JOHNSON v. DE SOTO COUNTY BOARD OF COMMISSIONERS: A SMALL MINORITY GROUP EXPERIENCES DIFFICULTY WHEN IT CLAIMS DILUTION OF ITS VOTING STRENGTH UNDER SECTION 2 OF THE VOTING RIGHTS ACT

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I. INTRODUCTION

In *Johnson v. De Soto County Board of Commissioners*,[1] the United States Court of Appeals for the Eleventh Circuit upheld the district court's reliance on non-census data to conclude that blacks could not, as of the time of trial, constitute a majority of the voters in a single-member district — an essential element of a racial vote-dilution claim.[2] The trial court credited testimony of the defendants' experts that, based on extrapolations from current voter-registration data, demographic changes in the eight years following the 1990 census had eliminated the possibility

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1. 204 F.3d 1335 (11th Cir. 2000). For a summary of this decision, see Debra Belniak Tuomey, Student Author, *Recent Developments*, 30 Stetson L. Rev. 1257, 1257–1260 (2001).

2. *Id.* at 1338–1339.

that a majority-black district could be established in the county.[3] Whether the estimation process employed in *De Soto County* will be useful to future litigants depends on the degree to which the challenged jurisdiction has experienced significant demographic changes since April 1, 2000, the date of the most recent census.

Although the most significant aspect of the *De Soto County* decision was its acceptance of non-census data as evidence of the existence of a majority-black district, the case itself raised other issues likely to be important in future vote-dilution litigation. The challenged bodies' overarching contention was that blacks were, in fact, experiencing a level of political success commensurate with their 11.8% portion of De Soto County's electorate.[4] Furthermore, the defendants contended that the county's black citizens simply lacked the numbers necessary to claim vote dilution.[5] The remedy sought would have provided the plaintiff minority group with twenty percent of the board's seats — almost twice its share of the electorate.[6] Neither the trial court nor the appellate court addressed the issue of how a minority group's relative and absolute numbers should be factored into a dilution claim. The issues defendants raised relating to the size of the plaintiff minority group are likely to be significant in the future as plaintiffs seek minority-controlled election districts in jurisdictions with smaller and smaller minority populations.

II. THE VOTE-DILUTION CLAIM

A. To Establish Racial Vote-dilution, a Minority Group Must Demonstrate That It Clearly Will Benefit from the Adoption of Single-member Districts

In *De Soto County*, black citizens claimed that the at-large[7] method of electing the county commission and school board diluted their voting strength in violation of Section 2 of the Voting Rights Act,[8] the Fourteenth Amendment to the United

3. *Id*. at 1343.

4. *Id*. at 1338.

5. *Id*. at 1338, 1343.

6. *See id*. at 1338 (stating that the plaintiffs' plans consisted of drawing five single-member districts with one district having a majority of black voters).

7. An at-large method of election is one in which all of the jurisdiction's voters elect the office at issue. *Black's Law Dictionary* 536 (Bryan A. Garner ed., 7th ed., West 1999). In *De Soto County*, all county voters were entitled to vote for all five members of the school board and the board of county commissioners. *De Soto County*, 204 F.3d at 1337.

8. 42 U.S.C. § 1973 (1994).

States Constitution, and the Fifteenth Amendment to the United States Constitution.[9] For relief, the plaintiffs asked that the court impose single-member election districts,[10] with one district drawn to contain a majority of potential black voters.[11] The essence of a vote-dilution claim is that, as a consequence of the inability of minority-preferred candidates to attract the votes from the majority-white electorate, minority citizens are unable to elect candidates of their choice in an election system that requires more votes for election than the group can deliver.[12] Plaintiffs in a vote-dilution suit typically will contend that, if an alternative electoral system will permit blacks to elect their choices without help from white voters, it should be adopted.[13]

Since its official recognition of racial vote dilution as a cognizable injury in the early 1970s, the United States Supreme

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9. *De Soto County*, 204 F.3d at 1335.

10. Had single-member districts been ordered, the county would have been divided into five districts. A voter then would have been permitted to vote only for the candidates running in the district in which the voter lived.

11. *De Soto County*, 204 F.2d at 1338.

12. At-large elections for local governing bodies and multi-member elections for state legislative districts are the most typical electoral systems challenged as dilutive of minority-voting strengths. *E.g. Thornburg v. Gingles*, 478 U.S. 30 (1986) (involving a challenge to multi-member legislative districts); *City of Mobile v. Bolden*, 446 U.S. 55 (1980) (involving a challenge to at-large elections for the city commission). If, as in *De Soto County*, a candidate must receive a majority of the votes cast to be nominated in the primary, a candidate preferred by blacks whose numbers are less than a majority of the electorate must attract white votes. Moreover, a minority-preferred candidate who secures his or her party's nomination must still attract a majority of the vote in most general elections because it is rare for there to be more than two candidates. The smaller the minority group's percentage of the electorate, the greater the support needed from outside the group. In *De Soto County*, blacks were only slightly more than eleven percent of the electorate, which meant that if they were one-hundred-percent cohesive in support of a candidate, that candidate still needed to secure about forty-four percent of the white vote to be elected.

13. The typical remedy for dilution is to replace the at-large or multi-member district elections with single-member districts. Single-member districts permit residents of specific areas and neighborhoods in a jurisdiction to elect representatives beholden to them — representatives who might not be able to attract sufficient jurisdiction-wide support to be elected at-large. Because blacks, and to a lesser degree, Hispanics, often live in racially- or ethnically-identifiable neighborhoods, a division of the jurisdiction into single-member election districts frequently will produce some number of districts in which the group is a majority of the electorate. By seeking single-member districts, the minority group demonstrates a willingness to trade such influence as it may have on the election of all members of the governing board for a guarantee of control over the election of one or more members. *See generally* Katharine I. Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 La. L. Rev. 851, 863–876 (1982) (examining how election structure impacts the election of black candidates).

Court consistently has refused to find vote dilution merely because the minority was unable to elect its choices in the challenged electoral system, but might be able to do so in an alternative electoral system.[14] Rather, to establish vote dilution, the plaintiff must establish that the "processes leading to nomination and election [are] not equally open to participation by the group in question," such that, under "the totality of the circumstances," the group's opportunity to elect candidates of its choice is not equal to that of others in the electorate.[15] In 1982, Congress incorporated this "totality of the circumstances" standard into its amendment of Section 2 of the Voting Rights Act — a measure the lawmakers undertook to provide a statutory alternative for the constitutional vote-dilution claim.[16]

In *Thornburg v. Gingles*,[17] the Supreme Court, in its first construction of amended Section 2, set out three preconditions that are essential to a vote-dilution claim. Plaintiffs must demonstrate that (1) the minority group is "sufficiently large and geographically compact to constitute a majority [of the voting age population of] a single-member district," (2) the minority group is politically cohesive, and (3) "the white majority votes sufficiently as a bloc to" usually defeat the candidates preferred by minority voters.[18] Failure to establish any one of these factors is fatal to the plaintiffs' claim.[19] Proof of the existence of the preconditions is necessary, but not sufficient, to establish dilution.[20] Plaintiffs also

14. *E.g. White v. Regester*, 412 U.S. 755, 765–766 (1973) (stating that it is not sufficient for the minority group to show that it has not elected legislative seats in proportion to its voting potential); *Whitcomb v. Chavis*, 403 U.S. 124, 143 (1971) (recognizing from the prior cases of *Fortson v. Dorsey*, 379 U.S. 437 (1965), and *Burns v. Richardson*, 384 U.S. 73 (1966), that dilution claims can be brought only if the election systems minimize or cancel out a minority's voting strength).

15. *White*, 412 U.S. at 765–766, 769–770.

16. Pub. L. No. 97-205, 96 Stat. 131, 134 (1982). In *Bolden*, the Court concluded that racial vote dilution violated the constitution only if the dilution-causing electoral system had been adopted or maintained for a discriminatory purpose. 446 U.S. at 66. Congress amended Section 2 to provide a statutory discriminatory results standard, adopting the constitutional standard from *Whitcomb* and *White*. *Gingles*, 478 U.S. at 35 (1986).

17. 478 U.S. 30 (1986).

18. *Id*. at 50–51.

19. *See e.g. League of United Latin Am. Citizens # 4552 (LULAC) v. Roscoe Indep. Sch. Dist.*, 123 F.3d 843, 847 (5th Cir. 1997) (affirming dismissal of claim for failing to show third factor); *Negron v. City of Miami Beach*, 113 F.3d 1563, 1571 (11th Cir. 1997) (affirming dismissal of claim for failing to show first factor); *Concerned Citizens of Hardee County v. Hardee County Bd. of Commrs.*, 906 F.2d 524, 526–527 (11th Cir. 1990) (affirming dismissal of claim for failing to show second factor).

20. *Johnson v. DeGrandy*, 512 U.S. 997, 1011–1012 (1994).

must demonstrate that, based on "the totality of the circumstances," their political opportunities are less than those of others in the electorate.[21] The minority group's inability to elect candidates of its choice must be attributable to race, and not to other reasons any group's candidates are unsuccessful.[22]

B. The Defendants Maintained That the Small Size of the Black Electorate, Not Racial Bias in the Electorate, Explained the Level of the Group's Political Influence

De Soto County was a somewhat unusual target for vote-dilution litigation. Historically, such suits were brought on behalf of groups that were a sufficiently large portion of a jurisdiction's electorate such that their lack of electoral success led to suspicions that race was responsible.[23] However, in 1990, blacks were a mere 1,954 (11.76%) of De Soto County's 16,610 potential voters.[24] Although the defendants contested the existence of the first and third *Gingles* preconditions, the underlying theme of their defense was that blacks enjoyed a level of political success commensurate with their share of the electorate.[25]

Despite blacks' small portion of the electorate, the plaintiffs were able in 1990 to create a district in which blacks were a

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21. *Id.*

22. *Nipper v. Smith*, 39 F.3d 1494, 1514–1515, 1524–1526 (11th Cir. 1994).

23. *E.g. Gingles v. Edmisten*, 590 F. Supp. 345, 357 (E.D.N.C. 1984), *aff'd in part, rev'd in part, sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986) (in the case that developed the three preconditions, the minority group's portion of the electorate was approximately equal to one seat in each challenged district).

24. The census reported that blacks constituted 13.7% of the county's voting-age population. *De Soto County*, 204 F.3d at 1338. However, the county contained a substantial number of persons of voting age who were not qualified to become electors — the largest portion of whom were inmates in a state prison. *Id.* The non-voting population was disproportionately black. *Johnson v. De Soto County Bd. of Commrs.*, No. 90-366-CIV-FTM-170, slip op. at 5-6 (M.D. Fla. Oct. 23, 1998) (copy on file with *Stetson Law Review*). The prison inmates are all convicted felons. *Id.* at 6. In Florida, convicted felons who have not had their civil rights restored are ineligible to vote. Fla. Const. art. VI, § 4(a); Fla. Stat. § 97.041(2)(b) (2001). In addition, the pre-incarceration residences of the vast majority of the inmate population were not in De Soto County, placing an additional limitation on their eligibility to vote in the county. Consequently, blacks made up a smaller portion of the potential electorate.

25. Republicans, for example, were about twenty percent of the county's electorate, but only one Republican had ever been elected to either of the defendant boards. Bureau of Econ. & Bus. Research & Warrington College of Bus. Admin., *Florida Statistical Abstract 1999*, 611 (Janet J. Galverez et al. eds., 33d ed., U. of Fla. 1999) (illustrating that Republicans were twenty percent of the electorate).

majority — 54.37% — of the district's potential voters.[26] The defendants contended that the first precondition required both "compactness" — meaning that the group's residential patterns permitted it to take advantage of a single-member district — and "numerosity" — meaning that it had to constitute roughly a "seat's worth" of the electorate to claim an expectation of electing a candidate primarily identified with the group.[27] Congress, the defendants argued, simply did not envision that groups too small to capture a seat in a proportional-representation system could nevertheless claim dilution under a statute that specifically disclaimed the existence of a right to proportional representation.[28] Indeed, had the plaintiffs prevailed, the remedy would have been, in effect, to set aside a seat for the group, thus giving it control over twenty percent of the legislative power, nearly twice its portion of the electorate.[29] As explained more fully below, the court did not address the defendants' "seat's worth" argument because, by the time of trial, plaintiffs' proposed majority-black district had disappeared.

III. NON-CENSUS DEMOGRAPHIC DATA ESTABLISHED THAT, AT THE TIME OF TRIAL, A MAJORITY-BLACK DISTRICT COULD NOT BE DRAWN IN DE SOTO COUNTY

A. The Outcome in *Johnson v. De Soto County* Was Ultimately Determined by Plaintiffs' Inability to Overcome Evidence That, as of the Time of Trial, Creating a Majority-black District Was Not Possible

Despite conceding that a majority-black district could be created based on the 1990 census, the defendants had contended, from the beginning of the litigation, that demographic changes already evident in 1990 eventually would eliminate any possibility for such a district. The influx of white population into

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26. *De Soto County*, 204 F.3d at 1339 n. 5.

27. *Id*. at 1343. By a seat's worth, we simply mean a portion of the electorate roughly equal to the share of voting power held by one seat on the relevant governing body. In the case of De Soto County's five-member boards, that number would have been twenty percent.

28. Congress included this proviso in amended Section 2: "*Provided*, that nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b) (1994) (emphasis in original).

29. For the argument that only groups whose numbers equal a "seat's worth" of the electorate can claim dilution, see *infra* Part IV(B)(1).

the county, which had lowered the black percentage of the electorate from the 1980 census to the 1990 census, showed no sign of abatement and seemed likely actually to accelerate in the 1990s.[30] There were also signs that blacks were moving from the county's historically-black neighborhoods that formed the core of the plaintiffs' proposed district to predominately-white areas of the county — a phenomenon the defendants' demographer testified was taking place nation-wide.[31]

In the more typical jurisdiction sued for vote dilution, the minority population is sufficiently large that a decade of demographic change is not likely to eliminate all options for creating majority-minority districts. In the case of De Soto County, however, plaintiffs' putative district contained all three of the county's historically-black neighborhoods, which together constituted almost eighty-seven percent of the county's eligible black electorate.[32] Only 257 blacks potentially eligible to vote resided outside plaintiffs' proposed district, all of them too geographically remote from the district to be included by any reasonable modification of its boundaries.[33] Thus, slight out-migration of blacks or in-migration by whites could eliminate the

30. From 1980 to 1990, disproportionate white growth resulted in blacks' portion of the population dropping from 18.7% to 15.6%. *Johnson*, 204 F.3d at 1338 (stating that in 1990 blacks comprised 15.6% of the county population); Pl.'s Compl. at ¶ 10, *De Soto County*, No. 90-366-CIV-FTM-170 (M.D. Fla. Oct. 23, 1998) (copy on file with *Stetson Law Review*) (stating that in 1980 blacks comprised 18.7% of the county population). Increase in the white population and stagnation in the black population were in line with reasonable expectations. Lay witnesses for the defendants testified that De Soto County was becoming increasingly attractive to retirees, the vast majority of whom were white. There was no obvious reason why a rural county in central Florida would be particularly attractive to blacks.

31. *De Soto County*, 204 F.3d at 1338 n. 3; *see also* William H. Frey & The Brookings Instn., Ctr. on Urban Metro. Policy, *Melting Pot Suburbs: A Census 2000 Study of Suburban Diversity* <html://www.brookings.org/es/urban/census/frey.pdf> 2 (June 2001) (describing this demographic shift occurring nation-wide).

32. In some circumstances the presence of a large non-voting population, such as a prison, will aid the creation of a minority-controlled district. Because these non-voting populations must be included when testing for compliance with constitutional one-person, one-vote requirements, their inclusion in a district with a heavy minority population may mean that the minority is a majority of the electorate, even when the non-voting population is predominately white. For example, suppose a district has to contain 1,000 persons of voting age to satisfy equal-population requirements. In a district in which blacks are 400 of the 1,000, and prisoners are another 250, blacks would be a majority of the potential electorate of 750. This option was not available in *De Soto County* because including the county's substantial prison population and the black neighborhoods in the same district was not possible.

33. *De Soto County*, No. 90-366-CIV-FTM-170 slip op. at 11-12.

group's majority status, and there were no readily apparent options for creating a different majority-black district. The most obvious threat was simply that the differential rate of growth in the white and black populations would reduce the black percentage below that needed to be a majority of a district, even if the entire black population could be placed in a district.

The case was filed in December 1990 but, through no fault of the defendants, was not tried until mid-1998.[34] There were very obvious signs of white-population growth and of black dispersion from the historically-black neighborhoods during the eight years the case was pending,[35] but quantifying the impact of these changes on the existence of a majority-black district appeared impossible. On the eve of trial, defendants obtained the most recent county voter-registration data as a part of their routine trial preparation. A comparison with comparable registration data recorded close to the time of the 1990 census revealed that registration had increased substantially in every precinct for both whites and blacks, except for black registration in the precincts making up the plaintiffs' proposed district. In these precincts, black registration had increased, but at a dramatically lower rate.[36]

Defense counsel believed this latest registration information could provide the means to quantify the demographic changes in the county in the eight years since the 1990 census discussed above. The approach was novel, yet simple. It had two major premises. The first was that registered voters constitute a sample — a very large sample, in fact — of the underlying voting-age population otherwise eligible to vote. The second was that this sample could be used to determine whether a majority-black district still existed in the county.

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34. On November 9, 1994, the district court granted plaintiffs' motion for summary judgment against the school board only. *Johnson v. De Soto County Bd. of Commrs.*, 868 F. Supp. 1376, 1383 (M.D. Fla. Nov. 9, 1994), *rev'd*, 72 F.3d 1556 (11th Cir. 1996). The school board appealed and the case against the county commission was stayed during the appeal. *Johnson v. De Soto County Bd. of Commrs.*, 1994 U.S. Dist. LEXIS 17900 at *6 (M.D. Fla. Dec. 9, 1994). A panel of the Eleventh Circuit reversed the summary judgment and remanded the case for the trial. *De Soto County*, 72 F.3d 1556, 1565 (11th Cir. 1996). The trial was then held before the district court in Summer 1998.

35. *De Soto County*, 204 F.3d at 1338 & n. 3.

36. Black registration within plaintiffs' district increased by 11.1%. Br. of Appellee at 21, *Johnson v. De Soto County Bd. of Commrs.*, 204 F.3d 1335 (11th Cir. 2000) (copy on file with *Stetson Law Review*). Black registration outside the district increased by 263% (starting, however, from a very low base), and white registration county-wide increased by 31.7%. *Id*.

Absent evidence to the contrary, one can reasonably assume that, if registration has increased more in precinct "A" than in precinct "B," this increase can be explained by a disproportionate increase in the voting-age population living in "A."[37] In 1991, when the plaintiffs' proposed district contained a 54.37% black voting-age majority, black registrants in the district were 10.7% of all of the county's registered voters.[38] By 1998, they were only 9.05% of the county total — a drop of more than fifteen percent.[39] Considering this drop, it seemed highly unlikely that blacks within the district remained, as of 1998, sufficiently numerous to constitute a majority of the voting-age population of an equally-populated single-member district.

One possible problem with using registered voters as a sample of the underlying population is that whites generally register to vote at higher rates than blacks.[40] Thus, reliance on registration data may over-predict the actual degree to which white growth has exceeded black growth. Several factors made it reasonable to assume that this was not true in De Soto County. First, black-registration rates in 1991 for blacks then residing in the plaintiffs' district actually exceeded the registration rates for whites county-wide.[41] Second, the National Registration Act of 1993 (the so-called "Motor Voter" Act)[42] had been implemented between the census and the trial date.[43] One of the chief selling points of this act was that it would eliminate the gap between black- and white-registration rates.[44] It would have been illogical

37. An alternative explanation would be that citizens already living in precinct "A," but not those already living in precinct "B," had been motivated to register by some political or community event — something like a voter-registration drive, for example. In the case of *De Soto County*, there simply was no evidence of a registration drive from which blacks in plaintiffs' district had been excluded.

38. *De Soto County*, 204 F.3d at 1339 n. 5; *De Soto County*, No. 90-366-CIV-FTM-170, slip op. at 13.

39. *De Soto County*, No. 90-366-CIV-FTM-170 slip op. at 13.

40. *See* Jennifer C. Day, Avalaura Gaither & U.S. Dept. of Comm., U.S. Census Bureau, *Voting and Registration in the Election of November 1998: Population Characteristics* 4 <http://www.census.gov> (Aug. 2000) (displaying a higher percentage registration of whites to blacks for congressional elections from 1966 to 1998).

41. *De Soto County*, 204 F.3d at 1342 n. 13.

42. 42 U.S.C. § 1973gg (1994).

43. *De Soto County*, 204 F.3d at 1342 (stating that the Motor Voter law was passed in 1993).

44. The Motor Voter initiative no doubt contributed to the observable increase in the number of registered voters merely by adding more of the unregistered electorate already in the county in 1990 to the registration rolls. There was, however, no support for the proposition that this was the primary explanation for the nearly twenty-five percent

to conclude that the registration rates for blacks living within the plaintiffs' district had decreased, despite the Motor Voter Act, when registration everywhere else in the county — including among blacks not in the district — had increased.

The second premise was that one could determine the ratio between black voters in the plaintiffs' district and all other voters, that must exist for blacks to be a majority of the potential electorate in an equally-populated district.[45] If black voters in the plaintiffs' district — the only significant concentration of blacks in the county — fell below this ratio, blacks could not possibly be a majority of the voting-age population of an equally-populated district. The only remaining issue then would be whether the district boundaries could be modified to bring in additional black population from outside the district.

Calculating the ratio of black voters in the plaintiffs' district to all other voters that would be necessary for them to equal a majority of the district was more involved than expected. To comply with the one-person, one-vote requirement, each district had to contain approximately twenty percent of the total population. Superficially, one would then assume blacks would be in the majority in a district in which their numbers were equal to ten percent of the county-wide population. However, to satisfy the first precondition, the group must constitute a majority of a district's voting-age population.[46] Because a greater portion of the white population than of the black population is of voting age, a

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increase in registration county-wide. Indeed, by 1998, there were more blacks registered to vote in precincts outside the plaintiffs' district than there were blacks of voting age living in these areas in 1990. *De Soto County*, No. 90-366-CIV-FTM-170 slip op. at 11-12 (showing that there were 257 voting-age blacks living outside the plaintiffs' district in 1990); Br. of Appellee at 21, *supra* n. 36, at 21 (stating that there were 298 blacks registered to vote in precincts outside the plaintiffs' district).

45. In the time available, it was possible to pinpoint the residences of the small number of black registrants in the voting precincts that were split to create the district, but not those of the larger number of white registrants affected by the split. Had it been possible to determine the number of white registrants in the district, it probably would have been unnecessary to calculate the ratio. What the defendants' estimation process established was that blacks living within the plaintiffs' proposed district in 1998 were too few in numbers to be a majority of an equally-populated district. The ratio evidence alone could not demonstrate that the current population within the district as drawn was majority-white. It was theoretically possible, but highly unlikely, that the drop in the district's black population's portion of the total electorate had been matched by a similar drop in the district's white population. If true, the district, though significantly under-populated, could have remained majority-black.

46. *Supra* n. 18 and accompanying text.

district that contains a majority-black population may still not contain a majority-black voting-age population.[47] The smaller portion of the black population that is of voting age also means that the number necessary to equal a majority of the voting-age population of a district goes down as the black population of the district increases.[48] Thus, the number of black voters necessary to equal a majority of a district will in fact be something less than ten percent of the county-wide electorate.

The defendants' experts calculated that, for De Soto County, blacks eligible to vote within a district would have to be 9.62% of the county's total electorate to constitute a slight majority (51%) of the district.[49] Using registration data, defendants' experts calculated that blacks eligible to vote in the district were only 9.05% of the county's eligible electorate,[50] which translated to 45.9% of an equally-populated district. Other evidence established that those black registrants outside the plaintiffs' district were too remote geographically to be added to the district.

Over the plaintiffs' objections, the district court agreed with other courts that have considered the matter, when it concluded that evidence other than the census is admissible to prove the existence of the first *Gingles* precondition.[51] The court also found the defendants' evidence convincing, and thus the plaintiffs' claim failed.[52]

B. The 2000 Census Substantiated the Defendants' Methodology

When the 2000 census figures were released earlier in 2001,

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47. For example, a total black population of 100 might contain 62 blacks of voting age, while a white population of 100 might contain 76 whites of voting age so that, for blacks to be a majority of the potential electorate, they must be somewhat more than a majority of the population.

48. In an all-white district, 76 of 100 persons would be of voting age. In an all-black district, 62 of 100 persons would be of voting age. The greater the portion of blacks in a district, the fewer the number of persons of voting age, and therefore, the smaller the number needed to equal a majority. Consequently, blacks equal to a majority of a district's voting-age population will be somewhat less than ten percent of total voting-age population, if the remaining four districts are majority-white.

49. The details of these calculations are available from the Authors.

50. The details of these calculations are available from the Authors.

51. *E.g.*, *Westwego Citizens for Better Govt. v. City of Westwego*, 906 F.2d 1042, 1045–1047 (5th Cir. 1990) (remanding to allow the presentation of non-census data, including voter-registration information, as admissible); *Garza v. County of L.A.*, 918 F.2d 763, 772–777 (9th Cir. 1990) (stating that non-census data can be properly considered and is permissible evidence).

52. *De Soto County*, 204 F.3d at 1343.

they indicated that the total population of De Soto County had grown by thirty-five percent during the 1990s, giving the county the fourteenth-highest growth rate among Florida's sixty-seven counties.[53] The percentage of blacks among the county's total population declined from 15.6% in 1990 to 12.7% in 2000, while the percentage of blacks among the county's voting-age population dropped from 13.7% in 1990 to 11.7%.[54] When the county's substantial, disproportionately-black inmate population is removed, blacks made up only 8.3% of the county's non-institutionalized voting-age population in the year 2000.[55] This percentage is well below the 9.62% required for blacks to constitute a majority of the eligible electorate in a single-member district — even if all could be included within one district. Thus, had the plaintiffs' district based on the 1990 census been adopted, it almost certainly would not have contained a black majority in 1998. Moreover, after mandatory redistricting following the 2000 census, the black percentage of an equally-populated district inevitably would have been even smaller.

IV. DE SOTO COUNTY'S LESSONS FOR FUTURE LITIGANTS

A. Supplementing the Census in Vote-dilution Litigation

Although the court in *De Soto County* affirmed that non-census information is relevant to establish or disestablish the first *Gingles* precondition, the defendants' particular use of registration information to update the census may have been too fact-specific to be directly useable in other jurisdictions.[56] The census was more than eight years old at the time of the *De Soto* trial, which no doubt influenced the court to consider more current data.

Litigants in the next several years probably will face a difficult task in persuading a court to augment the so-recently-taken 2000 census with registration or other non-census data.

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53. Bureau of Econ. & Bus. Research, *Florida Population: Census Summary 2000* at 10, 38 (U. of Fla. 2001).

54. *De Soto County*, 204 F.3d at 1338; U.S. Census Bureau, *Census 2000 Redistricting Data* <http://factfinder.census.gov> (accessed July 24, 2001).

55. The precise details by which this percentage was calculated are available from the Authors.

56. For future litigants, the most promising part of the *De Soto* methodology is probably the simple observation that registration data may be used as a sample of the size and location of the underlying voting-age population.

Quite legitimately, the census is presumed to have been reported accurately until proven otherwise.[57] Moreover, even though demographics change hourly, the census will, in many places, remain the most reliable measure of population distribution until the next census. Attempts to augment the census later likely will be most feasible when even minor demographic change may mean that a majority-minority district can be created, or that — as in *De Soto County* — one based on the last census has disappeared and alternative districts are not feasible. Under these circumstances, as well as in those rare circumstances in which a dramatic change in an area's population can be documented,[58] either party should be able to use registration data to demonstrate that a demographic shift affecting the existence of the first precondition has taken place.

Note, however, that, unless a new jurisdiction-wide census is taken, all that can be done with non-census information is to augment the most recent census. Plaintiffs who are relatively close to a majority of a district's electorate based on the census, can use registration data to demonstrate that, as of the time of trial, there is sufficient additional minority population within the boundaries of a district for the group to constitute a majority.[59] The remedial district still must be constructed using the most recent census data and would appear on paper not to contain a majority-minority district. Non-census data would be used merely to demonstrate the group's actual majority status.

B. Other Issues Related to "Group Size" Arising out of Vote-dilution Claims Brought by Small Minority Groups

Although evidence that plaintiffs no longer could satisfy the first precondition made the defendants' case easier to win, it also meant that the courts did not have to address other significant

57. *Dixon v. Hassler*, 412 F. Supp. 1036, 1040 (W.D. Tenn. 1976), *aff'd without opinion, sub nom. Republican Party of Shelby County v. Dixon*, 429 U.S. 934 (1976).

58. An event such as a large plant closing, or the opening of a new low-income-housing development, could produce large population changes in a limited area. Some of the more obvious events that cause sudden large shifts in population — openings or closings of prisons or military installations — should not have an impact on the ability to create a minority district, because these populations should simply be excluded. The first precondition should be evaluated realistically to require a minority group that is, in fact, a majority of the likely electorate in a district.

59. This is different from a situation in which a minority group is not a majority of the voting-age population but is, in fact, a majority of the voter-eligible population without updating the census.

issues raised by the minority group's absolutely and relatively small numbers. These issues are likely to be important in future challenges to at-large elections, primarily because many jurisdictions with larger minority populations have already responded to actual or threatened litigation under Section 2 by changing to single-member districts.[60]

It is a fact of political life that, ultimately, any group's political impact is largely a function of the number of votes it can deliver. A group claiming dilution must demonstrate that it receives less from the political process than others similarly situated in terms of politically-relevant characteristics such as size and political cohesiveness. It also must demonstrate that racial bias in the electorate is the reason it experiences less-than-expected political influence, rather than the typical reasons any group might not achieve its political potential. Thus, the Authors contend that a minority group's absolutely and relatively small numbers should be considered first and foremost in deciding whether the group can claim dilution at all. If the size of the group is not a bar to a dilution claim as a matter of law, size must nevertheless be considered when evaluating the existence of the *Gingles* preconditions. Finally, the group's size must be factored into the "totality of the circumstances" analysis when comparing the group's legitimate expectations of political influence with its actual political influence in the challenged system and in deciding whether racial bias is the reason for any differences in the two. In light of the nature of this piece, only a brief summary of these issues is possible here.

1. A Group Constituting Less Than a Seat's Worth of the Electorate Should Not Be Permitted to Claim That At-large Elections Dilute Its Voting Strength

Several Supreme Court decisions imply that relief for dilution should be limited to minority groups equal in size to a seat's worth of the electorate in the local jurisdiction. In *Whitcomb v. Chavis*,[61] one of the cases upon which Congress

60. Almost certainly, most Section 2 litigation will arise in connection with the mandatory redistrictings that will be necessary to conform single-member districts already in place to the 2000 census information. Here, the most difficult issues will be those involving the creation of minority-controlled districts, which in many jurisdictions will have been made more difficult by the geographic dispersion of the black population during the last decade.

61. 403 U.S. 124 (1971).

based the standard for Section 2, the Supreme Court rejected the notion 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 majority living in an area sufficiently compact to constitute a single-member district."[62] Implicit in this statement is the idea that only those groups with the numbers necessary to claim a seat are in a position to allege that racial bias in the local electoral system has deprived them of the benefit of their numbers in the political process.

The Supreme Court also implied, in *Johnson v. DeGrandy*,[63] that the measure of a group's voting strength could not exceed its portion of the electorate.[64] The Court described how ten single-member districts of 100 voters each could be manipulated to allow a minority group constituting just forty percent of the electorate to control seven (seventy percent) of the seats, noting that,

> [h]owever prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75 percent above its numerical strength indicates a denial of equal participation in the political process.[65]

When blacks are shown to have unique political interests that are not accommodated in the political process, others cannot complain if seats equal to the influence the group should have are set aside for those interests. The remaining interests in the electorate are not "under-represented." When, however, minority voters are given seats that significantly exceed their voting strength, other interests are unfairly diminished. A response that whites are "over-represented" when all of the members of a local governing body are white would be misguided. Whites "as whites" are not represented at all. White voters are divided into multiple interest groups that form temporary coalitions along interest lines, depending upon the issues. Setting aside a seat for minorities in excess of their share of the electorate does not harm

62. *Id*. at 156 (footnote omitted); *see Davis v. Bandemer*, 478 U.S. 109, 131–132 (1986) (stating that the failure of proportional representation is not sufficient to establish a vote-dilution claim).

63. 512 U.S. 997 (1994).

64. *Johnson*, 512 U.S. at 1017, 1019–1020; *see Hines v. Mayor & Town Council of Ahoskie*, 998 F.2d 1266, 1274 (4th Cir. 1993) (holding that a proposed Section 2 remedy giving a minority group a share of the jurisdiction's representation in excess of its share of the electorate infringes upon the rights of other voters).

65. *Johnson*, 512 U.S. at 1017 (footnote omitted).

whites per se but, rather, it diminishes the available seats through which all remaining political factions must further their political agendas. This harm is avoided if groups claiming dilution are limited to those with numbers equal to roughly a seat's worth of the electorate. If the group lacks those numbers, there simply is nothing to dilute.

2. Group's Constituting Less Than a Seat's Worth of the Electorate Should Not Be Able to Satisfy the Gingles "Preconditions"

The plaintiffs in *De Soto County* were correct when they contended that the first *Gingles* precondition simply requires the group to be sufficiently numerous and sufficiently compact to constitute a majority of a single-member district. However, in *Gingles* itself, all of the challenged multi-member districts had minority groups that at least approached a seat's worth of the electorate.[66] Thus, the Supreme Court had no occasion to consider whether a group constituting half a seat's worth could satisfy the "sufficiently numerous" component of the precondition. The interpretation most consistent with the history of dilution claims is that the group must have the numbers to expect to elect candidates of its choice in the challenged system and be geographically situated so as to take advantage of an alternative-election system if its expectations are thwarted. Minority groups are entitled to the same influence as others similarly situated, not to a system of representation that fortuitously provides them with greater-than-expected political influence.

3. A Politically Cohesive Group May Nevertheless Be Too Small to Legitimately Expect to Routinely Elect Candidates of Its Choice

When blacks are the group claiming dilution, plaintiffs generally have little difficulty demonstrating the second precondition, that the group is politically cohesive. The group's tendency to vote together and, thus, reliably deliver a bloc of votes to a candidate, is a major factor in its expectation of influence. No matter how cohesive voters are, however, their expectation of political influence is ultimately determined by their numbers. Moreover, rarely will any group be one hundred

66. *Gingles*, 590 F. Supp. at 357.

percent cohesive.[67] All told, on election day a group making up ten percent of the electorate might end up providing a bloc of only 60 or 70 votes per 1,000 votes cast.

4. Failure to Factor the Group's Size into the Third Precondition Is Unfair to Jurisdictions Challenged by a Small Minority Group

The third precondition is often the outcome-determinative factor in racial vote-dilution litigation. Ignoring a great many issues raised by this precondition, one can argue that it is satisfied if whites vote sufficiently as a bloc to overcome the combined votes of minority and cross-over voters.[68] It is easy to see how the size of the minority vote directly impacts whether its preferred candidates will receive a sufficient number of cross-over votes to be elected. If the group can deliver only ten percent of the vote, its candidates must pick up almost forty-five percent of the white vote to be elected — and more still if the group is not one-hundred-percent cohesive. If size is not factored into the determination of this precondition, a jurisdiction with a small minority population is penalized even if it routinely provides significantly higher levels of support for minority preferred candidates than jurisdictions in which the size of the group means that fewer cross-over votes are needed. [69]

5. The Group's Size Should Be an Important Factor in the "Totality of the Circumstances" Analysis

An ultimate determination of racial vote dilution should be seen as a conclusion that the group has experienced less political

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67. For example, in De Soto County some blacks were registered as Republicans and others did not vote with the group in the Democratic primary. Bureau of Econ. & Bus. Research & Warrington College of Bus. Admin., *supra* n. 25, at 611.

68. In the context of a racial vote-dilution case involving a single minority group, a "cross-over" voter is one who is not a member of the minority group. Typically, these are white voters.

69. In *De Soto County*, for example, the only black candidate who ran for a seat on one of the challenged boards received 39.4% of the white vote — which would have resulted in his election, had black voters been able to deliver a seat's worth of the vote. Def.'s Ex. 50B at 48, *De Soto County*, No. 90-366-CIV-FTM-170, slip op. (M.D. Fla. Oct. 23, 1998) (copy on file with *Stetson Law Review*). Many losing white candidates in other contests received less white support. Moreover, this black candidate received greater white support than black candidates in one of the districts unsuccessfully challenged in *Gingles*. *See Gingles*, 590 F. Supp. at 366 (stating that a black candidate received almost thirty-eight percent of the white vote).

influence than its numbers and cohesiveness suggest it should expect, and that racial bias in the electorate is the reason. In the totality of the political circumstances, small numbers affect more than the votes a group can deliver.

One obvious impact of small numbers is a shortage of viable candidates. Another is the absence of a financial and organizational structure to support candidates. If candidates and resources are in short supply, the black community may choose to concentrate its political efforts on other offices. For example, in De Soto County, politically-ambitious blacks were more interested in city, rather than county, government. The county's largest black neighborhood was located in the city of Arcadia. Blacks had run successfully for the Arcadia City Council since 1971 and, at the time of trial, blacks who were twenty-six percent of Arcadia's electorate, held forty percent of the seats, including that of the mayor.[70]

V. CONCLUSION

De Soto County can be cited for the general proposition that voter-registration data may, under the appropriate circumstances, be used to supplement census data. However, in order to utilize the registration data accurately, one must take into account differences in registration rates, the presence of populations not eligible to vote, or not inclined to vote, as well as other anomalies in the population or the data that might affect how accurately registration information will reflect the underlying population. Moreover, one must also be aware that the Motor Voter Act may result in inflation of registration rates because it makes removal of ineligible voters from the rolls more difficult. If this inflation is not equal for minorities and non-minorities, estimates based on registration will be correspondingly distorted.

De Soto County was a moderately important case in that it affirmed the novel use of non-census data to negate the existence

70. Comparing the election of black candidates in the city of Arcadia with their election in the county dramatically demonstrates the impact of size. In the city, blacks, at twenty-six percent of the voting-age population, were more than a seat's worth of the electorate. U.S. Dept. of Comm., U.S. Census Bureau, *1990 Census of Population and Housing* Summary Tape File 1A P12, Race by Sex by Age, Arcadia City (copy on file with *Stetson Law Review*). They were able to form a base of support for candidates who then routinely were able to pick up sufficient votes from outside the group to be elected. That case against the city of Arcadia was resolved in the city's favor on its motion for judgment as a matter of law at the close of the plaintiffs' case. *De Soto County*, No. 90-366-CIV-FTM-170, slip op. at 2, n. 3.

of a minority group capable of forming a majority of a single-member district. Resolution of the plaintiffs' claim on this basis was good news for the defendants, but resulted in the court's not reaching the ultimately more significant issue of the impact of a minority group's size on a racial vote-dilution claim. Thus, future cases will have to decide whether a minority group constituting less than a seat's worth of the electorate has a legitimate expectation of electing candidates of its choice. If not, the minority group's "ability to elect" is simply not there to be diluted.