiguous census tracts in the city of San Antonio. Over 78% of Barrio residents were Mexican-Americans, making up 29% of the county’s total population. The Barrio is an area of poor housing; its residents have low income and a high rate of unemployment. The typical Mexican-American suffers a cultural and language barrier that makes his participation in community processes extremely difficult, particularly, the court thought, with respect to the political life of Bexar County. “[A] cultural incompatibility . . . conjoined with the poll tax and the most restrictive voter registration procedures in the nation have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than the Blacks were formally denied access by the white primary.” . . . The residual impact of this history reflected itself in the fact that Mexican-American voting registration remained very poor in the county and that only five Mexican-Americans since 1880 have served in the Texas Legislature from Bexar County. Of these, only two were from the Barrio area. The District Court also concluded from the evidence that the Bexar County legislative delegation in the House was insufficiently responsive to Mexican-American interests.

*White v. Regester*, 412 U.S. at 766-69 (footnotes and citations omitted).

70. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff’d on other grounds sub nom*, *East Carroll Parish School Bd. v. Marshall*, 424 U.S. 636 (1976) (per curiam).

these factors need not be proved in order to obtain relief.<sup>71</sup>

Following the *Zimmer* case, two dozen vote dilution cases were decided by the lower courts before the Supreme Court altered the legal standard set forth in *White*.

The test of vote dilution after *Zimmer* focused upon disproportionate impact as evidenced by the *White* factors, all of which must be objectively demonstrated, as proof of racial gerrymandering. The constitutional basis for these challenges was the fourteenth and fifteenth amendments. In 1976, the Supreme Court held in *Washington v. Davis*,<sup>72</sup> that official action would not be held unconstitutional solely because it resulted in a racially disproportionate impact. There also had to be proof that a discriminatory purpose was a motivating factor.<sup>73</sup> In *Arlington Heights v. Metro Housing Development Corp.*,<sup>74</sup> the Court outlined the evidence which a court could examine to reach a discriminatory purpose finding, such as historical background of the decision to redistrict, sequence of events leading up to the challenged action, substantive departures from past factors, and contemporary statements of the decision makers.<sup>75</sup>

The Fifth Circuit, in *Nevett v. Sides*,<sup>76</sup> attempted to reconcile the *Zimmer* factors with the new fourteenth and fifteenth amendment standards laid out in *Washington* to illustrate that proof of the *Zimmer* factors could demonstrate discriminatory purpose as well as discriminatory impact.<sup>77</sup> This approach was rejected by the Supreme Court in *City of Mobile v. Bolden*:<sup>78</sup>

[B]ecause the appellees had proved an "aggregate" of the *Zimmer* factors, the Court of Appeals concluded that a discriminatory purpose had been proved. That approach, however, is inconsistent with our decisions in *Washington v. Davis*, . . . and *Arlington Heights*. . . . Although the presence of the indicia relied on in *Zimmer* may afford some evidence of a discriminatory purpose, satisfaction of those criteria is not of itself sufficient proof of such a purpose. The so-called *Zimmer* criteria upon which the District Court and the Court of Appeals relied were most assuredly insuf-

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71. *Id.* at 1305 (footnotes omitted).

72. 426 U.S. 229 (1976).

73. *Id.* at 239-42.

74. 429 U.S. 252 (1977).

75. *Id.* at 267-68.

76. 571 F.2d 209 (5th Cir. 1978), *cert. denied*, 446 U.S. 951 (1980).

77. *Id.* at 228-29.

78. 446 U.S. 55 (1980).



ficient to prove an unconstitutionally discriminatory purpose in the present case.<sup>79</sup>

It is with this formulation that the legislative history of the section 2 amendments begins. In amending section 2, Congress had to modify the purpose test developed in *Bolden*, *Washington*, and *Arlington Heights* to obtain the results test previously established in *White*.

#### IV. LEGISLATIVE BACKGROUND SURROUNDING THE *GINGLES* CASE

##### A. *State Legislative History of Redistricting*

Pursuant to its federal constitutional duty as required by *Reynolds v. Sims* and sections 3 and 5 of article II of the North Carolina Constitution, the North Carolina General Assembly, in July 1981, passed acts reapportioning its senate and house chambers.<sup>80</sup> The initial redistricting plan differed little from the apportionment of members established in the 1971 redistricting.<sup>81</sup> The only change in the House of Representatives was to add a representative to Mecklenburg County and to eliminate a representative from eastern North Carolina. All urban counties in the state were composed of at-large, multimember districts, due in part to the state constitutional requirement passed in 1968,<sup>82</sup> that no county could be divided or subdivided in the creation of a legislative district. On September 16, 1981, the *Gingles* plaintiffs filed suit alleging that a twenty percent population disparity between legislative districts violated the one-person, one-vote requirement, that multimember districts diluted the voting strength of black citizens, and that the North Carolina constitutional provisions requiring no division or subdivision of counties had not been submitted to the Justice Department for clearance pursuant to section 5 of the Voting Rights Act.<sup>83</sup>

On November 25, 1981, in state court in Iredell County, *Pugh v. Hunt* was filed by Republican voters and was subsequently removed to United States District Court for the Eastern District of North Carolina.<sup>84</sup> The *Pugh* plaintiffs, in addition to claims made

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79. *Id.* at 72-73.

80. 1981 N.C. Sess. Laws chs. 771, 800 & 821.

81. N.C. CONST. art. II, §§ 3(3) & 5(3).

82. 1971 N.C. Sess. Laws ch. 483.

83. Plaintiff's complaint, *Gingles v. Edmisten*, 590 F. Supp. 345 (E.D.N.C. 1984).

84. No. 81-1966 (E.D.N.C. filed Nov. 25, 1981).

by racial minorities, also alleged that multimember districts were partisanly designed to submerge Republican voters as well as black voters. A similar suit was filed in Indiana and announced the same day as *Gingles*, alleging partisan election gerrymandering there.<sup>85</sup>

Thirteen years after its ratification and one week after initiation of the *Gingles* suit, the state submitted the 1968 constitutional amendment to the United States Department of Justice for preclearance. Following the state's submission, the general assembly reconvened on October 29, 1981, to reconsider its redistricting enactments. The house amended its reapportionment plan, drastically altering its legislative makeup to reduce the twenty percent population disparity.<sup>86</sup> The senate declined to alter its plan.

On November 30, 1981, by letter, the United States Attorney General interposed an objection, pursuant to section 5, to the North Carolina constitutional amendment prohibiting subdivisions of counties in creating legislative districts.<sup>87</sup> On December 7, 1981, he objected to the state senate and congressional reapportionment plans.<sup>88</sup> On January 20, 1982, he objected to the revised state house apportionment plans.<sup>89</sup> In each of the letters, the Attorney General stated that his objection was based "upon the use of large multimember districts . . . [which] submerges cognizable minority population concentrations into larger white electorates."<sup>90</sup> Following the rejection of the state house plan by the Department of Justice in October 1981, the state senate and house committees on redistricting met in January of 1982 and adopted redistricting "criteria."

On January 23, 1982, Representative Joe Hege (R-Davidson) presented a plan for redistricting the state into single-member districts which included majority black districts in seven areas of North Carolina. This Republican plan was followed by other plans submitted at a public hearing on February 4, 1982. The North Car-

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85. *Davis v. Bandemer*, 106 S. Ct. 2797 (1986). For a discussion of this case see Hess, *Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer*, 9 CAMPBELL L. REV. 207 (1987).

86. H.B. 1201, Reg. Sess., 1981 House Journal 732.

87. Letter from U.S. Assistant Attorney General William Bradford Reynolds to Alex Brock (November 30, 1981).

88. Letter from U.S. Assistant Attorney General William Bradford Reynolds to Alex Brock (December 7, 1981).

89. Letter from U.S. Assistant Attorney General William Bradford Reynolds to Alex Brock (January 20, 1982).

90. *Id.*

olina Black Lawyers Association submitted a senate redistricting plan with three black majority districts, and a house redistricting plan with ten black majority single-member districts. On February 11, 1982, the North Carolina General Assembly ratified chapters 4 and 5 of the Session Laws of the First Extra Session.<sup>91</sup> By letter of April 19, 1982, the United States Attorney General interposed an objection to this plan also.<sup>92</sup> The legislature convened for the fourth time to draft a redistricting plan on April 26, 1982. Single-member reapportionment plans were introduced again by the Republicans in the house and senate, but were not adopted. The adopted plan provided for black majority districts in the section 5 covered counties of Guilford and Cumberland, but provided for no black majority districts in the other sixty noncovered counties which included Mecklenburg, Forsyth, Wake and Durham Counties.<sup>93</sup> These plans were precleared and the election of 1982 proceeded.

The significance of the legislative chronology for the *Gingles* and *Pugh* plaintiffs was that where the state had the burden of proving that multimember, at-large districting did not have the purpose or effect of racial discrimination, it could not make such a showing for the Attorney General. However, the plaintiffs were then faced with the task of shouldering the burden of proof under the existing *Bolden* standard, that these districts did have the purpose and effect of racial discrimination, though the plaintiffs did have a record where they could argue intentional discrimination pursuant to the test articulated in *Arlington Heights*<sup>94</sup> and required by *Bolden*. Finally, it became obvious that despite continued appeals, the general assembly would not draw single-member minority districts unless forced to do so by the Attorney General or the federal courts; and when this requirement was made, they would "swallow the smallest pill."

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91. 1981 N.C. Sess. Laws 6, chs. 4 & 5 (1st Extra Sess. 1982).

92. Letter from United States Assistant Attorney General William Bradford Reynolds to Alex Brock (April 19, 1982).

93. 1981 N.C. Sess. Laws 15, chs. 1 & 2 (2d Extra Sess. 1982).

94. In *Arlington Heights* the Supreme Court noted, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." 429 U.S. at 266. Among the specific considerations are the historical background of an action, the sequence of events leading to a decision, the existence of departures from normal procedure, legislative history, and the impact of a decision upon minority groups. 429 U.S. at 266-68.

*B. Legislative History of the 1982 Amendments to the Voting Rights Act*

The legislative history of the amendments to the Voting Rights Act have a unique North Carolina perspective, given the position on the amendments held by the late Senator John East. Senator East's view of the amendments was marked:

Fundamental—indeed radical—changes in the way our democracy works will surely come about if Congress passes S. 1992. This measure would not only extend the extraordinary requirements of the Voting Rights Act of 1965, but would also place new, severe, and unconstitutional restraints on local governments throughout the country. Before the Senate acts on this bill, members should take adequate time to consider both the need to extend the Act and the . . . unparalleled power to alter the character of local and state government in the hands of the Federal Government.<sup>95</sup>

Senator East was a vocal opponent of the amended sections of the statute and offered many amendments to the bill to codify the intent standard. The ultimate result of his efforts was to clarify Congress' intent to alter the Supreme Court's ruling in *Bolden*, and to illustrate to the Supreme Court and the district courts that Congress clearly understood the impact which these amendments would have on multimember districts.

The House version of the section 2 amendments was aimed at substituting the intent test for the results test directly. "Section 2 of H.R. 3112 will amend Section 2 of the Act to make clear that proof of discriminatory purpose or intent is not required in cases brought under that provision. Many of these discriminatory laws have been in effect since the turn of the century."<sup>96</sup> The House report described in detail that the change was specifically designed to include "not only voter registration requirements and procedures, but also methods of election and electoral structures, practices and procedures which discriminate."<sup>97</sup> Discriminatory election structures can minimize and cancel out minority voting strength as much as prohibiting minorities from registering and

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95. SUBCOMM. ON THE CONSTITUTION OF THE SENATE COMM. ON THE JUDICIARY, 97TH CONG., 2D SESS., VOTING RIGHTS ACT, REPORT ON S.1992, 43 (Comm. Print 1982), reprinted in S. REP. NO. 417, 97TH CONG., 2D SESS. 201 (1982) (Minority Views Senator East).

96. H.R. REP. NO. 227, 97TH CONG., 1ST SESS. 29 (1981).

97. *Id.*

voting. Numerous empirical studies based on data collected from many communities have found a strong link between at-large elections and lack of minority representation. The House version of amended section 2 read as follows:

No voting qualification or prerequisite to voting or standard practice or procedure shall be imposed or applied by any State or political subdivision in any manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 4(f)(2). The fact that members of a minority group have not been elected in numbers equal to the group's proportion of the population shall not, in and of itself, constitute a violation of this section.<sup>98</sup>

After passage of the House bill, the proponents of the intent test had the opportunity to make their case in hearings conducted by the subcommittee on the Constitution, chaired by Senator East. The record of the hearings disclosed a strong difference of opinion over the House version. The proponents of the intent test focused in on several key objections. First, they pointed out that the effects test has no "core value" by which a district court may reach a decision, as does the constitutionally based intent test. Second, absent a showing of a constitutional violation, the intent test would transfer legislative decisions on reapportionment and forms of government completely to the federal judiciary. Third, minority groups would be able to obtain proportionality of representation, a remedial objective which, like numerical quotas in other cases involving racial discrimination, is impermissible. Finally, adoption of a results test would actually diminish a minority's political influence rather than enhance it, since the number of legislators it could influence would be reduced.

Criticism of the House version of section 2 also focused on maintaining the status quo established in *Bolden*. Critics maintained that section 2 is merely a codification of the fifteenth amendment and that an alteration of the standard would incorporate expanded notions of civil rights into law. They contended that the House test enacted an unknown standard which would invite attack on any apportionment system or election device where a minority group failed to achieve a result which, at a minimum, did not equal its proportion of the general population. Under the House version, proportional representation, when combined with

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98. *Id.* at 30.

only a single *Zimmer* factor, such as historic de jure or de facto discrimination, would be sufficient to establish a section 2 violation. Therefore, a prima facie case could easily be established which a party could not successfully rebut by evidence of nonracial motivation or other nonracial reasons. In sum, the Senate opposition felt replacement of the *Bolden* standard would lead to a major legal assault on cities with at-large voting systems, resulting in a federal guarantee of equal results and not equal opportunity.<sup>99</sup> These objections were heard again by the Supreme Court in *Gingles*.

In response to these criticisms, the subcommittee stated that the results test was a new test, not merely a reformulation of the *White* and *Zimmer* standards. Therefore, the decision in the end would be unpredictable and contradictory since the standard of review in district court cases concerning racial discrimination is "clearly erroneous." Disparate results would necessarily be obtained from a loosely formulated equitable approach.

In the formal Judiciary Committee proceedings, Senator East offered amendments which would have eliminated the use of multimember districts as a criteria for voting rights challenges under section 2. This approach was rejected. Subsequently, a "compromise" was agreed upon as suggested by Senator Dole, which gave some additional assurances to the critics of the results test that proportional representation would not be the sole criteria for a violation of the Act while still holding that a different standard other than the constitutional intent test was the standard intended by the committee. With the Dole amendment, section 2 was altered to read as follows:

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the state or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a), in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the state or political subdivision is one circumstance which may be considered; *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the

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99. S. REP. NO. 417, 97th Cong., 2d Sess. 345 (1982).

population.<sup>100</sup>

In establishing a violation, the committee listed a series of typical factors which the plaintiffs could show, depending upon the kind of rule challenged to prove a section 2 violation. These included:

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;
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 the plaintiff's evidence to establish a violation are:

[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group.

[W]hether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. While these enumerated factors will often be the most relevant ones, in some cases other factors will be indicative of the alleged dilution.<sup>101</sup>

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100. Voting Rights Act Amendments of 1982, 42 U.S.C. § 1973(b)(2) (1982) (emphasis in original).

101. S. REP. NO. 417, 97th Cong., 2d Sess. 28-29 *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 206-07.

In addition to the typical factors, Congress included a disclaimer in the Act to insure that it was not instructing the district courts to establish a quota system for offices. The interplay between the disclaimer and vote polarization became evident in *Gingles* as the key elements needing judicial definition.

## V. THE *GINGLES* CASE

### A. *The District Court Decision*

The district court decision in *Gingles v. Edmisten*<sup>102</sup> was the first case to apply newly amended section 2 of the Act. At the time of the trial, the legislature had modified its reapportionment plan to conform to the one-man, one-vote standard, and had precleared its redistricting plan pursuant to section 5 of the Voting Rights Act for the forty North Carolina counties which the Act covers.<sup>103</sup> However, there remained sixty noncovered counties including legislative multimember districts in Mecklenburg, Forsyth, Wake, Durham, Wilson, Edgecombe, Nash and the northeast counties, all of which contained either submerged or fractured minority populations which could have composed single-member districts. It is this question upon which the litigation focused. The chief elements of proof at trial were extensive stipulations of fact primarily composed of census and governmental statistical data, lay witness testimony to demonstrate the continued lack of minority political involvement, demonstrative evidence showing the location of minority group members within the multimember districts, and substantial use of expert testimony.<sup>104</sup> Expert testimony was employed to illustrate the use of racial appeals in political campaigns, the history of official discrimination, and voting patterns in elections which were racially polarized.

Cognizant of its importance as the first trial utilizing amended section 2, the court began its opinion by articulating its understanding of congressional intent in passage of amended section 2 in five carefully reasoned postulates. The court first found that the "fundamental purpose of the amendment to section 2 was to remove intent as a necessary element of racial vote dilution claims brought under the statute."<sup>105</sup> Second, "[i]n determining whether,

102. 590 F. Supp. 345 (E.D.N.C. 1984).

103. *Id.* at 350-51.

104. *Id.* at 345.

105. *Id.* at 353 (footnote omitted).



'based on the totality of circumstances,' a state's electoral mechanism does so 'result' in racial vote dilution, the Congress intended that courts should look to the interaction of the challenged mechanism with those historical, social and political factors generally suggested as probative of dilution . . . ."<sup>106</sup> Third, the court pointed out that "Congress also intended that amended Section 2 be interpreted and applied in conformity with the general body of pre-*Bolden* racial vote dilution jurisprudence that applied the *White v. Regester* test . . . ."<sup>107</sup> This included the consideration that "the demonstrable unwillingness of substantial numbers of the racial majority to vote for any minority race candidate or any candidate identified with the minority race interest is the linchpin of vote dilution by districting."<sup>108</sup> Fourth, the court stated, "Amended section 2 embodies a congressional purpose to remove all vestiges of minority race to vote dilution perpetuated on or after the amendment's effective date by state or local electoral mechanisms."<sup>109</sup> Finally, the court found that by "enacting amended Section 2, Congress made a deliberate political judgment that . . . national policy respecting minority voting rights could no longer await the securing of those rights by normal political processes"<sup>110</sup> regardless of "several risks to fundamental political values."<sup>111</sup> These five points by the court underscore the issues which were raised by the Attorney General and ultimately decided by the Supreme Court. The key considerations were, of course: What is vote polarization and what role does the success of black candidates have in defeating a claim of vote dilution?

The district court found that in each of the challenged districts there were concentrations of voters sufficient to draw black majority, single-member districts.<sup>112</sup> The court then examined the *Zimmer* factors and found that North Carolina had a history of official discrimination against black citizens in voting matters, and that the effects of racial discrimination continue in public facilities, education, employment, housing and health. The court further found that the existence of racial appeals in political campaigns continued, and other voting procedures existed that lessened the

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106. *Id.* at 354.

107. *Id.* at 354-55.

108. *Id.* at 355 (citations omitted).

109. *Id.* (citations omitted).

110. *Id.* at 357.

111. *Id.*

112. *Id.* at 358.

opportunity of black voters to elect candidates of their choice, including the majority vote runoff requirement and lack of subdistrict residency requirements. As well, the court noted the lack of sustained success in electing black candidates.<sup>113</sup> The importance of these findings for future section 2 litigation in North Carolina cannot be underestimated in light of the Supreme Court's opinion. The presence of these factors when combined with racially polarized voting supplies plaintiffs with the elements necessary to establish a *prima facie* case. Since several of the factors have been judicially determined, future litigation of these facts may not be necessary in each section 2 case. However, counsel for the plaintiffs will have to introduce similar evidence to support the *Zimmer* findings of fact.

After an exhaustive review of these findings, the court then turned to the "linchpin" issue of voter polarization which if connected to other findings of fact would lead to the conclusion that multimember districts resulted in lessened electoral opportunity for blacks.<sup>114</sup> The court adopted the definition of racially polarized voting supplied by the plaintiff's expert witness, Dr. Bernard Grofman. Dr. Grofman found that the results of an individual election would have been different depending upon whether it had been held among only white voters or only black voters in particular elections.<sup>115</sup> To statistically analyze the voting behavior in these districts, Dr. Grofman took fifty-three elections in the challenged districts in which a black candidate ran for office, and examined racial voting patterns by two methods: "extreme case analysis" and "ecological regression analysis."<sup>116</sup> The extreme case analysis studied voting in racially segregated precincts; the regression analysis used both racially segregated and racially mixed precincts and provided any corrective measure necessary to reflect the fact that voters within the two groups might behave differently.<sup>117</sup> In its examination of both methods, the court found racially polarized voting in each election studied. In each election, the degree of polarization was both statistically<sup>118</sup> and substantively significant.<sup>119</sup>

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113. *Id.* at 359-67.

114. *Id.* at 367.

115. *Id.* at 368.

116. *Id.* at 367 n.29.

117. *Id.*

118. "Statistically significant" in this context means not a random mathematical event. *See id.* at 368.

119. "Substantive" as used by the district court denotes legally actionable

In addition to the discussion regarding vote polarization, the court, in passing, commented twice on the role that proportionality has in voting dilution cases. The court defined vote dilution as follows:

The essence of racial vote dilution . . . is this: that primarily because of the interaction of substantial and persistent racial polarization in voting patterns (racial bloc voting) with a challenged electoral mechanism, a racial minority with distinctive group interests that are *capable* of aid or amelioration by government is effectively denied the political power to further those interests that numbers alone would presumptively . . . give it in a voting constituency not racially polarized . . . .

The mere fact that blacks constitute a voting or population minority in a multi-member district does not alone establish that vote dilution has resulted from the districting plan. . . . Nor does the fact that blacks have not been elected under a challenged districting plan in numbers proportional to their percentage of the population.<sup>120</sup>

The court noted that this was "the limit of the intended meaning of the disclaimer in Section 2 that 'nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.'"<sup>121</sup>

This brief discussion on the part of the court led the appeal points for both the United States Solicitor General and the North Carolina Attorney General. Racially polarized voting is probative of vote dilution only insofar as it is outcome determinative. In other words, where blacks consistently lose elections, because no whites or few whites will vote for them, the voting is racially polarized. Where blacks win because of bloc voting and single-shot voting by blacks, combined with substantial support from whites, then racial polarization does not have any legal significance.<sup>122</sup>

The district court also examined the success of black candidates in elections, comparing the relative success that blacks in Durham County house races had (a black candidate was elected in every election since 1973) with the lack of success which black candidates had in North Carolina House District 8, where no black

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vote dilution. See *id.*

120. *Id.* at 355 (emphasis supplied) (citations omitted).

121. *Id.* at 355 n.13.

122. Brief for Appellant at 40-41, *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986).

candidate had ever been elected.<sup>123</sup> They examined elections in each jurisdiction and found both racially polarized voting and a diminished likelihood of success that a black candidate would have over a white counterpart in the districts.<sup>124</sup> Based upon these findings, the court concluded a violation was found in each of the districts, including Durham, where black candidates had enjoyed relative success.<sup>125</sup>

The court found the redistricting plans adopted in April of 1982 in violation of the Act and ordered the state to redraw the legislative districts.<sup>126</sup> The general assembly complied by drawing single-member districts in all jurisdictions.<sup>127</sup> Following the judgment however, the state appealed.

The appeal stated as its purpose: "Insofar as the lower federal courts have viewed racial bloc voting as the linchpin of vote dilution, it is imperative that this Court formulate a standard by which that condition can be established."<sup>128</sup> The United States Solicitor General concurred, stating that in some of the challenged districts violations were found where blacks had sustained electoral success and, therefore, the court must have utilized a legal standard of section 2 which guaranteed electoral success. Secondly, the court's definition of racial bloc voting as mere differences in the election outcome if the election was held among the black and white communities was fundamentally flawed, since the ultimate issue for determination was whether such polarization results in electoral defeats.<sup>129</sup> Since the court found electoral success in some districts, it missed the mark in the connection between vote polarization and the ultimate conclusion it must make, a decision which is judicially reviewable. The appellant's identification of racial bloc voting and the level of black electoral success recalled the congressional debates between advocates of result tests and the disclaimer language prohibiting proportionality. It was with these points of focus that the Supreme Court discussion began.

The *Gingles* case also raised anew for the Supreme Court certain fundamental "political questions," a legal thicket in which the

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123. 590 F. Supp. at 366.

124. *Id.* at 367.

125. *Id.*

126. *Id.* at 376.

127. 1984 N.C. Sess. Laws 4, chs. 4-6 (Extra Sess. 1984).

128. Brief for Appellant at 21, *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986).

129. Brief for United States as Amicus Curiae at 12-13, *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986).

Court generally prefers not to enter on the grounds of judicial restraint. What is the role of the judiciary in insuring minority political rights in a democracy? What amount of representation, if any, should a minority or political group be entitled to as a matter of law or equity? How does the Court grant relief to a minority group to enable them to elect representatives of their choice without guaranteeing proportional representation? To what extent does the remedy of guaranteed numerical goals for minorities harm other political and constitutional values?

### *B. The Supreme Court Decision*

In upholding the district court's decision, Justice Brennan authored a majority opinion which directly addressed these fundamental issues.<sup>130</sup> The majority judgment was concurred in by the Court's more "conservative" justices on differing grounds. In some ways, the concurring opinions were more plaintiff-oriented than the Brennan opinion.<sup>131</sup>

Brennan began by discussing the *prima facie* elements of a section 2 case.<sup>132</sup> In the context of a multimember election district, he opined, there are certain preconditions necessary to show a section 2 violation.<sup>133</sup>

First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. . . . Second, the minority group must be able to show that it is politically cohesive. . . . Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it—in the absence of special circumstances, such as the minority candidate running unopposed—usually to defeat the minority's preferred candidate.<sup>134</sup>

Finally, Brennan observed, "the usual predictability of the majority's success distinguishes structural dilution from the mere loss of an election."<sup>135</sup> Most of these ultimate conclusions were evidenced by statistical analysis showing racially polarized voting.<sup>136</sup>

After examining the general principles which precondition a

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130. *Thornburg v. Gingles*, 106 S. Ct. 2752 (1986).

131. 106 S. Ct. at 2763.

132. *Id.* at 2766-67.

133. *Id.*

134. *Id.* (citations and footnote omitted).

135. *Id.* at 2767.

136. *Id.*

claim, Justice Brennan adopted the district court's working definition of racially polarized voting: racial polarization exists where there is a consistent relationship between the race of the voter and the way in which the voter votes, for example, where black voters and white voters vote differently.<sup>137</sup> If there is a difference in voting patterns, the second question becomes one of degree. In analyzing a section 2 claim to determine whether the degree or extent of the existence of racially polarized voting is legally cognizable, the opinion would first have a court examine the statistical evidence of racial voting.<sup>138</sup> Next, the court should determine whether, in addition to racially polarized voting, there exists other dilutive devices encumbering minority voting strength, such as "majority vote requirements, designated posts, and prohibitions against bullet voting . . . ."<sup>139</sup> In addition, the court should look at the percentage of minority registered voters in the district, the size of the district, and, in multimember districts, the number of available seats in the particular election and the number of candidates running for those seats.<sup>140</sup> Finally, evidence of vote dilution must extend over a period of more than one election.<sup>141</sup> The evidence, where rebutted if a minority candidate has been successful, should be evaluated to determine whether other factors could explain success, such as lack of opposition, incumbency, bullet voting patterns or other similar explanations.<sup>142</sup>

Justice Brennan's opinion examined the state's three objections to the district court's handling of the vote polarization issues. The first objection was that racially polarized voting should be defined as voting patterns for which the principle cause is race and which cannot be rebutted by evidence of other reasons such as party affiliation, age, religion, income, incumbency, education or campaign expenditures.<sup>143</sup> A multitude of factors should be examined, not just a correlation between the race of the voter and his voting habits. Justice Brennan's opinion rejected this approach because the cause of racially polarized voting patterns was not rele-

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137. *Id.* at 2776.

138. *Id.* at 2769-70.

139. Single-shot voting, sometimes called "bullet" voting is a technique used in multi-candidate races where a voter possessing the ability to vote for multiple candidates limits his vote to one candidate or a "single-shot".

140. *Id.* at 2770.

141. *Id.*

142. *Id.* at 2771.

143. *Id.* at 2776.

vant in determining a section 2 claim since it was the existence of such a pattern standing alone which made an otherwise race-neutral election device discriminatory. The opinion suggested that consideration of irrelevant variables would lead to results that were "indisputably incorrect" under section 2.<sup>144</sup> For example, an inconsistent result was reached from an analysis that considered that poor candidates lost elections more often wealthy candidates, even though minority candidates might be more likely to be poor.<sup>145</sup>

Next, Justice Brennan and a plurality of the Court found that the race of the candidate was not relevant in a section 2 inquiry.<sup>146</sup> The issue to be determined was not whether black voters voted for or preferred black candidates, but whether black voters' choices were electable as equally as white voters' choices. It was not the success of black candidates to office which the vote polarization analysis must examine, but the success with which the minority communities' candidates were elected which should be the focus of inquiry. From this conclusion, Justice White and four other Justices demurred, stating that this issue did not have to be decided in this case<sup>147</sup> and they would not desire to preclude evidence altogether of the race of a candidate in making a section 2 inquiry.<sup>148</sup> It is this difference of opinion which was the most remarkable in the case, since Justice O'Connor and her "conservative" colleagues were sustaining a more pro-plaintiff position than was "liberal" Justice Brennan. Finally, the Court rejected the state's appeal that vote polarization be defined as continued rejection of black candi-

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144. *Id.* at 2773.

145. We can find no support in either logic or the legislative history for the anomalous conclusion to which appellants' position leads—that Congress intended, on the one hand, that proof that a minority group is predominately poor, uneducated, and unhealthy should be considered a factor tending to probe a § 2 violation; but that Congress intended, on the other hand, that proof that the same socioeconomic characteristics greatly influence black voters' choice of candidates should destroy these voters' ability to establish one of the most important elements of a vote dilution claim.

*Id.* at 2775.

146. *Id.*

147. *Id.* at 2784 (White, J., concurring); *id.* at 2793 (O'Connor, J., concurring). Chief Justice Burger and Justices Powell and Rehnquist joined Justice O'Connor in her concurring opinion.

148. *Id.* at 2782-83 (White, J., concurring); *id.* at 2793 (O'Connor, J., concurring).

dates by the white community.<sup>149</sup> The Court held that this definition of racial bloc voting would frustrate Congress' desire that the intent test be eliminated in Section 2 inquiries.<sup>150</sup>

Justice O'Connor raised several fundamental issues which the Court addressed in *Gingles*, and provided the counterpoint for the Brennan opinion. The first issue concerned the measure of minority voting strength. There are theoretically several measures of minority voting strength, the first of which is the strictly proportional method of taking minority voters as a percentage of the total voters in an area. The minority would then have the potential to elect that percentage of representatives from the area.<sup>151</sup> Many European countries adopt this system of voting for legislative seats. If North Carolina were to adopt this approach, approximately ten senate and twenty-four house seats would be minority-controlled seats. This approach however, is specifically rejected by the Voting Rights Act and prior court decisions. A second approach would be to adopt the equitable remedy of gauging minority voting strength by examining various election or redistricting plans which would enhance minority voting influence without regard to black electoral success. The court could examine the impact which such plans would have on minority influence in elections, such as at-large districts with subgeographic, predominately minority districts. Such an equitable approach might be suggested by *Wallace v. House*,<sup>152</sup> and seemed to be Justice O'Connor's preferred alternative. However, neither approach was adopted by a majority of the Court. Justice O'Connor termed the Brennan approach as "maximum feasible minority voting" strength<sup>153</sup> but in this characterization, she is in error since the maximum strength would be representation on a strictly proportional basis. In addition, both the Brennan and O'Connor opinions leave for another case the issue of reduction of minority group influence. For example, what about areas which contain a sufficient number of minority voters to constitute forty

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149. *Id.* at 2777.

150. *Id.*

151. As Justice O'Connor stated: "[I]f the minority group constituted 30% of the voters in a given area, the court would regard the minority group as having the potential to elect 30% of the representatives in that area." *Id.* at 2786-87 (O'Connor, J., concurring).

152. 515 F.2d 619, 633 (5th Cir. 1975) (court noted that "for there to be substantial—and thus illegal—impairment of minority voting rights, there must be some fundamental unfairness in the electoral system").

153. *Gingles*, 106 S. Ct. at 2787 (O'Connor, J., concurring).



percent of a single-member district? If these voters are relegated to a two-member, multimember district, has not their influence been similarly reduced or diluted?

The second major question for the Court was: What is racial bloc voting, and how is it demonstrated? Here there was no significant divergence of opinion concerning what was the statistical *prima facie* case for racial bloc voting as defined by both the district court and the Supreme Court. There was a strong divergence of opinion, however, on what rebuttal evidence could be used to mitigate a statistical showing of racial bloc voting. All the justices agreed that statistical proof of divergent racial voting patterns can be used to show political cohesiveness and to assess prospects for electoral success.<sup>154</sup> However, Justice O'Connor would allow evidence of multivariant analysis or other factors to determine why bloc voting by whites has consistently defeated minority candidates; and a majority of the Court properly found that the race of a candidate may be a relevant factor in analyzing vote dilution claims.<sup>155</sup>

The final issue the Court resolved was: What weight is to be given to evidence of electoral success by minority candidates? It was this final issue which drew the most discussion. All members of the Court concluded that there can be no section 2 claim where members of a minority group consistently experience electoral success in numbers roughly proportional to their population.<sup>156</sup> However, when electoral success was less than proportional, the Court split on the type of approach. Justice Brennan's approach was to have the courts examine the success of an occasional black candidate against the other *Zimmer* factors to determine if the success could be explained on another basis.<sup>157</sup> Justice O'Connor's approach was to reserve consideration of this issue for another time.<sup>158</sup> However, her approach suggested that if a jurisdiction with a multimember district had an occasional minority-preferred candidate elected, then a court should look to see if other avenues of influence existed for the minority group other than the election process, for instance, to what extent were elected officials responsive to the needs of the minority community? If another avenue

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154. *Id.* at 2792-93.

155. *Id.*

156. *Id.* at 2793-94.

157. *Id.* at 2779.

158. *Id.* at 2795.

existed, Justice O'Connor did not say what would be the impact on a section 2 claim.

Probably the most surprising aspect of the *Gingles* opinion was the Court's handling of the issue of a candidate's race. The plurality's definition of racially polarized voting did not depend on the race of a candidate to determine if polarized voting was present. However, all of the statistical evidence adduced at the district court level specifically analyzed only elections between black and white candidates as the measure of racially polarized voting. If elections between two black candidates or two white candidates are examined, given North Carolina's predominately one-party system, then the minority and majority could have been said to prefer the election of the same candidate. This finding would negate, for litigation purposes, the crucial finding of racial bloc voting. Clearly, Justice Brennan's opinion suggested an approach that makes the race of the candidate irrelevant. However, Justices O'Connor and White rejected this approach which could well emasculate section 2. This issue remains to be examined by further litigation.

## VI. EFFECTS OF *GINGLES*

The *Gingles* decision will have dramatic effects on election systems in North Carolina. Presently pending in federal court in the Eastern District of North Carolina is a section 2 case challenging North Carolina's method of electing its superior court judges.<sup>159</sup> Currently the judges are nominated from large, multi-member districts and then elected in a state-wide election. At-large forms of local governments are facing challenges in the cities of High Point and Asheboro, and in Forsyth, Guilford, Wilson, and Onslow Counties. Under particular fire are boards of education. These only foreshadow other potential lawsuits, given the extensive use of at-large systems in North Carolina by local governments.

The change from at-large election systems to systems which have single-member districts have other subtle political effects. These political effects were correctly foreseen by Judge Phillips in the District Court decision in *Gingles*.

In making that political judgment, Congress necessarily took into account and rejected as unfounded, or assumed as outweighed, several risks to fundamental political values that oppo-

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159. *Alexander v. Martin*, No. 86-1048-CIV-5 (E.D.N.C. 1986).

nents of the amendment urged in committee deliberations and floor debate. Among these were the risk that the judicial remedy might actually be at odds with the judgment of significant elements in the racial minority; the risk that creating "safe" black-majority single-member districts would perpetuate racial ghettos and racial polarization in voting behavior; the risk that reliance upon the judicial remedy would supplant the normal, more healthy processes of acquiring political power by registration, voting and coalition building; and the fundamental risk that the recognition of "group voting rights" and the imposing of [an] affirmative obligation upon government to secure those rights by race-conscious electoral mechanisms was alien to the American political tradition.<sup>160</sup>

North Carolina has a total racial minority population of approximately twenty-five percent. A proportional representation system would mathematically entitle a racial minority to approximately ten senators and twenty-four representatives. Since *Gingles*, the legislature has had three minority senators and thirteen minority representatives. Although much less than a proportional representative system, this modest improvement is a leap from the prior record of one senator and three representatives prior to 1980. However, an equally significant impact has occurred in the remainder of the districts where the remnants of the counties elect the majority of the legislators. The political balance of having a predominately black and Democratic portion of a constituency removed makes conservative and Republican candidates competitive in the remainder of these districts.

An examination of the elections held in the districts affected by the *Gingles* case and the section 5 challenges bear this out. In the past, a unified black community would often provide the balance of power among white candidates. Now the black community has one or two representatives assured of their support who can act as spokesmen for their interests. This was the tradeoff which Congress and the civil rights community made in the urban areas. In areas where blacks approach a majority status, the decision will insure their continued success, as well as change the complexion of the remaining districts.

Prior to 1980, Guilford County, a "covered" county under the Voting Rights Act, elected its general assembly members, school boards, city governments in Greensboro and High Point, and

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160. 590 F. Supp. at 356-57.

county commissioners all at-large. Today, all of these bodies are elected by district systems which include at least one minority district. The effect of this result has had partisan considerations. In 1980, Guilford County had one white Republican state senator and two white Democratic state senators; two white Republican house members and five white Democratic house members. In 1984, it had two white Republican senators and one black Democratic senator, and five white Republican house members, one white Democratic house member and one black Democratic house member. Districting not only alters the political equation for the black community, but also for white candidates. Of particular note is the example of State Senator William Martin, who lost in a nine-member Democratic house primary in 1980, and subsequently won election in 1982 in a black majority senate district.

Given the likelihood of increased litigation in this area of the law, what defense is there to a section 2 case after the *Gingles* decision? Clearly, the best solution is a community-based political agreement. Protecting an at-large system of voting requires a willingness on the majority's part to build coalitions with minorities to elect candidates who have sufficient appeal to a majority of the members of that group. In addition, it requires that local communities and institutions be composed of representatives supported by minority groups.

## VII. CONCLUSION

*Gingles'* primary significance in litigation will be in the findings of fact with regard to a number of the *Zimmer* factors which can now be cited as precedent in similar Voting Rights litigation. The presence of these factors, when combined with other dilutive features of North Carolina's electoral system and with racially polarized voting, will go far in establishing a violation of a section 2 claim. These factors can be determinative, given the low success of black officeholders in North Carolina. The political effects on a jurisdiction with a cognizable minority population will also be profound—as they have been, for example, in section 5 areas like Guilford County.

Left unresolved in the *Gingles* opinion were several questions which future case law will need to address. How will future courts define the standard of racial voting strength? *Gingles* dealt only with several legislative districts. What should be the standard when the state-wide system is challenged? In the district court opinion, plaintiffs were invited to attack the state's majority vote

runoff requirements as a discriminatory device enhancing vote dilution.

Second, when does a section 2 claim dilute a minority's voting strength if it does not have sufficient numbers to constitute a majority? Can an electoral device of multimember districts *reduce* the impact of a vote? Justice Brennan suggested it may. If so, how can such a case be proven?

Third, can one rebut a section 2 claim by showing that white candidates can be the choice of black electorates? Justice Brennan's plurality opinion also seems to suggest this is possible. *Gingles* decision also means increasing competitiveness in single-member district elections. It may also point to reductions in the cohesiveness in predominately black districts as competition for representation begins in these elections. Without the need to single-shot in order to elect black candidates, the reality of political competition may flourish.

*Gingles* is the latest in a long line of Supreme Court decisions that guarantee citizens the right to vote and to have that vote counted. *Gingles* is also the latest discussion of balancing majority rule and minority rights in our democracy. Perhaps the clearest statement of the end to be accomplished in this debate comes from John C. Calhoun, on the veto power:

[V]est the powers of the Government in the whole—the entire people—to make it in truth and reality the Government of the people, instead of the Government of a dominant over a subject part, be it the greater or less—of the whole people—self-government; and if this should prove impossible to practice, then to make the nearest approach to it, by requiring the concurrence in the action of the government, of the greatest possible number consistent with the great ends for which Government was instituted—justice and security, within and without. But how is that to be effected? Not certainly by considering the whole community as one, and taking its sense as a whole by a single process, which, instead of giving the voice of all, can but give that of a part. There is but one way by which it can possibly be accomplished; and that is by a judicious and wise division and organization of the Government and community, with reference to its different and conflicting interests, and by taking the sense of each part separately, and the concurrence of all as the voice of the whole. Each may be imperfect of itself, but if the construction be good and all the keys skillfully touched, there will be given out in one

blended and harmonious whole, the true and perfect voice of the people.<sup>161</sup>

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161. J. CALHOUN, **BASIC DOCUMENTS** 229-31 (1952).