



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

Touro Law Review

Volume 11 | Number 2

Article 10

1995

The Pale Impact Of Recent Case Law on the Ascendancy of the Voting Rights Act

Frank N. Schellace

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Civil Rights and Discrimination Commons](#), [Constitutional Law Commons](#), [Election Law Commons](#), [Judges Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

Schellace, Frank N. (1995) "The Pale Impact Of Recent Case Law on the Ascendancy of the Voting Rights Act," *Touro Law Review*. Vol. 11: No. 2, Article 10.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol11/iss2/10>

This Symposium: The Supreme Court and Local Government Law is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE PALE IMPACT OF RECENT CASE LAW ON THE ASCENDANCY OF THE VOTING RIGHTS ACT

Hon. Leon D. Lazer:

Let's move on now to something completely different, the Voting Rights cases. They have a real effect on The Suffolk County Legislature as far as the districts are concerned. As you know, the Nassau County Board of Supervisors was invalidated by Judge Arthur Spatt of the federal district court.

To discuss the Supreme Court cases that came down this past year on the subject of voting rights, our speaker is Frank Schellace who is the law secretary to Justice Kenneth D. Molloy of the New York State Supreme Court. He is an expert in this field, and I should tell you that on behalf of The Institute of Local and Suburban Law, he made a presentation in seeking to have this law school retained as a consultant with the Commission on Government Revision, the body charged with creating a new government for Nassau County. I am sure, of course, that you are probably aware that we never achieved it, but he was to be the person that I would work with had we been retained. He had appeared at all the public meetings and work sessions of the commission and was invited to testify as an expert at a number of the public hearings. I should also add that he was granted amicus curiae status by Judge Arthur Spatt in that case. So I now introduce you to Frank Schellace.

Frank N. Schellace, Esq.:*

INTRODUCTION

Thank you, Judge. This is a subject that I know from my days of law school which was not one that was covered in great detail.

What I will attempt to do initially is to give a brief overview of the Voting Rights Act. I will then explain the impact of two major cases that came down this past Term by the Supreme Court which pertain to section 2 of this act on vote dilution.

The Voting Rights Act arose as a remedy to racially discriminatory election practices, particularly in the south. The enactment of the Fifteenth Amendment¹ after the Civil War, eliminated many statutory obstacles to African-American voting. Nevertheless, state and local officials soon utilized impediments to voter registration as a means of denying African-Americans the right to vote. Such impediments included the use of literacy tests and grandfather clauses.² In the early 'sixties, the United States Department of Justice challenged the use of literacy tests in voter registration on a case-by-case basis.³ Because this approach proved ineffective, Congress passed the Voting Rights Act of 1965.⁴

* Law Secretary to New York State Supreme Court Justice Kenneth D. Molloy, 10th Judicial District. B.S. State University of N.Y. at Stony Brook, 1975; J.D. Hofstra University of Law, 1978. The views expressed in this article are the author's and not necessarily the views of Justice Molloy or the New York State Supreme Court. The author wishes to express his thanks to research assistant Morris E. Fischer, and Stacey Klein of the *Touro Law Review* for their timely and excellent work. The author also wishes to express his gratitude to the tireless efforts of the members of the Nassau County Commission on Government Revision and one of their lead consultants, Debra A. Levine.

1. U.S. CONST. amend. XV, § 1. Section one provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.*

2. *See People ex rel. Chadbourne v. Voorhis*, 236 N.Y. 437, 141 N.E. 907 (1923) (emphasizing the requirement of a voter to fill out a certificate of literacy to qualify to vote); *Ferayorni v. Walter*, 121 Misc. 602, 202 N.Y.S. 91 (Sup. Ct. Queens County 1923) (recognizing that particular voters have to pass literacy requirement).

3. *See Apache County v. United States*, 256 F. Supp. 903 (D.D.C. 1966) (holding that Apache County official used the literacy test in a discriminatory fashion to his own advantage).

4. 42 U.S.C. § 1973 (1986). Section 1973 states in relevant part:

(a) No voting qualification . . . or standard, practice, or procedure shall be imposed by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ;

Again, as I said a moment ago, the Act was to remedy racially discriminatory election practices. The two central provisions of the Voting Rights Act are sections 2 and 5. Section 2 forbids any state or political subdivision from imposing or implying voting qualifications or prerequisites to any voting standard, practice, or procedure which results in a denial or abridgment of the right of any citizen to vote on account of race, color, or membership in a language minority.⁵

Section 2 has always been significant in the area of redistricting. Redistricting and reapportionment are two processes that take place every ten years following the census. The census determines the population of the entire country by state. As populations shift from state to state following each census there is a reapportionment of the number of congressional districts each state has. The final process of redistricting is the establishment of the precise geographical boundaries of each congressional and state legislative district.⁶ Historically, a number of states have sought to dilute the

(b) A violation of subsection (a) . . . is established if . . . shown that the political processes leading to . . . election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a)

(c) Whenever a State or political subdivision . . . shall enact . . . any voting qualification . . . or standard, practice, or procedure with respect to voting different from that in force . . . on November 1, 1964, . . . such State or subdivision may institute an action for a declaratory judgment that such . . . practice, or procedure does not have the . . . effect of denying . . . the right to vote on account of race or color

Id.

5. Voting Rights Act of 1965, Pub. L. No. 89-110, § 2, 79 Stat. 437. Prior to the 1982 amendments the Act provided: "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." *Id.*

6. Redistricting is distinguished from reapportionment. *See* BLACK'S LAW DICTIONARY 1137 (6th ed. 1990). "Reapportionment" is defined as a realignment or change in legislative districts brought about by changes in population and mandated by the constitutional requirement of equality of representation (*i.e.* one person, one vote mandate). A new apportionment of seats in the House of Representatives among States 'according to their respective numbers', is required by Art. 1, § 2 of the U.S. Constitution after every decennial census.

strength of African-American voters by establishing districting lines in a disfavorable way towards this group of voters.⁷

Section 5 of the Voting Rights Act requires certain states and the various political subdivisions of those states that seek to enact or administer voting qualifications or prerequisites, to obtain preclearance from the United States Department of Justice.⁸ The specific Act states that the requirement pertains to those states that Congress identified as ones that have traditionally erected discriminatory barriers in front of African-American voters.

A section 5 state or a political subdivision of such state could bypass this section 5 preclearance requirement by obtaining a declaratory judgment from the United States District Court for the District of Columbia.⁹ While obtaining such declaratory judgment is possible, it is a much more timely and costly procedure.

Id.

7. See *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994). The court noted that the Supreme Court had recognized two grounds on which redistricting might be violative of the Equal Protection Clause. First, some voters had less weight than those cast by voters in other districts where districts were not equal in population. Second, even where districts were of equal population, they were sometimes drawn for the purpose or resulted in unfair "dilution" or canceling out certain voting weights. *Id.* at 421-22.

8. Voting Rights Act of 1965, Pub. L. No. 89-110, § 5, 79 Stat. 437 (codified as amended at 42 U.S.C. § 1973(c) (1986)). Section 5 provides in pertinent part:

[A] state or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color"

Id. See *Presley v. Etowah County Comm'n*, 502 U.S. 491 (1992) (holding that all changes in voting must be precleared under § 5 of the Voting Rights Act, however, § 5 does not apply to changes with regard to the allocation of power among governmental officials).

9. See 42 U.S.C. § 1973(c) (1986).

I. THE LANDMARK VOTING RIGHTS CASE OF *CITY OF MOBILE V. BOLDEN* AND THE CONGRESSIONAL RESPONSE

In a case entitled *City of Mobile v. Bolden*,¹⁰ decided in 1980, a plurality of the Supreme Court clarified the point that a plaintiff challenging a state's redistricting by way of the Voting Rights Act, must establish discriminatory intent. Namely, the plaintiff must demonstrate that the purpose behind the redistricting was to minimize the voting strength of minorities.

Prior to this landmark case, it was unclear whether such plaintiffs were required to establish discriminatory intent, or whether they could rely on the fact that such redistricting resulted in discrimination against minorities. On one hand, the *Bolden* Court pointed to earlier cases upon which it could have been "suggested" that disproportionate effects alone could establish a vote dilution claim.¹¹ However, the *Bolden* Court explained that none of these earlier decisions were inconsistent with the "discriminatory intent" requirement.¹²

On the other hand, the Supreme Court stated in another voting rights case, *Thornburg v. Gingles*,¹³ that in fact a pre-*Bolden* plaintiff did not have to show that the state or political subdivision

10. 446 U.S. 55 (1980) (holding that disproportionate effects alone are insufficient to establish a claim of unconstitutional racial vote dilution).

11. The Supreme Court cited *White v. Regester*, 412 U.S. 755 (1973), as a prime example. In *White*, the Court affirmed that the one-person-one-vote plan unconstitutionally diluted the voting strength of minorities. *Id.* at 765. The Court also noted that a Fifth Circuit case, *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), was decided upon a misunderstanding that it was not necessary to show a discriminatory purpose. The Court established that this principle of "discriminatory intent" was originally established in *Washington v. Davis*, 426 U.S. 229 (1976). In *Davis*, the Court affirmed the district court's finding that a job qualification test administered to potential police officers did not unlawfully discriminate on the basis of race. *Id.* at 232.

12. *Bolden*, 446 U.S. at 66.

13. 478 U.S. 30 (1986) (holding that a challenge to § 2 of the Voting Rights Act must be accompanied by proof that the operation of a multi-member electoral structure affected their ability to elect favorable candidates).

exercised “discriminatory intent.” He could rely on the discriminatory results of such redistricting to establish his claim.¹⁴

In any event, Congress found the *Bolden* burden of “discriminatory intent” unacceptable since it would be too difficult for Voting Rights Act plaintiffs to achieve.¹⁵ Thus, Congress amended section 2 of the Voting Rights Act in 1982.¹⁶ Under this amendment, plaintiffs could now establish a voting rights dilution claim by demonstrating that minorities were denied an equal chance to participate in the electoral process based upon the totality of the circumstances.¹⁷ Hence, Congress eliminated the “discriminatory intent” requirement. Additionally, Congress stated that the new vote dilution elements should not be guarantees of proportional representation.¹⁸ In other words, just because minorities comprise twenty percent of a given population, does not require a state to redistrict in order to guarantee that one of every five legislators will be a minority member.

The Supreme Court interpreted this congressional amendment for the first time in *Gingles*.¹⁹ In *Gingles*, plaintiffs challenged existing multi-member state legislative districts.²⁰ A multi-member district is one upon which more than one legislature is elected to represent that district. These multi-member legislatures are elected by way of at-large voting. That consists of the entire voting population of a given area and the power to elect all of the

14. *Id.* at 43-44 n.8.

15. See *Major v. Treen*, 574 F. Supp. 325, 344 (E.D.L.A. 1983) (“[T]he Committee has concluded that this intent test places an unacceptably difficult burden on plaintiffs.” (quoting S. REP. NO. 97-417 (1975))).

16. Voting Rights Act of 1965, Pub. L. No. 97-205, § 2, 96 Stat. 131 (codified as amended at 42 U.S.C. §§ 1971, 1973(b) (1988)). Section 2 establishes that a violation of the right of any citizen to vote occurs if “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 protected class of citizens.” *Id.*

17. See *Gingles*, 478 U.S. at 79. In *Gingles*, the Court held that a vote dilution challenge can only be established if under the “totality of circumstances,” the mechanisms resulted in unequal access to the electoral process. *Id.*

18. *Id.*

19. *Id.* at 43-79.

20. *Id.* at 35.

representatives of that district's legislature. The process of at-large elections for multi-member districts could potentially have a disparate impact upon minority voters. For example, assume that a district decides to become multi-member via at-large voting. It will elect four legislators to the state senate. Minorities in the given district comprise twenty-five percent of the district's population. There is a great chance that the election results will ignore any minority candidate. However, had this district decided to break apart into four distinct single-member districts, with the twenty-five percent minority population comprising one of those districts, that minority candidate would win an election in the minority district. Consequently, the minority group would be represented.

The *Gingles* Court set forth a three-pronged test that a voting rights plaintiff must pass in order to establish a voting rights dilution claim.²¹ First, the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district.²² Second, the minority group must vote in a politically cohesive manner.²³ Third, the minority's preferred candidate is usually defeated by white bloc voting.²⁴ The Supreme Court has also applied the *Gingles* test to the redistricting of single-member districts.²⁵

II. THE 1994 SUPREME COURT AND THE VOTING RIGHTS ACT

The October 1994 Term of the Supreme Court produced two significant cases in the area of the Voting Rights Act. These cases both involved classic claims of minority vote dilution pursuant to

21. *Id.* at 50-51.

22. *Id.* at 50.

23. *Id.* at 51.

24. *Id.*

25. *See* *Grove v. Emison*, 113 S. Ct. 1075 (1993) (holding that *Gingles*' three-prong test applied to single-member districts).

the amended section 2 of the Voting Rights Act.²⁶ These cases were respectively, *Johnson v. De Grandy*,²⁷ and *Holder v. Hall*.²⁸

On the first day of the new Term, the Court heard arguments in three consolidated appeals arising from challenges to the redistricting of both houses of the Florida State Legislature in *De Grandy*.²⁹ On the same day, the argument was heard in *Holder*, which involved a section 2 challenge to a single commissioner form of county government.³⁰

The two cases involved two different voting situations. The *De Grandy* case involved the redistricting of the Florida State Legislature.³¹ *Holder* involved a challenge to a form of county government which contained a single commissioner, possessing both legislative and executive power.³²

After the 1990 census, the Florida Legislature had to redistrict its 40 state Senate districts and 120 House districts in order to take into account the new population figures from the 1990 census. Florida has a unique provision in its state constitution which provides that if a redistricting plan is not in effect within a certain time period, the Florida Supreme Court will enter into the process and will modify or enact a plan.³³

The Florida State Senate and House were unable to enact a redistricting plan pursuant to the Voting Rights Act because the Justice Department had refused to grant preclearance within the allotted time frame for the legislature to enact such a plan. Therefore, the Florida Supreme Court modified the legislature's redistricting plan in order to address the objections that had been

26. See *supra* note 16.

27. 114 S. Ct. 2647 (1994) (holding that plaintiffs satisfied *Gingles*' "totality of circumstances" test for voter dilution under § 2 of the Voting Rights Act).

28. 114 S. Ct. 2581 (1994) (holding that a challenge to the size of the government body under § 2 cannot be brought in the absence of a definite and reasonable standard by which to review such a challenge).

29. *De Grandy*, 114 S. Ct. at 2651-52.

30. *Holder*, 114 S. Ct. at 2584.

31. *De Grandy*, 114 S. Ct. at 2651-52.

32. *Holder*, 114 S. Ct. at 2584.

33. *De Grandy*, 114 S. Ct. at 2652-54.

interposed by the Justice Department when it had refused to grant preclearance.

At the same time of the Florida Supreme Court's review, a three-judge panel had been convened to hear various federal claims relating to the redistricting. These claims were brought by Miguel De Grandy, a Hispanic member of the Florida House and other Hispanic voters,³⁴ which will be referred to as the *De Grandy* plaintiffs, as well as claims asserting a consolidated action brought by the Florida NAACP and African-Americans,³⁵ which will be referred to as the NAACP plaintiffs, and the third action, as indicated, brought by the United States.³⁶

The three-judge panel then adopted the Florida Supreme Court's modified districting plan. Therefore, there was no need to seek further preclearance by the Justice Department, and the panel then considered the parties' various objections relating to the plan.³⁷

The three-judge panel applied the three-prong analysis set forth in *Gingles*.³⁸ It concluded that both the Florida House and Senate redistricting plans violated section 2 of the Voting Rights Act in that they permissibly diluted the voting strength of minority voters in the Dade County area.³⁹ As I stated earlier, the *Gingles* test requires, as a precondition to a section 2 voter dilution claim, that plaintiff demonstrate one, that the minority group is sufficiently large and geographically compact to support a majority-minority district; two, that the majority group is politically cohesive; and three, that there is a pattern of polarized bloc voting.⁴⁰

Following a trial, the three-judge panel found that the second and third prong were satisfied in that blacks and Hispanics were

34. *Id.* at 2651-52.

35. *Id.*

36. *Id.* at 2652.

37. *Id.* at 2656-59.

38. *Id.* at 2656.

39. *Id.* at 2652-56. However, the finding of vote dilution in the Senate seats did not have a significant effect because solving the problem for the blacks caused the problem for Hispanics and vice versa. *Id.* Thus, because the remedies were mutually exclusive, the district court found that the fairest solution was to defer to the decision of the state legislature. *Id.* at 2652-53. The Supreme Court affirmed this decision. *Id.* at 2663.

40. See *supra* notes 21-24 and accompanying text.

separate politically cohesive groups, and that there was a high degree of racially polarized voting in the Dade County area.⁴¹ What we mean by politically cohesive is that their voting patterns, as evidenced from election results, are the same.

Florida African-Americans and Hispanics do not vote similarly. They have different interests, so they are two distinct politically cohesive groups for purposes of the *Gingles* test.⁴²

In addition, with respect to the first factor, the three-judge panel concluded that the *De Grandy* plaintiffs had shown that the Dade County area districts could be redrawn to produce a total of four Senate districts and eleven House districts, and that Hispanic majorities would be geographically compact.⁴³

The court also found that the NAACP plaintiffs had shown that the districts could be redrawn to create three Senate districts that had black majorities and were geographically compact because the plan only contained nine Hispanic majority-minority House districts, three Hispanic majority-minority Senate districts, and two black majority-minority Senate districts.⁴⁴

The three-judge panel concluded that the House plan unlawfully diluted the voting strength of Hispanic voters and that the Senate plan diluted the voting power of both blacks and Hispanics.⁴⁵

The court, in constructing a remedy for the section violation, adopted a modified version of the *De Grandy* plaintiffs' House plan, which provided for eleven Hispanic districts.⁴⁶ As to the Senate plan, however, the court found that the plan could not be redrawn to provide for both a fourth Hispanic district and a third

41. *De Grandy*, 114 S. Ct. at 2653.

[T]he court found political cohesion within each of the Hispanic and black populations but none between the two . . . and a tendency of non-Hispanic whites to vote as a bloc to bar minority groups from electing their chosen candidates except in a district where a given minority makes up a voting majority.

Id.

42. *Id.*

43. *Id.* at 2652.

44. *Id.*

45. *Id.*

46. *Id.*

African-American district.⁴⁷ Here, the court found that the plans submitted by the *De Grandy* plaintiffs, which provided four Hispanic seats, would have wasted African-American votes by patterning very large numbers of African-American voters into only two Dade County districts and would have replaced a third strong black plurality district with an oddly-shaped district running from Fort Lauderdale all the way to Vero Beach, for anyone who is familiar with the demographics of Florida.

The Court found that since the remedies for both section 2 violations were mutually exclusive, the challenged plan was entitled to deference as representing the state's efforts to vote or to create a plan that was the fairest to all ethnic communities.⁴⁸ This is interesting because the very plan that the Court found to have violated section 2 of the Voting Rights Act was the remedy which was imposed in the case. Since a section 2 violation was inevitable, as one ethnic group would have been diluted to have avoided diluting the other, the plan reasonably split the difference by dilution among both ethnic groups.

The State of Florida, the *De Grandy* plaintiffs, and the United States all appealed directly to the United States Supreme Court.⁴⁹ How that works in Voting Rights cases, unlike other types of cases where the case goes before a single federal district judge, three-judge panels are enacted pursuant to the federal rules, and appeals from the three-judge panel go directly to the United States Supreme Court.⁵⁰

The State of Florida appealed the three-judge panel's finding of the section 2 violation arguing that because of the percentage of Hispanic Senate seats, three out of forty statewide, or seven and one half percent, it is at least equal to the percentage of Hispanic voters in the state which is seven percent.⁵¹ Thus, the failure to

47. *Id.*

48. *Id.* at 2663.

49. *Id.* at 2651-52.

50. See 42 U.S.C. § 1973(c) (1986). Section 1973(c) provides in pertinent part: "Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court." *Id.*

51. *De Grandy*, 114 S. Ct. at 2654-56.

create a fourth Hispanic seat does not result in dilution in a section 2 violation. Similarly, the state argued that both its House and Senate plans accurately reflected the percentage of Hispanics in the voting-age population of the Dade County area.⁵²

Again, section 2 of the Voting Rights Act specifically states that proportional representation of racial and ethnic groups is not required. The state's argument, therefore, was that the existence of proportional representation should create a safe harbor that renders a redistricting plan immune from a section 2 challenge.⁵³

The United States and the *De Grandy* plaintiffs defended the three-judge panel's finding of the section 2 violation as to the Hispanics vote dilution in both the House and Senate plans, but argued that they erred in failing to hold a full hearing on the scope of available remedies before concluding that a fourth Hispanic district court cannot be created without including African-American voters.⁵⁴

The State of Florida's challenge to the finding of a section 2 violation provided the Supreme Court with an opportunity to clarify the requirements of section 2 in the context of a single-member districting plan. Again, *Gingles* involved a multi-member district.⁵⁵

In a prior Term of the Supreme Court, a case entitled *Grove v. Emison*,⁵⁶ involved a challenge to Minnesota's redistricting plan, and it was held that the section 2 claims were subject to the three-prong *Gingles* test in single-member districts.⁵⁷ The issue, therefore, that remained unsettled was how far a state had to go to avoid vote dilution in creating single-member districts, or stated another way, whether section 2 of the Voting Rights Act, as a three-judge panel had found in *De Grandy*, required a state to maximize the number of minority districts.⁵⁸

52. *Id.* at 2654.

53. *Id.* at 2660.

54. *Id.* at 2653-54.

55. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

56. 113 S. Ct. 1075 (1993).

57. *Id.* at 1084-85.

58. *De Grandy*, 114 S. Ct. at 2659.

The three-judge panel in *De Grandy* seemed to think that section 2 of the Voting Rights Act would be violated unless Florida affirmatively and consciously carved up the state along racial lines to facilitate ethnic bloc voting to maximize the maximum extent possible within the limits of geographic compactness.⁵⁹

Remember, with respect to the Senate plan, the three-judge panel found that section 2 of the Voting Rights Act required both the maximization of African-American districts and Hispanic districts even though the court concluded that it was impossible to do so.⁶⁰ During the Nassau County Charter Revision Process, I had been informed by Commissioner Grasing that the term "Hispanic" does not encompass Latinos. However, in order to simplify the cases, I will use the term "Hispanic" to encompass Latinos as well. In addition, Hispanics are the largest growing group following the 1990 census.

Now, the second reason why this case was of a particular importance concerns the effect of the Supreme Court's decision in a case entitled *Shaw v. Reno*.⁶¹ In *Shaw*, the Court, in a five-to-four decision, held that a claim is stated under the Equal Protection Clause where the plaintiffs allege that a race-neutral redistricting plan, "cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification."⁶² *Shaw* was not a

59. *Id.* at 2659-60. Justice Souter went on to denounce such a reading of section 2 by stating:

One may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from a mere failure to guarantee a political feast. However prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75% above its numerical strength indicates a denial of equal participation in the political process. Failure to *maximize* cannot be the measure of Section 2.

Id. at 2660 (emphasis added).

60. *Id.* at 2652-53.

61. 113 S. Ct. 2816 (1993) (holding that white voters could challenge an irregularly shaped black majority congressional district).

62. *Id.* at 2828.

Voting Rights Act case. The *Shaw* case was brought strictly on equal protection grounds.⁶³

Let me just summarize a little bit. *Shaw* was a subject of an extensive debate at last year's conference here at Touro.⁶⁴ *Shaw* involved a challenge to North Carolina's decision to create a second African-American majority-minority congressional district by joining together a narrow district of approximately 160 miles long, which was no wider than Interstate I-85.⁶⁵ The *Washington Post* ran a story, I do not know if this is true as I have not driven on I-85, but if you drove down I-85 with both of your doors open, you would kill everybody in the district. There are various points in the district that apparently are that narrow.

The Court in *Shaw* expressly refused to decide whether the Constitution permits the creation of majority-minority districts to decide in a manner that could be explained in non-racial terms.⁶⁶ For example, where the redistricting, although race conscious, demonstrates due regard for districting plans such as compactness. More significantly, in *Shaw*, the Court expressly refused to reach the plaintiffs' claim that section 2 of the Voting Rights Act is unconstitutional to the extent that it required the creation of a bizarrely-shaped I-85 district.⁶⁷ Earlier in that Term, the Court, in a case entitled *Voinovich v. Quilter*,⁶⁸ had similarly gone out of its way to state that it was not expressing its view on the unconstitutionality of a state's intentional creation of a majority-minority district to avoid a section 2 vote dilution claim.⁶⁹

63. *Id.* at 2824.

64. See Charles Stephen Ralston & Michael A. Carvin, *Voting Rights Debate*, 10 TOURO L. REV. 415 (1994).

65. *Id.* at 2820-21.

66. *Id.* at 2825-27.

67. *Id.*

68. 113 S. Ct. 1149 (1993) (holding that intentional manipulations of electoral districts to get majority-minority districts is permissible under § 2 of the Voting Rights Act where it is acting pursuant to remedy a prior violation of § 2).

69. *Id.* at 1158. The Court noted that it has yet to make a decision as to whether the Fifteenth Amendment applies to voter-dilution claims. Indeed, Justice O'Connor noted that the Court has "never held any legislative apportionment inconsistent with the Fifteenth Amendment." *Id.* Regardless, the

The pattern that can be seen here is that in some of these cases, in *Shaw* specifically, the Court says very little in terms of giving future guidance to the state legislatures in terms of what they should do, and there is very little guidance from the different opinions that make up these five-to-four decisions to allow other courts to come up with standards or guidelines to apply. So the cases that were in a number of courts had stated their actions waiting for decisions, in *De Grandy* in particular, for guidance on how they should rule. It was not to be. There are more questions that are unanswered following these cases than there are questions that are answered.

De Grandy was decided by a vote of seven-to-two.⁷⁰ Justice Souter delivered the opinion. Let me read from Justice Souter's decision. "We hold that no violation of [section] 2 can be found here, where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population."⁷¹ I was curious when I was listening to Judge Lazer speak about that phrase "roughly proportional." That was the same terminology as was used in *De Grandy*.⁷² Justice Souter then stated:

While such proportionality is not dispositive in a challenge to single-member districting, it is a relevant fact in the totality of the circumstances to be analyzed when determining whether members of the minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.⁷³

Now, in a concurring opinion, Justice O'Connor emphasized that the opinion did more than just reject the maximization theory that had been set forth by the three-judge panel, that central to the opinion was that proportionality, defined as the relationship

Court chose not to answer the issue of the Fifteenth Amendment's scope and whether it applied to respondents in this case based on an erroneous finding of intentional discrimination on the part of the Ohio Reapportionment Board. *Id.*

70. *De Grandy*, 114 S. Ct. at 2651.

71. *Id.*

72. *Id.*

73. *Id.*

between the number of majority-minority voting districts and the minority groups share of the relevant population, is always relevant evidence in determining vote dilution, but is never dispositive.⁷⁴ Further, she stated that a lack of proportionality can never by itself prove vote dilution, for courts must always carefully and searchingly review the totality of the circumstances.⁷⁵

Justice Kennedy, in a concurring opinion, agreed with Justice O'Connor that the district courts maximization theory was an erroneous application of section 2.⁷⁶ He went on to identify the more difficult question of proportionality for which the statutory text did not provide a clear answer. He was disturbed by the concept of proportionality and that it could lead to segregation and that single-member districts utilizing proportionality as a criteria is a dangerous concept.⁷⁷ Justice Kennedy also pointed out that the Court's decision in *Shaw* "did not resolve the broad question of whether the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim."⁷⁸ He also made clear that the case did not present constitutional claims but only claims under section 2 of the Voting Rights Act.⁷⁹ That language gives reason to believe that there were constitutional claims presented in that case, thus, adding further confusion to what the state of the law is today.

Now, what is also interesting about the two cases is that Justice Thomas, joined by Justice Scalia, dissented in *De Grandy*.⁸⁰ They dissented, calling attention to a fifty-four page concurring opinion that Justice Thomas wrote in the *Holder* case.⁸¹

Now, we get into the issue that I am sure students have heard of in constitutional law, the debate between strict construction as to

74. *Id.* at 2664 (O'Connor, J., concurring).

75. *Id.* (O'Connor, J., concurring).

76. *Id.* (Kennedy, J., concurring).

77. *Id.* at 2666 (Kennedy, J., concurring). Justice Kennedy noted that "[a]s a general matter, the sorting of persons with an intent to divide by reason of race raises the most serious constitutional questions." *Id.* (Kennedy, J., concurring).

78. *Id.* at 2666-67 (Kennedy, J., concurring) (quoting *Shaw v. Reno*, 113 S. Ct. 2816, 2818 (1993)).

79. *Id.* at 2667 (Kennedy, J., concurring).

80. *Id.* (Thomas, J., dissenting).

81. *Id.* (Thomas, J., dissenting).

the Reagan appointees, and the expansive view of the Constitution. In *Holder*, Justice Thomas went through an exhaustive review of the Court's prior precedence and concluded, and this is a radical decision, that section 2 of the Voting Rights Act does not cover any dilution challenges and that he would only apply section 2 to state enactments that regulate citizen's access to the ballot or processes for counting a ballot, that redistricting plans and electoral mechanisms that may affect the weight given to a ballot cast and counted, are beyond the purview of the Act.⁸² Justice Thomas went through every case, every word of the statute, the legislative history, and committee reports. Then he distinguished them and found that section 2 of the Voting Rights Act does not apply to redistricting plans.⁸³ As I said, that is a very radical concept.

A review of the current case law shows, according to Justice Thomas, that by construing the Act to cover dilutive electoral mechanisms, the federal courts have been placed in a hopeless position of weighing questions of political theory.⁸⁴ Justice Thomas and Justice Scalia believe that there were no guidelines nor benchmarks here with which to determine dilution claims.⁸⁵

Justice Thomas also found fault in the Court's approach to the totality of the circumstances approach.⁸⁶ He contends that once a plaintiff's group establishes that it is mathematically possible to control a seat, (the first *Gingles* precondition), the size of geographic compactness, and that it is a district, the only question remaining is whether the current number of seats is proper, that proportionality and mathematical ratios are the only test.⁸⁷ According to Justice Thomas, joined by Justice Scalia, the totality

82. *Holder v. Hall*, 114 S. Ct. 2581, 2619 (1994) (Thomas, J., concurring). Justice Thomas stated that the "text of the statute must control, and the text of section 2 does not extend the Act to claims of dilution." *Id.* at 2613. (Thomas, J., concurring).

83. *Id.* at 2619 (Thomas, J., concurring). Justice Thomas further stated that the "terms do not include a State's or political subdivision's choice of one districting scheme over another." *Id.* (Thomas, J., concurring).

84. *Id.* at 2591-92 (Thomas, J., concurring).

85. *Id.* at 2592 (Thomas, J., concurring).

86. *Id.* at 2614-19 (Thomas, J., concurring).

87. *Id.* at 2615 (Thomas, J., concurring).

of the circumstances approach that the *De Grandy* opinion stressed, is nothing but an illusion--that it would "more accurately be called a test for enduring proportional electoral results according to race."⁸⁸

In *Holder*, the Court limited its grant of certiorari to the question of whether a single commissioner form of government, where one individual, as I indicated, performed all executive and legislative functions rather than a multi-member Board of Commissioners, is subject to a vote dilution challenge in section 2 of the Voting Rights Act.⁸⁹ The Eleventh Circuit held that the use of such form of government in Bleckley, Georgia, a rural county which had this form of government since its creation in 1912, violated section 2 of the Voting Rights Act because the creation of a five-member governing commission using the same districting lines as the five-member county school board that existed in that county, would permit the election of an African-American commission.⁹⁰

Bleckley County has an African-American voting-age population of twenty percent.⁹¹ A five-to-four decision was rendered by the Court, holding that the size of the governing body is not subject to a vote dilution challenge under section 2 of the Voting Rights Act.⁹² The opinion was joined by Justices Thomas and Scalia.⁹³ There is no objective and workable standard for a reasonable benchmark where a challenge is brought to a governing body's size; there is no reason why one size should be picked over another, and that accordingly, there will be no standards to apply for future cases.

Justice Blackmun dissented, joined by Justices Stevens, Souter, and Ginsburg.⁹⁴ The dissent focused on past precedent and concluded that the "size of government body is a standard,

88. *Id.* at 2618 (Thomas, J., concurring). Justice Thomas stated that the test "is an empty incantation--a mere conjurer's trick that serves to hide the drive for proportionality that animates our decisions." *Id.* (Thomas, J., concurring).

89. *Id.* at 2584.

90. *Id.* at 2585.

91. *Id.* at 2584.

92. *Id.* at 2588.

93. *See supra* notes 81-88.

94. *Holder*, 114 S. Ct. at 2583 (Blackmun, J., dissenting).

practice, and procedure” under section 2 of the Voting Rights Act.⁹⁵ Furthermore, minority voters may challenge the “dilutive effects by demonstrating their potential to elect representatives under an objectively reasonable alternate practice.”⁹⁶ They reasoned that since the Act was adopted for a broader purpose of ridding the country of racial discrimination in voting, and based upon precedent, then, the action begins with the broadest possible scope.⁹⁷

CONCLUSION

To summarize, the *Holder* and *De Grandy* decisions failed to provide any guidelines to help state and local governments to perform the redistricting of the future, rather they create more ambiguity. There is no definition as to what a reasonably compact district is, or for that matter, what a compact district is. *De Grandy* does tell us that even if *Gingles*’ preconditions are satisfied, you still have to look at the totality of circumstances. There is no definition of totality of the circumstances. For state and local governments, it will mean that more experts and consultants will have to be retained and retained early in the process in order to survive challenges based upon the Voting Rights Act. Here, there is a cost factor.

I will now take any questions that anybody would have.

Audience Member:

In *Jackson v. Nassau County Board of Supervisors*,⁹⁸ what case did the plaintiffs cite for their argument?

95. *Id.* at 2619 (Blackmun, J., dissenting).

96. *Id.* at 2619 (Blackmun, J., dissenting).

97. *Id.* at 2619-21 (Blackmun, J., dissenting).

98. 818 F. Supp. 509 (E.D.N.Y. 1993) (holding that the weighted voting system used by the Nassau County Board of Supervisors violated the one-person-one-vote principle under the Equal Protection Clause of the Fourteenth Amendment and was therefore unconstitutional).

Frank N. Schellace, Esq.:

There were a number of causes of action brought in that case, including a Voting Rights Act cause of action. However, the procedural posture of *Jackson* was a motion by the defendants that had been made for summary judgment and Judge Spatt granted summary judgment to the plaintiffs on the first cause of action on equal protection grounds, finding that the weighted vote system violated one-person-one-vote.⁹⁹

There had not been a finding of a violation of the Voting Rights Act. However, one can argue that, to the extent in Nassau County--a wholly contained assembly district--that a minority district can elect a majority-minority representative, had the case proceeded forward, the court might have found a violation of section 2 of the Voting Rights Act. The case was decided distinctly on one-person-one-vote, and the parties agreed to accept a county legislature as an alternate form of government.

99. *Id.* at 534.