"ABILITY TO INFLUENCE" CLAIMS UNDER SECTION 2 OF THE VOTING RIGHTS ACT†

> "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."[1]

INTRODUCTION

Section 2 of the Voting Rights Act[2] prohibits the implementation of voting districts, as well as other laws and practices,[3] that result in less opportunity for minorities to participate in the political process and to elect representatives of their choice. For example, Section 2 prohibits redistricting plans that divide a minority group neighborhood into separate voting districts and thus weaken the group's political power to elect a candidate who addresses their concerns.[4] Section 2 also prohibits discriminatory electoral schemes, such as at-large elections, that tend to dilute the voting strength of minority groups.[5] Section 2 prohibits such practices and devices because all citizens are entitled to realize the full power of their vote and have an effective voice in the political process.

In 1986, the Supreme Court in *Thornburg v. Gingles*[6] estab-

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1. Wesberry v. Sanders, 376 U.S. 1, 17 (1964).

2. Voting Rights Act of 1965 (codified at 42 U.S.C. §§ 1971, 1973 to 1973b (1988)). As amended in 1982, Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, is the primary authority for lawsuits challenging dilution of minority voting strength. *See infra* note 39 for the language of Section 2 as amended in 1982. Section 2 is enforced by the Attorney General or by private parties in lawsuits filed in local federal district courts.

3. Voting rights litigation originally focused on the prohibition of voting procedures such as poll taxes, literacy tests, and discriminatory voter registration that prevented Blacks (and later Latinos) from even reaching the ballot box. Today, Section 2 litigation focuses on electoral barriers such as at-large voting schemes and racial gerrymandering.

4. For techniques of racial gerrymandering, i.e., cracking, stacking, and packing, *see* Frank Parker, *Racial Gerrymandering and Legislative Reapportionment, in* MINORITY VOTE DILUTION 85 (Chandler Davidson ed., 1989).

5. *See infra* note 28 for an example of an at-large electoral scheme prohibited by Section 2; *see generally* Chandler Davidson & George Korbel, *At-large Elections and Minority Group Representation, in* MINORITY VOTE DILUTION, *supra* note 4, at 65.

6. 478 U.S. 30 (1986).

lished three necessary conditions that minority plaintiffs must satisfy if they are to prevail in Section 2 claims involving multi-member[7] districts:

> (1) 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,[8]
> (2) the minority group must be able to show that it is politically cohesive, and
> (3) the minority group must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate.[9]

If a plaintiff fails to satisfy any one prong, courts may grant summary judgment in favor of the defendants.[10]

The *Gingles* three-prong test was an attempt by the Supreme Court to develop a guide for courts in determining whether multi-member districts operate to impair minority voters' ability to elect representatives of their choice. Although the Court did not decide what standards should pertain to "a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multi-member district impairs its ability to *influence* elections",[11] lower courts have used *Gingles'* first prong to exclude minority groups who do not constitute a clear numerical majority[12] of a proposed district. Consequently, such a reading of *Gingles* renders Section 2

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7. A multi-member district is a district that elects more than one person to fill a given office. A single-member electoral district is a district that elects only one person to fill a given office.

8. In Section 2 cases, the single-member district is generally the appropriate standard against which to measure minority group potential to elect because it is the smallest political unit from which representatives are elected. *Gingles,* 478 U.S. at 50 n.17.

9. *Id.* at 50-51.

10. Voting Rights protection is still available if a minority group can prove that a redistricting plan is the result of intentional discrimination. S. REP. No. 417, 97th Cong., 2nd Sess. 27 (1982) [hereafter Senate Report]; *see also* Garza v. County of Los Angeles Bd. of Supervisors, 918 F.2d 763, 775 (9th Cir. 1990), *cert. denied,* 498 U.S. 1028 (1991). This discussion addresses only those "ability to influence" plaintiffs who cannot prove intentional discrimination.

11. *Gingles,* 478 U.S. at 46-47 n.12.

12. To constitute a majority, most courts require that a minority group constitute at least 50% of an intended district's voting-age population. *E.g.,* Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984)(three judge panel), *aff'd in part and rev'd in part,* Thornburg v. Gingles, 478 U.S. 30 (1986)("no aggregation of less than 50% of an area's voting age population can possibly constitute an effective voting majority"). Many courts also follow a rule of thumb requiring a minority group to constitute 65% of a district's population in order to account for low voting-age population, low registration, and low voter turnout rates. *E.g.,* Ketchum v. Byrne, 740 F.2d 1398, 1415 (7th Cir. 1984), *cert. denied,* City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985)(description of the 65% rule). Because no lower court has ruled against minority plaintiffs composing over 50% of the voting-age population in a proposed district, this paper assumes *Gingles'* first prong is satisfied if a district exceeds 50% minority voting-age population, and not overall minority population. However, *Gingles* is silent on this question.

useless to any minority group that does not constitute a numerical majority.[13]

The following hypotheticals[14] are helpful in understanding when a court may or may not use the first prong of *Gingles* to preclude a Section 2 claim. Assume that a city is composed of 1,000 registered voters (800 whites and 200 Latinos), who will all vote in a single-member election scheme. This city has three separate voting districts, each containing 333 individuals. If one district can be drawn including the 200 Latinos, they will compose a numerical majority or 66% of that district's population, and therefore it will survive *Gingles'* first prong should the city thereafter divide this 66% Latino district into two separate districts.

Assume that another city with the same election scheme is composed of 880 whites and 120 Latinos. If one district can be drawn including the 120 Latinos, this group will compose a minority or 40% of this district's population and therefore will fail to satisfy *Gingles'* first prong should the city divide this minority group into separate districts. The city could divide the Latino population and include 20% in one district and 20% in the other; any combination would not violate Section 2. However, the Latino group could bring an "ability to influence" claim under Section 2 and avoid the first prong altogether. The plaintiffs could argue that a 40% Latino voting bloc influences policy and party platforms and may even be sufficient enough to elect a specific candidate.[15]

In 1991, a federal court recognized a claim where the minority plaintiffs argued that the group could constitute an "ability to influence" district even though they could not constitute a numerical majority in a single-member district. In *Armour v. Ohio*,[16] the Sixth Circuit refused to apply Gingles' first prong although the minority

13. The reader should note that the first prong of *Gingles* requires a minority group to be sufficiently large *and* geographically compact. To satisfy the compactness requirement, a minority population must be sufficiently concentrated so that a district can be created in which the minority group is a majority. *See generally* Pamela Karlan, *Maps and Misreadings: The Role of Geographical Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173 (1989)(*Gingles'* focus on geographic concerns does not reflect the Voting Rights Act's commitment to broader ideas of political participation and civic inclusion). The requirement of geographic compactness will not be discussed in this paper and the reader should assume that this requirement is satisfied in all hypotheticals and cases mentioned.

14. These hypotheticals do not necessarily represent situations that may arise in voting districts. They are simplified examples so that the reader may better understand "ability to influence" claims.

15. For the purposes of this paper, I define "ability to influence" claims as those claims where a minority group does not constitute over 50% of the voting age population in a given district. This definition, however, does not suggest that "influence" plaintiffs are unable to elect the candidate of their choice. As I will discuss later, in some situations, influence plaintiffs may have the "ability to elect" the candidate of their choice. The reader should note that it is difficult, if not impossible, to accurately determine when influence ends and electability begins. *See* discussion *infra* pp. 109-10.

16. 775 F. Supp. 1044 (N.D. Ohio 1991)(three-judge court).

plaintiffs constituted only 36% of an intended district's population.[17] The *Armour* court reasoned that the Black plaintiffs had sufficient influence in the legislative election process to force white Democrats to be sensitive to them by virtue of the group's population size.[18] In effect, the Black Democrat plaintiffs could control the outcome of the election with the support of white Democratic voters.

Currently, the Supreme Court has not squarely addressed an "ability to influence" claim under Section 2 nor developed a standard within the influence context for lower courts to follow. As a result, federal courts have ruled against "influence" plaintiffs simply because of the minority group's inability to compose more than 50% of the voting age population in a district.[19] I will discuss the leading cases which have addressed "ability to influence" claims and examine the various interpretations of the first prong of *Gingles*.[20] First, I will briefly familiarize the reader with the Voting Rights Act and the evolution of Section 2 for a better understanding of "ability to influence" claims.

I. THE VOTING RIGHTS ACT

On August 7, 1965, Congress enacted the Voting Rights Act[21] to rid "the country of racial discrimination in voting."[22] The Voting Rights Act was the culmination of numerous unsuccessful efforts to create an effective remedy for discriminatory voting practices. Before the 1965 enactment, the Fifteenth Amendment[23] and other federal legislation[24] prohibited the denial of voting rights on the basis of race, color, or previous condition of servitude. Nevertheless, government officials and private citizens continued to infringe on the right to vote through literacy tests, poll taxes, harassment, physical intimidation and other practices.[25] The result of such practices was low registration and voter turnout among minorities, and in some areas, almost total exclusion from the political

17. *Id.* at 1052.

18. *Id.* at 1059-60. *See also* discussion *infra* pp. 105-07.

19. *See* discussion *infra* pp. 104-08.

20. The second and third prongs of *Gingles* will not be discussed in this paper. Even if a minority group is able to show it is politically cohesive (second prong) and that the majority group votes as a bloc so as to defeat the minority's preferred candidate (third prong), courts may still grant a summary judgment if the group cannot constitute a voting-age majority of a single-member district.

21. For a brief history of the Voting Rights Act, see Chandler Davidson, *The Voting Rights Act: A Brief History, in* CONTROVERSIES IN MINORITY VOTING 7 (Bernard Grofman & Chandler Davidson eds., 1992).

22. South Carolina v. Katzenbach, 383 U.S. 301, 315 (1966).

23. U.S. CONST. amend. XV, § 1.

24. Senate Report, *supra* note 10, at 5.

25. *Id.*

process.[26] The Voting Rights Act was implemented to provide an adequate remedy in combatting these obstacles. However, the Voting Rights Act did more than just strengthen judicial remedies as did previous legislation, it provided for direct federal action through new procedures and remedies that would allow a flexible response to the immediate and potential barriers to full and effective minority political participation.[27]

Yet despite the passage of the Act, government officials continued to dilute the voting strength of Blacks and other minority groups through the implementation of at-large election schemes.[28] Unlike single-member election schemes, at-large elections tend to hurt minority groups because they are usually concentrated in a few neighborhoods and are outnumbered by whites. In response to this type of practice, the Supreme Court and lower courts began using the Voting Rights Act to prohibit discriminatory at-large election schemes. Specifically, in *White v. Regester*[29] and *Zimmer v. McKeithen*,[30] the Supreme Court and the Fifth Circuit established a standard analysis to guide courts when deciding cases alleging a denial of equal opportunity for minorities "to participate in the political processes and to elect legislators of their choice."[31]

In *White*, the Supreme Court invalidated multi-member at-large districts in Dallas and Bexar Counties in Texas, because these districts diluted the voting strength of Blacks and Latinos. In its analysis, the *White* court considered a variety of local circumstances in its finding of vote dilution.[32] For example, the Court found a history of racial discrimination in voting requirements, campaign

26. U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 29-37 (1982).

27. U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: TEN YEARS AFTER 3-10 (1975). The Voting Rights Act contains general provisions, such as Section 2, that affect the entire nation. The Act also contains special provisions that are temporary and only affect jurisdictions that meet certain criteria. For a detailed discussion on all general and special provisions of the Voting Rights Act, see U.S. COMMISSION ON CIVIL RIGHTS, THE VOTING RIGHTS ACT: UNFULFILLED GOALS 4-11 (1981).

28. In an at-large election, every voter votes for all the elective positions. In many at-large election schemes, each voter is entitled to the number of votes as there are open positions. For example, assume that a city has a total voting age population of 1000 individuals who all vote: 700 whites, 200 Latinos, and 100 Blacks. Also assume there is racially polarized voting, i.e., whites vote for whites, and minorities vote for other minorities. If a multimember at-large election of three city supervisors were held, each voter would have three votes. If there are three white candidates and one minority candidate, the majority of whites will vote for the white candidates and the majority of Latinos and Blacks will vote for the minority candidate. As a result, the minority candidate will receive approximately 300 votes while each white candidate will receive at least 700 votes. Since candidates with the most votes win in at-large elections, all three white candidates will be elected.

29. 412 U.S. 755 (1973).

30. 485 F.2d 1297 (5th Cir. 1973)(en banc), *aff'd*, East Carroll Parish School Board v. Marshall, 424 U.S. 636 (1976).

31. *White*, 412 U.S. at 766.

32. *Id.* at 769-70.

tactics, education, employment, and other areas.[33] The Fifth Circuit in *Zimmer* later developed the *White* "totality of the circumstances" analysis into various factors for courts to use in determining the possible discriminatory impact of multi-member districts.[34] The various factors measured minority access to the political process, with an emphasis on historical as well as local realities.

The "totality of circumstances" approach articulated in *White* and *Zimmer* was subsequently used in the majority of vote dilution cases after 1973. Using this framework, other courts focused on the results and effects of voting discrimination; no showing of intentional discrimination was necessary. In 1980, however, a Supreme Court plurality in *City of Mobile v. Bolden*[35] abandoned the *White-Zimmer* framework and held that the Voting Rights Act prohibited only intentional discrimination.

A. *The Voting Rights Act: narrow interpretation*

In *Mobile*, Black residents of Mobile, Alabama, claimed an at-large system of electing the city's commissioner diluted their voting strength in violation of the Fifteenth Amendment and Section 2 of the Voting Rights Act. A divided Supreme Court concluded that the Fifteenth Amendment bars only direct interference with the right to vote and does not reach vote dilution cases.[36] Consequently, the Supreme Court held that discriminatory intent must be

33. *Id.* at 766-70.

34. In 1982, Congress adopted the *White-Zimmer* factors (also known as the "Senate Factors") when it amended Section 2 of the Voting Rights Act. As articulated in the 1982 Senate Report regarding the amended Section 2, the factors which courts should consider under Section 2 claims are: (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; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction. Additional factors which courts may consider are: [8] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority groups, and [9] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous. Senate Report, *supra* note 10, at 28-29 (footnotes omitted).

35. 446 U.S. 55 (1980).

36. *Id.* at 65. The Court stated that "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *Id.* at 62.

proven to claim protection under the Voting Rights Act since Section 2 is intended to assist in effectuation of the Fifteenth Amendment.[37]

As a result of *Mobile's* intent requirement, litigators virtually stopped filing new vote dilution cases because of the extreme difficulty in establishing the discriminatory intent or motive of state officials.[38] In response to *Mobile's* rigid intent requirement, however, Congress quickly amended Section 2 adding specific language which stated that the Voting Rights Act forbids not only intentional discrimination, but also any practice shown to dilute minority voting strength.

B. *The Voting Rights Act: broad interpretation*

In 1982, Congress amended Section 2 of the Voting Rights Act[39] to prohibit any voting practice or procedure "imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizens of the United States to vote on account of race or color" or language minority status.[40] Section 2 ensures that minority voters have the same opportunity to participate in the political process that other citizens enjoy. If, "as result of the challenged practice or structure plaintiffs

37. *Id.* at 60-61. At the time of the *Mobile* decision, Section 2 was very similar in language to the Fifteenth Amendment. It read: "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." The Fifteenth Amendment reads: "The right of citizens of the United States to vote shall not be denied or abridged by any State on account of race, color or previous condition of servitude." U.S. CONST. amend. XV, § 1. Although the Fifteenth Amendment prohibits interference with the right to vote, courts had historically failed to enforce this mandate. As a result, Section 2 made clear the purpose of the Fifteenth Amendment by incorporating the constitutional language.

38. Senate Report, *supra* note 10, at 26.

39. The 1982 amended Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied 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, or in contravention of the guarantees set forth in section 4(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) of this section is established if, based on the totality of the 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) of this section 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 population. 42 U.S.C. § 1973(b) (1991).

40. 42 U.S.C. §§ 1973 & 1973b(f)(2) (1991).

do not have an equal opportunity to participate in the political process and to elect candidates of their choice, there is a violation of this section."[41]

In the spirit of the *White-Zimmer* line of cases, the results test requires an inquiry into the "totality of the circumstances."[42] When looking to the totality of the circumstances, Congress set forth a non-exhaustive list of factors, adopted from *White* and *Zimmer* to guide courts in determining whether there has been a Section 2 violation.[43] Congress indicated that in applying these factors, courts should engage in a practical searching evaluation of the past and present reality of the political system in question.[44] Courts typically examine a number of the Senate factors, focusing on the factors most relevant to the kind of violation alleged. No single factor, however, is essential to the establishment of a Section 2 claim.[45]

II. INTERPRETING SECTION 2

In 1986, the Supreme Court addressed the amended Section 2 in a challenge to North Carolina's multi-member, at-large, state legislative district system in *Thornburg v. Gingles*.[46] The lower court in *Gingles* ruled in favor of the Black plaintiffs relying on the "totality of circumstances" analysis.[47] On appeal, the Supreme Court affirmed this holding but modified the Section 2 analysis to provide a test for establishing liability in multi-member schemes.[48] While noting that the enumerated Senate factors dealing with the historical treatment of minorities in elections were relevant to a claim of vote dilution,[49] the Supreme Court established three necessary preconditions that must be met before such claims receive consideration. The Court required that the minority group be (1) sufficiently large and geographically compact, (2) politically cohesive, and (3) the group must be subject to white bloc voting.[50] *Gingles* required

41. Senate Report, *supra* note 10, at 28.

42. 42 U.S.C. §§ 1973 & 1973b (1991).

43. *See supra* note 34 and accompanying text.

44. Senate Report, *supra* note 10, at 28-29.

45. The Voting Rights Act "requires the court's overall judgement, based on the totality of the circumstances and guided by those factors in the particular case." Senate Report, *supra* note 10, at 29 n.118.

46. 478 U.S. 30 (1986).

47. Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984)(three judge panel), *aff'd in part and rev'd in part*, Thornburg v. Gingles, 478 U.S. 30 (1986).

48. The Supreme Court expressly left open the question whether the preconditions apply in challenges to single-member districting devices. 478 U.S. at 46-47 n.12. However, the Supreme Court recently extended the preconditions to single-member districting in Growe v. Emison, No. 91-1420, 1993 U.S. Lexis 1780, at *28 (February 23, 1993). *See also infra* note 54 and pp. 110-12.

49. *Gingles*, 478 U.S. at 47-49.

50. *See supra* note 9 and accompanying text.

that these threshold criteria be satisfied before attempting to show vote dilution by a totality of the circumstances.

In explaining the first precondition, the Court stated:

> [T]he minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district. If it is not, as would be the case in a substantially integrated district, the *multimember form* of the district cannot be responsible for minority voters' inability to elect its candidates.[51]

The Court reasoned that "[u]nless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."[52] The Court, however, expressly stated that it was not considering whether Section 2 permitted claims brought by a minority group that was not large enough to constitute a numerical majority in a single-member district but could still "influence" an election. The Court stated:

> The claim we address in this opinion is one in which the plaintiffs alleged and attempted to prove that their ability to *elect* the representatives of their choice was impaired by the selection of a multimember electoral structure. We have no occasion to consider whether Section 2 permits, and if it does, what standards should pertain to, a claim brought by a minority group, that is not sufficiently large and compact to constitute a majority in a single-member district, alleging that the use of a multimember district impairs its ability to *influence* elections.[53]

As a result of the Supreme Court's refusal to squarely address "ability to influence" claims, the lower courts are in conflict in their interpretation of *Gingles'* first precondition.[54]

A. *Conflict in the Lower Courts*

In 1988, the Seventh Circuit in *McNeil v. Springfield*[55] rejected an influence claim under Section 2. In *McNeil*, Black plaintiffs of

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51. 478 U.S. at 50.

52. *Id.* at 50 n.17.

53. *Id.* at 46-47 n.12.

54. More recently, the Supreme Court in *Growe*, No. 91-1420, 1993 U.S. Lexis 1780, at *28 n.5 (1993), and Voinovich v. Quilter, No. 91-1618, 1993 U.S. Lexis 1939, at *16 (March 2, 1993), reiterated its reluctance to resolve whether a failure to show the geographic compactness of a minority group sufficiently large to constitute a majority is needed when a plaintiff alleges that a voting practice or procedure impairs the minority group's ability to influence an election. On both occasions, the Court did not reach the plaintiff's "ability to influence" claims. However, dicta in the *Voinovich* decision indicates how the Court may approach "ability to influence" claims in the future. *See* discussion *infra* pp. 110-12. The lower court decisions to be discussed were decided before these recent Supreme Court decisions (no post-*Voinovich* "influence" cases were available at the time this paper was completed). Consequently, this paper is unable to address the impact of *Voinovich* on the lower courts.

55. 851 F.2d 937 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989).

Springfield, Illinois, challenged a park and school board multi-member, at-large electoral system. Using census figures, the plaintiffs were able to draw a single-member district that was 50.2% Black in total population, but only 43.7% in voting-age population. The Court of Appeals for the Seventh Circuit affirmed the district court's summary judgment in favor of the defendants on the ground that the plaintiffs failed to satisfy *Gingles'* first prong.[56]

Although the plaintiffs claimed an enhanced proportion of Blacks in a single-member district would allow them to influence an election,[57] the *McNeil* court rejected the contention that a court, in considering Section 2 claims, can explore the totality of the circumstances without first determining whether the *Gingles* thresholds are met.[58] The *McNeil* court did acknowledge the possible adverse impact of such a bright-line test on some meritorious ability-to-influence claims. However, the court explained that *Gingles'* first precondition is a trade-off and justifiably sacrifices "some claims to protect stronger claims and promote judicial economy."[59] The *McNeil* court stated:

> Courts might be flooded by the most marginal section 2 claims if plaintiffs had to show only that an electoral practice or procedure weakened their ability to influence elections. While Congress intended to make it easier for minorities to show that their vote has been diluted, it presumably did not intend to require courts to entertain claims by a tiny segment of a multi-member district's population that the group's inescapably minimal influence has been impaired by the electoral arrangements.[60]

Although the *McNeil* court rejected the concept of an influence district in a multi-member scheme, the Sixth Circuit in *Armour v. Ohio*[61] accepted an influence district in the single-member context.

In 1991, the Sixth Circuit in *Armour* recognized an influence claim where a single-member district could be drawn with a 36% minority voting-age population. The plaintiffs in *Armour* were Black, voting-age residents of two legislative districts of Mahoning County, Ohio. The plaintiffs alleged that a boundary line separating two single-member districts (52nd and 53rd Ohio House of Representatives) unlawfully diluted their voting strength. Under the

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56. *Id.* at 941.

57. *Id.* at 943. In simple terms, the plaintiffs contended that an enhanced Black voting-age district of 43.7% would enable them to win in a multi-candidate election. If several candidates ran, Blacks would give their votes to one candidate while white voters would be split among several other candidates.

58. The *McNeil* court did not consider Plaintiffs' claim that white cross-over votes would enable Black candidates to elect the candidate of their choice in the proposed district. The court stated: "Cross-over voting is to be considered only after the *Gingles* prerequisites are met." *Id.* at 943 n.9.

59. *Id.* at 943.

60. *Id.* at 947.

61. 775 F. Supp. 1044 (N.D. Ohio. 1991)(three-judge court).

state-adopted legislative districting plan, the 52nd House district was 11.1% Black and the 53rd was 24.9% Black.[62] The plaintiffs sought a district where the population would be 36% Black.

Using a totality of circumstances approach, a divided three-judge court found vote dilution although Plaintiffs could not form a majority in either legislative district. The *Armour* court held that the Black plaintiffs had sufficient influence in the legislative election process to force white Democrats to be sensitive to them by virtue of their population size.[63] In a reconfigured district, Black plaintiffs would constitute nearly one-third of the voting-age population and one-half of the Democratic vote. Since Black voters in Mahoning County consistently voted eighty to ninety percent Democratic, and white voters consistently voted fifty percent Democratic, the *Armour* court found that the plaintiffs could elect a candidate of their choice.[64]

In recognizing the Plaintiffs' influence claim, the court relied on the *Gingles* language in footnote 12,[65] and held that the threshold conditions do not apply to Section 2 Voting Rights challenges to single-member districts.[66] The *Armour* court also relied on language from *Chisom v. Roemer*,[67] a Supreme Court decision which suggests that minority influence claims may be actionable under Section 2.[68]

In *Chisom*, the Supreme Court extended Section 2 protection to judicial elections. In its analysis, the Court held that Section 2 plaintiffs must demonstrate that an electoral device diminishes both the opportunity to participate in the political process *and* the opportunity to elect candidates of their choice.[69] In his dissent, Justice Scalia argued that if both conditions must be violated, then "minorities who form such a small part of the electorate in a particular jurisdiction that they could on no conceivable basis 'elect represent-

62. *Id.* at 1047.

63. *Id.* at 1060.

64. 775 F. Supp. at 1059 n.19. The *Armour* court confusingly states that it is not reaching a decision based on an "ability to influence" claim: "We need not reach the question of whether such an [ability to influence] action may be viable under the Voting Rights Act because we find that the plaintiffs have met their burden of demonstrating an ability to elect a candidate of their choice." *Id.* Despite this language, the *Armour* court recognized an "ability to influence" claim because the court refused to apply the *Gingles* first precondition to a 36% minority population district. *See* Hastert v. State Bd. of Elections, 777 F. Supp. 634, 651-52 (N.D. Ill. 1991)(referring to *Armour* as an "influence" case). Indeed, the distinction between "ability to elect" and "ability to influence" is confusing and will be discussed later. *See infra* notes 86-90 and accompanying text.

65. *Gingles*, 478 U.S. at 46-47 n.12.

66. 775 F. Supp. at 1050-51. The Supreme Court in *Growe* subsequently extended the *Gingles* preconditions to single-member districts. *See supra* note 48.

67. 111 S. Ct. 2354 (1991).

68. *Armour*, 775 F. Supp. at 1052.

69. *Chisom*, 111 S. Ct. at 2365 (emphasis added).

atives of their choice' would be entirely without Section 2 protection."[70] Justice Stevens, joined by five justices, responded that the dissent's argument rested on "the erroneous assumption that a small group of voters can never influence the outcome of an election."[71]

Based on these statements in *Chisom*, and the *Gingles* disclaimer in footnote 12 that restricted the pre-conditions to situations in which plaintiffs were challenging multimember redistricting, the *Armour* court concluded that the *Gingles* pre-conditions did not apply to all Section 2 challenges.[72] The court stated:

> We cannot agree with defendants that a government may with impunity divide a politically cohesive, geographically compact minority population between two single member districts in which the minority vote will be consistently minimized by white bloc voting merely because the minority population does not exceed [fifty percent].[73]

Although the *Armour* court acknowledged the concerns for a bright-line test in Section 2 cases, it countered:

> Even if serious problems lie ahead in applying the "totality of the circumstances" described in [Section] 2(b), that task, difficult as it may prove to be, cannot justify a judicially created limitation on the coverage of the broadly worded statute, as enacted and amended by Congress.[74]

Two months after the *Armour* decision, however, the Seventh Circuit in *Hastert*[75] extended the *Gingles* preconditions to a single-member election scheme.[76]

In *Hastert*, the plaintiffs contended that a redistricting plan diluted the voting strength of Black communities in Springfield and Decatur, Illinois, by placing those two cites in separate congressional districts.[77] The plaintiffs asked the court to recognize a district with a 4.9% Black voting-age population concentration as a minority influence district.[78] Although the *Hastert* court agreed that the Supreme Court has not foreclosed ability to influence

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70. *Id.* at 2371 (Scalia, J. dissenting).
71. *Id.* at 2365 n.24.
72. *Armour*, 775 F. Supp. at 1052.
73. *Id.*
74. *Id.* (citing Chisom v. Roemer, 111 S. Ct. 2354, 2368 (1991).
75. 777 F. Supp. 634 (N.D. Ill. 1991).
76. Unlike *Armour*, the *Hastert* court extended *Gingles'* voter majority requirement to a single-member district case. The *Hastert* court stated: "The concerns animating the *Gingles* electoral majority precondition for multi-member cases—concerns of proof and relief—reside equally in the single-member context. [citation omitted] Thus, we believe the *Gingles* electoral majority pre-condition may limit the Court's options when it does consider single-member district cases under the amended Section 2." *Id.* at 654. The Supreme Court in *Growe* subsequently agreed with this extension. *See supra* note 48.
77. 777 F. Supp. at 651.
78. *Id.*

claims,[79] the court refused to "embrace the influence concept in the open-ended manner" proposed by the plaintiffs.[80] Claiming it had no direct legislative or judicial guidance on the subject matter, the *Hastert* court was reluctant to expand the scope of the Voting Rights Act to recognize Plaintiffs' 4.9% claim, because such recognition would create "a definition of a minority influence district that has no statistical bounds as to voter group size."[81]

Although the *Hastert* court considered the Plaintiffs' claim too open-ended, language from the opinion suggests that a larger minority group population might have been considered differently. The court states: "[E]ven if we were to embrace the *Armour* minority influence district concept, the . . . plaintiffs have failed to provide any meaningful substantive evidence in support of the dilution claim."[82] In spite of this language, the *Hastert* court did not indicate what evidence or minority population size was needed to bring forth a successful influence claim.

III. Is There a Workable Standard for Influence Claims?

The different approaches to influence claims, as displayed by the leading cases aforementioned, indicate the difficulty which future influence plaintiffs will have in attempting to formulate an acceptable standard for courts to follow. To complicate matters, the courts which have rejected influence claims have failed to provide a definition of "influence" or a workable standard of voter dilution in that context.

Concerned that the courts might be flooded by the most marginal Section 2 claims, the Seventh Circuit in *McNeil* rigidly imposed a 50% numerical majority requirement on the 43.7% minority voting-age group without considering the plaintiffs' evidence of political influence.[83] The *Hastert* court took *McNeil* one step further by applying the 50% numerical majority requirement to a single-member district. Although not addressing a standard for a larger group not constituting a majority in a single-member district, the *Hastert* court held that a 4.9% minority voting-age group could not successfully bring forth an influence claim. It is unclear whether a

79. *Id.* at 652.
80. *Id.* at 655.
81. *Id.* at 654. In its holding, the *Hastert* court was concerned about a broad reading of the Voting Rights Act and the possibility of similar 4.9% claims in the future. The court stated: "We are troubled, however, by the fact that the *Armour* court appears to have concluded that because the Supreme Court has not ruled out the influence district concept, the Court will likely embrace [a] broad interpretation of Section 2 without limitation in the future." *Id.* at 652.
82. *Id.* at 655.
83. *McNeil*, 851 F.2d at 943 n.9.

larger group, such as the 36% plaintiff group in *Armour* would have been treated differently by the *Hastert* court.

Unlike *Hastert*, the *Armour* court was unwilling to extend *Gingles* beyond its language that "expressly limited the application of [the] pre-conditions to situations in which plaintiffs were challenging only the multi-member districting."[84] More importantly, the *Armour* court was willing to read Section 2 broadly in light of the Supreme Court's reluctance to hold otherwise. As a result, the *Armour* court skipped the *Gingles* preconditions and looked to the political realities of Mahoning County, such as the number of Black Democrats in the district and their influence on Democratic policy making.[85] Yet even *Armour* confusingly skirted the influence issue by claiming that Plaintiffs had demonstrated an "ability to elect" a candidate of choice rather than the "ability to influence" the outcome of the election.

The "ability to elect" and "ability to influence" distinction is indeed confusing because no uniform standard can accurately determine the minority group size needed in order to ensure electoral success.[86] Depending on the state, city, or district, a minority voting-age population more or less than 50% may ensure a minority group's ability to elect a representative of choice.[87] To deal with this uncertainty, a minority population district greater than 50% is required by many courts to ensure electoral success. Moreover, these courts will usually require a minority group to constitute 65% of a district's population in order to account for low voting-age population, low registration, and low voter turnout rates,[88] even though it is clear that a high percentage requirement is not necessary in many circumstances.[89] As the *Armour* court found, a 36% minority group is able to elect the candidate of its choice with the help of white cross-over voting. Indeed, a 36% minority voting-age group is far below a 50% majority requirement, yet is large enough to be

84. *Armour*, 775 F. Supp. at 1051.

85. *Id.*

86. Justice O'Connor, concurring in *Gingles*, alluded to the artificiality in distinguishing between the "ability to elect" and the "ability to influence." *Gingles*, 478 U.S. at 90 n.1 (O'Connor, J., concurring). Justice O'Connor "express[ed] no view as to whether the ability of a minority group to constitute a majority in a single-member district should constitute a threshold requirement for a claim that the use of multi-member districts impairs the ability of minority voters to participate in the political processes and to elect representatives of their choice." *Id.*

87. *See generally* Bernard Grofman & Lisa Handley, *Identifying and Remedying Racial Gerrymandering*, 8 J. L. & POL. 345, 382-84 (1992) (discussing minority proportions in districts that either have elected a minority candidate or failed to elect a minority candidate). In the U.S. House of Representatives, for example, every district above 45.2% Black had elected a Black representative as of 1990. In one instance, a mere 22.9% was sufficient to elect a Black representative. *Id.* at 383.

88. *Id.*

89. *E.g.*, Ketchum v. Byrne, 740 F.2d 1398, 1413-17 (7th Cir. 1984), *cert. denied*, City Council of Chicago v. Ketchum, 471 U.S. 1135 (1985).

electorally successful.[90]

Even more difficult than determining electoral success is measuring influence. Where does a court draw the line between an influential minority group and an uninfluential minority group? Should influence plaintiffs be defined as only those minority groups under 50% who have the ability to elect the candidate of choice? Indeed, a 40% cohesive minority group in a district may be electorally successful where enough white voters cross-over and vote for the minority group's candidate of choice. However, requiring such a high percentage ignores smaller minority groups who may act as swing votes in an election.[91] For example, in a district where white voters commonly split across party lines, a 20% cohesive minority group could align itself with one of these groups and therefore become the determining voting bloc of the election. As a result, keeping such a 20% minority group intact would give this group more clout to demand the implementation of programs and policies that address their needs.

A recent unanimous Supreme Court decision sheds some light on how influence claims may be approached in the future. In *Voinovich v. Quilter*,[92] the Supreme Court once again refused to fully recognize an ability to influence claim. However, for the purpose of its opinion, the Court assumed the viability of influence claims so that it could reach the question of whether voter dilution had occurred. In dicta, the Court stated:

> Of course, the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim. For example, the first *Gingles* pre-condition, the requirement that the group be sufficiently large to constitute a majority in a single district, would have to be modified or eliminated when analyzing the influence-dilution claim.[93]

The Supreme Court language in *Voinovich* is indeed significant be-

90. The outcome of each election is affected by citizenship, registration, voter turnout, incumbencies, economic conditions, and many other variables. In Gingles v. Edmisten, 590 F. Supp. 345 (E.D.N.C. 1984), the court stated that minority voting strength depends "upon the philosophical-political make-up of the population majorities in the districts. Dependent upon that factor alone, [a] 30% population minority may in fact have greater voting strength than does [a 45% minority population]. Such non-mathematical factors are quintessentially political in nature, the kind whose assessment is most treacherous for courts of law and most appropriate for the legislative process." *Id.* at 383.

91. "The 'swing' argument is based on the division between relatively large, stable voting blocs, such as the regular Democratic and Republican voters. If a minority bloc is independent, and is larger than the difference between the two major voting blocs, then the minority bloc can 'swing' elections between the candidates favored by each of the two major blocs. Where such a pattern is established, candidates may be very responsive to the minority bloc's concerns in an effort to win their votes." Illinois Legislative Redistricting Comm'n v. La Paille, 786 F.Supp. 704, 715 (N.D. Ill. 1992).

92. No. 91-1618, 1993 U.S. Lexis 1939, at *16 (March 2, 1993).

93. *Id.* at *23.

cause it clearly discourages a rigid application of the *Gingles* three preconditions in all situations. More importantly, in advocating a more flexible use of the three preconditions, the Court specifies that the first prong may be inapplicable in the "ability to influence" context.

In spite of the Court's willingness to modify or eliminate the first prong when considering influence claims, however, other dicta in the *Voinovich* opinion indicates that large minority groups will most likely benefit from influence claims if such claims are recognized by the Supreme Court in the future. The *Voinovich* Court explains that a minority group's complaint in an "ability to influence" claim is "not that [minority] voters have been deprived of the ability to constitute a majority, but of the possibility of being a sufficiently large minority to elect their candidate of choice with the assistance of cross-over votes from the white majority."[94] This language indicates that the Supreme Court is looking toward a minority group's possibility of electoral success rather than more subtle ideas of political participation and influence, such as coalition building, grass-root organizing, and influencing party platforms. Consequently, those "influential" minority groups who can determine the outcome of an election by acting as a swing voting bloc may be without Section 2 protection.

This interpretation of *Voinovich* would support the outcomes in *Hastert* and *Armour*. Requiring a large minority group in influence cases would justify *Hastert's* rejection of a 4.9% influence claim. In most circumstances, a cohesive 4.9% group can at best swing the outcome of an election. *Armour's* 36% minority group, on the other hand, was sufficiently large enough to benefit from white cross-over voting. As a result, *Armour's* refusal to use *Gingles'* first prong in its analysis would be justified in light of the *Voinovich* language. However, an automatic rejection of a 43.7% voting-age claim, as was the case in *McNeil,* would not be justified without first determining whether such a group could be electorally successful with or even without white cross-over voting.

In spite of the *Voinovich* dicta, there still exists no standard for lower courts to follow in ability to influence cases. As a result, lower courts are free to approach influence claims in the same ad hoc manner as has been done previously. Although the *Voinovich* language suggests a flexible response to influence claims, courts may still be unwilling to consider those minority groups large enough to be electorally successful unless some standard or guideline is devel-

94. *Id.* It must be noted that white cross-over voting does not necessarily defeat the requirement of white bloc voting (*Gingles'* third-prong). In *Gingles*, the court stated that "a white bloc vote that normally will defeat the *combined strength of minority support plus white 'crossover' votes* rises to the level of legally significant white bloc voting." 478 U.S. at 56 (emphasis added).

oped by the Supreme Court. The *McNeil* court echoes such a concern:

> Given the [*Gingles*] decision to draw a bright-line for summary judgment purposes, it seems counterproductive to permit plaintiffs who cannot satisfy the threshold *Gingles* tests to make alternative claims that would obliterate the bright-line. If allowed, the "ability to influence" claim would severely undermine whatever good purpose is served by the threshold factors.[95]

IV. CONCLUSION

Assuming that the Supreme Court will eventually recognize influence claims by modifying or eliminating *Gingles'* first prong,[96] *Voinovich* indicates that smaller cohesive minority groups, possibly including those groups who may swing an election, will have no legal remedy under Section 2. Yet is such a result consistent with Section 2 and the underlying ideals of the Voting Rights Act?

Unfortunately, the language of Section 2 offers no direct guidance for approaching influence claims. Section 2 simply states that members of a class of citizens cannot have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[97] The question is whether Section 2's "political opportunity" language should be read broadly to protect smaller groups who may be denied political participation if divided into separate districts.[98]

The Voting Rights Act and its purpose of remedying past discrimination lends support to any standard that would enhance minority voting strength as well as political participation. During the hearings on the Voting Rights Act of 1965, Attorney General Katzenbach testified that "[S]ection 2 would ban 'any kind of practice . . . if its purpose or effect was to deny or abridge the right to vote

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95. *McNeil,* 851 F.2d at 947.

96. Although this comment does not set forth a standard for influence claims, influence plaintiffs would necessarily need to look to additional factors not mentioned in the Senate Report if a totality of circumstances test is adopted. The nine Senate factors focus on the effects of vote dilution in the at-large electoral context. However, in a single-member district context as was the case in *Armour*, for example, courts must consider if fragmentation has occurred, i.e., whether a government with impunity divides a "politically cohesive, geographically compact minority population between two single member districts in which the minority vote will be consistently minimized by white bloc voting merely because the minority population does not exceed a single district's population divided by two." 775 F. Supp. at 1052.

97. *See supra* note 39.

98. *See* Kathryn Abrams, *Raising Politics Up: Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988). In advocating a broader interpretation of Section 2, Abrams states: "Although enhancing the ability of minority voters to elect candidates of their choice is an important means of reducing disaffection and ensuring a voice for minority voters in the political process, over the long run, enforcement must secure opportunities for interaction and political coalescence as well." *Id.* at 453.

on account of race or color.'"[99] Senator Jacob Javits further explained that the purpose of the Voting Rights Act was "to deal with the accumulation of discrimination . . . . The bill would attempt to do something about accumulated wrongs and the continuance of the wrongs."[100] Both Attorney General Katzenbach's and Senator Javits' statements reflect the ideals that the Voting Rights Act not only intended to combat and remedy past patterns and effects of societal discrimination, but also to protect future political effectiveness. Indeed, promoting any minority involvement in the political process is consistent with the purpose of the Voting Rights Act. Yet, political participation in the forms of discussion, coalition-building, and lobbying party platforms may still be limited through gerrymandering and other electoral devices if Section 2 overlooks smaller minority groups who might have their only protection under an influence standard.

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99. Senate Report, *supra* note 10, at 17.

100. Senate Report, *supra* note 10, at 5 (quoting 111 Cong. Rec. 8295 (1965)).

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