SUPREME COURT OF THE UNITED STATES

No. 91–2012

JACKIE HOLDER, ETC., ET AL., PETITIONERS *v.*
E. K. HALL, SR., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

[June 30, 1994]

JUSTICE KENNEDY announced the judgment of the Court and delivered an opinion, in which THE CHIEF JUSTICE joined, and in all but Part II-B of which JUSTICE O'CONNOR joined.

This case presents the question whether the size of a governing authority is subject to a vote dilution challenge under §2 of the Voting Rights Act of 1965, 42 U. S. C. §1973.

The State of Georgia has 159 counties, one of which is Bleckley County, a rural county in central Georgia. Black persons make up nearly 20% of the eligible voting population in Bleckley County. Since its creation in 1912, the county has had a single-commissioner form of government for the exercise of "county governing authority." See Ga. Code Ann. §1–3–3(7) (Supp. 1993). Under this system, the Bleckley County Commissioner performs all of the executive and legislative functions of the county government, including the levying of general and special taxes, the directing and controlling of all county property, and the settling of all claims. Ga. Code. Ann. §36–5–22.1 (1993). In addition to Bleckley County, about 10 other Georgia counties use the single-commissioner system; the rest have multimember commissions.

In 1985, the Georgia Legislature authorized Bleckley County to adopt a multimember commission consisting of five commissioners elected from single-member districts and a single chairman elected at large. 1985 Ga. Laws, p. 4406. In a referendum held in 1986, however, the electorate did not adopt the change to a multimember commission. (In a similar referendum four years earlier, county voters had approved a five-member district plan for the election of the county school board.)

In 1985, respondents (six black registered voters from Bleckley County and the Cochran/Bleckley County Chapter of the National Association for the Advancement of Colored People) challenged the single-commissioner system in a suit filed against petitioners (Jackie Holder, the incumbent county commissioner, and Probate Judge Robert Johnson, the superintendent of elections). The complaint raised both a constitutional and a statutory claim.

In their constitutional claim, respondents alleged that the county's single-member commission was enacted or maintained with an intent to exclude or to limit the political influence of the county's black community in violation of the Fourteenth and Fifteenth Amendments. At the outset, the District Court made extensive findings of fact about the political history and dynamics of Bleckley County. The court found, for example, that when the county was formed in 1912, few if any black citizens could vote. Indeed, until passage of federal civil rights laws, Bleckley County "enforced racial segregation in all aspects of local government—courthouse, jails, public housing, governmental services—and deprived its black citizens of the opportunity to participate in local government." 757 F. Supp. 1560, 1562 (MD Ga. 1991). And even today, though legal segregation no longer exists, "more black than white residents of Bleckley County continue to endure a depressed socio-economic status." *Ibid.* No black person has

run for or been elected to the office of Bleckley County Commissioner, and the District Judge stated that, having run for public office himself, he "wouldn't run if [he] were black in Bleckley County." See 955 F. 2d 1563, 1571 (CA11 1992).

The court rejected respondents' constitutional contention, however, concluding that respondents "ha[d] failed to provide any evidence that Bleckley County's single member county commission [wa]s the product of original or continued racial animus or discriminatory intent." 757 F. Supp., at 1571. Nor was there evidence that the system was maintained "for tenuous reasons" or that the commissioner himself was unresponsive to the "particularized needs" of the black community. *Id.*, at 1564. There was no "slating process" to stand as a barrier to black candidates, and there was testimony from respondents that they were unaware of any racial appeals in recent elections. *Id.*, at 1562, n. 2, 1583.

In their statutory claim, respondents asserted that the county's single-member commission violated §2 of the Voting Rights Act of 1965, 79 Stat. 437, as amended, 42 U. S. C. §1973. Under the statute, the suit contended, Bleckley County must have a county commission of sufficient size that, with single-member election districts, the county's black citizens would constitute a majority in one of the single-member districts. Applying the §2 framework established in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), the District Court found that respondents satisfied the first of the three *Gingles* preconditions because black voters were sufficiently numerous and compact that they could have constituted a majority in one district of a multimember commission. In particular, the District Court found that "[i]f the county commission were increased in number to six commissioners to be elected from five single member districts and if the districts were the same as the present school board election districts, a black majority `safe' district . . .

would result." 757 F. Supp., at 1565. The court found, however, that respondents failed to satisfy the second and third *Gingles* preconditions—that whites vote as a bloc in a manner sufficient to defeat the black-preferred candidate and that blacks were politically cohesive.

The Court of Appeals for the Eleventh Circuit reversed on the statutory claim. Relying on its decision in *Carrollton Branch of NAACP* v. *Stallings*, 829 F. 2d 1547 (CA11 1987), the court first held that a challenge to the single-commissioner system was subject to the same analysis as that used in *Gingles*. Applying that analysis, the Court of Appeals agreed with the District Court that respondents had satisfied the first *Gingles* precondition by showing that blacks could constitute a majority of the electorate in one of five single-member districts. The court explained that it was "appropriate to consider the size and geographical compactness of the minority group within a restructured form of the challenged system when the *existing structure* is being challenged as dilutive." 955 F. 2d, at 1569. The Court of Appeals further found that the District Court had erred in concluding that the second and third *Gingles* preconditions were not met. Turning to the totality of the circumstances, the court found that those circumstances supported a finding of liability under §2. The court therefore concluded that respondents had proved a violation of §2, and it remanded for formulation of a remedy, which, it suggested, "could well be modeled" after the system used to elect the Bleckley County school board. *Id.*, at 1573–1574, and n. 20. Because of its statutory ruling, the Court of Appeals did not consider the District Court's ruling on respondents' constitutional claim.

We granted certiorari to review the statutory holding of the Court of Appeals. 507 U. S. ___ (1993).

Section 2 of the Voting Rights Act of 1965 provides that "[n]o 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." 42 U. S. C. §1973(a). In a §2 vote dilution suit, along with determining whether the *Gingles* preconditions are met[1] and whether the totality of the circumstances supports a finding of liability, a court must find a reasonable alternative practice as a benchmark against which to measure the existing voting practice. See *post*, at 3 (O'CONNOR, J., concurring in part and concurring in judgment). As JUSTICE O'CONNOR explained in *Gingles:* "The phrase vote dilution itself suggests a norm with respect to which the fact of dilution may be ascertained . . . . [I]n order to decide whether an electoral system has made it harder for minority voters to elect the candidates they prefer, a court must have an idea in mind of how hard it should be for minority voters to elect their preferred candidates under an acceptable system." 478 U. S., at 88 (opinion concurring in judgment) (internal quotation marks omitted).

In certain cases, the benchmark for comparison in a §2 dilution suit is obvious. The effect of an anti-single-shot voting rule, for instance, can be evaluated

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[1]*Gingles* requires a showing that "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district," 478 U. S., at 50, that the minority group is politically cohesive, and that the majority group "votes sufficiently as a bloc to enable it-in the absence of special circumstances . . . usually to defeat the minority's preferred candidate." *Id.*, at 51.

by comparing the system with that rule to the system without that rule. But where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under §2. See *post*, at 3–7 (O'CONNOR, J., concurring in part and concurring in judgment).

As the facts of this case well illustrate, the search for a benchmark is quite problematic when a §2 dilution challenge is brought to the size of a government body. There is no principled reason why one size should be picked over another as the benchmark for comparison. Respondents here argue that we should compare Bleckley County's sole commissioner system to a hypothetical five-member commission in order to determine whether the current system is dilutive. Respondents and the United States as *amicus curiae* give three reasons why the single commissioner structure should be compared to a five-member commission (instead of, say, a 3–, 10–, or 15–member body): (1) because the five–member commission is a common form of governing authority in the State; (2) because the state legislature had authorized Bleckley County to adopt a five–member commission if it so chose (it did not); and (3) because the county had moved from a single superintendent of education to a school board with five members elected from single-member districts. See Brief for United States as *Amicus Curiae* 17–18.

These referents do not bear upon dilution. It does not matter, for instance, how popular the single-member commission system is in Georgia in determining whether it dilutes the vote of a minority racial group in Bleckley County. That the single-member commission is uncommon in the State of Georgia, or that a five–member commission is quite common, tells us nothing about its effects on a

minority group's voting strength. The sole commissioner system has the same impact regardless of whether it is shared by none, or by all, of the other counties in Georgia. It makes little sense to say (as do respondents and the United States) that the sole commissioner system should be subject to a dilution challenge if it is rare—but immune if it is common.

That Bleckley County was authorized by the State to expand its commission, and that it adopted a five-member school board, are likewise irrelevant considerations in the dilution inquiry. At most, those facts indicate that Bleckley County could change the size of its commission with minimal disruption. But the county's failure to do so says nothing about the effects the sole commissioner system has on the voting power of Bleckley County's citizens. Surely a minority group's voting strength would be no more or less diluted had the State not authorized the county to alter the size of its commission, or had the county not enlarged its school board. One gets the sense that respondents and the United States have chosen a benchmark for the sake of having a benchmark. But it is one thing to say that a benchmark can be found, quite another to give a convincing reason for finding it in the first place.

To bolster their argument, respondents point out that our §5 cases may be interpreted to indicate that covered jurisdictions may not change the size of their government bodies without obtaining preclearance from the Attorney General or the federal courts. Brief for Respondents 29; see *Presley* v. *Etowah County Comm'n*, 502 U. S. ___, ___-___ (1992) (slip op., at 9–10); *Lockhart* v. *United States*, 460 U. S. 125, 131–132 (1983); *City of Rome* v. *United States*, 446 U. S. 156, 161 (1980). Respondents contend that these §5 cases, together with the similarity in language between §§2 and 5 of the Act, compel the conclusion

that the size of a government body must be subject to a dilution challenge under §2. It is true that in *Chisom* v. *Roemer*, 501 U. S. 380, 401–402 (1991), we said that the coverage of §§2 and 5 is presumed to be the same (at least if differential coverage would be anomalous). We did not adopt a conclusive rule to that effect, however, and we do not think that the fact that a change in a voting practice must be precleared under §5 necessarily means that the voting practice is subject to challenge in a dilution suit under §2.

To be sure, if the structure and purpose of §2 mirrored that of §5, then the case for interpreting §§2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application.[2] Section 5 applies only in certain jurisdictions specified by Congress and "only to proposed changes in voting procedures." *Beer* v. *United States*, 425 U. S. 130, 138 (1976); see 42 U. S. C. §1973b(b) (specifying jurisdictions where §5 applies). In those covered jurisdictions, a proposed change in a voting practice

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[2]Section 2 provides that "[n]o 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." 42 U. S. C. §1973(a).

Section 5 requires preclearance approval by a court or by the Attorney General "[w]henever a [covered] State or political subdivision . . . shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting . . . different from that [previously] in force or effect" so as to ensure that it "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." 42 U. S. C. §1973c.

must be approved in advance by the Attorney General or the federal courts. §1973c. The purpose of this requirement "has always been to insure that no voting-procedure changes would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." 425 U. S., at 141. Under §5, then, the proposed voting practice is measured against the existing voting practice to determine whether retrogression would result from the proposed change. See *id.*, at 141. The baseline for comparison is present by definition; it is the existing status. While there may be difficulty in determining whether a proposed change would cause retrogression, there is little difficulty in discerning the two voting practices to compare to determine whether retrogression would occur. See 28 CFR §51.54(b) (1993).

Retrogression is not the inquiry in §2 dilution cases. 42 U. S. C. §1973(a) (whether voting practice "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color"); S. Rep. No. 97–417, p. 68, n. 224 (1982) ("Plaintiffs could not establish a Section 2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the political strength of a minority group"). Unlike in §5 cases, therefore, a benchmark does not exist by definition in §2 dilution cases. And as explained above, with some voting practices, there in fact may be no appropriate benchmark to determine if an existing voting practice is dilutive under §2. For that reason, a voting practice that is subject to the preclearance requirements of §5 is not necessarily subject to a dilution challenge under §2.

This conclusion is quite unremarkable. For example, in *Perkins* v. *Matthews*, 400 U. S. 379, 388 (1971), we held that a town's annexation of land was covered under §5. Notwithstanding that holding, we

think it quite improbable to suggest that a §2 dilution challenge could be brought to a town's existing political boundaries (in an attempt to force it to annex surrounding land) by arguing that the current boundaries dilute a racial group's voting strength in comparison to the proposed new boundaries. Likewise, in *McCain* v. *Lybrand*, 465 U. S. 236 (1984), we indicated that a change from an appointive to an elected office was covered under §5. Here, again, we doubt Congress contemplated that a racial group could bring a §2 dilution challenge to an appointive office (in an attempt to force a change to an elective office) by arguing that the appointive office diluted its voting strength in comparison to the proposed elective office. We think these examples serve to show that a voting practice is not necessarily subject to a dilution challenge under §2 even when a change in that voting practice would be subject to the preclearance requirements of §5.

With respect to challenges to the size of a governing authority, respondents fail to explain where the search for reasonable alternative benchmarks should begin and end, and they provide no acceptable principles for deciding future cases. The wide range of possibilities makes the choice "inherently standardless," *post*, at 5 (O'CONNOR, J., concurring in part and concurring in judgment), and we therefore conclude that a plaintiff cannot maintain a §2 challenge to the size of a government body, such as the Bleckley County Commission. The judgment of the Court of Appeals is reversed, and the case is remanded for consideration of respondents' constitutional claim.

It is so ordered.