MULTI-MEMBER DISTRICTS AND BLACK VOTERS

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I. *The Problem*

IN THE PAST TEN years, beginning with *Baker v. Carr*,[1] courts have insisted that election districts for all levels of government, from Congressmen to school boards, be equal in population.[2] At the same time, it has become increasingly evident that gerrymandering — "stacking the deck" — has continued to flourish and, for Blacks and other minorities, has often made reapportionment virtually meaningless.[3] Courts have repeatedly warned that gerrymandering is unconstitutional,[4] but have just as repeatedly held that particular allegations of gerrymandering had not been proved.

One of the most common and virulent forms of gerrymandering involves the use of at-large or multi-member districts. In this area, the courts have promised much and delivered little, but there has been a breakthrough in the past year, and the law is beginning, slowly, to catch up with political reality. The key to that political reality is the choice between exercising greater control over fewer representatives or exercising less influence over more representatives. In the typical situation, for example, Blacks may be 30 percent of the total population of a five-man legislative district, but are so distributed that if the area were carved up into five single-member districts, there would be black majorities in one or two of them.[5] Opinions differ about the relative desirability of the two systems, but it is the theme of this article that multi-member districts discriminate against Blacks in those states or communities where there is a high degree of racial discrimination, where white voters will not vote readily for a Black candidate or for a candidate closely identified with Black interests, or where Blacks find it difficult to join with other groups to form winning coalitions. As a practical matter, this means that multi-member districts are discriminatory in the South and less so in other parts of the country.

II. *The Early Cases*

The basic rule on multi-member districts was suggested in 1965 in *Fortson v. Dorsey*,[6] and was solidified the following year in *Burns v. Richardson:*

> Where the [equal population] requirements of *Reynolds* v. *Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular cast, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[7]

There was no attempt by plaintiffs to

1. 369 U.S. 186 (1962).
2. Baker v. Carr itself did not establish the one-man one-vote rule; it simply said malapportionment cases were justiciable, and said the ground rules would be developed in later cases. The one-man one-vote rule (which was thought radical then) was suggested in Gray v. Sanders, 372 U.S. 368 (1963) and Wesberry v. Sanders, 376 U.S. 1 (1964), and made explicit in Reynolds v. Sims, 377 U.S. 533 (1964).
3. Gerrymandering is commonly defined as the division of an area into political units in an unnatural and unfair way for the advantage (or disadvantage) of a particular group.
4. Not all gerrymanders. Thus, arranging districts to help one part at another's expense seems to be considered part of the game, and courts are divided about whether it is proper to draw districts to protect incumbents. *Compare* Burns v. Richardson, 384 U.S. 73, 89n.16 (1966), *with* Simpson v. Mahan, ...F. Supp.....(E.D. Va. 1972). Racial gerrymandering, however, is universally condemned, and that is what this article is about.
5. Gerrymandering by manipulating the lines of single-member districts can likewise destroy potential majorities, but virtually every attack on that type of gerrymandering has been rejected. *E.g.*, Howard v. Adams County Bd. of Supervisors, 453 F.2d 455 (5th Cir. 1972); Graves v. Barnes, C.A. No. A-71-CA-142, Slip Op. pp. 58-60 (W.D. Texas Jan. 28. 1971) (Houston). About the only case sustaining such an attack involves discrimination against the Navajo Indians. Klahr v. Williams, 339 F. Supp. 922 (D. Ariz. 1972).
6. 379 U.S. 433 (1965).
7. Dorsey v. Fortson, 228 F.Supp. 259 (N.D. Ga. 1964), Holt v. Richardson, 240 F. Supp. 724 (D. Hawaii 1965).

prove discrimination in either *Fortson* or *Burns;* in each case, the district court simply found that a mixed system of multi- and single-member districts was unconstitutional *per se.*[8] The Supreme Court reversed both district courts, but its opinions contained little or no indication of what would be regarded as sufficient proof of discrimination. The only such clue came in *Burns,* where the Court listed three factors that seemed to indicate that excessive reliance on multi-member districts:

> It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson,* districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one[9]

LITTLE MORE HELP was given in the next few years. In one case, *Sims v. Baggett,*[10] a three-judge court struck down an apportionment plan which combined majority-black and majority-white counties in multi-member districts in the Alabama House of Representatives. The court, relying in part on Alabama's long-standing practice of discrimination and on the absence of any legitimate purpose for combining the counties in question, held the counties had been combined for the purpose of discrimination against Blacks. In two other cases, *Burnette v. Davis* (Virginia)[11] and *Kilgarlin v. Hill* (Texas),[12] district courts rejected claims of discrimination and were upheld by the Supreme Court in per curiam affirmances. In each case, the Black voters sought to introduce evidence of the sort demanded by the Supreme Court in *Fortson-Burns;* in each case, that evidence was primarily proof that blacks consistently failed to win at-large elections and testimony that the Black population concentrations would have enabled Black candidates to win if the elections had been held by district. In each case, the district court interpreted this as a claim that Blacks were entitled to proportional representation from districts carved out along racial lines, a form of racial separatism which each court held violated the "color-blind" requirements of the Constitution.[13]

III. *The Whitcomb Case*

IN 1969, FOR THE first time, in *Chavis v. Whitcomb,*[14] some Black plaintiffs sought to put on detailed proof that at-large districts diluted their votes. The case arose in Marion County, Indiana (Indianapolis), which was approximately one-sixth black and which elected eight Senators and 15 Representatives at-large to the Indiana Legislature. The plaintiffs showed that Marion County met all three requirements set forth in *Burns* (large multi-member districts, in both legislative houses, and without subdistricted residence requirements).

They also introduced extensive census data and demographic statistics to show (1) that poor Blacks were concentrated in an area called the Center Township Ghetto Area, (2) that, on certain issues like housing, sanitation and welfare, they shared certain characteristics — and therefore interests — which differed sharply from the interests of non-ghetto residents, (3) that the number of legislators from the ghetto in the previous ten years had been disproportionately low, and (4) that the large districts made it easier for the political parties to control candidates' nominations and legislators' performance, and therefore diluted the influence that any group of voters, especially a minority, could have over any legislator.

8. Dorsey v. Fortson, *supra,* Holt v. Richardson, *supra.*
9. 384 U.S. 73, at 88.
10. 247 F. Supp. 96 (M.D. Ala. 1965).
11. 245 F. Supp. 241 (E.D. Va. 1965), *aff'd,* 382 U.S. 42 (1965).
12. 252 F. Supp. 404 (S.D. Texas 1965), *aff'd in part and rev'd in part,* 386 U.S. 120 (1966).
13. Both the Virginia and Texas district courts referred to the statement of Justice Douglas, dissenting in Wright v. Rockefeller, 376 U.S. 52, 66 (1963), that "government has no business designing electoral districts along racial or religious lines."
14. 305 F. Supp 1364 (S.D. Ind. 1969), *order entered,* 307 F. Supp. 1362 (S.D. Ind. 1969), *rev'd sub nom.* Whitcomb v. Chavis, 403 U.S. 124 (1971).

Based on this evidence, the district court found that the plaintiffs had proved the at-large districts diluted Black voters' votes. More particularly, as the Supreme Court later put it:

> [T]he District Court thought ghetto voters' claims to the partial allegiance of eight senators and 15 representatives was not equivalent to the undivided allegiance of one senator and two representatives; nor was the ghetto voters' chance of influencing the election of an entire slate as significant as the guarantee of one ghetto senator and two ghetto representatives.[15]

The District Court's opinion was widely heralded, and it was commonly believed that the Marion County plaintiffs had found the key to the Supreme Court's insistence on evidence of dilution. It was therefore with dismay that many greeted the news, on June 7, 1971, that the Supreme Court had reversed the district court, and had held, once again, that the proof of dilution was insufficient.

The Supreme Court's *Whitcomb v. Chavis* decision was particularly dismaying to many because they thought the opinion made it impossible ever to prove a case of racial gerrymandering.[16] What seems more accurate is that the opinion makes it nearly impossible ever to prove a case of *political* gerrymandering. The Court discussed the hazards of party politics as a fact of life against which the Constitution offers no protection, and made it clear that it would not listen to a claim that members of an ordinary political organization or interest group lost elections because of multi-member districts.

The Court's rejection of the Black plaintiffs' claims was based directly upon its view that Blacks in Marion County were no different from any other interest group. The Court said:

> . . . the failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been 'canceled out' as the District Court held, but this seems a mere euphemism for political defeat at the polls.[17]

IT SEEMS CLEAR that the Supreme Court took an unduly narrow view of the evidence, and failed to ask or answer critical questions. For example, apart from references to tradition, the Court failed to explain *why* it was constitutional to create a district which invariably (no matter which party won) allowed a slim majority of the county's voters to elect all 23 of its legislators. The Court likewise failed to explain *why* it was permissible to make the ghetto's representation depend upon the results of countywide races. Rather than answering these and other questions, the Court seemed to adopt a theory and proceed to fit the facts to it.

But, if the *Whitcomb* Court's implicit rejection of political gerrymandering claims is taken as a valid starting point, the rejection of the racial claim is incorrect because, *on the evidence presented in that case,* the Court concluded that Black voters in Marion County are completely indistinguishable from any other political interest group (e.g., white Democrats).

The Supreme Court made this point obliquely by referring repeatedly to the absence of any claim of discrimination. Thus, the Court pointed out that there was no evidence "that this segment of the population is being denied access to the political system,"[18] or "that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice."[19]

On the contrary, the Court held that Blacks in Marion County were able to form coalitions and participate freely in the political process; that there was a strong two-party system with votes cast along party lines rather than racial lines

15. 403 U.S. at 154.
16. *See, e.g.*, Note, 85 *Harv. L. Rev.* 135-46 (1971).
17. 403 U.S. at 153.
18. 403 U.S. at 155.
19. 403 U.S. at 149.

(both in the ghetto and elsewhere);[20] that Blacks typically voted Democratic and formed a significant part of the Democratic Party's strength; that Blacks were influential in the Republican Party as well, which also slated Black candidates (though not necessarily the ghetto's choices); and, overall, that Blacks in Marion County were important political forces casting significant votes.

Against this background, the Supreme Court rejected the claim of racial dilution because it was unwilling to agree with the district court that the partial allegiance of 23 legislators was insignificant or that the undivided allegiance of three legislators would have been preferable.

IV. *The Recent Southern Cases*

MEANWHILE, A different attitude had been taken toward multi-member districts in cases arising under the Voting Rights Act of 1965. Section 5 of that Act[21] requires most Southern state or local governments to gain federal clearance before changing their voting laws or procedures in any way.[22] In *Allen v. State Board of Education*,[23] the Supreme Court held that a change from district to at-large elections was covered by Section 5 because of the potential for discrimination in such a change:

> Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting.[24]

Shortly after the *Allen* decision, the Attorney General exercised his authority under Section 5 of the Voting Rights Act to block Mississippi and Louisiana counties from electing certain officials at-large, on the basis of his finding that at-large elections in those circumstances would discriminate against Black voters.[25]

In 1971, the Supreme Court, in *Perkins v. Matthews*,[26] reiterated its holding that a change from district elections to at-large elections was covered by the Voting Rights Act, and specifically cited shifts to at-large elections as the leading technique by which the votes of newly enfranchised Black voters were being diluted.[27]

The attitude formed in the Voting Rights Act cases bore fruit rapidly in a series of Southern state reapportionment cases, which not only showed that multi-member districts could be broken down, but showed what evidence would do it.

The first case, *Conner v. Johnson*,[28] was almost mysterious. A three-judge court in Mississippi, forced to draw its own plan because the legislature's plan contained unequal districts, accepted the Black plaintiffs' argument against large multi-member districts, but held there was not enough time to draw single-member districts before the elections began. On an emergency appeal by the plaintiffs, the Supreme Court, in ordering the district court to draw single-member districts if feasible, said "we agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large multi-member districts as a general matter."[29] That sen-

20. The only evidence introduced comparing voting patterns of ghetto and non-ghetto residents (a critical factor, according to this article) showed the predominance of party discipline over race: in 1968 three Blacks were elected on the Republican ticket countywide (running as well as white Republians), but finished well behind white Democratic opponents in the ghetto. Whitcomb v. Chavis, *supra*, Appendix 64-68, 103-06.
21. 42 U.S.C. § 1973c. The Act covers any state or locality which in 1964 or 1968 used a literacy test and had less than 50 percent voting registration or turnout. In practice, this includes all or part of seven Southern states and scattered counties in a few other states.
22. A covered state or local government must submit any new voting law or procedure to the United States District Court for the District of Columbia or to the Attorney General of the United States, and must bear burden of proving that the voting change is not racially discriminatory in purpose or effect. If it cannot prove this (*i.e.*, if the Attorney General "objects" to the change) the change may not go into effect.
23. 393 U.S. 544 (1969).
24. 393 U.S. at 569.
25. Letter, Assistant Attorney General Jerris Leonard to Mississippi Attorney General A. F. Summer, May 21, 1969; Letters, Leonard to Louisiana Attorney General Jack Gremillion, June 26 and September 10, 1969. (The last letter is reprinted in LeBlanc v. Rapides Parish Police Jury, 315 F. Supp. 783, at 788-89 (W.D. La. 1969).
26. 400 U.S. 379 (1971).
27. 400 U.S. at 389.
28. 330 F. Supp. 506 (S.D. Miss. May 18, 1971) *remanded*, 402 U.S. 690 (June 3, 1971), *supplemental order entered*, 330 F. Supp. 521 (S.D. Miss. June 16, 1971) *second remand denied*, 403 U.S. 928 (June 21, 1971), *vacated and remanded sub. nom.* Connor v. Williams, 404 U.S. 549 (1972).
29. 402 U.S. at 692. The emergency appeal involved only Hinds County (Jackson), where appellants argued an adequate single-member plan was available. On remand, however, the district court held again that there was insufficient time to draw the districts, and the Supreme Court refused to disturb that decision. *See* citations in fn. 28, *supra*.

tence, coming four days before the decision in *Whitcomb,* played a critical role in keeping the doors open and eventually paved the way for other District Courts to develop theories for dealing with multi-member districts.

Soon after that, in Louisiana, both the Voting Rights Act and the Constitution were applied to prohibit multi-member districts in the State Legislature. The Attorney-General, to whom the reapportionment plan had been submitted under the Voting Rights Act, found that the use of multi-member districts and other, crude examples of gerrymandering rendered the entire reapportionment plan for both houses discriminatory.[30] At the same time, in *Bussie v. Governor of Louisiana,*[31] the district court rejected the state's plans in favor of single-member plans drawn by a special master. The court held that the almost total exclusion of Blacks from the Louisiana Legislature in this century proved that Black votes had been diluted, and found that using multi-member districts and adhering to historic boundaries would continue the dilution. Accordingly, a single-member district plan was ordered as the sole method that would truly protect Black citizens' right to equal participation in the electoral process.

Three months later, in January 1972, in *Sims v. Amos,*[32] a district court in Alabama reached the same conclusion about multi-member districts in that State's legislature. That decision had been foreshadowed two years earlier, when the same District Court held that multi-member districts in the large cities probably discriminated against Blacks; at that time, however, the court withheld relief in the hope that the Legislature would adopt a new apportionment eliminating the multi-member districts.[33] When the Legislature failed to do so after the 1970 Census, the District Court held a hearing at which various parties were invited to present plans. The court adopted the Black plaintiffs' plan which called for single-member districts throughout, relying both on the fact that no other plan achieved population equality, and on the racial discrimination that resulted from the use of multi-member districts. The court distinguished *Whitcomb* in these terms:

> . . .[W]e do note that *Whitcomb* arose in Indiana, a State without the long history of racial discrimination evident in Alabama [citing *Sims v. Baggett*]. Thus we feel justified in pointing out that in Alabama it is reasonable to conclude that multi-member districts tend to discriminate against the black population.[34]

DESPITE the Supreme Court's repeated statements that discrimination must be proved, not presumed, the district courts in Mississippi, Louisiana, and Alabama struck down multi-member districts without any formal evidence in the record showing discrimination. Each of these states, of course, is covered by the Voting Rights Act, and their history of discrimination is so blatant that the courts could have taken judicial notice of whatever facts were needed.

These cases set the stage for the most ambitious effort thus far — in Texas. The difficulties were great; Texas is not covered by the Voting Rights Act; Blacks and Mexican-Americans have probably made greater progress than in other Southern states; and, most of all, the multi-member districts had been upheld six years before in an opinion which was affirmed by the Supreme Court.[35]

In the Texas case, *Graves v. Barnes,*[36] Dallas Blacks and San Antonio Chicanos presented evidence that there was a long and continuing history of discrimination, that elections were heavily influenced by race, that some white candidates openly campaigned on racial themes, and that there had been few minority candidates

30. Letter, Assistant Attorney General David L. Norman to Louisiana Attorney General Jack Gremillion, August 20, 1971.
31. 333 F. Supp. 452 (E.D. La. 1971), *aff'd,* 457 F.2d 796 (5th Cir. 1971). The district court also held certain single-member districts had been gerrymandered to dilute black votes. That part of the holding was reversed by the fifth circuit, but the fifth circuit's reversal was vacated and remanded for further consideration. Taylor v. McKeithen, ... U.S. ..... (1972).
32. 336 F. Supp. 924 (M.D. Ala. 1872).
33. Nixon v. Brewer, 49 F.R.D. 122 (M.D. Ala. 1969).
34. 336 F. Supp. at 936.
35. Kilgarlin v. Hill, 386 U.S. 120 (1967).
36. C.A. No. A-71-CA-142 (W.D. Texas Jan. 28, 1972) (three-judge court) [hereinafter cited as *Graves*].

and fewer successful ones. Most significantly, there was evidence showing that in elections involving clear racial choices, the wishes of minority voters were generally (though not always) opposed and outweighed by the wishes of the overall (white) electorate. This evidence came primarily from detailed statistics showing that the voting patterns of white and minority precincts *as to minority candidates* were opposing mirror images, *i.e.,* that minority candidates generally carried minority precincts overwhelmingly but were beaten handily in white precincts.

The result was an 80-page opinion upholding the claims of discrimination and ordering the immediate implementation of single-member districts in Dallas and San Antonio.

BEFORE TURNING to the specific evidence offered in regard to Dallas and Bexar County (San Antonio), the *Graves* court emphasized a number of facts and issues — not involved in *Whitcomb* — which suggested that multi-member districts might well be inherently discriminatory in Texas. These factors included proof that the expense of campaigning in large districts discriminated against poor candidates and their supporters; the irrationality of the overall plan, by which Houston was divided into single-member districts while other large cities elected their representatives at-large; and the presence of discriminatory devices superimposed on the multi-member system, including a requirement of a runoff if no candidate received a majority, and also including a system by which each of the at-large seats constituted a separate "numbered post" and each candidate qualified to run for one specific numbered post. Finally, the court noted, "unlike the State of Indiana, Texas has a rather colorful history of racial segregation."[37] Since the court had found malapportionment, and therefore ordered a new statewide plan drawn at the next legislative session, it did not find it necessary to declare all the multi-member districts unconstitutional, but simply implied strongly that the new legislative plan must eliminate them.

In Dallas and Bexar County, though, the court found that the Black and Chicano plaintiffs' evidence presented a compelling case of "constitutional trespass . . . so egregious"[38] that immediate relief was required. As to Dallas, the court emphasized the history of racial discrimination, the fact that Blacks were effectively excluded from the Democratic primaries because those primaries were controlled by a predominantly-white slating organization, and the fact that hostility toward the Black community was still an integral part of Dallas politics. As to Bexar County, the court emphasized the discrimination against Chicanos, the high illiteracy and low voter registration rates among Chicanos, and the contrasting voting patterns in elections with Chicano candidates.

The court's conclusions about the two districts were essentially separate formulations of the same principle:

> In essence, we find that the plaintiffs have shown that Negroes in Dallas County are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority. If participation is to be labeled 'effective' then it certainly must be a matter of right, not a function of grace.[39]
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> All these factors confirm the fact that race is still an important issue in Bexar County and that because of it, Mexican-Americans are frozen into permanent political minorities destined for constant defeat at the hands of the controlling political majorities.[40]

The *Graves* court was thus able easily to distinguish *Whitcomb,*[41] and to do so even though the Texas proof did not show total exclusion and did not prove that minority candidates were always rejected by the majority. Indeed, the court viewed the Bexar County Chicanos as a political minority even though the census showed

37. *Graves,* Slip Op. 38.
38. *Graves,* Slip Op. 3.
39. *Graves,* Slip Op. 40-41.
40. *Graves,* Slip Op. 52.
41. *Graves,* Slip Op. 41, n.18.

that Chicanos constituted a numerical majority of the population. Proof of total exclusion was unnecessary since the Supreme Court in *Whitcomb* had demanded only proof that the particular minority have "less opportunity" for success.[42] The Texas court ended by agreeing with the Supreme Court that minorities are not automatically entitled to representation, and that no interest group has a constitutional right to be successful. But, the court concluded, "a State may not design a system that deprives such groups of a reasonable chance to be successful."[43]

Ten days after the district court's opinion came down, Justice Powell refused to stay the creation of the single-member districts in Dallas and Bexar Counties.[44] Justice Powell observed that the district court had found the two multi-member districts unconstitutional under the standard prescribed in *Fortson, Burns* and *Whitcomb,* and said the district court opinions "attest to a conscientious application of principles enunciated by this Court."[45] He further implied that it was unlikely the Supreme Court would even decide to review the case, and, finally, noted that he had been able to consult six other Justices, each of whom agreed that the stay should be denied.

The opinion of Justice Powell was little noticed at the time, but it showed that someone had finally found the key to dismantling a discriminatory multi-member district.

SINCE THE *Graves* case, there have been some additional developments. For example, the Attorney General, pursuant to the Voting Rights Act, objected to multi-member districts in the Georgia and South Carolina Legislatures;[46] the Fifth Circuit reversed the dismissal of a case challenging the at-large composition of the Dallas City Council;[47] and the San Antonio City Council voluntarily decided to shift from at-large elections to single-member districts.

More important, perhaps, are the actual election results in the two places where the dismantling has already occurred: Louisiana and Texas. In Louisiana, where two Blacks have sat in the State House (at separate times) in this century, the 1972 elections put eight Blacks members in the House of Representatives. And in Texas, where the Dallas and Bexar County delegations together had one Black and one chicano last year, the 1972 elections will probably produce four Blacks and four Chicanos.

V. *Predicting the Immediate Future*

NOT ALL THE results have been consistent. One month after *Whitcomb* was decided, a District Court upheld multi-member districts in the Virginia House of Delegates,[48] and, more recently, another district court has rejected an attack on multi-member districts in both houses of the South Carolina Legislature[49]. The South Carolina court took *Whitcomb* to mean that multi-member districts are discriminatory only if they are racially motivated or if racial discrimination is built into the election laws; a history of racial discrimination was held to be irrelevant, as was proof of racially divided voting patterns.

The question is likely to be settled soon. The Supreme Court has already noted probable jurisdiction in the Virginia case,[50] and a notice of appeal has been filed in one of the South Carolina cases. The likely nature of the Supreme Court's decision is shown not only by Justice Powell's opinion in *Graves,* but by a footnote in *Taylor v. McKeithen,*[51]

42. *Graves,* Slip Op. 53.
43. *Graves,* Slip Op. 56.
44. Graves v. Barnes, 405 U.S. 1201 (1972).
45. *405 U.S. at 1204.*
46. Letter, Assistant Attorney General David L. Norman to Georgia Attorney General Arthur K. Bolton, March 3, 1972; Letter, Norman to South Carolina Attorney General Daniel R. McLeod, March 6, 1972.
47. Lipscomb v. Jonsson, ... F.2d ..... (5th Cir. 1972).
48. Howell v. Mahan, 330 F.Supp. 1138 (E.D. Va. 1971), *prob. jur. noted,* ..... U.S. ..... (1972).
49. Twiggs v. West, ... F.Supp. ..... (D.S.C. 1972) (Senate); Stevenson v. West, ... F.Supp. ..... (D.S.C. 1972) (House of Representatives).
50. —— U.S. ..... (1972). The Black plaintiffs' appeal is captioned Thornton v. Prichard, No. 71-553. At the same time that the Supreme Court noted probable jurisdiction of the *Thornton* appeal, it also noted probable jurisdiction of two other appeals from the Virginia decision, both of which involved one man, one vote questions. Mahan v. Howell, No. 71-364; City of Virginia Beach v. Howell, No. 71-363.
51. ..... U.S. ..... (1972). The parts of this case involving multi-member districts are discussed at fns. 30, 31, *supra.*

a Louisiana case involving racial gerrymandering in single-member districts. In sending the case back to the Fifth Circuit for reconsideration, the Supreme Court pointed out that the case was not controlled by *Whitcomb:*

> The important difference, however, is that in *Whitcomb* it was conceded that the State's preference for multi-member districts was not rooted in racial discrimination. 403 U.S. at 149. Here, however, there has been no such concession and, indeed, the District Court found a long 'history' of bias and franchise dilution in the State's traditional drawing of district lines. *Cf. id.* at 152.[52]

It seems likely, then, that multi-member districts will be held unconstitutional whenever they include a substantial number of members of an isolated minority group, especially a racial minority. A minority will be considered isolated when it finds difficulty in forming coalitions, when its members are discriminated against or disfavored by others, or when its candidates or positions cannot easily gain support from other groups.

In cases involving racial minorities, proof of isolation may include the following types of evidence:[53] a pattern of racial divisiveness in the electorate; a fairly recent history of racial discrimination, public or private; instances of racial appeals by candidates; a showing that minority votes have little effect on the election results; the absence or weakness of a white opposition party or faction (which might compete for minority votes); a sharp rise in white turnout when minority candidates run; a relative paucity of minority candidates; or a showing that in elections involving clear racial choices the wishes of minority voters are generally opposed and overborne by the wishes of the overall (white) electorate. In short, the isolation of a racial minority will be shown whenever there is some evidence that racial issues are influential to any significant degree, in determining the lines of political division or in diverting the attention of the electorate from nonracial issues.[54]

VI. *What Does It All Mean?*

If the Supreme Court does make it plain that multi-member districts are generally discriminatory in the South, the law will at last comply with common sense and political reality. it is not clear, though, how long such a holding would be appropriate, as political reality changes. Even now it is not clear what the proper rule should be in portions of the North and West where Blacks do have enough political clout to operate as a minority in a multi-member district. The answer to these questions, and others, requires a lot more political science and empirical research than is available, but the following suggestions may be useful.

As noted at the beginning of this article, the critical question involves the comparison between control over a few officials and less influence over a greater number. The answer to that riddle depends in turn upon the nature of the community or the electorate. Many minorities exercise considerable influence. Voters tend to form politically oriented interest blocs. Because voters' interests are multiple, these blocs tend to shift, fragment, coalesce and overlap, and voters in a minority on one issue may combine with others to form a majority on other issues or at other times. For this reason, members of a mobile minority in a fluid political system cannot be ignored. Each of these ordinary minorities (such as union members, students, veterans, or Blacks in some places) has the potential to form the balance of power; therefore, even its minority influence over a number of officials may amount to substantial

52. ..... U.S. at ..... . In vacating the fifth circuit's opinion, the Supreme Court implied that a state with a history of discrimination may have an affirmative obligation to draw "benign districts" to overcome the effects of past dilution of Black votes.

53. The plaintiffs in Texas developed a "recipe" for presenting evidence of the necessary elements. The recipe included three types of proof: (1) detailed analysis of election returns, showing comparative voting patterns by race; (2) testimony by veteran observers, such as politicians, community leaders, or newsmen, showing how that state's or city's political process works in fact; and (3) testimony by political scientists verifying the political science theories involved, providing a framework for the empirical evidence, and describing the likely effect of various practices on the ability of minority voters to cast meaningful votes.

54. *See* V. O. Key, *Southern Politics* 254 (Vintage ed. 1949).

power. To isolate a minority of this sort into one or a few districts limits its influence to a few officials, and lessens this minority's capability of affecting overall decisions.[55]

None of this analysis applies where a minority is isolated. There, as with Blacks in much of the South, minority influence is essentially *no* influence, and power comes only from control over one or more officials. That type of power, of course, is limited, because it leaves the other officials virtually or totally free of any need to be responsive to Black voters, and therefore free of any need to cooperate with the few Black officials.

On the other hand, there are certain ways in which only someone Black *and* controlled totally by Blacks can adequately represent Blacks — and the same goes for other minorities. For these purposes, no matter how much influence a minority has, the white voters are likely to veto the candidate who is most responsive to his natural constituency.[56]

THE PROBLEM can be put in various ways. The candidate who needs and gets white support can be more "effective," but at doing what? Or is that better than getting nothing done? In a society which is fairly homogeneous, single-member districts controlled by various blocs may promote divisiveness (for better or worse), but in an already divided society, a multi-member district solves no problems except by total submergence of the minority.[57] How do people decide on what side of the line their own situation falls?

A basic part of the problem is that different people have different answers. Thus, in *Wright v. Rockefeller,* the plaintiffs sued to break up the Harlem Congressional district and spread the influence of Black and Puerto Rican voters over four districts. Intervenors came in to preserve the Harlem district intact. And different types of government may call for different answers. Thus, multi-member districts are declining in state legislatures, but they are increasing in city councils, where they are probably more dangerous (especially when the entire council is elected from a single at-large district and the losing faction is *totally* shut out).[58]

FINALLY, IF THE comparative advantages of single- and multi-member districts depends upon the political climate, when does the political climate change enough to call for a change in the districting system? The last question may be the key to the Supreme Court's reluctance to decide these questions in broad constitutional terms: it knows that much of what passes for constitutional argument is really political or philosophical preference, and that today's holdings may not stand up very well next year (which simply leaves the job in the hands of the unresponsive political institutions).

> ". . . it is perfectly possible to have people voting all day long, and the vote to be relatively useless, because of the way the rules of the game are rigged against them."[59]

55. Thus, in Louisiana, blacks argued for single-member districts, but were opposed by the chairman of the state AFL-CIO, who argued in favor of multi-member districts.
56. "There are some Blacks who could come out of the Black community with let's say one hundred per cent, virtually, and there are some that could come out of there with sixty-eight per cent and the rest of the White community might prefer to have that Black come out of there with sixty-eight per cent because he is more acceptable to them." [Deposition of Professor Clifton McCleskey, pp. 317-18, introduced into evidence in Graves.] [Hereinafter cited as McCleskey Deposition.]
57. "Q Wouldn't it be the case that multiple member districts would avoid this polarization?
"A Certainly not. It [polarization] doesn't, of course, *have any origination in electoral mechanics.* It originates in historic positions of blacks and whites. It originates in different socio-economic status. It originates in patterns of socialization which produces prejudice, fear and so on in the groups. That the imposition of multiple member districts would eradicate racial antipathy, prejudice, so on, is nonsense."
Deposition of Professor Everett Ladd, p. 23, introduced into evidence in Stevenson v. West, ... F. Supp. ..... (D.S.C. 1972).
58. For the trend to single-member districts in legislative elections, *see* Dixon, Democratic Representation, 504 (1968); *Comment,* 68 U.Mich.L.Rev. 1577, n. 1 (1970). For the trend to multi-member districts in local elections, *see* Rehfuss, "Are at-large elections best for council-manager cities?" 61 National Civic Review, 236 (1972). In most cities with at-large elections, the entire city council is elected citywide, which is comparable to a state legslature in whih all members must run statewide.
59. McCleskey Deposition, p. 325.