CONSTITUTIONAL LAW—SUPREME COURT DECLARES NEW STANDARD OF PROOF FOR GROUPS ALLEGING SUBMERGENCE IN A MULTI-MEMBER ELECTION DISTRICT—*Whitcomb v. Chavis*, 403 U.S. 124 (1971).

The State of Indiana has a bicameral legislature consisting of a senate with fifty members and a house of representatives with one hundred members.[1] This action was brought against the Governor of Indiana challenging the constitutionality of certain state statutes[2] in so far as they apportioned Marion County into a multi-member district[3] for the election of its state senate and house of representatives. Under the authority of the challenged statutes, Marion County, which includes the city of Indianapolis, composes a multi-member house district of fifteen representatives and a multi-member senate district of eight senators.[4] A three-judge district court was convened to hear the action.[5]

This action basically consists of a two-pronged attack upon Marion County's election procedure. The first allegation concerns inter-county malapportionment, specifically, that Marion County's election procedure results in an unconstitutional overrepresentation since: (a) the true test of voting power is the ability to cast tie-breaking votes, and, in theory, voters in multi-member districts had a greater opportunity to cast such votes; and (b) multi-member district delegations have a tendency to vote as a bloc.[6] The second allegation deals with intra-county malapportionment, specifically, that Marion County's at large election procedure acted invidiously to submerge the voting strength of a cognizable racial element residing within the county.[7]

The inter-county aspect of the action was brought by a black resident of Lake County, a smaller multi-member district, alleging that the vote of Lake County blacks was diluted in comparison with the blacks of Marion County. Plaintiff Walker supported his allegation by

1 18 THE BOOK OF THE STATES 65 (1970-71).

2 IND. ANN. STAT. §§ 34-102, -104 (1969).

3 A multi-member district is an election district that elects two or more legislators from that district at large to a particular house of the legislature. A single-member district is an election district which, based on its population, elects only one legislator from the entire district. *See* Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577 (1970); Note, *Ghetto Voting and At-Large Elections: A Subtle Infringement Upon Minority Rights*, 58 GEO. L.J. 989, 997 n.62 (1970).

4 INDIANA STATE BOARD OF ACCOUNTS, ROSTER OF STATE AND LOCAL OFFICIALS OF THE STATE OF INDIANA 46-49 (1970).

5 Chavis v. Whitcomb, 305 F. Supp. 1364 (S.D. Ind. 1969).

6 Whitcomb v. Chavis, 403 U.S. 124, 144-46 (1971).

7 *Id.* at 144.

attempting to establish that the test of true voting strength was the ability to cast tie-breaking votes, that is, the more votes one could cast, the greater would be his chance of breaking a tie.[8] Mathematical formulae were introduced that rendered a percentage factor based on this tie-breaking ability which could be compared with factors computed for other districts.[9] In addition, plaintiff charged that because all the legislators had a tendency to vote as a bloc, the Marion County delegation, in effect, gave every voter in that multi-member district fifteen legislative voices in the Indiana house of representatives and eight legislative voices in the senate.[10] Although observing a possible disparity between the voting power in Lake and Marion Counties,[11] the three-judge court did not sustain the inter-county allegation and stated that the detrimental effects of multi-member districts on smaller multi-member districts and single-member districts were not sufficiently proven.[12]

The intra-county aspect of the action was brought by residents of the northern half of Center Township, an area found to be a racial "ghetto" by the district court.[13] The plaintiffs produced population and percentage figures to illustrate how the ghetto had fared in electing representatives who resided therein. The percentage of legislators drawn therefrom was substantially less, on a percentage basis, than the

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8 *Id.* at 144-46.

9 For an in depth discussion of the tie-breaking vote concept as the measure of true voting power, *see* Banzhaf, *Multi-Member Electoral Districts—Do They Violate The "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966).

10 305 F. Supp. at 1390. The district court "found that the Marion County elected delegations usually do vote in blocs." *Id.* at 1391.

11 *Id.* at 1390. The district court stated:

> [W]e find that he [plaintiff Walker, the Lake County resident] probably has received less effective representation than Marion County voters. It has been shown that he votes for fewer legislators and, therefore, has fewer legislators to speak for him. He also, theoretically, casts fewer critical votes than Marion County voters, but we decline to so hold in the absence of sufficient evidence as to other factors such as bloc and party voting in Lake County.

Id.

12 *Id.*

13 The district court drew generally upon the Report of the National Advisory Commission on Civil Disorders, commonly called the Kerner Report, for its definition of a ghetto:

> A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom.

305 F. Supp. at 1373.

ghetto area might have elected on the basis of its percentage of population in the district. It was proven that the two contiguous areas of Washington Township and the non-ghetto area of Center Township had elected, again on a percentage basis, a disproportionately greater number of residing legislators than their population base would have warranted.[14] The district court declared that because the ghetto had specific areas of legislative interest more closely affecting it than other portions of the electorate, the minimization of the ghetto's voting strength was well established.[15] The district court concluded that this minimization, due to the ghetto's submergence in the multi-member Marion County district, would have been cured by eliminating Marion County as a large multi-member district.[16] Thus, the intra-county aspect of the action was sustained.

The Supreme Court, in a six to three decision, reversed the finding that the Center Township ghetto residents were unconstitutionally submerged,[17] but affirmed the finding that no inequality of voting power among single-member districts, small multi-member districts and large multi-member districts had been demonstrated.[18] In this affirmance, the Court flatly rejected plaintiff Walker's tie-breaking vote argument as strictly theoretical,[19] and commented:

> The real-life impact of multi-member districts on individual voting power has not been sufficiently demonstrated, at least on this record, to warrant departure from prior cases.[20]

One might well infer from the Court's statement that it is highly unlikely that any such mathematical computation would ever be accepted. Factors such as party affiliation, race and previous voting characteristics were cited as influences on actual voting power.[21] Obviously, such considerations would be extremely difficult to mathematically determine. The other factor cited to demonstrate a difference between the voting power of districts was the bloc-voting tendency, which, although conceded by the Court as true, was rejected as sufficient proof

14 *Id.* at 1382-84. The plaintiffs produced geographical statistical breakdowns of Marion County's legislative delegation.

15 *Id.* at 1380. The areas specifically cited by the court were: "[U]rban renewal and rehabilitation, health care, employment training and opportunities, welfare, and relief for the poor, law enforcement, quality of education, and anti-discrimination measures." *Id.*

16 *Id.* at 1399.

17 Whitcomb v. Chavis, 403 U.S. 124, 155-60 (1971).

18 *Id.* at 147.

19 *Id.* at 145-46.

20 *Id.* at 146.

21 *Id.*

in itself that the plaintiff's voting power had suffered.[22] Walker failed to demonstrate that one vote cast in Marion County counted for more than a single vote cast in another election district.

In rejecting the submergence argument, the intra-county allegation, the Court held that the failure of the ghetto to elect its proportionate share of ghetto residents to the assembly, a factor upon which the district court had placed great emphasis,[23] did not establish a case of invidious discrimination.[24] Rather, the Court viewed the disenfranchisement of the ghetto dwellers in the same light as the disenfranchisement of all voters who vote for the losing candidate; the ghetto dwellers were simply Democratic voters in a Republican district and, for that reason, were able to elect few legislators of their own.

> [T]he failure of the ghetto to have legislative seats in proportion to its population emerges more as a function of losing elections than of built-in bias against poor Negroes. The voting power of ghetto residents may have been "cancelled out" as the District Court held, but this seems a mere euphemism for political defeat at the polls.[25]

Thus, the Court held that the equal protection doctrine could no more be implemented in favor of the plaintiff ghetto dwellers than it could in favor of any other voters who voted for losing candidates.[26]

The Court went on to state that the submergence of a cognizable racial element is proven not by a mere listing of special legislative interests, but by a showing that had single-member districts existed a reverse legislative outcome would have resulted.[27] The Court found no proof that this criteria had been met and stated that without such proof all conceivable minority interests would attack their multi-member districts and thus "spawn endless litigation."[28] In summary, the Court concluded:

> The short of it is that we are unprepared to hold that district-based elections decided by plurality vote are unconstitutional in either single- or multi-member districts simply because the supporters of losing candidates have no legislative seats assigned to them.[29]

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22 *Id.* at 147.

23 305 F. Supp. at 1381-85. The plaintiffs produced numerous tables in the district court illustrating the limited number of elected representatives they had produced.

24 403 U.S. at 149.

25 *Id.* at 153.

26 *Id.* at 160.

27 *Id.* at 148, 155.

28 *Id.* at 157.

29 *Id.* at 160.

SUBMERGENCE—EQUAL PROTECTION

In reversing the district court, *Whitcomb* subscribed to a series of federal court decisions which have denied relief to plaintiffs who charged that their particular multi-member district invidiously discriminated against them.[30] It is obvious from the thrust of those decisions that multi-member districts are not per se unconstitutional. In fact, *Reynolds v. Sims*[31] specifically authorized their use, stating:

> Simply because the controlling criterion for apportioning representation is required to be the same in both houses [population basis] does not mean that there will be no differences in the composition and complexion of the two bodies. Different constituencies can be represented in the two houses. One body could be composed of single-member districts while the other could have at least some multimember districts.[32]

Although this statement was dictum, the Court certainly would not have authorized and advocated the use of an apportioning scheme which it considered unconstitutional.

In subsequent attacks upon multi-member districts, the courts have had to fashion criteria upon which exceptions to the general authorization of *Reynolds* could be based. Two Supreme Court decisions, *Fortson v. Dorsey*[33] and *Burns v. Richardson*,[34] had previously specified the elements which one alleging submergence must prove:

(1) A cognizable *racial* or *political* element must exist in the multi-member district under attack.

(2) The multi-member district must, intentionally or otherwise, minimize or cancel out the voting strength of that group.[35] Such minimization could be shown by:

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30 Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Goldblatt v. City of Dallas, 279 F. Supp. 106 (N.D. Tex. 1968); Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966), *rev'd sub nom. on other grounds*, Kilgarlin v. Hill, 386 U.S. 120 (1967); Schaefer v. Thomson, 251 F. Supp. 450 (D. Wyo. 1965), *aff'd sub nom.* Harrison v. Schaefer, 383 U.S. 269 (1966); Davis v. Cameron, 238 F. Supp. 462 (S.D. Iowa 1965); Mann v. Davis, 245 F. Supp. 241 (E.D. Va.), *aff'd sub nom.* Burnette v. Davis, 382 U.S. 42 (1965).

31 377 U.S. 533 (1964).

32 *Id.* at 576-77.

33 379 U.S. 433 (1965) (election of a legislator from a geographical subdivision of the county by the entire constituency of the county held not to be unconstitutional).

34 384 U.S. 73 (1966) (fear of building "monolith election" districts because the same multi-member district served to elect members to both houses of the legislature held to be speculative evidence and thus insufficient).

35 379 U.S. at 439.

(a) the district's election of a relatively large number of the total number of legislators in the state;

(b) the nonexistence of subdistricts within the district, since when subdistricts exist, legislators are drawn, at least geographically, from all areas of the district;

(c) multi-member districts serving as a basis for the election of both houses of a bicameral legislature.[36]

With these established criteria, it is now possible to evaluate the *Whitcomb* decision. The first part of the submergence test, the existence of a cognizable group, had required that either a racial or political element may be the object of invidious discrimination. In order to fulfill this criterion, it would be necessary that the group bringing the action be essentially homogeneous, that is, it must possess common characteristics. It is vital that homogeneity be carefully observed; otherwise, interest groups whose only common bond is a singular set of interests might successfully challenge multi-member districts.[37] In proving homogeneity, the racial element clearly has an advantage over the political element, primarily because those of the same race frequently have similar cultural ties and similar interests.[38] On the other hand, the term political element reveals little. Plaintiffs would have to establish all the elements of homogeneity necessary for the group to be recognized as a cognizable political element.[39] Some possible indicia might be the group's geographical permanence, the income and educational levels of group members, job status, religious affiliation, and ethnic roots.[40] In general, the thrust of the word "political" is more towards a cross-sectional group with a single common interest.

The district court in *Whitcomb* took pains to carefully delineate the existence of a cognizable racial element. As previously mentioned, plaintiffs' geographical area was defined as a ghetto, a classification indicating very specific conditions and special legislative interests.[41] The Supreme Court made no attempt to refute this fact.

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36 384 U.S. at 88.

37 403 U.S. at 156-57.

38 Comment, *supra* note 3, at 1593-95.

39 *Id.* at 1595:

> Such groups . . . are likely to be highly variegated in terms of the social and economic status of their members. As a result, parties who allege that they are a part of a cognizable political element will not have a distinguishing characteristic as obvious or as significant as race, nor an isolated residential setting like a ghetto, from which the conclusion of socioeconomic homogeneity may be rather easily drawn.

40 *Id.*

41 305 F. Supp. at 1373.

The second half of the submergence test stipulated that intent was not an issue in proving minimization and the plaintiffs conceded that there was no intentional deprivation of voting power.[42] The burden of proof, however, still remained with the plaintiff to prove invidious effect.[43] Proceeding to the remainder of the test, the district court found that the plaintiffs had met the criteria of vote minimization: (a) Marion County, the largest election district in the state, elected over 15% of the total legislative census; (b) Marion County was not subdistricted in order to give geographical diversity to the county's legislative delegation; (c) Marion County was the same elective district for both the house and senate.[44] These criteria from *Burns,* however, were merely suggested indicia of invidious discrimination within a multi-member district and were not the definitive tests to be met.

The Supreme Court did not reject the district court's finding as to the *Fortson* and *Burns* criteria but rejected them as the exclusive test of vote minimization. Thus, while the Marion County election district was large, was not subdistricted, and was a common multi-member district for both legislative houses, that was held to be insufficient to establish minimization.[45] The Court held that the plaintiffs

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42 403 U.S. at 149. It was essential that intent not be viewed as a prerequisite for relief since the Marion County multi-member district had grown as its black population had grown. Note, *Multimember Districting as a Violation of Equal Protection,* 1970 WIS. L. REV. 552, 556 (1970). The county had existed as the basic election district for decades prior to the existence of the voting bloc alleging invidious discrimination. Thus, if it had been necessary to prove intent to gerrymander the black ghetto out of its voting power, the plaintiffs would have had a minimal chance of success. Comment, *supra* note 3, at 1600-03. *See also* R. DIXON, DEMOCRATIC REPRESENTATION 478 (1968).

43 403 U.S. at 144. *See* R. DIXON, *supra* note 42, at 496-98:

> Up to and including the 1964 *Reapportionment Decisions* courts handled the burden of proof problem so that once plaintiffs had made the easy showing, on the basis of census figures, of significant disparities in district population, the burden of proof shifted to defenders of the legislatively chosen apportionment system. They had to show that all disparities were not only reasonable but also explicable as the logical result of a consistently followed and identifiable set of apportionment factors . . . .
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> Now, however, the roles are reversed. In the post-*Reynolds* period a legislatively chosen apportionment plan which on its face is "equal" is itself entitled to a presumption of constitutionality. The burden is on the challenger not only to suggest but to *prove* that the system "was designed to or would operate to minimize or cancel out the voting strength of racial or political elements of the voting population."
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> . . . [W]here "representation" is the focus and the plan is attacked on the ground that a political gerrymander has resulted, the Supreme Court is disposed to presume the best [about the apportionment plan] and impose a stringent burden of proof (as in *Fortson, Burns, Kilgarlin*) . . . .

44 305 F. Supp. at 1386-87.

45 403 U.S. at 146-48.

must also prove that had single-member districts existed, the legislative outcome of disputed issues would have been different.

> [N]othing before us shows or suggests that any legislative skirmish affecting the State of Indiana or Marion County in particular would have come out differently had Marion County been sub-districted and its delegation elected from single-member districts.[46]

It is with this statement that the *Whitcomb* decision supplements the tests of *Fortson* and *Burns* with an additional requirement. The plaintiffs had produced numerous statistics to prove their allegation that ghetto interests were not being represented.[47] One must assume that the measure of cancellation or minimization is whether or not candidates reflect the specific interests of the ghetto area. A corollary to that assumption is that since the specific interests are relative to a group within a specific geographical area, then those candidates reflecting those specific interests should be drawn therefrom.[48] However, by adopting the reverse legislative outcome test, the Supreme Court placed the proof for vote minimization well beyond the evidence presented by the plaintiffs.

The new *Whitcomb* test is based on faulty reasoning. If the allegation of submergence is justiciable, and the Court has said it is,[49] then a particular cognizable racial or political element's choice of a political party should have no bearing on that allegation. The dilution or cancellation of voting strength is a constitutional issue that rises above the choice of political party. If the Democratic Party had consistently won instead of lost, or if the ghetto dwellers had consistently voted overwhelmingly for the Republican slate, the ghetto dwellers may still have suffered vote dilution or minimization because of the stranglehold the two political parties had on the selection of candidates[50] and because the ghetto dwellers were realistically limited to the choice of these two parties, neither of which may have adequately represented those specific interests previously mentioned. The point is that the effect of the votes of an identifiable racial group was unconstitutionally minimized by the Marion County multi-member district.

The effect of the *Whitcomb* test is to present a standard that will,

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46 *Id.* at 148.

47 305 F. Supp. at 1381-85.

48 Note, *supra* note 3, at 992.

49 403 U.S. at 143.

50 305 F. Supp. at 1385. The district court stated:

> As a general rule, for any given candidate to be elected to the General Assembly from Marion County, his or her party must prevail in the election.

Id.

in a practical sense, be impossible to meet. Proof as to how a hypothetical representative would have affected previous legislative results is a preposterous demand to be made of any litigant; and since the plaintiff attacking the multi-member district could, for the most part, present only speculative evidence, the litigation would realistically be doomed at the outset. Federal courts have specifically ruled against plaintiffs bringing suits against multi-member districts because the allegation of minimization or cancellation of voting strength was predicated upon future elections.[51] The same reasoning could very well apply to attempts to prove that a reverse legislative outcome would have occurred with single-member districts. Plaintiff, faced with the new burden of the *Whitcomb* case, after having based his claim on the *Fortson* and *Burns* criteria, lost the case because of insufficient evidence.

The Court's decision established a precedent that will make any future litigation alleging submergence within a multi-member district a perilous undertaking. Therefore, utilization of the doctrine of equal protection to establish political or racial submergence exists only as a theoretical remedy. Perhaps, however, this doctrine can be employed by these submerged groups along another avenue of attack, namely, an attack on mixed districting systems.

MIXED SYSTEMS—EQUAL PROTECTION

The equal protection clause, as applied to the allocation of legislative representation, has been held in *Reynolds v. Sims* to require "the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged."[52]

Within a given legislative body, whether it be the house or the senate, there are, at least, the following possible systems of election districts:[53] one large system with representatives elected at large;[54]

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[51] 384 U.S. at 88-89.

[52] 377 U.S. at 565.

[53] So-called floterial districts are ignored in this analysis. The floterial district was defined in Davis v. Mann, 377 U.S. 678, 686 n.2 (1964) as:

> [A] legislative district which includes within its boundaries several separate districts or political subdivisions which independently would not be entitled to additional representation but whose conglomerate population entitles the entire area to another seat in the particular legislative body being apportioned.

Rather than presenting the problem of a separate and different kind of district, floterial districts are overlapping districts or groups of districts that must therefore be considered apart from the problem of multi- and single-member districts. *See* Hamilton, *Legislative Constituencies: Single-Member Districts, Multi-Member Districts, and Floterial Districts*, 20 W. POL. Q. 321, 334 (1967).

[54] The at large election dilutes voting power, albeit uniformly, so outrageously as

multi-member districts of varying sizes; multi-member districts of varying sizes and some single-member districts; multi-member districts of uniform size; multi-member districts of uniform size and some single-member districts; and a system of all single-member districts. Clearly, one large district with representatives elected at large, or all uniform multi-member districts, or a system of all single-member districts would not on their face violate this standard since they treat each voter in the districting scheme the same,[55] provided that the population of each district is reasonably close in size.[56]

The other possible systems, multi-member districts of varying size, multi-member districts of varying size mixed with some single-member districts, and multi-member districts of uniform size mixed with some single-member districts, satisfy the equal protection clause only to the extent that the following assumption is true: "that the dilution of voting power suffered by a voter who is placed in a district 10 times the population of another is cured by allocating 10 legislators to the larger district instead of the one assigned to the smaller district."[57]

The disagreement over multi-member districting has always been framed as a discussion of the merits of single-member districts versus multi-member districts. Apparently, the Supreme Court in *Whitcomb* would have us believe that the constitutionality of multi-member districts is well settled as a general proposition, without emphasizing the different settings in which a multi-member district may be placed as having any bearing on its constitutionality. The Court focuses attention on single-member districts versus multi-member districts alone, without noting that a multi-member district may be set in a uniform system, like the system of multi-member districts of uniform size, or in a mixed system, like any system combining single- and multi-member districts:

> The question of the constitutional validity of multi-member districts has been pressed in this Court since the first of the modern reapportionment cases. These questions have focused . . . on the quality of representation afforded by the multi-member district as compared with single-member districts.[58]

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to probably violate other constitutional safeguards than equal protection, *e.g.*, the fifteenth amendment. For a discussion of the effects of a statewide, at large election, *see* the congressional debates in CONG. GLOBE, 27th Cong., 2d Sess. 445-48 (1842). For a modern example, see the account of the 1964 election of the Illinois House of Representatives in R. DIXON, *supra* note 42, at 300-03.

55 *See* 305 F. Supp. at 1392.

56 377 U.S. at 577.

57 403 U.S. at 144.

58 *Id.* at 142.

Because of the different possible combinations and sizes of multi-member districts, it might have been expected that the Court would make distinctions between them for the purpose of determining whether a particular multi-member district is violative of the equal protection clause. But now, the Court seems to accept once and for all the notion that one can consider the constitutional validity of a multi-member district as a thing apart from its districting scheme, to be compared with the generic single-member district, also detached from its districting scheme. In the past, all the Court had said was that, as a matter of law, there was nothing inherently discriminatory in an at large election district[59] and that equal protection does not require all single-member districts.[60] Until *Whitcomb*, moreover, the Court had limited its inquiry to a comparison of single- and multi-member districts, occasionally touching on,[61] but never before ruling on the different question of uniform districting systems versus mixed districting systems. This limitation is due also to peculiar factual situations presented in litigation and to plaintiffs who have charged dilution of voting power on the basis of their citizenship in an election district,[62] rather than on the basis of their citizenship in an entire electoral districting system.

The broader question of uniform versus mixed districting systems depends on the validity of the assumption that the dilution suffered by a voter in a large district is cured by giving more representatives to that district.[63] The validity of this assumption depends on the answers to the following two questions:

1. What are the relative merits of single- versus multi-member districts?

2. What are the relative merits of smaller multi-member districts versus larger multi-member districts?

The answers to both of these questions are implied in *Whitcomb*: the quality of representation afforded by each may be unequal, but it

59 Lucas v. Forty-Fourth General Assembly of Colorado, 377 U.S. 713, 731 n.21 (1964).

60 377 U.S. at 577:

> One body could be composed of single-member districts while the other could have at least some multi-member districts.

61 379 U.S. at 438.

> Agreeing with appellees' contention that the *multi-member constituency* feature of the Georgia scheme was *per se* bad, the District Court entered the decree on summary judgment. We treat the question as presented in that context, and our opinion is not to be understood to say in all instances or under all circumstances such a *system* as Georgia has will comport with the dictates of the Equal Protection Clause.

Id. at 438-39 (emphasis added).

62 *See, e.g.*, Dorsey v. Fortson, 228 F. Supp. 259, 261 (1964).

63 403 U.S. at 144.

is not substantially unequal (or at least it does not rise to a constitutional violation), and, in any case, the plaintiffs have not in this case proved a constitutional violation.

Ignoring for the moment the question of constitutionality, consider the significant differences in the quality of representation that have been noticed by proponents of multi-member districts and by proponents of single-member districts through the years. We will assume that similar arguments could be made as to the difference in the quality of representation afforded by larger and smaller multi-member districts.

The argument of plaintiff, Walker, that multi-member districts overrepresent their voters, since multi-member delegations tend to vote as a bloc,[64] is the one that is most frequently made. The Supreme Court in *Whitcomb* answered this argument by asserting that no proof had been offered showing that this tendency is less true of single-member districts,[65] especially if they have common problems uniting them. Both sides of the argument fail to mention an underlying aspect of bloc voting; the party that wins in a multi-member district usually sweeps the election in that district.[66] Because affiliation with the dominant party is so crucial to the candidate who runs in a multi-member district, the party has tremendous disciplinary powers over a representative and can maintain this discipline over the entire delegation from the particular district long after the election,[67] thereby resulting in bloc voting. It is claimed that this arrangement affords more representation to the voter in the multi-member district.[68] In fact, it gives more representation to party leaders and screening or selection committees, rather than the individual voters. For multi-member districts, it is said that the resulting party strength and discipline leads to the enactment of the particular party's legislative program, subjecting that party to greater voter accountability.[69] But is this really true in a two party system in which the differences between the two parties and their legislative programs are often minimal or nonexistent?

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64 *Id.* at 146.

65 *Id.* at 147-48.

66 *Id.* at 134 n.11.

67 305 F. Supp. at 1385-86. At the trial plaintiff Chavis testified that as a state senator he had previously voted for the reapportionment plan that he was attacking in this suit. He had voted against the interests of his constituency, he said, in order to preserve his chances of renomination. Dixon, Memorandum on Whitcomb v. Chavis, Committee on Supreme Court Decisions, Association of American Law Schools 2 (1971).

68 403 U.S. at 146.

69 *See* Silva, *Compared Values of the Single- and the Multi-Member Legislative District*, 17 W. POL. Q. 504, 507 (1964).

Another argument frequently advanced by proponents of multi-member districts is that broader representation results, since a representative has more independence to vote for the general good, because he need not be as responsive to local interests as he would be if he were elected from a single-member district.[70] But this argument neglects the fact that the vacuum left by the removal of voter reprisal or punishment is immediately filled by subservience to party leadership. The issue is not really independence versus localism, but rather voter versus party control.

The assumption that the lack of representation in a larger district is cured by a proportionate increase in the number of representatives is criticized by the opponents of multi-member districts.[71] Professor Banzhaf applies mathematical theory to different sized single-member districts to show that voting power does not vary inversely with the population of the district, but rather by some other variable.[72] By adding representatives in direct proportion to increased population, he says, we overload multi-member districts. The test of voting power and, presumably, of effective representation, according to his definition, is the chance a voter has to cast a decisive or tie-breaking vote.[73]

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70 *See* 384 U.S. at 89 n.15; Silva, *supra* note 69, at 507.

71 *See* 403 U.S. at 129; Banzhaf, *supra* note 9, at 1322-24. *Cf.* Chavis v. Whitcomb, 305 F. Supp. at 1391:

> This analysis [Banzhaf's tie-breaking vote analysis] purports to show that where District A elects one representative from two candidates and District B, which is eight times as populous as District A, elects eight representatives from sixteen candidates, voters in District B cast more "critical votes," *i.e.*, break a theoretical tie, than voters in District A.

72 Banzhaf, *supra* note 9, at 1322-23 & n.28.

73 For example, in district *K* with three voters (*A*, *B*, and *C*) and two candidates (x and y), there are eight possible combinations of votes:

	A	*B*	*C*
#1	x	x	x
#2	x	x	y
#3	x	y	x
#4	x	y	y
#5	y	x	x
#6	y	x	y
#7	y	y	x
#8	y	y	y

However, only in situations #3, #4, #5, and #6, can individual voter *C* cast a tie-breaking vote. Hence, any individual voter in *K* has a 4/8 or 50% chance to cast a tie-breaking vote. In another district *L* with nine voters (three times larger than *K*) and two candidates, the comparable fraction (if another diagram were made) of tie-breaking votes to total combinations is 140 tie-breaking votes to 512 possible combinations. Therefore, the chance of an individual voter in *L* to cast a tie-breaking vote is 140/512 or 27%.

By convention, district *L* would get three representatives while *K* would get only one because *L* is three times larger in population than *K*. According to Banzhaf, how-

Another argument for multi-member districts is that they are less susceptible to gerrymandering than single-member districts.[74] On the surface, it would appear that single-member districts, being smaller and more numerous, would provide more opportunity to draw lines and thereby gerrymander. Studies have shown, however, that multi-member districts do allow for a more subtle form of gerrymandering by allowing a party to create a multi-member district in which it dominates; then it can always sweep into office its entire slate by the "winner-take-all" effect of multi-member districts.[75] Also, since multi-member districts tend to be larger than single-member districts, a multi-member districting system could be gerrymandered by the dominant party so that this party could win in every district in the state, whereas, in a system of small single-member districts, that would be almost impossible.[76]

Multi-member districts could be insulated against gerrymandering if a state used the traditional political boundaries as district lines.[77]

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ever, *L* should get only two representatives to *K's* one representative because the ability of an individual voter in *L* to cast a tie-breaking vote (27%) is roughly half that of the ability of the individual voter in *K* to cast a tie-breaking vote (50%).

The number of tie-breaking votes which an individual can cast in a district of any size can be determined by the formula:

$$2 \cdot \frac{(n-1)!}{\frac{n-1}{2}! \cdot \frac{n-1}{2}!}$$

where n is the number of voters in the district. The ratio of the tie-breaking vote to the total of possible combinations is found by dividing the result of the formula given above by 2^n, which is the number of possible combinations. 403 U.S. at 145 n.23.

Banzhaf's theory would seem inapplicable to a multi-member district in which an individual's ability to cast a tie-breaking vote would not change, regardless of how many candidates were running, but would only change as the population increased or decreased. If in district *M*, there were nine voters, as in *L*, and six candidates, rather than two, running for three offices, the ability of the individual voter to cast a tie-breaking vote would be 27% for the first office he voted for, as it would be for the other two offices. Hence, it would remain 27% for all votes cast.

74 R. DIXON, *supra* note 42, at 505.

75 Silva, *supra* note 69, at 514; Hamilton, *supra* note 53, at 325-28.

76 *See* Silva, *supra* note 69, at 514.

77 *See* Jackman v. Bodine, 55 N.J. 371, 379, 262 A.2d 389, 393, *cert. denied*, 400 U.S. 849 (1970):

> As to gerrymandering, the problem, it is true, is present both in congressional districting and in state legislative districting, but the opportunities are far more numerous with respect to elections to the state legislature. Nor will the computer likely be of aid if political subdivision lines are ignored. Computer-made plans, all mathematically perfect and doubtless numbering in the thousands, will still be keyed to instructions the computer itself cannot supply. Of course the use of existing county and municipal lines does not foreclose partisan selection of dis-

The preservation of such lines would, of course, be impossible under any uniform districting system. Then, with population shifts, the number of representatives in districts would change but the district lines would remain the same. The difficulty with this approach is that the population figures from district to district will often vary to such a degree that constitutional violations will result.[78] Consequently, there will necessarily be some drawing of lines and some opportunity to gerrymander.[79]

An argument is also made that the tenure of legislators in multi-member districts tends to be longer than that of legislators in single-member districts because of the more rapid turnover of legislators in the latter.[80] Consequently, legislators from multi-member districts tend to be more experienced, more able, and more influential, since by their tenure they rise to committee chairs and other politically powerful positions. But neither of these arguments seem to be borne out by statistical studies of the tenure of legislators from both types of districts.[81]

The main reason why the widespread use of multi-member districts is so troublesome was made apparent by the Kerner Commission Report, which stated:

> [I]t is clear that at-large representation, currently the practice in many American cities, does not give members of the minority community a feeling of involvement or stake in city government. Further, this form of representation dilutes the normal political impact of pressures generated by a particular neighborhood or district.[82]

Large multi-member districts contain distinctive racial, ethnic, and political constituencies. The larger the multi-member district, the easier it becomes to deprive these smaller constituencies of representatives who specifically represent their interests.[83] This effect also accounts for a degree of repression of the weaker party.[84] Additionally, there is an

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trict lines, but it does limit that opportunity and does tend to make the political party responsible for the district plan more readily accountable at the polls.

78 *See* Swann v. Adams, 385 U.S. 440, 444 (1967).

79 *See* 377 U.S. at 578; *cf.* Abate v. Mundt, 403 U.S. 182, 185 (1971).

80 R. DIXON, *supra* note 42, at 505.

81 Hyneman, *Tenure and Turnover of the Indiana General Assembly*, I & II, 32 AM. POL. SCI. REV. 51, 54, 312-13 (1938); Hyneman, *Tenure and Turnover of Legislative Personnel*, 195 ANNALS 21, 28 (1938).

82 REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS 154 (1968).

83 *Cf.* 377 U.S. at 731.

84 *See* Silva, *Relation of Representation and the Party System to the Number of Seats Apportioned to a Legislative District*, 17 W. POL. Q. 742, 767 (1964); Hamilton, *supra* note 53, at 325.

attendant complication of the election process that confuses voters and results in "slate" voting. In a large multi-member district, a voter might not be able to remember the names of the candidates, much less their voting records.[85] A third party's or an independent candidate's entrance into such a situation could almost be guaranteed eventual defeat at the polls.

As the dominant party seems to be assisted in overcoming the weaker party in an election, so the dominant faction within a party seems to be assisted by multi-member districts to maintain its power against other elements within the party, especially against an individual who wishes to challenge the party hierarchy.[86] The most vulnerable time for the "organization" is at the primary because of small voter participation in these primaries. Anyone who can bring out large numbers of voters for the primary may be able to topple the "organization" candidate or candidates. To negate this possibility, the multi-member district can be utilized to enlarge the district so that the independent candidate must reach a greater number of voters over a wider area, and to prevent him from confronting a particular candidate. Then, the independent will have to attack a slate of candidates, making it difficult or impossible to demonstrate his qualifications to the voters.[87]

In contrast to the arguments in support of multi-member districts, the most frequently heard arguments for single-member districts are: (1) they increase the accountability of the representative or candidate to the voter and reduce the influence of the "clubhouse" politician;[88] (2) they tend to strengthen the two party system by allowing for more impact by the weaker political party and by minority groups. These arguments appear valid, since it is unlikely in a populous district that one party would dominate in every location throughout the district.[89] In Marion County, single-member districts would have undoubtedly prevented the one party sweeps.[90]

It is also argued that a man who represents one district by himself has a sense of responsibility and importance that makes him perform at a higher level.[91] No studies have been undertaken concerning this, and

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85 *See* 377 U.S. at 731.

86 *See* Hamilton, *supra* note 53, at 323.

87 *See Id.*

88 For an interesting analysis of the moderating effect of single-member districts on "machine" politics, *see* CONG. GLOBE, 27th Cong., 2d Sess. 448 (1842) (remarks of Representative Arnold).

89 Hamilton, *supra* note 53, at 326.

90 *Id.*

91 NEW JERSEY COMMITTEE FOR FAIR REPRESENTATION, REAPPORTIONMENT IN NEW JERSEY: RECOMMENDATIONS AND SUPPORTING STATEMENTS 7 (1965).

it thus remains an unanswered question. Another supposed benefit of single-member districts is that they tend to discourage a multiparty system.[92] The existence of a multiparty system, however, would seem not to depnd upon the type of district,[93] but rather on other factors, such as the state's election laws and the political climate within the state. In New York, for example, third parties thrive[94] despite a tradition of single-member districts, especially in that State's assembly.[95]

The arguments generally made that are critical of single-member districts are: (1) they emphasize the candidate, rather than the party or the issues;[96] (2) they weaken and decentralize the parties, thereby increasing the influence of pressure groups[97] and of localism;[98] and (3) it is mathematically possible in a system of single-member districts for a party in a three party contest to win a majority of seats in the house without even a plurality of the total popular vote.[99]

But the same criticisms may also be made of multi-member districts. That single-member districts emphasize the candidate would also be true of a small multi-member district. It does seem likely, however, from the discussion above that in a single-member district there would be less emphasis on party affiliation. As to issues, no one has ever shown that multi-member districts encourage public debate to a greater extent than single-member districts. Logically, it would seem that anywhere the electorate possesses a greater sense of involvement, there would be a more spirited public debate concerning the candidates and the issues.

Concerning the charge of localism, again this seems to be more a consequence of the smallness of the typical single-member district than of the fact that only one representative is elected.[100] The plurality effect, too, is not due to any quality peculiar to single-member districts, but rather to the absence of any provision for a runoff election if no candidate in a race gets a majority of the vote.[101]

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92 R. DIXON, *supra* note 42, at 505.

93 However, multi-member districts tend to foster one party dominance and to that extent they discourage a multiparty system. In Michigan, for example, of 85 multi-member district elections in 10 years, all were party sweeps and not one of 42 multi-member district seats changed party in that time. Hamilton, *supra* note 53, at 324.

94 This is evidenced by the perennial influence of the Liberal Party and by the recent appearance of the Conservative Party culminating in the election of a U.S. Senator. *See* N.Y. Times, Nov. 4, 1970, at 1, col. 4.

95 *See* N.Y. CONST. art. III, § 5. *See also* Silva, *supra* note 69, at 514.

96 *See* Silva, *supra* note 69, at 506.

97 *Id.* at 506-07.

98 *Id.* at 506.

99 *Id.* at 513.

100 R. DIXON, *supra* note 42, at 504-05.

101 *Id.* at 505.

The conclusion safely drawn from these two arguments is that there are advantages and disadvantages to both single- and multi-member districts. It has been suggested that these advantages and disadvantages cancel each other out when both types of districts coexist in the same districting system,[102] and that when framed in a constitutional context, as it was in *Kruidenier v. McCulloch*,[103] the denial of equal protection to one group (the voters in a single-member district) is set off against the denial of equal protection to another group (the voters in a multi-member district). In that suit, which successfully challenged the constitutionality of multi-member districts, the Supreme Court of Iowa explicitly rejected this precise balancing as a matter of law.[104] But consider whether it would have any practical validity.

Generally, the advantages of the single-member district—the personal accessibility of the representative and his increased vulnerability at the polls—seem to occur at the stage of representation where there is interaction between the voter and the representative. On the other hand, the advantages of multi-member districts—the tendency to bloc vote, the independence of the representative (with regard to the voters), his ability to take a broad view rather than a local one—occur at the level of representation in which the representative "represents" his constituency in the legislature. If these two stages were wholly independent of each other, then perhaps there might be some sort of balance. The influence that a voter in a single-member district exerts over his representative might be offset by the diminution of influence that his representative suffers in the legislature by virtue of being from a single-member district. Likewise, the multi-member district voter's influence over his representative might be balanced against the greater

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102 Brief for Appellant at 18, Fortson v. Dorsey, 379 U.S. 433 (1965), *quoted in* Banzhaf, *supra* note 9, at 1319 n.24:

> The challenged method of electing senators in this case does not produce any mathematical devaluation of the vote. For example, let us compare the status of a Fulton County voter with one who resides in a rural district electing a single senator. The Fulton voter is a part of an electorate which is approximately seven times larger than the electorate of which the rural voter is a part, however, the Fulton County voter has the right to vote for seven senators whereas the rural voter may only vote for one. Theoretically, the rural voter would have a greater influence upon his single senator than the Fulton voter would have upon any one of his seven senators, but the latter's aggregate influence upon each of his senators would equal the rural voter's influence upon his single senator. In other words, the Fulton voter has an advantage in being able to vote for seven senators, but this advantage is offset by his being a part of the large electorate necessary to support the representation of seven senators.

103 258 Iowa 1121, 142 N.W.2d 355, *cert. denied*, 385 U.S. 851 (1966).

104 *Id.* at 1153, 142 N.W.2d at 374 (opinion of Stuart, J.):

> We know of no rule whereby the denial of equal protection to one class for one reason can be set off against the denial of equal protection to another class for a different reason in such a manner as to make an apportionment plan constitutional.

power of his representative in the legislature by virtue of being from a delegation of representatives from a multi-member district. But the two stages of representation are so closely bound together and dependent upon each other that they cannot be rationally separated. The vote cast in the polling place inevitably influences, to a greater or lesser degree, the vote in the legislature. But as yet, no scientific method has been developed to measure the imbalances on each side.

THE EFFECT OF WHITCOMB V. CHAVIS

It is one thing to say that the disadvantages of multi-member districts do not rise to the level of a constitutional injury and that, in any case, single-member districts may not be the solution. It is quite a different thing to say that a districting system that contains both multi- and single-member districts affords equal protection of the law to all. The Supreme Court in *Burns* and *Fortson* said the first outright,[105] and now in *Whitcomb* seems to be saying the second constructively.

Clearly all three cases deal in their factual situations with mixed systems. Note how the Court, speaking in *Whitcomb*, limits its decision in *Fortson*:

> In *Fortson,* the Court reversed a three-judge District Court which found a violation of the Equal Protection Clause in that voters in single-member districts were allowed to "select their own senator" but that voters in multi-member districts were not. *The statutory scheme in Fortson provided for subdistricting within the county,* so that each subdistrict was the residence of exactly one senator.[106]

In the Court's mind, the existence of subdistricting permitted it to avoid fashioning a view of multi-member districts of any wider scope than *Fortson* necessitated.

Similarly, the Court characterizes its decision in *Burns*:

> *Burns* vacated a three-judge court decree which required single-member districts except in extraordinary circumstances. The Court in *Burns* noted that "the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record."[107]

Whitcomb clearly put the question of uniform versus mixed systems in a way that the Court could not ignore. The complaint of plain-

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105 *See* R. DIXON, *supra* note 42, at 482.

106 403 U.S. at 142 n.22 (emphasis added).

107 *Id.* (footnote omitted).

tiff Walker alleged inter-county denial of equal protection. "[C]onsideration of Walker's claim," said the Court, "was limited to that to be given the uniform districting principle in reapportioning the Indiana general assembly."[108] Therefore, we may conclude from the Court's decision that mixed systems do comport with equal protection, at least until proven otherwise.

The Court may be correct in declining to force single-member districts on the states. It has been noted that the choice between single- and multi-member districts may well involve the choice between two philosophies of representative government[109] and that such a choice is reserved only to a legislature.[110] But at least a court might reasonably ask a state, if it is to make that choice, make it completely one way or the other, and in such a way as to apply uniformly to its citizenry. A state might even have one statewide district and fall within the limitation of equal protection in that each voter in the state would have a vote with the same force—though that force might be severely attenuated. Then, however, obviously ineffective representation would result and, hopefully, citizens would move together to change to a more effective and responsive districting plan.[111] But the present patchwork of mixed districting systems in most states disunites citizens by the unequal quality of representation they provide.

The Supreme Court has said that the lower house might have all single-member districts and the upper house might contain some multi-member districts.[112] Would it not be better and fairer if the lower house had all single-member districts and the upper house all multi-member districts, or vice versa? But let each state, however differently it wishes to district itself (there would be great freedom for the state with regard to type of district, population, number of representatives), treat each voter in the state uniformly.[113]

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108 *Id.* at 137.

109 Jackman v. Bodine, 55 N.J. 371, 386, 262 A.2d 389, 397 (1970):

> The question is really whether the equal protection clause provides an affirmative design of a democratic government, and if so, whether that design demands single-member districts.

See also Banzhaf, *supra* note 9, at 1324-25.

110 *See* Burns v. Richardson, 384 U.S. 73, 89 (1966). *See also* 305 F. Supp. at 1370.

111 A number of states, acting through their legislatures, have established single-member districts in one or both houses. Dixon & Hatheway, *The Seminal Issue in State Constitutional Revision: Reapportionment Method and Standards*, 10 WM. & MARY L. REV. 888, 903 (1969).

112 *See* Reynolds v. Sims, 377 U.S. 533, 577 (1964).

113 *See* 305 F. Supp. at 1392:

> If the districts were uniform and not unduly large, this would be an effective means of giving each citizen equal voting power . . . while avoiding problems of diluting political or racial minority group voting power . . . .

CONCLUSION

The reversal of the promise held out by the dicta in *Fortson* and *Burns* indicates that the Court is changing direction in the reapportionment area. Whether this is because Justice Frankfurter's warning against judicial entry into the political thicket in *Baker v. Carr*[114] is now being heeded,[115] or because the recent changes in the composition of the Court are having an effect on its decisions, or whether the slogan of "one man, one vote" has lost its magic appeal is a matter of conjecture.

The question that remains is what will be the effect of *Whitcomb v. Chavis* on the American political scene. In recent times, the major parties, Democrat and Republican, have never had less of a hold on the thoughts and the votes of the American people as they do at this time.[116] The down-the-line party voter is almost a rarity, while the ticket-splitter is becoming more common, especially among the younger voters.[117] In a sense, the body politic is fragmenting into so many parts that two parties cannot contain and give expression to all of these new factions and, at the same time, maintain the minimum of unity and integrity required of a political party.[118] *Whitcomb v. Chavis* could have been the vehicle by which the Court could have eased and legitimized this process of fragmentation. Or, if it could not bring itself to endorse single-member districts as a solution, it could have at least acknowledged the frustrations of those who, like the plaintiffs in *Whitcomb*, suffer from the indifference of the two major parties. Decisions like this will cause many, in like circumstances, now to move outside these familiar avenues. Thus, the long range effect of *Whitcomb*, and decisions like it, may not be to save the major parties, but rather to seal their fates.[119]

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Michael L. Shanahan

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114 369 U.S. 186, 266 (1962) (Frankfurter, J., dissenting).

115 *See* Justice Harlan's concurring opinion in Whitcomb v. Chavis, 403 U.S. at 170.

116 F. DUTTON, CHANGING SOURCES OF POWER 228 (1971).

117 *Id.* at 228-29.

118 *Id.* at 240.

119 *Id.* at 242:

> [T]o constrict political expression and new groupings when large numbers of citizens are groping for an alternative to the two major parties could estrange even more of the public from the political system than has already occurred. It is American society, not just our politics, that is fragmenting. To seal off rather than vent the substantial pressures which are building invites even greater frustration and trouble.