Page v. Bartels: A "Total Effects" Approach to Evaluating Racial Vote Dilution Claims

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INTRODUCTION

In a strange role reversal, a group of New Jersey Republicans filed a federal suit with a coalition of minority voters claiming that the state's redistricting plan diluted minority voting strength.[1] A three-judge panel unanimously rejected the Republicans' claims in *Page v. Bartels*.[2] The decision marked a fundamental shift in the interpretation of Section 2 of the Voting Rights Act ("Section 2"), which guarantees an equal opportunity for political participation.[3] Section 2 calls for a "totality of the circumstances" analysis to determine whether a voting rights violation has occurred.[4] The Supreme Court's seminal Section 2 case, *Thornburg v. Gingles*,[5] however, adopted a bright-line, three-prong test as the threshold measure of racial vote dilution.[6] Lower courts applied the *Gingles* test rigidly without incorporating a "totality of the circumstances" analysis.[7]

Page applied the three-prong test, but, in marked contrast to other vote dilution cases, it focused on the total effect of the redistricting plan rather than on the rigid dictates of the *Gingles*

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1. Page v. Bartels, 144 F.Supp.2d 346 (D.N.J. 2001).

2. *Id.*

3. *See infra* note 23.

4. *See infra* note 27 and accompanying text (stating factors recommended by the Senate Judiciary Committee).

5. 478 U.S. 30 (1986).

6. *Id.* at 49-51. *See infra* note 30 (discussing the difference between Congress' analysis and the Supreme Court's interpretation of Section 2).

7. *See infra* note 38.

test.[8] Soon after *Page*, New Jersey held primary elections under the new redistricting plan.[9] The results overwhelmingly affirmed the *Page* court's prediction that the total effect of the redistricting plan would enhance minority participation and choice rather than diminish it.[10] In the November general elections, minority members retained seats in the legislature, and in two of the newly redrawn districts, all six minority incumbents were reelected.[11] The Republican claims, already deemed incorrect in theory, were completely undermined in fact.[12] More importantly, the election results added substantially to the impact *Page* will have in subsequent Section 2 cases.

Part I of this Comment describes the *Gingles* bright-line, three-prong test used by lower courts as a guide to eliminate legally insignificant Section 2 claims.[13] Part II discusses the *Page* decision and the court's "total effects" approach to applying the *Gingles* bright-line test.[14] Part III analyzes the *Page* court's "total effects" approach and shows that it better evaluates racial vote dilution claims under Section 2 than does the traditional *Gingles* bright-line analysis.[15] The goal of this Comment is to demonstrate that the *Page* "total effects" approach provides an improved analytical framework for racial vote dilution claims under Section 2.

I. BACKGROUND

A. Section 2 of the Voting Rights Act Guarantees Equal Political Opportunity for Minorities in the "Totality of Circumstances."

Congress enacted the Voting Rights Act in 1965 to prohibit states from using racially discriminatory practices, such as poll taxes and literacy tests.[16] Between the enactment of the Voting

8. *See infra* notes 91-105.

9. Sam Hirsch, *Unpacking* Page v. Bartles*: A Fresh Redistricting Paradigm Emerges in New Jersey*, 1 ELECTION L.J. 7, 18 (2002).

10. *Id.* at 18-19.

11. *See* David M. Herszenhorn, *Democrats Win Assembly in New Jersey*, N.Y. TIMES, Nov. 7, 2001, at D1. *See also Results: The Races for New Jersey*, N.Y. TIMES, Nov. 7, 2001, at D7 (listing the winners of each race for New Jersey State offices).

12. *See* Herszenhord, *supra* note 11, at D1.

13. *See infra* notes 16-70 and accompanying text.

14. *See infra* notes 71-109 and accompanying text.

15. *See infra* notes 110-148 and accompanying text.

16. Voting Rights Act of 1965, 42 U.S.C. § 1973 (1965). The Act safeguards the rights provided by the Fourteenth and Fifteenth Amendments. *See id.* The

Rights Act and Congress' amendments to Section 2 in 1982, plaintiffs rarely sought relief under Section 2.[17] In 1980, the Supreme Court made racial vote dilution claims under Section 2 nearly impossible to sustain with its decision in *City of Mobile v. Bolden.*[18] The Court held that to sustain a racial vote dilution claim, plaintiffs must prove that discriminatory intent drove the challenged electoral practice.[19] The *Bolden* plaintiffs – all of Mobile's Black voters–argued that by holding city-wide, "at large" elections rather than breaking the city into districts corresponding to each of the three council seats, the city impermissibly diluted the Black vote in violation of Section 2.[20] The Court held that Section 2 did not grant greater rights than the Fifteenth Amendment and without evidence of discriminatory intent, any racial vote dilution claim under Section 2 must fail.[21]

Bolden's intent requirement severely reduced voting rights

Fourteenth Amendment guarantees that "No State shall . . . deny to any person . . . the equal protection of the laws." U.S. CONST. amend. XIV, § 1. The Fifteenth Amendment guarantees that a citizen's right to vote may not be "denied or abridged . . . on account of race, color, or previous condition of servitude." U.S. CONST. amend. XV, § 1.

17. Virtually all voting rights litigation prior to 1982 was based on a Section 5 racial vote dilution theory. *See Racial and Ethnic Discrimination, Section 5 of the Voting Rights Act: Preclearance Requirements, at* http://www.senate.leg.state.mn.us/departments/scr/redist/red2000/CH3part3.htm (Sept. 14, 2001) (summarizing the function of Section 5). Certain jurisdictions with a history of discrimination are subject to "preclearance" under Section 5 of the Voting Rights Act. *See id.* Jurisdictions subject to "preclearance" must submit any change in a voting qualification, prerequisite, standard, practice, or procedure to the U.S. Attorney General for approval. *See id.* Any change that would reduce the minority voters' right to the electoral franchise violates the Act. *See generally,* SAMUEL ISSACHAROFF, PAMELA S. KARLAN, & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 605-09 (2d ed. 2001) [hereinafter LAW OF DEMOCRACY]. The U.S. Attorney General analyzes whether a jurisdiction has reduced minority voting strength by comparing the existing districting scheme to the new plan. *See id.* The U.S. Attorney General considers a number of factors, including whether the new plan fragments or concentrates minority populations, ignores traditional districting criteria, disregards natural boundaries, or does not heed the jurisdiction's stated standards. 42 U.S.C. § 1973 (1982). A court only strikes a proposed districting plan if its net effect is to minimize minority voters' right to vote when compared to the benchmark plan. *See* Beer v. United States, 425 U.S. 130, 141 (1976). Although plaintiffs in these jurisdictions preferred Section 5 litigation because it provided quicker solutions, Section 5 offered limited help to minority groups. *Id.* at 147-48 (Marshall, J. dissenting). Section 5 could only prevent racial vote dilution among certain jurisdictions and remedies were limited to preserving the status quo (which presented little relief to minority groups whose right to vote was drastically diminished from the beginning). *Id.* at 132.

18. 446 U.S. 55 (1980).

19. *Id.* at 61-62.

20. *Id.* at 58.

21. *Id.* at 61-62.

litigation and several cases were remanded for reconsideration under the new standard.[22] Within two years, Congress responded by amending Section 2.[23] The amendments rendered *Bolden*'s intent requirement obsolete by explicitly eliminating the intent requirement for a racial vote dilution claim.[24] The amended Section 2 substantially expanded the protections afforded minority groups by guaranteeing equal access to all stages of the electoral process.[25]

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22. *See* Armand Derfner, *Vote Dilution and the Voting Rights Act Amendments of 1982, in* MINORITY VOTE DILUTION 161 (Chandler Davidson ed. 1989).

23. As amended, Section 2 states:

> (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 1973b(f)(2) of this title, as provided in subsection (b) of this section.
>
> (b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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 (1982). Besides *Bolden*, another reason why the Voting Rights Act was reviewed and amended was that it was about to expire. *See* LAW OF DEMOCRACY, *supra* note 17, at 747. Prior to the 1982 amendments, courts generally decided districting cases based on constitutional, not statutory grounds. *See, e.g.*, Rogers v. Lodge, 458 U.S. 613 (1982) (deciding on Fourteenth Amendment grounds); United Jewish Org. of Williamsburg, Inc. v. Carey, 430 U.S. 144 (1977) (deciding on Fourteenth and Fifteenth Amendments, and Section 5 grounds); Kirksey v. Board of Supervisors of Hinds County, Miss, 554 F.2d 139 (5th Cir. 1977)(deciding on Fourteenth Amendment grounds). Section 2 provided stronger statutory grounds for deciding vote dilution cases. LAW OF DEMOCRACY, *supra* note 17, at 746-47.

24. 42 U.S.C. § 1973. The House characterized discrimination under Section 2 as the extent to which "minority groups are denied 'access' to the political process 'through vote dilution and other discriminatory devices and practices.'" Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1366 (1983) (quoting letter from Peter W. Rodino, Jr. to Don Edwards (July 14, 1981)).

25. Boyd & Markman, *supra* note 24, at 1390 (quoting *Hearings on the Voting Rights Act Before the Senate Subcommittee on the Constitution of the Committee on the Judiciary*, 97th Cong., 2nd Sess. 200-01 [hereinafter *Senate Hearing*] (statement of Senator Charles W. Mahias)). Throughout the hearings, debate often centered on what threshold question judges should ask when evaluating evidence in a section 2 claim. *Id.* at 1390-1410. Benjamin Hooks, the Executive Director of the NAACP, testified that he felt efforts to ascertain the parameters of the test had been reduced to "wholly uninstructive statements of the sort that 'you know discrimination when you see it'" or so precise as to require a mathematical

The Senate Report accompanying the Section 2 amendments listed seven factors to consider in determining whether a plaintiff had established a prima facie case for racial vote dilution.[26] The factors were: (1) the extent of any history of racial discrimination; (2) the extent of racial vote polarization; (3) the extent to which the state or subdivision had used voting practices or procedures that would increase the opportunity for discrimination; (4) whether minority group members had been denied access to a candidate slating process; (5) the extent to which minority group members suffered the effects of discrimination in other areas such as education, which hindered their ability to participate effectively in the political process; (6) whether political campaigns had been marked by racial appeals; and (7) the extent to which minority candidates had been elected to office.[27] The Senate report anticipated that analysis of these factors would clearly show whether an electoral system or practice denied minority groups equal access to the political process.[28] The Senate's test was designed to all courts to assess a vote dilution claim on the basis of demonstrable effects rather than the defendant's motivation.[29]

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definiteness creating "proportional representation"). *Id.* at 1400 (quoting *Senate Hearing* at 253). Utah Senator, Orin Hatch shared Hooks' concern that the amendments would extend to redefine the concept of discrimination as "'proportional representation'"—where "'if 55% of Baltimore is [B]lack, that 55% ought to be represented as sole [B]lack districts or at least majority [B]lack districts.'" *Id.* at 1390 (quoting *Senate Hearing* at 200 (statement of Senator Orin Hatch)). Proponents of the bill advocated a totality of circumstances approach. *Id.* at 1390 (statement of Senator Mathias). Senator Robert Dole proposed a compromise: The new language in Section 2 would retain the "results" language of the House bill, but would include a new subsection that would limit its parameters. *Id.* at 1415. These parameters were adopted from pre-*Bolden* cases, *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973), both of which used a totality of the circumstances approach. *See* S. REP. NO. 97-417, at 28-30 (1982). The Dole compromise apparently resolved the dispute, as it became part of the enacted version. 42 U.S.C. § 1973. The new subsection provided that the issue to be decided under the results test is whether political processes are equally open to minority and non-minority voters, and also states that the section does not establish a right to proportional representation. *Id.*

26. S. REP. NO. 97-417, at 28-29 (1982).

27. *Id.*

28. *See id.*

29. *See id.*, at 28.

> As the Supreme Court has repeatedly noted, discriminatory election systems or practices which operate, *designedly or otherwise*, to minimize or cancel out the voting strength and political effectiveness of minority groups, are an impermissible denial of the right to have one's vote fully count, just as much as outright denial of access to the ballot box (emphasis added).

Id.

B. The Supreme Court's Failure to Clarify the Gingles' "Bright Line" Test Has Triggered Inconsistent Application of the Law.

Two years after enactment of the amendments, the Supreme Court reduced the Senate's seven factors to a bright-line, three-prong test in *Thornburg v. Gingles*.[30] The test required that a minority group prove: (1) "it is sufficiently large and geographically compact to constitute a majority in a single-member district;"[31] (2) "it is politically cohesive;"[32] and (3) in the absence of special circumstances, bloc voting by the White majority usually defeats its preferred candidate."[33] In *Gingles*, Black citizens of North Carolina challenged a redistricting plan under Section 2.[34] The *Gingles* plaintiffs argued that the legislature had diluted their votes by drawing multi-member, rather than single-member, districts in which plaintiffs were "submerg[ed] . . . in a white majority."[35] Although the Court recognized that the Senate Report factors were relevant to evaluate a claim of racial vote dilution,[36] the Court reduced the Senate factors to three essential elements.[37] Under this framework, if a court determines that a

30. 478 U.S. 30, 45 (1986) (explaining that the Senate did not specify that any number of factors be proved or that a majority of them point one way or the other, and that the factors in the Senate report were not comprehensive or exclusive).

31. *Id.* at 50. In *Voinovich v. Quilter*, 507 U.S. 146 (1993), plaintiffs attempted to get around *Gingles'* first prong by relying on footnote 12 of Justice Brennan's opinion, which expressly reserved the question, stating: "whether § 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." *Id.* at 157 (quoting *Gingles*, 478 U.S. 30 at 46, n.12). The *Voinovich* Court left unanswered the question whether such "influence-dilution" claims are viable under Section 2. *Id.* at 154. The *Voinovich* plaintiffs claimed that the redistricting plan deprived Black voters of equal political access by creating a small number of districts with a disproportionately large Black voter population. *Id.* at 149-150. The plan allegedly minimized the number of districts in which Black voters could have been placed. *Id.* The Court assumed for the purpose of resolving the case that plaintiffs had stated a cognizable Section 2 claim, even though Black voters did not constitute a majority in a single-member district. *Id.* at 154. Black voters would have been an influential minority capable of electing their preferred candidates with the help of White voters. *Id.* The Court ultimately rejected the plaintiffs' claim because it failed the *Gingles'* third prong (the requirement of sufficient white majority bloc voting to frustrate the election of the minority group's candidate of choice). *Id.* at 158.

32. *Gingles*, 478 U.S. 30 at 51.

33. *Id.* at 50-51.

34. *Id.* at 35.

35. *Id.* at 46.

36. *Id.* at 48.

37. *Id.* at 49.

plaintiff satisfies the threshold three-prong test, the court may then evaluate the other Senate factors and other relevant evidence under the totality of the circumstances.[38]

Lower courts have interpreted the first prong of *Gingles* to require inquiry into more than simple population numbers. They have generally held that plaintiffs may satisfy *Gingles'* first prong – size and geographical density of the minority group – by showing that the minority group constitutes more than half of the *voting age* population, and not, as a literal reading might suggest, more than half of the *overall* population.[39]

The second *Gingles* prong requires that the minority group show political cohesion – that a significant number of its members usually vote for the same candidate.[40] In *Growe v. Emison,*[41] the Supreme Court considered, but did not decide, the issue of whether lower courts may find such cohesion in minority jurisdictions with significant ethnic and language diversity.[42] In

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38. *See id.* at 48. With its three factors, the *Gingles* Court intended to create a threshold test, not a dispositive one. *See id.* at 50 (describing the three circumstances as "necessary preconditions"). However, lower courts have used the *Gingles* test exclusively without fully evaluating the other factors. *See, e.g.,* Solomon v. Liberty County, 899 F.2d 1012, 1017 (11th Cir. 1990) (finding proof of *Gingles'* three factors "both necessary ... and sufficient"). The *Solomon* Court suggested that the Senate's "totality of the circumstances" analysis was valuable for the light that it can shed on *Gingles'* factors. *Id.* at 1017.

39. *See, e.g.,* Romero v. City of Pomona, 883 F.2d 1418, 1426 (9th Cir. 1989) (holding that the appropriate measure for the first *Gingles* prong was the *eligible* minority voter population rather than the *total* minority population). *See also* Overton v. City of Austin, 871 F.2d 529, 539 (5th Cir. 1989) (noting that expert's analysis of the correlation between race and voter preference was of limited value because expert disregarded age levels and voter registration within minority population); McNeil v. Springfield Park Dist., 851 F.2d 937, 944-45 (7th Cir. 1988) (concluding that "substantial evidence and common sense" dictate that *Gingles'* first prong requires a majority in the voting age population). *But see* Garza v. County of Los Angeles, 918 F.2d 763, 774-75 (9th Cir. 1990) (analyzing district based on total population rather than voting population as minority group had disproportionately greater numbers of non-voters); Jennifer C. Day, *Projection of the Voting-Age Population for States: November 1998,* CURRENT POPULATION REPORTS, U.S. Department of Commerce, Economics and Statistics Administration, 1 (April 1998) (noting that the "voting age population includes all U.S. residents 18 years and over" including those ineligible to vote "such as noncitizens, convicted felons, and prison inmates").

40. *See* MULTIETHNIC COALITION BUILDING IN LOS ANGELES: A TWO-DAY SYMPOSIUM, NOVEMBER 19-20 1993 (Eui-Young Yu & Edward T. Chang, eds., 1995); Bryan O. Jackson, Elisabeth R. Gerber, & Bruce E. Cain, *Coalition Prospects in a Multi-Racial Society: African-American Attitudes Toward Other Minority Groups,* 47 POLITICAL RESEARCH QUARTERLY, 277-94 (1994).

41. 507 U.S. 25 (1993).

42. *See id.* The *Emison* Court "assum[ed] [without deciding] that it was permissible for the District Court to combine distinct ethnic and language minority groups for purposes of assessing compliance with § 2." (emphasis added). *Id.* at 41.

Nixon v. Kent County[43], the Sixth Circuit held that a coalition of Blacks and Hispanics did not constitute a "minority group" under the *Gingles* test even though the coalition was politically cohesive.[44] The *Nixon* court predicted that if multi-ethnic coalitions were deemed "minority groups" for Section 2 purposes, legislators with invidious motives would be free to "pack" districts with two ethnic groups, thereby submerging the distinct interests of both groups.[45] The Court also concluded that extending Section 2 protection to groups conjoined for political reasons would "wrench the Act from its ideological and constitutional foundations."[46]

Although only the Fifth Circuit has expressly held "coalition suits" permissible,[47] all of the other circuits have assumed their validity.[48] These coalition suits arise out of a contemporary political climate that fosters interracial alliances.[49] Judicial recognition of multi-ethnic voting blocs is sensible for three reasons. First, Blacks and Hispanics prefer the same candidate in a growing number of jurisdictions.[50] Second, Whites are increasingly voting along party lines rather than racial lines to elect minority candidates.[51] Third, a growing number of people in the United States think of themselves as belonging to many different racial categories.[52]

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43. 76 F.3d 1381 (6th Cir. 1996).

44. *Id.*

45. *Id.* at 1391.

46. *Id.* at 1391-92.

47. *See* Campos v. City of Baytown, 840 F.2d 1240 (5th Cir. 1988) (permitting a group of Black and Hispanic voters to claim a Section 2 violation).

48. *See, e.g.*, Badillo v. City of Stockton, Cal., 956 F.2d 884 (9th Cir. 1992) (recognizing that coalition claims are permissible as long as the *Gingles* test is satisfied); Concerned Citizens v. Hardee County Bd., 906 F.2d 524 (11th Cir. 1990) (noting that two minority groups may be a single Section 2 minority); Knox v. Milwaukee County Bd. of Election Comm'rs, 607 F.Supp. 1112 (E.D.Wis. 1985) (allowing a group of Black and Hispanic citizens to bring a Section 2 claim).

49. *See* RAPHAEL F. SONENSHEIN, POLITICS IN BLACK AND WHITE: RACE AND POWER IN LOS ANGELES, xv (Princeton Univ. Press 1993).

50. *Id.*

51. *See* RICHARD A. KEISER, SUBORDINATION OR EMPOWERMENT? AFRICAN-AMERICAN LEADERSHIP AND THE STRUGGLE FOR URBAN POLITICAL POWER 90-158 (Oxford University Press 1997) (discussing the formation and success of biracial political coalitions in Philadelphia and Atlanta). *See also infra* note 99 and accompanying text (noting that the most salient factor in determining the outcome of the election is not the race of the candidate, but the party affiliation).

52. *See* Tamar Jacoby, *An End to Counting By Race?* 111 COMMENTARY 6, 37-40 (June 2001). In response to the change in the racial makeup of the United States, the Office of Management and Budget revised the categories for racial identification in the 2000 census. *See Racial and Ethnic Classifications Used in Census 2000 and Beyond*, at

If Section 2 plaintiffs sufficiently establish political cohesion, the third prong of the *Gingles* test then requires a showing that Whites and Blacks[53] generally support different candidates and that losses by Blacks at the polls are somehow connected to candidate or voter race.[54] Although six Justices agreed on this articulation of the prong, the Justices were divided over the reasoning behind, and the articulation of, the plan.[55]

Justice Brennan argued that the only relevant inquiry with respect to the third prong is whether the electoral choices made by Black and White voters are different – not the reasons for that difference.[56] For Brennan, the plaintiffs need not show that the race of the voter or candidate was the primary cause of voter behavior,[57] rather, a mere correlation between the race of the

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http://www.census.gov/population/www/socdemo/race/racefactcb.html (Apr. 12, 2000). In the past, census respondents could only select one box to indicate their racial identity. *See* Jacoby, *supra* at 38. In the 2000 census, respondents could select more than one race to indicate their racial identity, or they could write in their race. *See id.* Census results showed that many Americans from every region, age group, and color were of mixed heritage. *See id.* Forty-eight percent of those who identified themselves as Hispanic also checked "White," and 42 percent marked "Other." *See id.* Five percent of Blacks, six percent of Hispanics, 14 percent of Asian Americans, and 40 percent of American Indians checked more than one box. *See id.* In New York City, as many as one in four people identified themselves as multiracial individuals. *See id.*

53. The *Gingles* Court used the term "minority group." Thornburg v. Gingles, 478 U.S. 30, 51 (1986). This article uses the term "Black" when discussing *Gingles* for the sake of simplicity.

54. *Id.* at .50-51.

55. *See id.* at 82. Justice O'Connor represented four other justices in her concurrence: Justices Powell, Burger, and Rehnquist. *Id.* at 83-105. Justice White concurred in a separate opinion. *Id.* at 82-83.

56. *Id.* at 63 (noting that the central inquiry under Section 2, whether there is less opportunity to participate in the electoral process, only demands that Blacks and Whites vote differently, not why they vote differently). According to Brennan, plaintiffs only need to demonstrate a correlation between the race of the voter and the level of voter support for certain candidates. *Id.* at 61-62 (discussing that only a bivariate regression analysis is necessary to show polarized voting). Bivariate regression analysis would show the statistical significance of two factors: race and candidate selection. *Id.* at 61. Brennan was concerned that courts would inquire into whether Blacks and Whites vote differently because of socioeconomic characteristics. *Id.* at 64-67. This would defeat any claim of racial polarization where socioeconomic characteristics could describe the Black and White voting blocs. *Id.* at 65. Brennan thought plaintiffs should be able to establish a racial vote dilution claim even if race and socioeconomic characteristics were closely correlated. *See id.* at 64-67. Brennan noted that the logic and legislative history behind the Voting Rights Act does not demand otherwise. *Id.* at 64-65.

57. *Id.* at 61-62 (rejecting appellants' argument that only multiple regression analysis would be adequate evidence of polarized voting). Multiple regression analysis takes into account other variables which might also explain voters' choices, including party affiliation, age, religion, income, incumbency, education, campaign expenditures. *Id.* at 61 (citation omitted).

voter and level of voter support for certain candidates is sufficient.[58]

Five Justices disagreed with Brennan's reasoning in *Gingles*.[59] They argued that the threshold inquiry should evaluate whether causes other than race, such as partisan affiliation, explain divergent voting patterns between Blacks and Whites.[60] In her concurrence, Justice O'Connor argued that Brennan's approach essentially created a right to roughly proportional representation – a result directly conflicting with the Senate compromise.[61] Her approach advocated consideration of all factors bearing on whether the minority group has less opportunity to participate in the electoral process than other members of the electorate.[62]

Despite disagreement over how to measure polarized voting, the Justices agreed that polarized voting is the evidentiary centerpiece of a vote dilution claim.[63] Polarized voting, where Blacks vote for a certain candidate and Whites vote differently, exaggerates White political power and minimizes Black voting strength.[64] The *Gingles* Court incorporated this inquiry into each

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58. *Id.* at 62.

59. *See supra* note 55.

60. *See Gingles*, 478 U.S. at 83-104.

61. *Id.* at 84 (O'Connor, J., concurring) (noting that Congress wanted to allow vote dilution claims, but not create a proportional representation right for minority voters).

62. *See id.* at 99 (O'Connor, J., concurring). Some lower courts have adopted the O'Connor's approach. The Fifth Circuit, for example, required plaintiffs to show results of a multivariate regression analysis that determined the causes of racially divergent voting patterns. *See* League of United Latin Am. Citizens, Council No. 4434 v. Clements, 999 F.2d 831, 850-53 (5th Cir. 1993). Since the record showed that partisan affiliation, not race, best explained the different voting patterns among minority and White citizens in the contested counties, the court rejected the plaintiffs' Section 2 claim. *Id.* at 893-94. The court considered the totality of the circumstances, including the representatives' responsiveness to minorities' concerns, and ultimately held that Section 2 would not provide grounds for relief for mere political defeat at the polls. *Id.*

63. *See Gingles*, 478 U.S. at 55 (stating that courts and commentators agree that polarized voting is a key element of a vote dilution claim). *See also* Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1852-53 (1992) (summarizing that polarized voting was the evidentiary centerpiece of a Section 2 claim according to the *Gingles* Court). Lower courts have focused on evidence of polarized voting. *See generally* McMillan v. Escambia County, 748 F.2d 1037, 1043 (5th Cir. 1984); United States v. Marengo County Comm'n, 731 F.2d 1546, 1566 (11th Cir. 1984); Nevett v. Sides, 571 F.2d 209, 223 (5th Cir. 1978); Johnson v. Halifax County, 594 F.Supp. 161, 170 (E.D.N.C. 1984).

64. *Gingles*, 478 U.S. at 49-50 (1986). *See also* Issacharoff, *supra* note 63, at 1858-59 (explaining the necessary emergence of a group-based inquiry).

prong of its test.[65] The emphasis on polarized voting shifted the focus of voting rights litigation from ensuring that minorities were able to elect as many minority candidates as possible (proportionate to the minority population) to ensuring that polarized voting would not minimize minority voting strength.[66]

Despite the Court's emphasis on evidence of polarized voting, lower courts and the Justice Department required that jurisdictions create (or retain) as many majority-minority districts as possible.[67] The Department of Justice has authority to "preclear" the redistricting plans of jurisdictions that have a history of racial discrimination.[68] Section 5 of the Act requires that those jurisdictions gain the Justice Department's approval before implementing their redistricting plans.[69] Thus, under the authority of Section 5, the Justice Department adopted a policy that required states to maximize majority-minority districts even when the minority population was geographically dispersed.[70]

II. *PAGE V. BARTELS*: A NEW, FLEXIBLE, "TOTAL EFFECTS" APPROACH

The battle over how best to implement the amended Section 2 set the stage for a legal battle between Republicans and Democrats over New Jersey's redistricting plan.[71] When the

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65. *Gingles*, 478 U.S. at 56.

66. *Id.* *See also supra* notes 63-65 (noting that this approach ensured equal opportunities, not equal outcomes).

67. *See* United Jewish Org. of Williamsburgh v. Carey, 430 U.S. 144, 164 (1977) (holding that it was reasonable for the Attorney General to conclude that a minority population around 65% would be required to achieve enough minority voters to constitute a majority in one district); *Racial and Ethnic Discrimination, at* http:///www.senate.leg.state.mn.us/departments/scr/redist/red2000/Ch3part1.htm (last visited Oct. 26, 2002).

68. *See supra* note 17 and accompanying text.

69. *See supra* note 17 and accompanying text.

70. *See Racial and Ethnic Discrimination, at* http:///www.senate.leg.state.mn.us/departments/scr/redist/red2000/Ch3part1.htm (last visited Oct. 26, 2002). As a result, when some plans were redrawn to meet Justice Department requirements, some of the districts became so oddly-shaped that it caused them to be labeled "racial gerrymanders." *See id.* The racial gerrymanders were attacked in federal court for denying White voters their right to equal protection of the laws under the Fourteenth Amendment. *See generally* Lawyer v. Dep't of Justice, 521 U.S. 567 (1997); Shaw v. Hunt (Shaw II) 517 U.S. 899 (1996); Bush v. Vera, 517 U.S. 952 (1996); Miller v. Johnson, 515 U.S. 900 (1995); United States v. Hays, 515 U.S. 737 (1995); Shaw v. Reno (Shaw I), 509 U.S. 630 (1993).

71. *See* Page v. Bartels, 144 F.Supp.2d 346, 348-49 (D.N.J. 2001). An Apportionment Commission convened in early 2001 to apportion New Jersey's

bipartisan New Jersey Apportionment Commission deadlocked on a plan to reapportion the State's political districts, and could not reach consensus by the constitutionally mandated deadline, the Chief Justice of the New Jersey Supreme Court selected Larry Bartels, a professor of politics and public affairs at Princeton University, to break the tie.[72] Professor Bartels endorsed a plan, similar to the one submitted by the Democrats, that reconfigured the boundaries of Districts 27, 28, 29, and 34 in northern New Jersey.[73] Under the old districting system, Districts 27, 28, and 29 each elected Black representatives.[74] The Bartels plan proposed a decrease in the percentage of Black voters in District 27 from 53 percent to 28 percent, in District 28 from 57 percent to 48 percent, and in District 29 from 48 percent to 39 percent, while increasing the percentage of Black voters in District 34 from 4 percent to 35 percent.[75] The Commission eventually adopted the Bartels plan along party-lines.[76]

The plaintiffs – the Republican members of the New Jersey Senate and General Assembly, Black residents of Essex County, and Hispanic residents of Essex County and Hudson County – immediately filed suit.[77] They claimed that the Bartels plan violated Section 2 of the Voting Rights Act because it distributed Black voters who previously represented a majority of voters in three districts into four districts where they would end up in the minority.[78] The plaintiffs relied almost exclusively on the statistical fact that Blacks would no longer constitute a majority of voters in any of the districts to support their claim that the plan would reduce or eliminate the opportunity of Blacks to elect

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Senate and Assembly districts. *Id.* The chairs of the State committees of the Democratic and Republican parties each appointed five people to the ten-member Apportionment Commission. *Id.* The Commission met several times. *Id.* at 349.

72. *See Page*, 144 F.Supp. 2d. at 348-49 Professor Bartels is also a founding director of the Center for the Study of Democratic Politics at the Woodrow Wilson School of Public and International Affairs, a past president of the Methods Section of the American Political Science Association, and a former chair of the Board of Overseers of the National Election Studies. Page v. Bartels, 248 F.3d 175, 182-83 (3rd Cir. 2001). "Professor Bartels ha[d] studied and written extensively on electoral politics and statistical models." *Id.* at 183.

73. *Page*, 144 F.Supp. 2d at 349, 352.

74. *Id.* at 354.

75. *Id.* at 353.

76. *See id.* at 349. Of the Republican-appointed members, four were not present at the meeting where the plan was approved, and the one Republican-appointed member present voted against the Bartels plan. *Id.* at 349 n.2. Therefore, the Commission certified this plan by a vote of six to one. *Id.* at 349.

77. *Id. at* 349 n.3.

78. *Id.* at 353. Districts 27 and 34 are part of Essex County. *See id.* at 355.

legislators of their choice.[79] They argued that the districts were racially polarized and that therefore, Blacks would not be able to elect the candidate of their choice under the Bartels plan.[80] The plaintiffs' expert witness projected that White candidates would prevail over Black candidates in the newly-drawn districts due to a "chilling effect" on Black voters' participation in the political process when they comprise less than 50 percent of the voters in a given district.[81]

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79. *Id.* at 358. The court, however, proved to be interested not only in straight statistics but also in the testimony of Black and Latino state legislators. *See* Hirsch, *supra* note 9, at 14. In the hope of obtaining some favorable testimony, the Republicans called one minority legislator, Black Senator Ronald L. Rice. *Id.* at 14-15. Although Senator Rice lost the Democratic nomination for District 28, he nonetheless testified that his new district would elect a Black Democrat in the November general election and further admitted that the Bartels plan would provide "fair representation for all New Jerseyans," including Blacks. *Id.*

80. *Page*, 144 F.Supp. 2d at 353.

81. *Id.* at 358. The plaintiff's expert witness, sociologist Dr. James Loewen, analyzed precinct-level demographic and electoral data from four elections, a 1995 Democratic primary for General Assembly from District 28, and three countywide races; the 1994 Democratic primary for the Essex County Executive and the 1994 and 1998 general elections for the same office. *Id.* at 359. He examined how Black, White, and Latino populations voted in those elections and specifically looked at how Whites and Blacks voted in districts where each racial group had a majority. *Id.* at 359 n.11. He then "conducted a correlation analysis to determine whether there was a relationship between racial composition of a precinct and the election outcome." *Id.* at 359 n.11. He also performed an "ecological regression analysis" to look at the percentage of the voting age population by race in each precinct to determine which candidate each race voted for. *Id.* at 359 n.11. "Ecological regression analysis" is a standard technique for inferring individual-level behavior from aggregate (ecological) data. Thornburg v. Gingles, 478 U.S. 30, 52-53 n.20. (1986). Dr. Loewen found significant racial polarization in the 1994 and 1998 general elections for Essex County Executive, both of which resulted in a white Republican narrowly defeating a Black Democrat. *Page*, 144 F.Supp. 2d at 353, 359. Based on Dr. Loewen's analysis, the plaintiffs asserted that such prevalent racial bloc voting would prevent Blacks from relying on cross-over votes from other racial groups to ensure victory of their preferred candidates. *Id.* at 353. The Republican plaintiffs also contended that the interests of Hispanics and Blacks were so different that they could not be considered members of the same voting bloc. *Id.* When Dr. Loewen was asked whether the Bartels plan gave a fair opportunity to Black and Latino voters to elect candidates of their choice for the New Jersey Legislature, he testified that due to a "chilling effect" on racial minorities' participation in the political process when they comprise less than 50% of the voters in a given district, "the minority community's impression that it does not have a reasonable opportunity to elect a candidate of its choice leads to less political mobilization, fewer candidates, less money donated to campaigns, less voter registration, and lower voter turn-out." *Id.* at 358. Dr. Loewen projected that in the new District 27, a White candidate would receive 55% to 65% of the votes and a Black candidate would receive 40% to 45% of the voters. *Id.* at 359. In new District 34, Dr. Loewen projected that a White candidate would receive 52% to 62% of the votes. *Id.* He concluded minority voters may be able to elect the white candidate of their choice but "do not have the reasonable opportunity to elect the candidate of their choice, the candidate who might be more identified with their community." *Id.* at 359 n.12. Moreover, minority voters would not have a

The defendants – the five Democratic members of the Apportionment Commission, Professor Larry Bartels, the New Jersey Secretary of State, and the New Jersey Attorney General – argued that the districts were not racially polarized and that the Bartels plan would increase, not decrease, minority voters' opportunity to elect a candidate of their choice.[82] First, Professor Bartels testified that he followed nine criteria in drafting the apportionment plan, most of which were in accordance with traditional districting principles.[83] Second, minority legislators testified that members of other minority groups helped them win elections even when they did not run in a district where their own race constituted a majority of voters.[84] Finally, the defendants'

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reasonable opportunity to elect the candidate of their choice. *Id.*

82. *Page*, 144 F.Supp. 2d at 358.

83. *Id.* These included:

> (1) minimizing population deviation between the districts; ... (2) ensuring fair representation of minority voters as required by the Voting Rights Act and the federal Constitution; (3) keeping each of the forty existing districts contiguous; (4) keeping each of the existing districts reasonably compact; (5) respecting municipal boundaries by not splitting towns smaller than Newark and Jersey City among different districts; (6) respecting voting district boundaries; (7) avoiding any bias in favor of one or the other political parties; (8) ensuring that some seats remained competitive; and (9) minimizing voter disruption.

Id. These which entailed minimizing the situations where voters would have to vote for different incumbents). *Id.* The Bartels plan's adherence to districting principles probably precluded the plaintiffs from bringing a partisan dilution claim. Partisan vote dilution, when a redistricting scheme reduces a political interest group's electoral influence, is a difficult claim to make. *See* Davis v. Bandemer, 478 U.S. 109, 123 (1986) (stating that although partisan vote dilution claims are justiciable, the burden of proof for such a claim is virtually insurmountable). *See also* Karcher v. Daggett, 462 U.S. 725, 730 (1983) (stating that a redistricting plan is unconstitutional only if a state diverges from roughly equal numbers of people in each district and is unable to justify those deviations); *cf.* Kirkpatrick v. Preisler, 394 U.S. 526, 538 (1969) (Fortas, J. concurring) (holding that redistricting plans that have deliberately distorted district boundaries for partisan purposes are unconstitutional). Pressure from an unusually high standard for partisan vote dilution claims often forces political interest groups, which have a vested interest in the redistricting process, to characterize any legal challenges to redistricting plans as racial vote dilution claims. *See* Boyd & Markman, *supra* note 24, at 1367-68.

84. *Page*, 144 F.Supp. 2d at 356. The minority legislators all testified that they prevailed in state legislative elections because of significant cross-over voting from other racial groups. *Id.* For example, United States Congressman Robert Menendez, a Cuban American, stated that he received wide support from both Black and White voters. *Id.* He testified that when he first ran for Congress in 1992, he prevailed with 68% of the vote against a White opponent in a Congressional District that contained only a 25% Latino voting population and an 8% Black voting population. *Id.* at 356. Furthermore, Assemblywoman Nia Gill, a Black member of the Assembly from former District 27, testified that she had always received support from Latino and White voters. *Id.* Gill stated that she would run for Senate in new District 34, where she would be seated under the Bartels plan. *Id.* She was confident that a Black candidate could be elected to an

expert witness projected that the minority-preferred candidates would likely win under the Bartels plan because the political affiliation of a candidate, not the race, determined which candidate would win in the newly-drawn districts.[85]

On April 12, 2001, a district judge denied the plaintiffs' application for a preliminary injunction that would have halted the implementation of the Bartels plan.[86] The Third Circuit held an expedited hearing on April 23rd, and ruled that the plaintiffs'

Assembly position in new District 27 and that she, or another Black candidate, would be elected to the Senate in new District 34 where there was to be only a 35% Black voting population. *Id.* Gill explained that the districts in Essex County have a Democratic majority, and therefore, "the real contest would be in the Democratic primary." *Id.* According to Gill, the winner of the Democratic primary is likely to be elected in the general election. *Id.* As of the date of the trial, only Black women had filed to run in the Democratic primary for State Senator in new District 34. Gill testified that even if another non-minority candidate were to run in the primary, she would still be confident a Black candidate would be elected. *Id.* Other minority legislators also testified that they were elected in districts where as few as 30% of the voters were from their own racial group. *Id.* Assemblyman Wilfredo Caraballo, a Latino, stated that he won the Assembly seat in District 28 with the substantial support of Black and White voters. *Id.* at 357. District 28 only contained a 16% Latino voting population in 1995 when he first ran for the General Assembly. *Id.* It could be inferred from Caraballo's statement that reducing the number of Blacks in District 27 and increasing their numbers in District 34 would not diminish their opportunities to elect the candidate of their choice, but rather, the Bartels plan would augment their opportunities. *Id.*

85. *Id.* at 361. The defendants' expert witness, Dr. Allan Lichtman, examined the results of every general election and some primary elections for the state Senate and General Assembly held between 1991 and 1999 in the eleven districts from which minority legislators have been elected and also in one predominantly White district. *Id.* at 360. He also looked at six countywide elections held from 1994 through 1999 in Essex County where there was competition between Black and White candidates. *Id.* In total, Dr. Lichtman analyzed "over 150 separate elections," including more than 150 state-legislative contests in each of the twelve legislative districts that contained most of the state's minority residents and all of its Black and Latino state legislators. *Id.* First, he noted that eight of the fifteen Blacks currently serving in the state legislature were elected from districts that contained less than 30% Black voting age population. *Id.* at 365. Second, he found that more than half of the White voters in Districts 27, 28, and 29 tended to vote Democratic, even in elections where a Black Democrat was pitted against a White Republican. *Id.* Third, Dr. Lichtman projected that the outcome of biracial elections in new Districts 27 and 34 would be the election of the candidate preferred by Black voters. *Id.* More specifically, Lichtman testified that in every contest, the Democratic candidate, on average, won at least 83% of the minority vote, regardless of the candidate's race. *Id.* at 360-61. The same Democratic candidates, on average, won approximately half of the White vote. *Id.* at 365. Even in the most racially polarized legislative contests where a Black (or Latino) Democrat ran against a White Republican, the White vote never fell below 39% for the Democratic candidate. *Id.* at 361. Therefore, even if the race of the district were changed under the Bartels plan, minority candidates would still prevail among all demographic groups. *Id.*

86. *Id.* at 350. The judge refused their request to prevent the defendants from implementing the Bartels plan because the plaintiffs had "no likelihood" of ultimately prevailing on the merits. *Id.*

constitutional claims were not frivolous. The Third Circuit vacated the district judge's order on jurisdictional grounds, and remanded the case to a three-judge district court for a full evidentiary trial.[87] On May 2nd, three federal judges who resided in Essex County unanimously rejected the plaintiffs' constitutional claims on all counts.[88] Although the plaintiffs threatened to appeal the case directly to the U.S. Supreme Court, they did not seek an injunction pending that appeal.[89] Without the injunction, New Jersey held primary elections under the Bartels plan.[90]

The three-judge panel adopted the *Gingles* threshold test, but emphasized the third prong to assess whether the plaintiffs had a valid Section 2 claim.[91] First, the court rejected the notion that districts with of a majority of minorities must retain (or create) that majority.[92] The court relied on the Supreme Court's declaration that "Section 2 contains no *per se* prohibitions against particular types of districts . . . [o]nly if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate Section 2."[93]

The court then focused on the third prong of the *Gingles* test "out of turn" because, as the court noted, the bulk of the evidence and testimony addressed this element.[94] Ultimately, the court found that the total effect of the Bartels plan would be to enhance the opportunity for minority political participation.[95]

Based in part on testimonial evidence that Hispanics often vote for the same candidates as Blacks, the court determined that "minority voting age population" (MVAP), was the relevant demographic figure.[96] The court took note of the small sample size used by the plaintiffs' expert and refused to give a great deal of weight to his conclusions.[97] The two general election contests that

87. *Id.* at 351.

88. Hirsch, *supra* note 9, at 17.

89. *Id.* at 18.

90. *Id.*

91. *Page*, 144 F.Supp. 2d at 364.

92. *See id.* at 364-65.

93. *Id.* at 363 *citing* Voinovich v. Quilter, 507 U.S. 146, 155 (1993) (emphasis added). *See also* Johnson v. DeGrandy, 512 U.S. 997, 1020 (1994) (noting that although majority-minority districts may be necessary in some instances, in other jurisdictions coalitions of different groups may have the effect of electing minority candidates).

94. *Page*, 144 F.Supp. 2d at 364.

95. *Id.* at 364-65.

96. *Id.* at 358-65.

97. *Id.* at 365. Dr. Loewen found that an overwhelming majority of White voters chose the White candidate in three of the four elections he analyzed. *Id.* From just

the plaintiffs' expert analyzed appeared to be outliers, with an unusually low White voting percentage for Black Democratic candidates.[98] In contrast, the defendants' expert based his conclusions on data gathered from over 150 elections and testified that racial polarization did not and would not defeat the election of minority-preferred candidates.[99] The court also relied heavily on testimony from minority legislators who supported the Bartels plan and projected that the plan would increase minority election opportunities over the next decade.[100]

The court attached considerable weight to evidence other courts rarely considered, such as expert witness testimony that revealed that many of the White voters relocated into new District 27 as well as White voters who remained in District 34 were Republican.[101] Those White Republican voters would not, therefore, affect election outcomes in districts where Democrats still had a clear majority.[102] The court also accepted evidence that Black Democrats were more likely than White Democrats to vote in the Democratic primary.[103] This evidence led the court to conclude that the Black-preferred, Democratic primary election winner would also likely win the general election, regardless of whether the candidate is Black or White.[104] The evidence

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these four elections, Dr. Loewen concluded that racial polarization appeared to be a problem in Essex County, and therefore Black voters in Districts 27 and 34 could not count on sufficient White cross-over votes to ensure they could elect their preferred candidates. *Id.* Other factors influencing the validity and applicability of Dr. Loewen's data set troubled the court, including his focus on county-wide, not legislative, elections; the fact and relevancy of incumbencies; and special circumstances that affected at least half of the elections considered. *Id.* at 360 n.13.

98. *Id.* at 359 n.11.

99. *See supra* note 85. First, Dr. Lichtman noted that eight of the fifteen Blacks currently serving in the state legislature were elected from districts that contained less than 30% Black voting age population. *Page*, 144 F.Supp. 2d at 365. Second, he found that more than half of the White voters in Districts 27, 28, and 29 tended to vote Democratic, even in elections where a minority Democrat was pitted against a White Republican. *Id.* There was only one exception, which the court considered an aberration. *Id.* In one Senate general election, 61% of Whites voted for the White Republican candidate and 39% for the Black Democrat in District 29. *Id.* Third, Dr. Lichtman projected that the outcome of biracial elections in new Districts 27 and 34 would be the election of that candidate preferred by Black voters. *Id.* In sum, Dr. Lichtman opined that the most salient factor in determining the winner of biracial elections was the political party, not the race, of the candidate. *Id.* at 361.

100. *Id.* at 366.

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 361, 366.

supported the court's conclusion that, under the Bartels plan, Blacks would have the same opportunity as other racial groups to participate in the political process and to elect their preferred candidates. After considering the entire record, the court ultimately concluded that the plaintiffs failed to meet the third prong of the *Gingles* threshold test.[105]

As the court and the defendants predicted, minority candidates captured a record number of nominations to the state legislature from Essex County and statewide. In Districts 28 and 29, all six minority incumbents were renominated and reelected.[106] In District 27, Black Democrat Mims Hackett captured the General Assembly seat.[107] In District 34, Black Democrats Nia Gill and Willis Edwards captured a Senate seat and an Assembly seat, respectively.[108] Ultimately, the Bartels plan led to a record number of minority nominations and elections in the 2001 New Jersey primary.[109]

III. ANALYSIS

Prong 1: "Sufficiently Large and Geographically Compact"

The lower courts have interpreted the first prong in *Gingles* to require an analysis of the voting age population.[110] This interpretation does not extend far enough. Courts should also consider other factors potentially preventing minority voters from casting their votes. For example, a court should consider citizenship status because the minority population may not be "sufficiently large and geographically compact" once non-citizens are discounted.[111] A court's determination of whether a population is "sufficiently large and geographically compact" should also take into account evidence of historically lower minority voter turnout within the community in comparison to White voter turnout.[112]

The *Page* court went even further than these

105. *Id.* at 366.

106. *See* New Jersey State Legislature, *Legislative Roster 2002-2003 Session* (2002), *available at* http://www.njleg.state.nj.us/members/roster.asp.

107. *See id.*

108. *See id.*

109. *See Page*, 144 F.Supp. 2d 346, 357; Hirsch, *supra* note 9, at 19.

110. *See supra* notes 39-48 and accompanying text.

111. *See supra* notes 39-48 and accompanying text.

112. *See supra* notes 39-48 and accompanying text.

recommendations when it analyzed the three prongs of the *Gingles* test.[113] It did not apply the first *Gingles* prong in a vacuum.[114] Even though there were enough Black voters to constitute a "sufficiently large and geographically compact" population in three old districts, the Bartels plan split Black voters among four new districts.[115] The three-judge panel did not find this was a per se violation of Section 2.[116] The court relied on expert testimony and minority legislators' statements to conclude that splitting the three majority-minority districts increased minority electoral opportunity..[117] Rather than subscribe to rigid numerical calculations of the voting age population, the court appropriately considered the total political effect of the districting plan.[118] This is a logical approach when plaintiffs cannot show that polarized voting exists and when MVAP is the relevant demographic factor. Testimonial evidence demonstrated that the majority of voters in the districts studied will continue to cast their votes for minority Democrats in biracial elections.[119] Therefore, it is not necessary for a minority group or coalition to maintain a majority to ensure election of minority candidates.[120] The more sensible approach in light of Section 2's goal of equal opportunity for minority voters to elect their preferred candidates is to evaluate district plans for their total effects. If the court had applied a bright-line approach to *Page*'s first prong, it is likely that fewer minority candidates would have been elected.

Prong 2: A Minority Group Should Be Defined as a Multi-Ethnic Coalition

The *Page* court found that since Blacks and Hispanics often prefer the same candidates, total MVAP was the relevant demographic figure.[121] Using MVAP (52%) rather than Black Voting Age Population (BVAP) (35%) to evaluate the effect of the plan in District 34, the court concluded that Blacks would have the same opportunities as Whites to elect the candidates of their choice, even if all White voters in that district vote against a Black

113. *See supra* notes 101-104 and accompanying text.
114. *See supra* notes 101-104 and accompanying text.
115. *See supra* notes 78-81.
116. *See supra* notes 91-93 and accompanying text.
117. *See supra* notes 96-104 and accompanying text.
118. *See supra* notes 96-104 and accompanying text.
119. *See supra* note 84.
120. *See supra* notes 99-104 and accompanying text.
121. *See supra* note 96 and accompanying text.

candidate.[122] Today's racial politics support the notion that the definition of a "minority group" should be expanded to include coalitions of different minority groups.[123] Since racial vote dilution claims must be brought in the aggregate, the definition of who belongs in the aggregate should change as racial coalitions build and racial identities combine.[124] If Blacks, Hispanics, and multiracial individuals prefer the same candidates, Section 2's goal of ensuring equal political opportunity is furthered when a "minority group" includes multiple races.[125]

The Sixth Circuit's decision to deny standing to multiracial coalitions as a combined "minority group" is contrary to Section 2's goal.[126] Practically speaking, it is unrealistic in some jurisdictions to separate the interests of one minority group from another. First, it is difficult to identify those in the minority using rigid racial categories. [127] Second, Section 2's historical context lends no support to the notion that Section 2 only protects Blacks, and not Hispanics or other minority groups, from vote dilution.[128]

The *Page* court provides an appropriate framework for considering the combined interests of a "minority group." From testimonial evidence, the court rightly determined that MVAP, not BVAP, would assure that minority groups have equal political opportunity.[129] In situations where citizens of different races prefer the same candidate, a court should consider the effect of a redistricting plan based on the total minority population's electoral choices. The election results confirmed that the *Page* court reached the right conclusion.

Prong 3: Polarized Voting Should No Longer be the Evidentiary Centerpiece of a Section 2 Claim.

The *Gingles* Court established that the crucial factor used to identify vote dilution was the occurrence of racially polarized voting.[130] Although courts and commentators have concluded that polarized voting is the evidentiary centerpiece of a vote dilution

122. Page v. Bartels, 144 F.Supp.2d 346, 353-58 (D.N.J. 2001).
123. *See supra* notes 50-52 and accompanying text.
124. *See supra* note 52.
125. *See supra* note 23 and accompanying text.
126. *See* Nixon v. Kent County, 76 F.3d 1381, 1393 (6th Cir. 1996).
127. *See supra* note 52 and accompanying text.
128. *See supra* notes 23-29 and accompanying text.
129. *See supra* note 96 and accompanying text.
130. *See supra* notes 63-66 and accompanying text.

claim,[131] the *Page* court rightly rejected this approach.[132]

The *Page* court was unconvinced that the vote in Essex County was racially polarized, but did not end the *Gingles* analysis there.[133] The court continued to evaluate the contours of the third prong, resulting in a clearer understanding of New Jersey's local politics and the actual effect of the Bartels plan.[134] The court examined evidence showing that the primary often decided the general elections in highly Democratic districts and that the Black electorate was more likely to vote in the primaries.[135] The court also considered whether the addition of White Republicans to the new districts would endanger the minorities' chances to elect their preferred candidate and determined this would not adversely affect minority candidates.[136] These factors supported the defendants' claim that the Bartels plan enhanced, rather than diminished, minority voting opportunities.[137]

The court's rationale throughout is appropriate and consistent. A Section 2 claim emphasizes a districting plan's total effect on minority voters, in light of the Act's goal of protecting opportunity for minority electoral participation.[138] Rather than subscribe to a rigid determination of whether the vote was racially polarized, the court appropriately considered the opinions of minority legislators experienced and knowledgeable of the local political scene, as well as statistical projections that used voting data to analyze biracial legislative contests in Essex County.[139] Evaluating the total effect of a plan, rather than evaluating the claim according to broad and rigid factors better fulfilled the goal of Section 2 and is the appropriate measure of racial vote dilution.[140]

Additionally, using polarized voting as the threshold test of a Section 2 claim unnecessarily assumes that Whites and minorities are perpetual political enemies. Coalitions comprised of Whites and minorities could not bring a Section 2 claim because the Voting Rights Act presupposes that Whites and minorities have

131. *See supra* notes 63-66 and accompanying text.
132. *See supra* notes 101-104 and accompanying text.
133. *See supra* notes 101-104 and accompanying text.
134. *See supra* notes 101-104 and accompanying text.
135. *See supra* notes 101-104 and accompanying test.
136. *See supra* notes 98-101 and accompanying text.
137. *See supra* notes 98-101 and accompanying text.
138. *See supra* notes 96-105 and accompanying test.
139. *See supra* notes 96-105 and accompanying text.
140. *See supra* notes 96-105 and accompanying text.

opposing political preferences.[141] *Page* is a jurisdiction where some Whites and minority groups had the same political preferences.[142] The *Gingles* assumption that Whites will always have differing political preferences than minorities is no longer true.[143] Therefore, the threshold test for Section 2 claims should recognize that White support of minority-preferred candidates may aid a minority group. *Page* demonstrates that coalitions of minority voters in the numerical minority, with the support of White voters, may elect the candidate of their choice.[144]

Polarized Voting Alone Does Not Always Reveal Whether Minority Preferred Candidates Will Be Defeated

The Third Circuit is one of the first courts to approve a redistricting plan that separates, rather than consolidates, Black voting populations.[145] Prior court decisions and the Department of Justice mandated the creation of majority-minority districts whenever possible.[146] This well-intentioned but static approach would have led to much different election results in New Jersey. Lower courts should heed the Supreme Court's directive that creating majority-minority districts is not a Voting Rights Act requirement and that there is per se prohibition against creating certain types of voting districts.[147] The *Page* court rightly dismisses the notion that districting plans must create and may not dissolve majority-minority districts. As primary and election results confirmed, reducing the number of Blacks in three districts enhanced minority voting strength.[148]

CONCLUSION

Although the *Gingles* test applied rigidly is rife with problems, an analysis based in part on the three prongs is still necessary. Courts should follow *Page*'s flexible approach by incorporating the *Gingles* factors in an evaluation of the total effect of a redistricting plan on minority voters' opportunity to elect candidates of their choice. An evaluation of a variety of

141. *See supra* notes 98-99 and accompanying text.
142. *See supra* notes 98-99 and accompanying text.
143. *See supra* notes 98-99 and accompanying text.
144. *See supra* notes 98-99 and accompanying text.
145. *See supra* notes 73-76, 105 and accompanying text.
146. *See supra* notes 67-70 and accompanying text.
147. *See supra* note 93.
148. *See* Hirsch *supra* note 9, at 18-19; David Kocieniewski, *Trenton Democrats Are Out of Doghouse*, N.Y. TIMES, Nov.7, 2001, at D7.

factors affecting minority politics revealed through the testimony of minority legislators, the current status of local politics, and the statistical projections of relevant data sets will give better effect to a "total effects" test.

In the context of racial vote dilution claims, *Page* upholds a flexible approach in contrast to the static, bright-line *Gingles* test. Today's changing racial politics indicate a need to revamp the rigid *Gingles* test that is based upon outdated assumptions. A flexible, total political effects test will ensure that claims spurred on by political interest groups are stopped and, at the same time, that minority groups denied equal voting rights have viable legal recourse.