The Burger Court Opinion Writing Database

Thornburg v. Gingles

478 U.S. 30 (1986)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 2, 1986

83 - 1968 - Thornburg v. Gingles

Dear Sandra:

I join your concurring opinion of March 24th.

Regards,

Justice Sandra O'Connor

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

'86 MAY 29 P12:18

May 29, 1986

MEMORANDUM TO THE CONFERENCE

No. 83-1968

Thornburg v. Gingles

Although I continue to believe that the most equitable disposition of District 23 would be to vacate and remand, I am not so strongly tied to that view that I could not join a majority to reverse. The Chief Justice has not yet voted. But if, when he does, there are 5 to reverse outright, I will make a 6th.

Bill

W.J.B., Jr.

Dear Bill
I visited April 7
& assume you refer
to Sandra's later draft. Jim
will write on that.

cc

xc: Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 5, 1986

MEMORANDUM TO THE CONFERENCE

No. 83-1968 -- Thornburg v. Gingles

As you will recall, the vote in this case was basically 9-0, with several -- particularly, I believe, Byron, Lewis, Bill and Sandra -- voicing some uncertainty over the proper disposition of House District 23. While working on the opinion, I became aware of the following "gap" in the findings made by the District Court in support of its conclusion that the multi-member structure of District 23 has the effect of diluting black citizens' votes.

In House District 23 (Durham County), blacks constitute about one-third of the population. A black has been elected to the district's three-member delegation every two-year term since the 1972 election. Thus, blacks in that district have enjoyed proportional representation in the State House for at least a decade. No black, however, has been elected (at least since Reconstruction) to the Senate District corresponding to Durham County. The District Court was given and analyzed data from only the 1978, 1980, and 1982 elections. Initially the District Court determined that both the 1978 and 1980 elections were racially polarized in the sense that the outcome of the elections

would have been different if held in racially segregated electorates. The court also took account of the great disparity between black and white support for the successful black candidate, Kenneth Spaulding. Additionally, the court found, in effect, that the "handicap" of Representative Spaulding's race was somewhat offset in these elections by the facts that he essentially ran unopposed in each election and that he was an incumbent. Based on these considerations, the court concluded that, Spaulding's success notwithstanding, House District 23 experiences racially polarized voting to such a severe extent that it impairs blacks' ability to participate in the political process.

I think that the court's conclusion with regard to the 1978 - 1982 elections is permissible under Section 2. Unfortunately, the court was not furnished data concerning the three earlier elections in which a black was elected -- 1972, 1974, and 1976. In the absence of information about these elections, it is hard to know just what to make of this decade-long pattern of black success.

My opinion for the Court, as it now stands, affirms the District Court's finding of vote dilution in all of the contested districts. I think that the trial court's finding of racially polarized voting in recent elections, in combination with the other factors found by the court, is adequate to support the court's ultimate conclusion that the multi-member structure of the District results in dilution of blacks' votes. However, my views on this are sufficiently tentative that, if there were a

Court for it, I would be willing to revise Part IV, B of my opinion to isolate this evidentiary gap and to remand to the District Court for further proceedings concerning District 23 only.

Sincerely,

Bill

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: FEB 6 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[February ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

The question in this case is whether the three-judge District Court, convened pursuant to 28 U. S. C. 2284(a) and 42 U. S. C. § 1973(c) in the Eastern District of North Carolina, correctly found that the use of multimember districts in five North Carolina legislative districts resulted in the dilution of black citizens' votes and thus in a violation of § 2 of the Voting Rights Act of 1965, as amended June 29, 1982, 42 U. S. C. § 1973.

I

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's House of Representatives and Senate, utilizing population data gathered in the 1980 decennial census. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member and six at-large multimember districts,[1] arguing that the districting scheme diluted black citizens' votes in violation of the Fourteenth and

[1] Appellants initiated this action in September 1981, challenging the North Carolina General Assembly's July 1981 redistricting plan on a variety of grounds. The history of this action is recounted in the District Court's opinion, *Gingles* v. *Edmisten*, 590 F. Supp. 345, 350–358 (EDNC 1984). It suffices here to note that the General Assembly revised the 1981 plan in April 1982 and the issues that went to trial are those described in the text.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

February 21, 1986

No. 83-1968, Thornburg v. Gingles

Dear Byron:

I am a bit confused by the comment in your letter to me of February 19, 1986, that "it would improve opinions in this area if the facts and relevant factors were analyzed more directly in terms of the requirements of subsection 2(b) [of the amended Voting Rights Act] rather than in light of the amorphous standard of 'vote dilution.'"

As I understand it, minority voters may suffer "less opportunity than other members of the electorate to participate in the political process and to elect representative of their choice," §2(b), as a result of any one of at least three major types of electoral discrimination. The terms of art often used to describe these types of discrimination are disfranchisement, candidate diminution, and vote dilution. See, Davidson, Minority Vote Dilution, An Overview, in Minority Vote Dilution (C.Davidson, ed. 1984) 3.

"Disfranchisement" describes techniques used to prevent or discourage people from voting. Disfranchisement techniques that have been used to suppress the minority vote in our country range from force and violence, to poll taxes and literacy tests, to more subtle methods, such as purging the registration rolls (the efficacy of which has just been proven in the Philippines) and decreasing the number of voting machines in minority areas.

"Candidate diminution" occurs when candidates representing the interest of a group of voters are prevented or discouraged from voting. In addition to force and threats of reprisal, familiar techniques of candidate diminution include changing governmental posts from elective to appointive ones when a minority candidate has a chance of winning an election, setting high filing and bonding fees; and increasing the number of signatures required on qualifying petitions.

"Vote dilution" is a less precise term, but is generally agreed to refer to a process whereby election laws or practices, either singly or in concert, combine with systematic racial bloc

voting among an identifiable group to diminish the voting strength of at least one other group. Because dilution often operates to diminish a group's potential voting strength that derives from the group's geographic concentration, "vote dilution" is commonly used to describe the loss in potency of minorities' votes that occurs when a discreet concentration of minority voters that is sufficient to constitute a "safe" single member district is either "submerged" into predominately white multimember districts or "fractured" between two or more predominately white single member districts.

All §2 violations, whether they stem from disfranchisement, candidate diminution, or vote dilution, must be evaluated according to the standards set forth in the statute. That is what the District Court did in this case and what I did in my opinion. I intended that "vote dilution" serve simply as a shorthand term referring to a particular form of electoral discrimination.

I share what I perceive to be your frustration with the semantic carelessness and confusion, stemming from statistical terminology that is unfamiliar to most judges and lawyers, of opinions in this area. If you think that my opinion would be improved by a clarification of the relevant language, I would be happy to do so. I think that in this first case interpreting amended §2, it is important that members of the Court be in as much agreement as possible regarding its meaning and the pertinent legal standards. As always, I welcome your suggestions.

Sincerely,

Bill

Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

March 13, 1986

MEMORANDUM TO THE CONFERENCE

No. 83-1968

Thornburg v. Gingles

In due course I will be making changes in our circulation in response to Sandra's circulation of today.

W.J.B., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 4, 1986

No. 83-1968, Thornburg v. Gingles

Dear Byron,

The revision is almost finished and I hope to have it in your hands within the next week.

Sincerely,

WJB/mel

Justice White

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: APR 15 198

Recirculated: _____

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[April ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires for the first time that we construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. 2284(a) and 42 U. S. C. § 1973(c), correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b).

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] dis-

[1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—4 members), House No. 36 (Mecklenburg County—8 members), House No. 39 (part of Forsyth

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

April 15, 1986

MEMO TO THE CONFERENCE

No. 83-1968, Thornburg v. Gingles

I was persuaded by Byron's letter of February 19 and by Sandra's concurrence that lower courts would benefit from more extensive development of the legal standards that are applicable to minority voters' §2 claims of unequal electoral opportunity than I attempted in my initial draft. In order to develop those standards and to address some of the other concerns Sandra raised, I have so substantially revised my first draft that the version I circulate today is, in effect, a new opinion.

You will notice that I have altered the disposition of District 23 from an affirmance to a reverse and remand. Development of the applicable legal principles convinced me that such sustained proportional representation should create a presumption of equal opportunity. I believe, and state in my opinion, that in some situations it may be possible for plaintiffs to rebut this presumption. See pp. 41-42. Because we establish this presumption for the first time in this case, I prefer to remand to afford appellees an opportunity to meet their burden.

Although this "fairness" justification is the only one I offer in the opinion for the remand, I have another which I would like to bring to your attention in this memorandum.

Appellees suggest that blacks in District 23 had to rely on bullet (single-shot) voting[1] in order to elect the representatives of their choice. Appellees argue that, where blacks must rely on bullet voting in order to elect their chosen candidates, black voters are forced to choose between two options, both of which are unacceptable under §2. Black voters can either forfeit their opportunity to vote for a full slate of candidates, and thus have a chance to elect one representative of their choice; or they can vote for a full slate and elect no representative. By contrast, appellees contend, white voters are assured of the ability to elect a representative of their choice

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[1]I prefer to use the term "bullet voting" rather than "single-shot voting" because the term "single-shot" carries with it the incorrect connotation that it refers only to situations where one vote is cast. While it is often the case that bullet voting will be effective only where a single vote is cast, under certain circumstances voters may vote for more than one candidate -- but fewer than a full slate -- without hurting either of their preferred candidates.

As a simple illustration, let me revise slightly the facts of footnote 5 of my opinion, which describes the circumstances under which bullet-voting may enable minority voters to elect a representative of their choice. Assume a town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Ten candidates are running for office -- 2 blacks and 8 whites. Further assume that the whites in this town will divide their votes evenly among the white candidates. If the blacks "bullet vote" for the two black candidates -- that is, if they "target" the black candidates by withholding two of their votes from the white candidates -- the election results should be as follows. Each white candidate receives about 300 votes and each black candidate receives 400 votes. The two black candidates have won election.

and they can do so without sacrificing their opportunity to vote for a full slate. Consequently, appellees conclude that where black voters must depend on bullet voting they do not enjoy the same opportunity to participate in the political process or to elect representatives of their choice as whites do.

The election statistics reproduced at J.A. Ex.-8 seems to support appellees' suggestion that black voters in House District 23 owe their success in the last three elections to bullet voting. In both the primary and general elections, voters in House District 23 were entitled to cast 3 votes in each election. It is clear that almost all blacks bullet-voted for the two black candidates in the 1978 and 1982 primaries -- 99% and 91%, respectively, of all the votes cast by blacks went to those candidates. In other words, blacks withheld their remaining vote or votes from the white candidates. It seems also that many blacks bullet-voted in the 1982 general election -- 78% of all the votes cast by blacks went to the one black candidate. In the 1978 and 1980 general elections, blacks did not bullet-vote -- only 36% and 35% of all the votes cast by blacks went to the black candidate. <u>But</u>, in 1978 and in 1980, the black candidate ran unopposed. Indeed, it appears that all of the candidates ran unopposed -- that is, three candidates ran for three seats. All were guaranteed success. Thus black voters could vote for a full slate, confident of their ability to elect the black candidate.

While the District Court did observe generally that blacks in all of the contested districts relied on bullet voting to elect their preferred representatives, it made no findings

regarding the role of bullet voting in House District 23. Because we cannot and should not make such findings here, I do not believe that we should address at this time the merits of appellees' argument that reliance on bullet voting rebuts any presumption of equal opportunity that arises from sustained success. Furthermore, even if the District Court had found that blacks in District 23 had relied on bullet voting in the last three elections, it made no findings to explain the success of candidates preferred by black voters in the previous three elections. This gap alone, I believe, requires reversal and remand.

I perceive another, equally important reason to defer consideration of the question whether reliance on bullet voting should rebut the presumption of equal opportunity that arises from sustained success. The Senate Report instructs that courts should analyze §2 claims according to a "functional" rather than "formalistic" view of the political process, S. Rep. 30, n. 120, and with a "practical" approach to "reality." S. Rep. 30. I think we could use some assistance in determining the functional significance of sustained, successful reliance on bullet voting to claims of vote dilution through submergence in multimember districts. Consequently, I believe that we should allow the issue to receive some development in lower courts and in law review and social science literature before we address it. However, I would like to share with you at this time what I have gleaned, from the extensive research I have done for this new draft, to be the functional significance of such reliance.

As an initial matter, it is important to recall the factual context in which blacks in a multimember district need to rely on bullet voting in order to elect their preferred representatives. Blacks must constitute a minority of the district's population. And, the white majority must vote sufficiently as a bloc for candidates other than those preferred by blacks to defeat the blacks' preferred candidates in the absence of black bullet voting (or other unusual circumstances). Thus, black electoral success obtained through the use of bullet voting does not disprove the existence of significant white bloc voting or the detrimental effect the use of a multimember electoral structure generally has on the ability of blacks in the district to elect representatives of their choice.

What black electoral success obtained through bullet voting does show is this: Under certain circumstances, by withholding votes from candidates preferred by the majority, blacks can overcome the handicap of being a minority in a multimember district in which the majority votes substantially as a bloc for different candidates. As I understand it, blacks' ability to use bullet voting effectively is mathematically dependent on the percentage of all voters in the district who are black and on a bloc-voting majority splitting their votes among more candidates than there are open seats. See, e.g., City of Rome v. United States, 446 U.S. 156, 184, n. 19 (1980) (quoting U.S. Commission on Civil Rights, The Voting Rights Act: Ten Years After, pp. 206-207 (1975)); Lijphart, Introduction to Part II, in Representation and Redistricting Issues 104 (Grofman, Lijphart,

McKay, Scarrow, eds. 1982) ("[S]ingle-shot or bullet voting is only effective . . . when the majority divides its votes among several -- in our example of a four member district, more than four -- candidates").[2] Thus, blacks' ability to use bullet voting effectively seems to be largely fortuitous. It will vary according to the number of candidates running, the split in white support for those candidates, and the percentage of the voting population that is black. Through reliance on bullet voting, blacks may be able to win several elections in a row, but the multimember electoral structure, in combination with significant white bloc voting, will continue to pose a real threat to blacks' ability to elect their chosen candidates.

If my understanding of the mechanics of successful bullet voting is correct, I am inclined to think that blacks' need to rely on bullet voting to elect their chosen candidates rebuts any presumption of equal opportunity that sustained success creates. Nonetheless, I have not found much written on the subject, and, before coming to rest on the issue, I would like to see what lower courts and law review and social science articles will have to say about it after this opinion is handed down.

---

[2]This appears to be what happened in the 1978 primary in District 23. In that election, 7 candidates -- 2 blacks and 5 whites -- ran for 3 slots. As I explain above, blacks bullet voted for the two black candidates, casting 99% of all the votes they cast for these candidates. Further, blacks ranked these candidates first and second in the field. By contrast, whites cast only 10% of all the votes they cast for the black candidates, and ranked them sixth and seventh in the field. It seems likely, then, that the election of one black candidate was due to whites splitting their votes among the 5 white candidates. See J.A. Ex-5 & Ex-8.

I am less certain of my views concerning appellees' suggestion that, where blacks must rely on bullet voting to elect their preferred representatives in a multimember district, they have less opportunity than whites to participate in the political process. The theoretical basis for this argument seems to be that, unlike blacks, whites can vote for a full slate of candidates, and thus influence the election of more than one representative. Thus, in theory, more than one representative will be accountable to white voters and, consequently, whites will receive "more representation" than blacks. This is a much subtler and more complex argument than the "interference with the ability to elect" argument I describe above. I definitely prefer that this argument receive some scholarly and lower court development before we address it.

- WJB/md

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brenna**

Circulated: APR 21 1986

Recirculated: _____

3rd
2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[April ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires for the first time that we construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. § 2284(a) and 42 U. S. C. § 1973(c), correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2] dis-

[1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—4 members), House No. 36 (Mecklenburg County—8 members), House No. 39 (part of Forsyth

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: MAY 20 1986

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STYLISTIC CHANGES THROUGHOUT.
SEE PAGES

And 13, 16, 43, 46 - cert (new material)

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[May ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires for the first time that we construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. § 2284(a) and 42 U. S. C. § 1973(c), correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 22, 1986

No. 83-1968, Thornburg v. Gingles

Dear Byron,

I am delighted to learn that you are able to join much of my opinion.

If it turns out that there are five to reverse outright House District 23, I may well accede to the majority and change my vote. In the meantime, I plan to turn my discussion and disposition of that district into a separate subsection, so that you and others who disagree with me may clearly identify the part you do not join.

You raise a couple of interesting points with respect to the question whether the race of the candidate is relevant. Let me remark on them briefly. In your first hypothetical, where 80% of the blacks vote a democratic ticket and lose, my standard would probably support a finding of legally significant racial bloc voting in that single election. A violation of §2 would be found only if a substantial majority of blacks are unable to elect the representatives of their choice over a meaningful period of time. In your second hypothetical, where a majority of blacks favor one black candidate who loses, and whites plus a minority of blacks select a black candidate who wins, however, my standard might not even yield a finding of significant racial bloc voting in that election. I doubt that the fact that a simple majority of blacks, say 55%, vote one way, and 45% vote another, would demonstrate the political cohesiveness necessary to establish minority bloc voting. If, though, the number of black voters whose candidate was defeated constituted a substantial majority of black voters, say 80% or 90%, my standard would result in a finding of polarized voting in that election.

Your observation that the interests of black and white voters might occasionally divide along strict party lines and that, in those instances, the situation resembles interest group politics, which are not protected by §2, is certainly correct. But, while this situation resembles pure interest group politics, I do not think that it is always identical to it. Bearing in mind that §2 protects the right of minority voters "to elect the representatives of their choice," it seems to me that where the minority voters' race is very strongly correlated, as my standard

requires, with a particular set of interests (expanded public housing and welfare benefits for example), the distinction between the minority voters' race and their political affiliation loses meaning. In other words, I think that political interests in that instance are synonymous with racial interests.

Moreover, it seems to me that the candidate's race is irrelevant under the terms of §2, which specifies only that the voters must be minority group members and that the relevant candidates are the candidates of the minority group's choice. Nonetheless, as a practical matter, I suspect that in districts where blacks can prove that they regularly have difficulty electing their chosen representatives, they will generally have chosen a black and whites will have chosen a white. When the day comes when both blacks and whites are truly indifferent to the race of candidates, I doubt that §2 will be either applicable or extant.

Sincerely,

Bill

Justice White

STYLISTIC CHANGES THROUGHOUT.
SEE PAGES.

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Brennan

Circulated: MAY 27 1986

Recirculated: _____

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[May ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 29, 1986

MEMORANDUM TO THE CONFERENCE

No. 83-1968

Thornburg v. Gingles

Although I continue to believe that the most equitable disposition of District 23 would be to vacate and remand, I am not so strongly tied to that view that I could not join a majority to reverse. The Chief Justice has not yet voted. But if, when he does, there are 5 to reverse outright, I will make a 6th.

W.J.B., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 30, 1986

No. 83-1968, Thornburg v. Gingles

Dear Byron,

As you can see, I have revised my opinion to reverse outright in House District 23 and to eliminate Section VI, my response to Sandra's concurrence. I have deleted all of the material that was originally contained in Section VI, except a couple of paragraphs which merely explain the basis for the Court's vote dilution standard with a bit more clarity and in a bit more detail than I had initially done in text. Those paragraphs now appear in footnotes 15 and 17 at pages 15-17. I assumed that what you found objectionable in Section VI was not these paragraphs, but rather my treatment of Sandra's opinion and the discussion pertaining to Section III, C, which you did not join. If my assumption is incorrect, and you object to the material contained in footnotes 15 and 17, please let me know. I would, of course, delete those footnotes if you prefer.

Sincerely,

W.J.B., Jr./md

Justice White

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 5/30/86

Recirculated: _____

1, 15-17, 30, 43-44, 47,
Part VI deleted

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE BRENNAN delivered the opinion of the Court.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. § 2284(a) and 42 U. S. C. § 1973(c), correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged seven districts, one single-member[1] and six multimember[2]

[1] Appellees challenged Senate District No. 2, which consisted of the whole of Northampton, Hertford, Gates, Bertie, and Chowan Counties, and parts of Washington, Martin, Halifax, and Edgecombe Counties.

[2] Appellees challenged the following multimember districts: Senate No. 22 (Mecklenburg and Cabarrus Counties—4 members), House No. 36

pp. 1, 8, 16, 17, 23, 26, 31, 35, 41, 44

To: The Chief Justice
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: JUN 26 1986

Recirculated: _____

7th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE BRENNAN announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II, III–A, IIIB, IV–A, and V, and an opinion with respect Part IIIC in which JUSTICE MARSHALL, JUSTICE BLACKMUN, and JUSTICE STEVENS join and an opinion with respect to Part IVB in which JUSTICE WHITE joins.

This case requires that we construe for the first time § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. 42 U. S. C. § 1973. The specific question to be decided is whether the three-judge District Court, convened in the Eastern District of North Carolina pursuant to 28 U. S. C. § 2284(a) and 42 U. S. C. § 1973(c), correctly held that the use in a legislative redistricting plan of multimember districts in five North Carolina legislative districts violated § 2 by impairing the opportunity of black voters "to participate in the political process and to elect representatives of their choice." § 2(b), 96 Stat. 134.

I

BACKGROUND

In April 1982, the North Carolina General Assembly enacted a legislative redistricting plan for the State's Senate and House of Representatives. Appellees, black citizens of North Carolina who are registered to vote, challenged

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Held for No. 83-1968, Thornburg v. Gingles:
No. 85-1300, Collins v. City of Norfolk

The city of Norfolk, Virginia, chooses its seven-member city council in city-wide, at-large elections. It employs a staggered, four-year term system; that is, three council members are elected one year and the four others are elected two years later. A black was elected to the city council for the first time in 1968; between 1968 and 1984, the council consistently had one black member. In 1984, after the instant lawsuit had been filed, a second black was elected to the council.

Petitioners, seven registered voters of Norfolk and the NAACP, brought suit in federal district court alleging that the at-large election scheme violates §2 of the Voting Rights Act.

The District Court rejected petitioners' claim on a number of grounds, including its conclusion that petitioners had not established that Norfolk experiences racially polarized voting. The court defined racially polarized voting as the situation that exists when a "white backlash" occurs in response to a black candidate; that is, when white voters turn out in greater numbers than usual in response to the potential election of black candidates. The court also stated that whether whites attempt to limit the field of candidates is relevant to the existence vel non of racially polarized voting. Pet. App. 35a-41a, 70a-71a. The court additionally found that petitioners' statistical evidence of racial bloc voting did not support their claim because the statistical analyses did not prove that race, rather than the voter's age, ethnicity, education, and income, or the candidate's incumbency, campaign expenditures, endorsements, and name recognition, caused the disparity between white and black voting patterns. Id., at 36a-37a.

The Court of Appeals affirmed in a very cursory opinion. Essentially, the Court of Appeals applied the clearly erroneous standard to all of petitioners' claims, including their claim that the District Court had applied the wrong legal standard in determining that petitioners had not proven the existence of racially polarized voting.

Thornburg v. Gingles establishes that the ultimate determination whether a challenged election practice or structure operates to impair the ability of minority voters to elect candidates of their choice is a question of fact subject to review under the clearly erroneous test of Rule 52(a). However, Gingles makes abundantly clear that the interpretation of §2 and of the factors, set forth in the Senate Report, that tend to prove a §2 violation raises questions of law which are subject to

de novo review. Indeed, in Gingles we reviewed de novo North Carolina's claims that the District Court had erred with respect to the weight it assigned to electoral success of black candidates and with respect to the definition of racial bloc voting it had utilized. Furthermore, in Gingles, a majority of the Court agreed that plaintiffs need not prove that divergent racial voting patterns are caused solely by race in order to establish either black or white racial bloc voting, i.e., in order to prove that the minority group is politically cohesive and to assess its prospects for electoral success. See Opinion of BRENNAN, J., Part III-C and Opinion of O'CONNOR, J., Part III, p. 17. Thus, the definition of racial bloc voting employed by the District Court in Collins v. Norfolk is incorrect as a matter of law.

I recommend that we GVR in light of Gingles.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 30, 1986

MEMORANDUM TO THE CONFERENCE

Held for No. 83-1968, Thornburg v. Gingles:
No. 85-1635, Butts v. City of New York

New York Election Law §6-162 provides that where no candidate for the offices of mayor, city council president, or comptroller of the City of New York receives 40% or more of the votes cast by the members of a political party in a citywide primary election, the two candidates receiving the greatest number of votes must compete against one another in a run-off election to determine which candidate will represent the party in the general election. This run-off requirement has been in effect since 1972. Since that time, the run-off provision has been triggered in three primary elections -- two for mayor, one for city council president. In none of those initial primary elections did a minority candidate gain the highest number of votes. In only one election, the 1973 Democratic primary, did a minority candidate, Badillo, receive the second highest number of votes and consequently participate in a run-off election. In the 1973 initial primary election, Badillo received 29% of the vote and Beame received 34.5% of the vote. In the run-off election, Beame received 61% of the vote, and Badillo garnered 39%.

Petitioners, a class of black and Hispanic voters in New York City, challenged this statute, on the grounds that it violated both their Fourteenth Amendment rights to equal protection and §2 of the Voting Rights Act.

With respect to petitioners' constitutional claim, the District Court found that the run-off provision had been adopted with a discriminatory intent and that it thus violates the Equal Protection Clause. With respect to petitioners' §2 claim, the court applied the totality of the circumstances test established by §2; in particular it considered the factors tending to prove the existence of unequal electoral opportunity that are set forth in the Senate Report that accompanied the 1982 amendments to §2. Based on its factual findings, the court held that the primary run-off requirement violates §2.

The Court of Appeals (CA2) reversed. The court held that the District Court clearly erred in finding that the run-off provision had been adopted for a discriminatory purpose. The Court of Appeals also reversed the District Court's finding of a §2 violation. The principal ground for reversal was the court's belief that §2 has little relevance in the context of elections held for single-person offices, like mayor, as opposed to elections held for many-person offices, like city council. See Pet. 18a-20a, 25a. In particular, the court held that run-off requirements for single-person offices can never deny minority

voters an equal opportunity to elect representatives of their choice. The Court considered and rejected the argument that petitioners should lose on the ground that no minority candidate has yet lost a primary election due to the run-off law. While the court recognized that "it is undisputed that the run-off law has not yet had any actual discriminatory effect" and that "there has been no showing that the run-off law tends to have any harmful effect," id., the court concluded that proof of the existence of discriminatory results is not necessary to make out a §2 claim. Id., at 2la, n. 5.

Before this Court, petitioners abandon their equal protection claim and challenge only the Court of Appeals' reversal of their §2 claim.

In my view, CA2 reached the right result for the wrong reason. As Gingles makes clear, §2 is relevant to all electoral practices, mechanisms, and structures that result in minority voters having less opportunity than their white counterparts to elect representatives of their choice. Thus, CA2 erred in holding that §2 is not pertinent to elections for single-member offices, and in particular is not pertinent to run-off requirements for single-member offices. However, Gingles also makes clear that §2 plaintiffs must prove that the challenged mechanism results in unequal electoral opportunities. The legislative history of §2 demonstrates, and Gingles recognizes, that potentially dilutive, but otherwise legitimate, election practices like run-off requirements (as opposed to voter intimidation or literacy tests, for example), are not per se violative of §2. Plaintiffs must prove that the challenged mechanism actually harms them. Thus, I believe that CA2 erred in rejecting the argument that petitioners had not proven their claim because they could not show actual harm stemming from the run-off requirement.

While a GVR in light of Gingles would give CA2 an opportunity to correct the mistakes it made in the instant opinion, I am inclined to think that it is preferrable simply to deny the petition. The result reached by the Court of Appeals is correct and the analysis in Gingles will supercede the analysis employed by the Court of Appeals. Should courts continue to make the same errors after Gingles, we could grant a later case.

My vote is to deny.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

February 19, 1986

83-1968 - Thornburgh v. Gingles

Dear Bill,

In all likelihood, I am closer to Lewis than to you with respect to House District 23. And I would like to see what Sandra circulates before otherwise coming to rest.

I should say that it would improve opinions in this area if the facts and relevant factors were analyzed more directly in terms of the requirements of subsection 2(b) rather than in the light of the amorphous standard of "vote dilution." Doing so makes this a harder case than I had thought.

Sincerely yours,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

March 1, 1986

83-1968 - Thornburg v. Gingles

Dear Bill,

In tardy response to your letter of February 21, I am surprised that I managed to confuse you, which you seldom, if ever, are. In any event, I intended nothing earth-shaking--only the mundane observation that courts should pay close attention to the language of the statute they are construing, especially when they have not dealt with the statute before. Subsection 2(b) specifies the factors to be considered in determining a subsection 2(a) violation. It does not mention "vote dilution", much less "disenfranchisement" or "candidate diminution." But, unless persuaded otherwise by additional writing, I expect to join in affirmance except with respect to District 23.

Sincerely yours,

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 21, 1986

83-1968 - Thornburg v. Gingles

Dear Bill,

I have studied your fourth draft in this case and find it difficult to join in its entirety. Specifically, I have problems with Part III C insofar as it announces that the race of the voter is the crucial factor in ascertaining polarized voting and that the race of the candidate is irrelevant. Under your test, there is polarized voting if whites and blacks vote for different candidates, whatever their race. Suppose an 8-member multimember district that is 60% white and 40% black; suppose further that there are 6 white and 2 black republican candidates running against 6 white and 2 black democrats. Under your test, §2 would be violated if all the republicans are elected and 80% of the black voters vote the democratic ticket and 20% the republican. The majority of the blacks, who geographically and numerically could elect their choice in a properly drawn single-member district, have failed in this face-off to elect a candidate of their choice; hence, a violation. And wouldn't the result be the same in a single-member district that is 60% black, but enough blacks vote with the whites to elect a black candidate not favored by a majority of black voters. This sounds like interest-group politics to me and not what Congress had in mind in writing §2. And it is surely not what our prior cases were talking about. Furthermore, I doubt that on the facts of this case you need to draw the voter/candidate distinction. The District Court did not and reached the right result in all but District 23.

I also agree with Sandra that we should reverse outright on District 23, that the lack of white opposition to a black candidate should not be a factor weighing against the presumption of validity based on electoral success, and that the use of bullet voting to elect blacks is also of little if any significance in overcoming the presumption.

As presently advised, I join Parts I, II, III A and B, and V. Except with respect to the District 23 remand and your treatment of bullet voting and the lack of opposition to black candidates, I also join Part IV. As for the new VI, I'll think that over. I suppose this means that I am concurring in the opinion and judgment in part and dissenting in part and that I must write separately--but briefly.

Sincerely yours,

Justice Brennan

Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: MAY 27 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[May ——, 1986]

JUSTICE WHITE, concurring in part and dissenting in part.

I join Sections I, II, III A, III B, IV A and V of the Court's opinion. I dissent from Section III C, from Section IV B, ~~in part,~~ and in part from the judgment. I am also sufficiently doubtful about Section VI that I do not join it.

The Court holds in Section III C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an 8-member multimember district that is 60% white and 40% black, the blacks being geographically located so that 2 safe black single-member districts could be drawn. Suppose further that there are 6 white and 2 black democrats running against 6 white and 2 black republicans. Under the Court's test, there would be polarized voting and a likely § 2 violation if all the republicans, including the 2 blacks are elected, and 80% of the blacks in the predominantly black areas vote democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Con-

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 2 1986

pp. 1-2

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE WHITE, concurring in part and in the judgment and dissenting in part.

I join Sections I, II, III A, III B, IV and V of the Court's opinion. I dissent from Section III C.

omission

The Court holds in Section III C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an 8-member multimember district that is 60% white and 40% black, the blacks being geographically located so that 2 safe black single-member districts could be drawn. Suppose further that there are 6 white and 2 black democrats running against 6 white and 2 black republicans. Under the Court's test, there would be polarized voting and a likely § 2 violation if all the republicans, including the 2 blacks are elected, and 80% of the blacks in the predominantly black areas vote democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this is what Congress had in mind in amending § 2 as it did, and it seems quite

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: JUN 26 1986

p. 1

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE WHITE, concurring.

I join Sections I, II, III A, III B, IV A and V of the Court's opinion and agree with JUSTICE BRENNAN's opinion as to Section IV B. I disagree with Section III C of JUSTICE BRENNAN's opinion.

JUSTICE BRENNAN states in Section III C that the crucial factor in identifying polarized voting is the race of the voter and that the race of the candidate is irrelevant. Under this test, there is polarized voting if the majority of white voters vote for different candidates than the majority of the blacks, regardless of the race of the candidates. I do not agree. Suppose an 8-member multimember district that is 60% white and 40% black, the blacks being geographically located so that 2 safe black single-member districts could be drawn. Suppose further that there are 6 white and 2 black democrats running against 6 white and 2 black republicans. Under JUSTICE BRENNAN's test, there would be polarized voting and a likely § 2 violation if all the republicans, including the 2 blacks are elected, and 80% of the blacks in the predominantly black areas vote democratic. I take it that there would also be a violation in a single-member district that is 60% black, but enough of the blacks vote with the whites to elect a black candidate who is not the choice of the majority of black voters. This is interest-group politics rather than a rule hedging against racial discrimination. I doubt that this

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

February 6, 1986

Re: No. 83-1968-Thornburg v. Gingles

Dear Bill:

Please join me.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

May 20, 1986

Re: No. 83-1968-Thornburg v. Gingles

Dear Bill:

I am still with you.

Sincerely,

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 2, 1986

Re: No. 83-1968 - Thornburg v. Gingles

Dear Bill:

Like JPS, I believe that the District Court's findings adequately support that court's judgment with respect to District 23. I, therefore, cannot remain with you on the part of your latest draft that reverses that aspect of the panel's decision. I will be joining JPS's opinion, concurring in part and dissenting in part.

Sincerely,

T.M.

Justice Brennan

cc: Justice Stevens

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 4, 1986

Re: No. 83-1968-Thornburg v. Gingles

Dear John:

Please join me in your opinion, concurring in part and dissenting in part. I am withdrawing my earlier joinder of WJB's opinion.

Sincerely,

TM.

T.M.

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 13, 1986

Re: No. 83-1968, Thornburg v. Gingles

Dear Bill:

I still would affirm across the board and therefore join your opinion.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1986

Re: No. 83-1968, Thornburg v. Gingles

Dear John:

Please join me in your opinion concurring in part and dissenting in part.

Sincerely,

Harry

Justice Stevens

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 25, 1986

Re: No. 83-1968, Thornburg v. Gingles

Dear Bill:

I am joining John's writing in this case and therefore am with you in your opinion except Part IVB and House District 23.

Sincerely,

Harry

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 14, 1985

83-1968 Thornburg v. Gingles

Dear Chief:

Your assignment sheet for the December cases has just come to my desk (at 1:00 p.m. today).

I called you immediately but you had left the Court. I do not think I should write 83-1968 Thornburg v. Gingles, the North Carolina reapportionment case. I was one of possibly only three Justices who did not agree to affirm the District Court in all respects. My view was that the DC erred in its decision with respect to the Durham district (No. 23). In addition, I am not in accord with the extent to which the DC viewed the Zimmerman factors as the standard to apply, or with the DC's heavy reliance on statistical testimony with respect to "block voting".

In view of my differences, I doubt that an opinion I would write would attract a Court. It seems to me, therefore, that the case should be reassigned. I would, of course, appreciate being given another case to write, as I am well up to date.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

February 11, 1986

83-1968 Thornburg v. Gingles

Dear Bill:

In response to your memorandum of February 5, I will await Sandra's writing in this case.

I may well be able to join much of your opinion, although I have the reservations I mentioned at Conference with respect to the extent of the DC's reliance on statistics and inferences drawn therefrom with respect to "polarized" or "racial bloc" voting. Experience in Virginia (not only the recent election) persuades me that racial bloc voting has diminished and is not easy to identify.

As to House District 23 (Durham County), it still seems to me that there is little or no basis for the District Court's finding of a violation of §2 of the Voting Rights Act. I note your suggestion that we could remand on that issue. At present, however, I am inclined to think that the District Court's findings with respect to that District were clearly erroneous.

Sincerely,

Lewis

Justice Brennan

lfp/ss

cc: The Conference

March 21, 1986

83-1968 Thornburg v. Gingles

Dear Sandra:

Your opinion concurring in the judgment in part and dissenting in part, is persuasive and extremely well written. I do have the following suggestions.

1. The last sentence on page 10 is an important one. As there usually will be statistical evidence introduced in a §2 case, it would be helpful to frame the sentence in way that would require more than a showing of such proof in a single election. For example:

> "Congress probably intended that statistical proof of polarized racial voting patterns over a reasonable period of time could establish a prima facie case of racial bloc voting for §2 purposes, without particular regard for the causes of such patterns."

2. With this sentence in your opinion, I suggest that you explain how prima facie proof rules operate in the analogous context of Title VII cases. E.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792; Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248; and U.S. Postal Service Board of Governors v. Aikens, 460 U.S. 711. These cases establish that where the plaintiff has carried the initial burden of establishing a prima facia case, the burden of going forward then shifts to the defendant to present evidence sufficient to rebut the prima facie case. It should

be emphasized, however, that the burden of persuasion always remains on the plaintiff.

3. I like the reference to Judge Higginbotham's views, and particularly the last sentence on page 9 of your opinion identifying factors that could - and often do - rebut any inference of racial bloc voting. Perhaps this could follow the description of the order and allocation of proof.

4. Of course establishing even an unrebutted prima facie case of racial bloc voting does not end the case. A voting plan violates §2 only when it denies blacks an "equal opportunity to participate in the political processes and to elect candidates of their choice." One element of the "totality of the circumstances test" that District Courts may apply is the extent of racial bloc voting. Statistical evidence is relevant only to that particular element.

I only wish that your fine opinion could be for the Court. It is likely that Bill Brennan's opinion, affirming the District Court's almost total reliance on statistics, will be read expansively by lower courts. The compromise language proposed by Senator Dole is likely to have little effect. This would be regrettable, as the number of blacks now elected regularly to important positions makes clear, happily, that many whites support qualified black candidates regularly.

Sincerely,

Justice O'Connor

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 4, 1986

83-1968 Thornburg v. Gingles

Dear Sandra:

Please join me in your opinion concurring in the judgment in part and dissenting in part.

Sincerely,

L

Justice O'Connor

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

April 17, 1986

83-1968 Thornburg v. Gingles

Dear Blll:

I will await Sandra's further writing.

Sincerely,

L. Lewis

Justice Brennan

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 23, 1986

83-1968 Thornburg v. Gingles

Dear Sandra,

The revised draft of your opinion is persuasive and extremely well written. I intend to join you. I mentioned that arguably there may be some tension between your reliance on the long quote from Bandemer and my dissent in that case. It would help me if you could modify this.

On page 16, you quote from Bandemer to illustrate the point that WJB's exclusive focus on proportional election results is contrary to the results test announced in White and Whitcomb. In my dissenting opinion in Bandemer, I disagreed with BRW's characterization in that case [reflected in part in the language that you quote] of the evidence of discriminatory effect required by our equal protection cases. I criticized Byron for ignoring the fact that under equal protection analysis proof of heightened effect may be necessary to prove not only effect but also to give rise to an inference of invidious intent.

It would be helpful to me if you omit the full quote from Bandemer, and rely primarily on White and Whitcomb. The following could be substituted for the carry-over paragraph on pages 16-17:

> "The 'results' test as reflected in White and Whitcomb requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See White, supra, at 766. While electoral success is a central part of the vote dilution inquiry, White held that to prove vote dilution 'it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential,' 412 U.S., at 765-766, and Whitcomb flatly rejected the proposition that 'any group with distinctive interests must be represented in legislative halls if it is

> numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute a single member district.' 403 U.S., at 156. To the contrary, the plaintiffs succeeded under the 'results' test in White because they established 'that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.' 412 U.S., at 766. Just this term, the Court emphasized that this standard requires 'a substantially greater showing of adverse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution.'" Davis v. Bandemer, __ U.S. __, __ (1986).

It is unfortunate that in this important case the Court ignores the relevant legislative history, and comes close to rewriting §2 to require, in effect, proportional representation. Though much of the Court's 53-page opinion is unnecessary dicta, it is likely to be read as a binding construction of §2 in all situations.

Sincerely,

Lewis

Justice O'Connor

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

May 24, 1986

No. 83-1968, Thornburg v. Gingles

Dear Sandra,

I am still with you.

Sincerely,

L. Lewis

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

March 14, 1986

Re: No. 83-1968 Thornburgh v. Gingles

Dear Sandra,

Please join me in your opinion concurring in the judgment in part and dissenting in part.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

May 22, 1986

Re: No. 83-1968 Thornburg v. Gingles

Dear Sandra,

I am still with you.

Sincerely,

WHR

Justice O'Connor

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

February 11, 1986

Re: 83-1968 - Thornburg v. Gingles

Dear Bill:

Please join me. I am still persuaded that the District Court made the proper disposition of House District 23, but I don't rule out the possibility that I could be persuaded otherwise.

Respectfully,

John

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: APR 9 1986

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[April ——, 1986]

JUSTICE STEVENS, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at 4–8; 17–18 and n. 19; 24–25, nn. 24 and 25, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a legal, burden-shifting "presumption," *ante*, at 41, is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District

[1] See *ante*, at 40 ("Section 2 provides that '[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.' 42 U. S. C. § 1973(b). . . . However, the Senate Report expressly states that 'the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote,' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a safe minority candidate.' . . . The Senate Committee decided, instead, to 'require an independent consideration of the record'") (internal citations omitted).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

1, 3

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 3 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE STEVENS, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at 4–8; 19–20 and n. 23; 26–27 and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal, presumption, *ante*, at 43–44, is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statutory support. The evidence of candidate success in District

[1] See *ante*, at 42 ("Section 2 provides that '[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.' 42 U. S. C. § 1973(b). . . . However, the Senate Report expressly states that 'the election of a few minority candidates does not necessarily foreclose the possibility of dilution of the black vote,' noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a safe minority candidate.' . . . The Senate Committee decided, instead, to 'require an independent consideration of the record'") (internal citations omitted).

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 4 1986

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL, joins, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at 4–8; 19–20 and n. 23; 26–27 and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

7.1

From: **Justice Stevens**

Circulated: _____

Recirculated: JUN 2 6

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June 30, 1986]

JUSTICE STEVENS, with whom JUSTICE MARSHALL and JUSTICE BLACKMUN join, concurring in part and dissenting in part.

In my opinion, the findings of the District Court, which the Court fairly summarizes, *ante*, at 4–8; 19–20 and n. 23; 26–27 and nn. 28 and 29, adequately support the District Court's judgment concerning House District 23 as well as the balance of that judgment.

I, of course, agree that the election of one black candidate in each election since 1972 provides significant support for the State's position. The notion that this evidence creates some sort of a conclusive, legal presumption, *ante*, at 43–44, is not, however, supported by the language of the statute or by its legislative history.[1] I therefore cannot agree with the Court's view that the District Court committed error by failing to apply a rule of law that emerges today without statu-

[1] See *ante*, at 42 ("Section 2 provides that '[t]he extent to which members of a protected class have been elected to office . . . is one circumstance which may be considered.' 42 U. S. C. § 1973(b). . . . However, the Senate Report expressly states that 'the election of a few minority candidates does not "necessarily foreclose the possibility of dilution of the black vote," noting that if it did, 'the possibility exists that the majority citizens might evade [§ 2] by manipulating the election of a "safe" minority candidate.' . . . The Senate Committee decided, instead, to 'require an independent consideration of the record' ") (internal citations omitted).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

February 10, 1986

No. 83-1968 Thornburg v. Gingles

Dear Bill,

I agree with your rejection, in Part II of your opinion, of the suggestion that a racial minority's proportional electoral success in a single election does not preclude finding a §2 violation as a matter of law. It may be that even a decade-long pattern of proportional electoral success does not always preclude finding a §2 violation, but in my view great weight must be attached to such persistent success unless the plaintiffs can come forward with actual evidence that it results from a series of aberrations rather than from established and effective minority voting strength. As applied to House District 23, these views would at a minimum require remanding, particularly in light of the evidentiary gap identified in your helpful memorandum, although it may be possible to reverse the findings as to this district as clearly erroneous.

In any event, I plan to write separately to discuss not only the District 23 findings but also the issue of racial bloc voting. I have grave reservations about the District Court's method of assessing the extent of racial bloc voting and the manner in which the Court assigned weight to this factor in the various challenged districts. The District Court's ultimate findings of legally significant racial bloc voting may survive review under the clearly erroneous standard, which I agree is applicable. But I am not persuaded that Congress intended that districts in which a very large minority of white voters frequently vote for black candidates should be treated as exhibiting racial bloc voting as your opinion seems to imply, nor do I think the District Court's extensive reliance on aggregate rather than district-by-district statistics was proper.

Sincerely,

Sandra

SR FEB 13 10:20

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: MAR

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1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[March ——, 1986]

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

As I see it, our task in this case is first to discern Congress' intent in amending § 2 of the Voting Rights Act of 1965, and then to determine whether the decision of the three-judge District Court was faithful to that intent. I write separately because I am convinced that the Court largely fails to address the vexing issues of congressional intent this case raises. This omission mars the Court's analysis in several respects and renders the Court's affirmance of the District Court's judgment incorrect with respect to House District 23.

Two issues are central to the resolution of this case: how should federal courts evaluate and weigh (1) "the extent to which voting in the elections of the state or political subdivision is racially polarized," S. Rep. No. 97–417, p. 29 (hereinafter S. Rep.), and (2) "the extent to which members of the minority group have been elected to public office in the jurisdiction"? *Ibid.* When a districting plan is challenged these two factors will often be crucial to the application of the "totality of the circumstances" test contemplated by amended § 2 for establishing that a challenged electoral mechanism has a discriminatory effect. The Court fails to provide any guidance on either of these points. It affirms essentially on the theory that whatever the right standards are for assessing and weighing these two factors, on the facts of this case the

pp. 1, 2, 12

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAR 24 1986

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[March ——, 1986]

with whom JUSTICE REHNQUIST joins

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

As I see it, our task in this case is first to discern Congress' intent in amending § 2 of the Voting Rights Act of 1965, and then to determine whether the decision of the three-judge District Court was faithful to that intent. I write separately because I am convinced that the Court largely fails to address the vexing issues of congressional intent this case raises. This omission mars the Court's analysis in several respects and renders the Court's affirmance of the District Court's judgment incorrect with respect to House District 23.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

April 16, 1986

Re: 83-1968 - Thornburg v. Gingles

Dear Bill,

You have certainly written a more complete development of the law for §2 claims. It will require me to revise my opinion rather extensively and I will probably not be able to circulate anything for at least the next two weeks.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Stylistic Changes Throughout

pp. 4, 7, 8, 13, 15–17, 19, 20, 25, 26

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: MAY 22 1986

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[May ——, 1986]

JUSTICE O'CONNOR, concurring in the judgment in part and dissenting in part.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973), and to reject the "intent" test propounded in the plurality opinion in *Mobile* v. *Bolden*, 446 U. S. 55 (1980). S. Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S. Rep.). Whereas *Bolden* required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S. Rep. 28. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.*, at 193–194 (Additional Views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended to allow vote dilution claims to be brought under § 2, but we

file

Supreme Court of the United States
Washington, D. C. 20543

83-1968

I approved this. 4/24

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 23

Dear Lewis,

Thank you for the joinder in Gingles dissent. I will make some changes on pp. 16-17 in accordance with your request, although I would prefer to use the enclosed version if it is acceptable to you. The portions changed from your language are marked in the margin.

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litical power and the denial of fair representation," the plaintiffs in White met this standard, which, as the Court emphasized just this Term, requires "a substantially greater showing of ad-

I approved this. 4/24

If it is all right, I will delay recirculating for a short while to see if Byron is tempted to join in part.

Sincerely,

Sandra

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litical power and the denial of fair representation," the plaintiffs in White met this standard, which, as the Court emphasized just this Term, requires "a substantially greater showing of ad-

I approved this. 4/24

The "results" test as reflected in Whitcomb and White requires an inquiry into the extent of the minority group's opportunities to participate in the political processes. See White, supra, at 766. While electoral success is a central part of the vote dilution inquiry, White held that to prove vote dilution, "it is not enough that the racial group allegedly discriminated against has not had legislative seats in proportion to its voting potential," 412 U.S., at 765-766, and Whitcomb flatly rejected the proposition that "any group with distinctive interests must be represented in legislative halls if it is numerous enough to command at least one seat and represents a minority living in an area sufficiently compact to constitute a single member district." 403 U.S., at 156. To the contrary, the results test as described in White requires plaintiffs to establish "that the political processes leading to nomination and election were not equally open to participation by the group in question--that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice." 412 U.S., at 766. By showing both "a history of disproportionate results" and "strong indicia of lack of political power and the denial of fair representation," the plaintiffs in White met this standard, which, as the Court emphasized just this Term, requires "a substantially greater showing of ad-

verse effects than a mere lack of proportional representation to support a finding of unconstitutional vote dilution." Davis v. Bandemer, ___ U.S. ___, ___, ___ (1986).

pp. 1, 2, 7, 10, 14-22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 9 1986

5th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83-1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.*
RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June ——, 1986]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973), and to reject the "intent" test propounded in the plurality opinion in *Mobile* v. *Bolden*, 446 U. S. 55 (1980). S. Rep. No. 97-417, pp. 27-28 (1982) (hereinafter S. Rep.). Whereas *Bolden* required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S. Rep. 28. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.*, at 193-194 (Additional Views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended

Stylistic Changes Throughout

pp. 19, 22

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: _____

Recirculated: JUN 26 1986

6th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 83–1968

LACY H. THORNBURG, ET AL., APPELLANTS *v.* RALPH GINGLES ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA

[June 30, 1986]

JUSTICE O'CONNOR, with whom THE CHIEF JUSTICE, JUSTICE POWELL, and JUSTICE REHNQUIST join, concurring in the judgment.

In this case, we are called upon to construe § 2 of the Voting Rights Act of 1965, as amended June 29, 1982. Amended § 2 is intended to codify the "results" test employed in *Whitcomb* v. *Chavis*, 403 U. S. 124 (1971), and *White* v. *Regester*, 412 U. S. 755 (1973), and to reject the "intent" test propounded in the plurality opinion in *Mobile* v. *Bolden*, 446 U. S. 55 (1980). S. Rep. No. 97–417, pp. 27–28 (1982) (hereinafter S. Rep.). Whereas *Bolden* required members of a racial minority who alleged impairment of their voting strength to prove that the challenged electoral system was created or maintained with a discriminatory purpose and led to discriminatory results, under the results test, "plaintiffs may choose to establish discriminatory results without proving any kind of discriminatory purpose." S. Rep. 28. At the same time, however, § 2 unequivocally disclaims the creation of a right to proportional representation. This disclaimer was essential to the compromise that resulted in passage of the amendment. See *id.*, at 193–194 (Additional Views of Sen. Dole).

In construing this compromise legislation, we must make every effort to be faithful to the balance Congress struck. This is not an easy task. We know that Congress intended