Washington and Lee Journal of Civil Rights and Social Justice

Volume 4 | Issue 1 Article 13

Spring 4-1-1998

LEWIS v.ALAMANCE COUNTY 99 E3D 600 (4TH CIR. 1996).

LEWIS v. ALAMANCE COUNTY
99 F.3D 600 (4TH CIR. 1996).

I. FACTS

Black voters of Alamance County, North Carolina, brought suit in federal district court alleging that the county's system of electing county commissioners violated Section 2 of the Voting Rights Act.[1] Alamance County is governed by a five-member board of county commissioners, elected at-large to serve four-year staggered terms. In an election, voters may cast as many votes as there are vacant seats, but a voter may not cast more than one vote for any candidate. The plaintiff-appellants charged that this at-large method of electing county commissioners diluted the effect of minority votes and denied black voters an equal opportunity to elect representatives of their choice.[2]

In *Thornburg v. Gingles*[3] the Supreme Court defined three necessary preconditions before a challenge to a multi-member district can be sustained under Section 2 of the Voting Rights Act.[4] A minority group challenging a multi-member district must be able to show: 1) that the minority group is sufficiently large and geographically compact to make up a majority in a single-member district; 2) that it is politically cohesive; and 3) that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate.[5] The district court granted Alamance County's motion for summary judgment, finding the plaintiffs' evidence insufficient to demonstrate the third Gingles precondition because plaintiffs had not shown that minority-preferred candidates were usually defeated.[6] On appeal, appellants raised four challenges to the district court's methodology. First, appellants claimed that white candidates who received support from black voters in the general election only because they were Democrats should not have been counted as minority-preferred. Second, the district court inappropriately aggregated primary and general election results. Third, the district court should have discounted the success of one black candidate because of incumbency effects. Finally, appellants contended that the district court failed to determine whether some individual candidates should have been treated as minority-preferred.[7]

II. HOLDING

The Court of Appeals for the Fourth Circuit affirmed the summary judgment for the county.[8] Although it criticized some of the methodology employed by the district court, the majority failed to find reversible error.[9] The district court had only reviewed elections in which a black candidate was on the ballot when determining whether the third *Gingles* factor existed. The Fourth Circuit held that plaintiffs must proffer data from a majority of elections, including those in which only white candidates run, before they can show that the white majority votes sufficiently as a bloc to enable it to usually defeat the

---

[1]Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, provides:

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b (f) (2) of this title, as provided in subsection (b) or this section.

(b) a violation of subsection (a) of this section 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 thisin 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 aprotected class elected in numbers equal to their proportion in the population.

[2]*Lewis v. Alamance County,* 99 F.3d 600, 603 (4th Cir. 1996).

[3]*Thornburg v. Gingles,* 478 U.S. 30 (1986).

[4]While Alamance County is not divided into districts, the *Gingles* factors are still applicable because the county is a multi-member political unit, containing five representatives elected at large. The Fourth Circuit does not address the first two *Gingles* factors, but focuses on the third. It will be assumed that the plaintiffs have met their burden of demonstrating the first two *Gingles* factors.

[5]*Gingles,* 478 U.S. at 50-1.

[6]*Lewis,* 99 F.3d at 605.

[7]*Id.*

[8]*Id.* at 618.

minority's preferred candidate.[10] However, the court of appeals refused to reverse summary judgment because it is the plaintiffs' burden to establish a § 2 violation, and therefore their duty to provide data from a sufficient number of elections.[11]

The Fourth Circuit affirmed the district court's treatment of white Democratic candidates who enjoyed a majority of minority votes in the general election as minority-preferred, regardless of the amount of minority support those candidates received in the Democratic primary.[12] The court of appeals held "candidates who receive 99+% of the black vote in general elections are the black-preferred candidate *in the election,* regardless of their level of support in the primary."[13]

The court of appeals agreed with the appellants' contention "that the district court erred in not distinguishing between, and separately analyzing, primaries and general elections, in determining whether black-preferred candidates were 'usually' successful."[14] The Fourth Circuit stated that the Voting Rights Act requires equal opportunity to participate in general elections as well primary elections.[15] However, the court did not disrupt summary judgment because plaintiffs would not have prevailed on their Section 2 claim even if primary and general election results had not been aggregated for evaluation.[16]

The Fourth Circuit held that in multi-seat elections, any candidate who receives a majority of the minority votes, and places behind a successful first choice of minority voters, should automatically be deemed a minority-preferred candidate.[17] Furthermore, the district court erred by failing to treat as minority-preferred some successful candidates who place second and third behind the *unsuccessful* first choice among black voters.[18] The district court's error was harmless because it favored the plaintiffs.

The district court did not take into account the special circumstances surrounding the electoral success of black candidate O'Kelley. O'Kelley the only black candidate ever elected since the passage of the Voting Rights Act in 1965, was initially appointed to fill a vacant seat, and then won three straight elections.[19] O'Kelley's situation was unique because even in his first election he had the benefit of running as an incumbent.[20] The *Gingles* Court noted that "special circumstances, such as the absence of an opponent, incumbency, or the utilization of bullet voting, may explain minority electoral success in a polarized contest."[21] The Fourth Circuit refused to call the lower court's decision clearly erroneous because of its failure to discount O'Kelley's success.[22]

III. ANALYSIS/ APPLICATION

The Fourth Circuit held that plaintiffs must proffer data from a substantial majority of elections, including those in which only white candidates run, before they can show that the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidates.[23] Relying on Justice Brennan's plurality opinion in Gingles, the majority decided that the race of the candidate is not determinative of minority preferred status.[24] Because it is possible for minority voters to prefer white candidates, the court asserted that the district court must consider a representative cross section of elections before it is able to determine whether the third *Gingles* factor exists in a particular case.[25]

After establishing that the race of a candidate does not necessarily correlate with minority-preferred status, the court addressed the question of how much minority support the candidate needs to obtain that status. In *Collins v. City of Norfolk, Va.,* ("*Collins II*"), the Fourth Circuit held that the district court erred by identifying as minority-preferred some successful candidates who received over 50% of the minority vote, despite the fact that other unsuccessful candidates had enjoyed a far greater percentage of the minority vote.[26] The Collins II court recognized the risk of minority vote dilution in multi-seat at large elections in which voters are allotted more than one vote:

> If black voters exercised their right to cast all of their allotted votes, they ran the risk that their second and third choices would be declared their preferred candidates. Only by single-shot voting—withholding all votes save for their first

---

[9] *Id.* at 605-611.
[10] *Id.* at 611.
[11] *Id.* at 606.
[12] *Id.* at 614.
[13] *Id.* at 615.
[14] *Id.* at 616.
[15] *Id.*
[16] *Id.*
[17] *Id.* at 608.
[18] *Id.* at 611.
[19] *Id.* at 603.
[20] *Id.* at 632 (Michael, J. dissenting).
[21] *Gingles,* 478 U.S. at 57.
22 *Lewis,* 99 F3d at 617. The court also noted that the plaintiffs' expert failed to analyze the effect of incumbency on O'Kelley's success. Id.
23 *Id.* at 611.
24 *Id.* at 608. "Under § 2, it is the status of the cantidate as the chosen representative of a particular racial group, not the race of the candidate, that important." *Gingles,* 478 U.S. at 68 (plurality opinion).
25 Id. at 607-8.
26 *Collins v. City of Norfolk, Va.,* 883 F.2d 1232, 1239 (4th Cir. 1989).

> choice, and forfeiting the opportunity to cast all votes allotted to each voter—could the minority be assured that its second and third choices would not be declared its preferred candidates. In contrast, under the at-large system, the white voters can freely cast all votes allotted to them without suffering the penalty imposed on the minority voters. The district court's construction of the Act defeats the congressional purpose of assuring that the opportunity to participate in the electoral process is equally open to all citizens.[27]

The Fourth Circuit dismissed this part of *Collins II* as dictum and held that *Collins II* did not "adopt a per se rule against considering, as minority-preferred, candidates who finished second or third among minority voters behind an unsuccessful candidate who was the minority community's first choice."[28] When the minority's first choice candidate is unsuccessful, a two-step inquiry is required for evaluating the minority-preferred status of successful candidates which finish behind the first choice.[29] First, a court must determine whether the minority's first choice received significantly greater support from minority voters than other candidates who also received 50% of the minority vote.[30] If the first choice did not receive a far greater percentage of the minority vote, then the other candidates would qualify as minority-preferred, and the inquiry should cease after the first step.[31] On the other hand, if the unsuccessful first choice received a far greater percentage of the minority vote than the second and third place successful candidates, then the successful candidates would be presumed not to be minority-preferred.[32] In such a case the court must proceed to the second step of inquiry and review each situation individually to decide whether such a successful candidate could fairly be considered a representative of minority voters.[33]

Furthermore, the Fourth Circuit held that when the minority's first choice is successful in a multi-seat election, any candidate receiving at least 50% of the minority vote is automatically minority-preferred.[34] All other candidates finishing behind the successful first choice must receive an individualized determination of whether or not they may be called minority-preferred.[35] In effect, the court's holding allows for candidates who do not even receive a majority of the minority vote to be deemed the minority community's chosen representatives.

An overwhelming majority of black voters in Alamance County are Democrats.[36] These voters sometimes support candidates in the Democratic primaries who fail to receive a Democratic nomination. In the general election, many of the same black voters vote for a Democratic candidate, even though they did not support that candidate in the primary.[37] Appellants argued that since the black citizens of Alamance County generally support Democrats in partisan elections, a Democratic candidate should only be treated as minority-preferred if he or she were minority-preferred in the primary.[38]

The Fourth Circuit affirmed the district court's treatment of Democratic candidates, reasoning that the "Voting Rights Act is clearly concerned with whether blacks have an equal opportunity to elect the candidate of their choice in both nominations and elections."[39] Furthermore, to require that the candidate's minority-preferred status be carried forward from the primary, would be to ignore the possibility that the candidate's status might change between the primary and the general elections.[40] The court also contended that black voters do not vote monolithically, even in partisan election.[41] Based on these considerations, the Fourth Circuit held, "candidates who receive 99+% of the black vote in general elections are the black-preferred candidate in that election, regardless of their level of support in the primary."[43]

Only one black candidate has ever been elected to the Alamance County Board of County Commissioners.[44] In *Thornburg v. Gingles,* the Supreme Court stated:

> [T]he success of a minority candidate in a particular election does not necessarily prove that the district did not experience polarized voting in that election; special circumstances, such as the absence of an opponent, incumbency, or the uti-

---

[27]*Collins II,* 883 F.2d at 1239-40.

[28]*Lewis,* 99 F.3d at 612.

[29]*Id.*

[30]*Id.*

[31]*Id.*

[32]*Id.*

[33]*Id.*

[34]*Id.* at 614.

[35]*Id.* See *N.A.A.C.P. v. City of Niagra Falls, N.Y.,* 65 F.3d 1002, 1018 (2nd Cir. 1995) (holding that a candidate who received support from less than 50% of minority voters could not be minority-preferred).

[36]*Lewis,* 99 F.3d at 615.

[37]*Id.* at 626 (Michael, J., dissenting).

[38]*Id.* at 615.

[39]*Id.*

[40]*Id.*

[41]*Id.* at 616.

[42]*Id.* at 615.

[43]*Id.* at 620 (Michael J., dissenting).

[44]*Gingles,* 478 U.S. at 57.

> lization of bullet voting, may explain minority electoral success in a polarized contest.[45]

Appellants argued that the district court should have discounted candidate O'Kelley's electoral success because of the special circumstances surrounding his victories. O'Kelley was first appointed to fill a vacant seat and then won three straight elections.[46] O'Kelley's first election was a special election for the seat to which he was appointed, not an at-large election; and he ran as an incumbent in the next two elections.[47] *Gingles* establishes that special circumstances must be considered when determining whether the white majority usually blocs the election of a minority's preferred candidates. The Fourth Circuit dismissed the Supreme Court's instruction. "To reverse as clearly erroneous the district court's decision under these circumstances would be to transform what was at most a narrow or "special" circumstance envisioned by the Court only in *dicta* into a categorical rule that all electoral success of a minority-preferred incumbent are to be discounted."[47]

IV. THE DISSENT

Judge Michael dissented from the majority opinion. He believed that the plaintiffs had proffered enough evidence of vote dilution to survive summary judgment.[48] Judge Michael did not find it necessary to require plaintiffs to produce data from all-white elections.[49] However, he stated that a defendant may proffer such data to rebut a vote dilution claim.[50] He pointed our that *Gingles* itself was based on the review of only those elections that included a minority candidate, and that no court had ever before held that plaintiffs are required to produce evidence of all-white elections.[51] Judge Michael also disagreed with the majority's holding that plaintiffs must proffer data from a majority of elections. The *Gingles* court had specifically provided that the number of elections that must be studied would differ from case to case, depending on the pertinent circumstances.[52]

The dissent also criticized the majority's methods of identifying which candidates are and are not minority-preferred. Judge Michael asserted that complete reliance on statistical election data is not enough.[53]

> At the very least, we must examine the particular circumstances of each case to discern whether the electoral support that minority voters give a candidate (especially in general elections) truly reflects minority voters' preference or whether such support is itself a manifestation of a structural inequality in the challenged voting system.[54]

Thus, the dissent urged that a district court must complete both steps of the *Collins II* analysis whenever it is determining whether a successful candidate finishing behind the unsuccessful first choice among minority voters is minority-preferred.[55] The dissent stated that the first step in the inquiry, (whether the unsuccessful first choice received a significantly higher percentage of support than the second and third place finishers), should only create a presumption for or against minority-preferred status.[56] The second step requires the district court to determine whether the presumption is supported by the surrounding facts.[57] The majority held that the court making the determination of minority-preferred status need only to proceed to the second step if a candidate in not presumed minority-preferred.[58] The dissent found no need for such a distinction.[59]

The dissent also found error in the Fourth Circuit's holding that whenever the first choice among minority voters is successful, any candidate who receives a majority of the minority vote is automatically minority-preferred.[60] Judge Michael stated that such a test disregards the holding in *Collins II,* that a candidate in a multi-seat at-large election is not necessarily minority-preferred just because he or she receives 50% of the minority vote.[61] He contended that the court's decision undermines the Voting Rights Act and helps to mask structural inequalities that "work to create the appearance of minority preference where none actually exists."[62] Judge Michael would hold "that a district court must always make an individualized determination of whether any second- or third- place finisher who receives a majority of the minority vote is actually minority preferred."[63]

---

[45] *Lewis,* F.3d at 632.
[46] *Id.*
[47] *Id.* at 617.
[48] *Id.* at 621.
[49] *Id.* at 623.
[50] *Id.* at 624.
[51] *Id.* at 622-23.
[52] *Id.* at 622.
[53] *Id.* at 627.
[54] *Id.*
[55] *Id.* at 628.
[56] *Id.*
[57] *Id.*
[58] *Id.* at 612.
[59] *Id.* at 628.
[60] *Id.* at 629.
[61] *Id.*
[62] *Id.* at 630.
[63] *Id.* (emphasis added).

This individualized assessment should take account of the totality of surrounding circumstances.[64] Totality of circumstances review may entail examining data from primary elections.[65] The district court should also take into account the "fact that minority voters often support minority candidates."[66] Additionally, the dissent would not recognize any candidate receiving less than a majority of the minority vote as minority-preferred.[67]

Finally, the dissent found the inclusion of candidate O'Kelley's successes problematic. Judge Michael would hold that "O'Kelley's incumbency, coupled with his appointment and the unique nature of his 1974 [special] election, constitute special circumstances requiring that [the court] discount this election victory"[68] The dissent also stated that O'Kelley's second and third victories created genuine issues of material fact as to whether they may be included in determination of the third *Gingles* precondition.[69]

In sum, the dissent would reverse the district court's summary judgment ruling because the court had not made individual determinations of who was and was not a minority-preferred candidate. Furthermore, based on the election data proffered by the plaintiffs, the dissent found "that a genuine question of fact exists as to whether the at-large method for electing commissioners in Alamance County deprives black voters of the same opportunity to elect representatives of choice as is enjoyed by the white voters."[70] Judge Michael would have remanded the case for trial.[71]

V. CONCLUSION

The Fourth Circuit greatly reduces the potential for survival of § 2 vote dilution claims. Identifying which candidates are minority-preferred is a critical step in the establishment of the third *Gingles* precondition. While a majority of the Supreme Court could not agree on whether or not race of the candidate was a relevant factor in making this determination,[72] the Fourth Circuit concluded that a white candidate could be minority-preferred.[73] A problem with the court's assumption is that minority voters might have to support a white candidate in an election between white candidates simply because they have no other choice.

Based on its determination that the race of the candidate is irrelevant to minority-preferred status, the Fourth Circuit held that a plaintiff must proffer election data from a substantial majority of elections, including those without a black candidate.[74] While other circuits have refused to adopt a *per se* rule against reviewing white-on-white elections, most agree that elections that include both black and white candidates are generally more probative to vote dilution analysis.[75] In contrast, a vote dilution claim will not survive summary judgment in the Fourth Circuit unless the plaintiff proffers data from white-on-white elections.

A better approach than the Fourth Circuit's almost wholesale inclusion of virtually any white-on-white election data when conducting a § 2 analysis, might be to look at each all-white election individually and include only those elections which contain a chosen representative of the minority community. A candidate need not be black to be a representative, but the totality of the circumstances surrounding the election should lead to the conclusion that the minority voters have chosen the candidate to *represent* them. Such a method would preserve the integrity of the Voting Rights Act, while avoiding the "political appartheid" feared by the court.

Vote dilution claims are also burdened by the automatic adoption as minority-preferred, of any candidate who receives a majority of the minority votes, and places behind a successful first choice candidate among minority voters. Perhaps the most dangerous aspect of the court's opinion is the possibility that candidates who do

---

[64] *Id.*

[65] *Id.* at 630.

[66] *Id.* at 631.

[67] *Id.*

[68] *Id.* at 632.

[69] *Id.*

[70] *Id.* at 634.

[71] *Id.* at 632.

[72] In *Gingles*, Justice Brennan, joined by Justices Marshall, Blackmun, and Stevens concluded, "Under § 2, it is the status of the candidate as the chosen representative of a particular racial group, not the race of the candidate, that is important." *Gingles*, 478 U.S. at 68 (emphasis in original) (plurality opinion). Justice White, who joined the rest of the majority opinion, believed the race of the candidate to be a relevant factor in assessing § 2 violations. He stated that Justice Brennan's view was "interest group politics rather than a rule hedging against racial discrimination." *Id.* at 83 (White, J., concurring). Finally, Justice O'Connor, writing for a separate plurality, agreed with Justice White that the race of a candidate might be relevant in identifying racially polarized voting. *Id.* at 101 (O'Connor, J., concurring in judgment).

[73] *Lewis*, 99 F.3d at 610.

[74] *Id.* at 611.

[75] *See, Uno v. City of Holyoke*, 72 F.3d 973, 988 n.8 (1st Cir. 1995) ("Although the VRA does not require for a successful section 2 showing that minority-preferred candidates be members of the minority group, elections in which minority candidates run are often especially probative on the issue of racial bloc voting."); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) ("It is logical...that the most probative evidence of whether minority voters have an equal opportunity to elect candidates of their choice is derived from elections involving black candidates."); *Jenkins v. Red Clay Consol. School Dist. Bd. of Educ.*, 4 F.3d 1103, 1125 ("implicit in the *Gingles* holding is the notion that black preference is determined from elections which offer

not even receive a majority of the minority vote might be deemed minority-preferred after an individualized determination of their status.[76]

Even if a minority group that has never been able to elect a minority candidate in a multi-member district can establish that it is geographically compact and politically cohesive, it might not be able to prove that the white majority votes sufficiently to bloc the election of minority-preferred candidates. The Fourth Circuit's expansive definition of which candidates are minority-preferred certainly makes their task extremely difficult. The Fourth Circuit has made it nearly impossible for minority plaintiffs to overcome summary judgment and take their § 2 vote dilution claim to trial.

Summary and Analysis Prepared by:
Mona Raza

---

the choice a black candidate."); *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 503 (5th Cir. 1987) ("[W]e conclude that Gingles is properly interpreted to hold that the race of the candidate is in general of less significance than the race of the voter—but only within the context of an election that offers voters the choice of supporting a viable minority candidate."); *Baird v. City of Indianapolis*, 976 F.2d 357, 361 (7th Cir. 1992) (focused on the race of the candidate and did not discount victory of a black Republican, even though most black voters were Democrats). But *see, N.A.A.C.P. v. City of Niagra Falls*, 65 F.3d 1002 (2nd Cir. 1995) (refusing to adopt an "approach precluding the possibility that a white candidate can be the actual and legitimate choice of minority voters" because such an "approach would project a bleak, if not hopeless, view of our society—a view inconsistent with our people's aspirations for a multiracial and integrated constitutional democracy."); and *Harvell v. Blyrheville School Dist. #5*, 71 F.3d 1382 (8th Cir.) ("We do not categorically state that a candidate is the minority-preferred candidate simply because that candidate is a member of the minority.")

[76] *Lewis*, 99 F.3d at 614.