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RACIAL GERRYMANDERING

Cousins v. City Council of City of Chicago, 503 F.2d 912 (7th Cir. 1974)

"Legislators represent people, not trees or acres."[1] Legislators are elected by individuals with points of view and opinions; they are not elected by districts and territories drawn on maps. Without detailed analysis of the concept of representation, reapportionment cases have generally been treated as right to vote cases and have focused on "individual voter weight."[2] Mathematical exactitude of equal representation does not necessarily mean fair representation.[3] Voters may be more interested in being effectively represented than in a mathematically equal vote. If the voters of a particular ethnic or racial group are districted in a manner that gives them no substantial voting strength in any district, their votes may be counted equally with other votes, but their viewpoint may remain unrepresented by any given legislator. In *Cousins v. City Council of City of Chicago*,[4] a coalition of blacks, Puerto Ricans, Chicago aldermen, and various organizations contended that the defendant City Council had been invidiously discriminatory in its redistricting of city wards. The plaintiffs did not allege that the wards contained unequal numbers of voters. The Seventh Circuit Court of Appeals determined that the apportionment of wards by the defendant did not constitute purposeful or invidious racial or ethnic discrimination and thus was valid.

This article will analyze the two-prong approach posited by the court in the *Cousins* decision, which included consideration of racial motivation surrounding the redistricting and consideration of racial or ethnic discrimination in fact. First, United States Supreme Court decisions concerning racial gerrymandering will be reviewed. The Supreme Court has set forth certain criteria which must be met to bring a redistricting plan within the scope of constitutionality. Second, the *Cousins* decision will be summarized. Because the *Cousins* decision was the second appeal from a case heard in the district court, the decision can best be understood in light of the previous appeal. Finally, the reasoning of the decision and its outcome will be evaluated in light of the mandates of the United States Supreme Court and decisions of other federal courts.

1. Reynolds v. Sims, 377 U.S. 533, 562 (1964).
2. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 S. CT. REV. 1, 2 [hereinafter cited as Casper].
3. Halpin and Engstrom, *Racial Gerrymandering and Southern State Legislative Redistricting*, 22 J. PUB. LAW 37 (1973) [hereinafter cited as Halpin].
4. 503 F.2d 912 (7th Cir. 1974).

THE SUPREME COURT'S POSITION ON RACIAL GERRYMANDERING

In *Gomillion v. Lightfoot*,[5] a state statute which singled out "a readily isolated segment of a racial minority for special discriminatory treatment"[6] was said to violate the fifteenth amendment guarantee of the right to vote. Two years later the United States Supreme Court announced in *Baker v. Carr*[7] that numerical voter malapportionment by a state legislature can constitute a violation of the equal protection clause of the fourteenth amendment. After *Baker v. Carr* racial districting of a given voting populaton has been said to infringe on fourteenth amendment rights.[8] The United States Supreme Court since *Baker v. Carr* has found inherent in the concept of fair representation under the equal protection clause of the fourteenth amendment two propositions: (1) In apportionment schemes one man's vote should equal another man's vote as nearly as practicable,[9] and (2) assuming substantial equality of votes, an apportionment scheme must not operate to minimize or cancel out the voting strength of racial elements of the voting population.[10]

Most litigation in the Supreme Court concerning the diluting or cancelling out of racial voter strength has involved multi-member districts, or the at-large election scheme.[11] The primary objection to an at-large election scheme[12] is that it provides the dominant party or faction an opportunity to win all of the seats within a district. This defect is particularly acute and has serious constitutional dimensions in a racially polarized political system.[13] However, the Supreme Court has not always found invalid multi-member

5. 364 U.S. 339 (1960).
6. *Id.* at 346.
7. 369 U.S. 189 (1962).
8. White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Kilgarin v. Hill, 386 U.S. 120 (1967); Burns v. Richardson, 384 U.S. 78 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965); Wright v. Rockefeller, 376 U.S. 959 (1964).
9. Gaffney v. Cummings, 412 U.S. 735 (1973); Mahan v. Howell, 410 U.S. 315 (1973); Kirkpatrick v. Preisler, 394 U.S. 526 (1969); Arvey v. Midland Co., 390 U.S. 474 (1968); Reynolds v. Sims, 377 U.S. 533 (1964).
10. Cases cited *supra* note 8.
11. White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 78 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965).
12. In an at-large election scheme, the multi-member district, which is usually a large district, would elect a number of legislators for some office such as state senator. In contrast, single-member districts would each elect only one state senator. The effect of the multi-member district is to permit a faction of voters, if constituting the majority, to elect all of the state senators from that multi-member district. If the same multi-member district were divided into single districts where other factions predominate, state senators representing the other factions may be elected. Thus, an election scheme involving single-member districts permits the election of legislators representing various factions.
13. Parker, *County Redistricting in Mississippi: Case Studies in Racial Gerrymandering*, 44 MISS. L.J. 391, 393 (1973) [hereinatfer cited as Parker].

election districts when it is indicated that the state's preference for such districts was not rooted in racial discrimination and has no directly provable racial effect.[14]

Although the votes of an ethnic group may be cancelled by multi-member districts, they may also be diluted in a single-member district by redistricting plans which have been described as "cracking," "packing," and "stacking."[15] The "cracked" district is an area of heavy racial concentration fragmented into separate pieces.[16] The various pieces are then attached to other neighboring districts of low racial concentration. The outcome is new districts, none of which contains a high racial concentration. The Supreme Court has never explicitly found so-called "cracked" districting unconstitutional. It has implied that a scheme of this type which follows a "long 'history' of bias and franchise dilution in the State's traditional drawing of district lines may be unconstitutional."[17] The "packed" district is one into which minority voters are concentrated, thus containing many more minority members than neighboring districts.[18] The minority population may be so high, that it could influence the outcome in a number of neighboring districts if it were not concentrated into only one district. In *Wright v. Rockefeller,*[19] a statute provided for this type of apportionment of congressional districts in New York County, but the Court held that the plaintiffs had failed to prove that the New York Legislature was either motivated by racial considerations or had in fact drawn districts on racial lines. A "stacked" district usually lacks compactness, and has been said to resemble "nothing more than the partisan rapacious soul of its political creator."[20] A "stacked" district is frequently drawn to include certain neighborhoods or the residence of an incumbent who is seeking office. A "stacked" district is not per se violative of the equal protection clause of the Constitution unless it is statistically malapportioned or proven to be invidiously discriminatory.[21]

Cousins v. City Council of City of Chicago

On December 20, 1970, the plaintiffs filed their original complaint attacking the redistricting of the city wards. The plaintiffs included a num-

14. Whitcomb v. Chavis, 403 U.S. 124 (1971).

15. Parker, *supra* note 13, at 402. These terms were first coined in the context of under-representation of urban areas in Tyler, *Court versus Legislature: The Socio-Politics of Malapportionment,* 27 LAW AND CONTEMP. PROB. 390, 400 (1962) [hereinafter cited as Tyler].

16. Parker, *supra* note 13, at 403.

17. Taylor v. McKeithen, 407 U.S. 191, 194 n.3 (1972).

18. Parker, *supra* note 13, at 403.

19. 376 U.S. 959 (1964).

20. Tyler, *supra* note 15, at 401.

21. WMCA v. Lomenzo, 238 F. Supp. 916, 925 (S.D.N.Y. 1965), *aff'd per curiam,* 382 U.S. 4 (1965).

ber of aldermen,[22] a candidate for alderman,[23] two unincorporated voluntary organizations,[24] a number of black persons,[25] and one person of Puerto Rican origin and ancestry.[26] The gravamen of the plaintiffs' argument was that boundaries were drawn to accomplish the following:

(1) minimize the number of wards in which the majority would be black;
(2) minimize the number of wards in which the majority would be independent voters; and
(3) avoid having any ward in which the majority would be Puerto Rican.

On January 22, 1971, the district court entered its judgment[27] in which it determined that no plaintiff claimed an injury or impairment of an individual right, and hence no plaintiff had standing to bring the cause of action. The district court also found that the ordinance establishing the boundaries was not racially, ethnically, or otherwise discriminatory and thus not violative of the equal protection clause of the fourteenth amendment.

On appeal, the United States Court of Appeals for the Seventh Circuit reversed and remanded the judgment of the district court.[28] The court concluded that the plaintiffs, who were black and Puerto Rican, had sufficient standing as individual members of their respective groups, against which discrimination was allegedly directed. The court acknowledged that some blacks and Puerto Ricans in Chicago probably favored defendant's map, but noted the fact that "members of an alleged class are opposed to the claim is irrelevant."[29] The court determined, however, that the discrimination against the so-called "independent voters" was a non-justiciable political question. It was unable to find that plaintiffs' evidence clearly established that the ward boundaries were the product of purposeful racial or ethnic discrimination. The Seventh Circuit did find that the type of rights under consideraton required "special care"[30] and thus claims of impairment needed a full inquiry and remanded the case for a full trial on the merits.

The district court in the second trial held that the evidence established that the City Council's map complied fully with principles of equality of

22. William Cousins, Jr., A.A. Rayner, Jr., Leon M. Despres, William Singer, and George Barr McCutcheon.
23. Graciano Lopez.
24. Independent Voters of Illinois and Committee for an Effective City Council.
25. William Cousins, Jr., A.A. Rayner, Jr., Rev. Jesse L. Jackson, Rosemary Gulley, Rev. Richard Lawrence, Timuel P. Black, Jr., and Andrew Crout.
26. Graciano Lopez.
27. Cousins v. City Council of City of Chicago, 322 F. Supp. 428 (N.D. Ill. 1971).
28. 466 F.2d 830 (7th Cir. 1974).
29. *Id.* at 845.
30. *Id.* at 845.

representation except in one ward.[31] The district court found that one ward had been drawn intentionally to create a white majority where a black majority previously existed. The district court deemed it sufficient to redraw the boundary between two wards so that the ward, containing a white majority on defendant's map, became a word which was 52 per cent black.

On the second appeal the court failed to find any inference of purposeful minimization of voting strength of minority racial or ethnic groups in the overall map of the fifty wards.[32] It did not find invidious discrimination in the drawing of the one ward that was redistricted by the district court or in any other specific wards. The court also did not accept the plaintiffs' contention that the voting strength of the Spanish-language groups had been diluted. Finally, the court affirmed the the district court's allocation of the burden of proving discrimination in fact to the plaintiff rather than placing the "burden of justification"[33] on the defendant.

EVALUATION OF THE *Cousins* DECISION

The Inference of Purposeful Discrimination in the Overall Redistricting Plan

The court in the first *Cousins* appeal took the position that in light of the special rights involved, it would allow the plaintiffs an additional opportunity to prove their case on remand to the federal district court. The court took judicial notice that, according to revised census figures, 32.7 per cent of the population of Chicago was black. The fifteen wards in which a majority of the residents are black elect 30 per cent of the city's aldermen. Sixteen wards could elect 32 per cent, and seventeen wards could elect 34 per cent. The court noted that the transcript of the proceedings in the City Council on its face suggested only an attempt to create wards of equal population. However, considerable evidence had been introduced in the district court demonstrating racial motivation in the preparation of an earlier, confidential version of a proposed city map. The court made the following comment concerning this map:

> Although we are convinced that the district court took a clearly erroneous view of the Bell-student map project [the confidential map] and thus failed to consider important elements of plaintiffs' case, we are unable to say that the plaintiffs' case was so clearly established that the ward boundaries were the product of purposeful discrimination as to permit this court so to find.[34]

The court stated that it could remand to the district court for the limited purpose of demonstrating whether following an objective standard rationally

31. Cousins v. City Council of City of Chicago, 361 F. Supp. 530 (N.D. Ill. 1973).
32. 503 F.2d 912 (7th Cir. 1974).
33. *Id.* at 16.
34. 466 F.2d at 843.

related to redistricting, plaintiffs could produce a map with more than fifteen wards with a clear majority of blacks or Puerto Ricans. The court, however, concluded that the proper forum for resolution of the issues would be the federal district court for a second trial on the merits.

In similar cases in the Fifth District, the court of appeals has shown no special concern in giving plaintiffs a second opportunity to prove their case by demonstrating racial motivation and presenting their own maps. In *Howard v. Adams County Board of Supervisors*,[35] the Fifth Circuit approved a county-wide redistricting plan in which blacks would be in a majority in only one out of five districts, although the black to white ratio was one to one in the county. The blacks thus had the population strength to predominate in at least two districts. The court in *Howard* maintained that plaintiffs must prove (1) a racially motivated plan or (2) that the apportionment scheme would operate to minimize or cancel out the voting strength of racial elements of the voting population.[36] The record was said to be bare of racial motivation or purpose. The court maintained that there was no impermissible dilution of voting strength although the five districts contained the following percentages of blacks: 67, 45, 40, 40, and 10. The important distinction between *Howard* and the first *Cousins* appellate decision was that the court in *Cousins* was prepared to make additional inquiry because the rights considered were deemed to require "special care."[37] In the first *Cousins* decision, the overall figures of defendant's redistricting did not appear grossly unfair. Blacks predominated in fifteen wards, but theoretically could have predominated in sixteen. In *Howard*, on the other hand, blacks could theoretically predominate in two or three districts, but predominated in only one. The finding in the *Cousins* appellate decision was not simply based on the overall figures but on a second inquiry into racial motivation and a consideration of a map designed by plaintiffs. Although in *Howard* discrepancies were initially apparent, the Fifth Circuit showed no special concern in remanding for further proceedings.

In *Taylor v. McKeithen*,[38] the Fifth Circuit approved a redistricting plan prepared by "interested state senators"[39] over one prepared by a master appointed by the district court. The geographical area in issue concerned four districts. After finding the state's self-reapportionment plan violative of the equal protection clause, the district court appointed a master to prepare a plan. The trial court instructed the master to hold hearings and then draw districts that would be "as uniform and rational as possible."[40]

35. 453 F.2d 455 (5th Cr. 1972).
36. *Id.* at 457.
37. 466 F.2d at 843.
38. 499 F.2d 893 (5th Cir. 1974).
39. *Id.* at 894.
40. *Id.* at 894, n.1.

In the master's plan, black voters would predominate in two districts, and black population would also clearly predominate in the same two districts. In the "interested state senators' " plan, black voters would predominate in none of the districts although black population would predominate in one district. The Fifth Circuit in *Taylor* reversed the district court in approving the state senators' plan.

The court in *Taylor* maintained that blacks under the state senators' plan had a greater opportunity to have their voting power felt. The black population was more uniform under the state senators' plan, i.e. about 43 per cent in three of the districts, and black voter registration was said to be on a rapid increase. In addition, the court noted that whites were more inclined to vote for blacks than blacks for whites. The court then reasoned that a senate district having 43-45 per cent black population in 1971 could elect a black senator in 1975. In the district court in *Taylor*, the plaintiffs had presented maps, which as the trial judge said "merely show that plans could be presented which are within acceptable deviation limits while at the same time giving negro voters an even greater voter strength than does the court-approved plan."[41] The Fifth Circuit saw "no purpose to be served by remanding the case for the district court to construct a 'least drastic alternative.' "[42] The Seventh Circuit, in contrast, has placed extraordinary emphasis on allowing plaintiffs an adequate chance to show dilution of racial voting power by the use of plaintiffs' own maps and evidence of defendant's racial motivation.

The court noted that purposeful minimization of the voting strength of a minority racial or ethnic group is the sort of conduct which is unlikely to be directly or specifically proven. The second *Cousins* decision in effect used both an objective test (a map test) and a motivation test. The court purported to rely upon the map test. In actuality, it also considered racial motivation.

The map test which the court used in finding no inference of purposeful dilution of minority voting strength in the defendant's map was summarized in a footnote:

> One approach, where such a claim is made is to compare the number of black minority wards in the challenged map with another map which might equally reasonably be drawn, but with more such wards, and assess whether the difference is more probably explained by a purpose to discriminate than by legitimate considerations.[43]

41. *Id.* at 899.

42. *Id.* at 897. One of the Fifth Circuit's reasons for considering remand unnecessary was that a black had been elected from a district which the trial court had described as a safe white district. However, the Fifth Circuit apparently assumed that the electing of a black candidate from a given district was proof of the fact that black interests would be represented.

43. 503 F.2d at 914, n.1.

The plaintiffs' map produced sixteen wards with a majority of blacks; the defendant's map produced fifteen wards with a majority of blacks. The court in the second *Cousins* appeal thus refused to find any inference of purposeful dilution of racial or ethnic voting strength in the defendant's overall map based upon a comparison with the alternative map introduced by plaintiffs.

The court of appeals in the second *Cousins* decision not only used the map test, but also considered the findings of the trial court concerning racial motivation. Evidence of racially oriented conversations between aldermen concerning preparation of the map was introduced in both the first and second trials. The court in the first *Cousins* decision did not simply remand for the limited purpose of allowing plaintiffs to produce a map with more predominantly black or Puerto Rican wards. The court may well have ordered a complete new trial for more complete consideration of the comments surrounding the confidential map, which was constructed in an alderman's private office prior to the drawing of the official map in City Council. The court in its first decision did indeed state that the trial court failed to consider an important part of plaintiffs' case by not placing more emphasis on the preparation of the confidential map. Nonetheless, the district court in the second trial simply did not find evidence that the defendant's map was racially motivated.

The second *Cousins* decision followed the guidelines set down by the Supreme Court in considering both racial motivation and a map test. In *Wright v. Rockefeller*,[44] the Supreme Court noted that the plaintiff failed to prove either that the legislature was motivated by racial considerations or that it in fact drew districts on racial lines. In *Fortson v. Dorsey*,[45] the Supreme Court set forth what could be termed an objective test to determine whether invidious discrimination in racial gerrymandering exists. Violations of the equal protection clause were said to occur only if it can be shown that "designedly or *otherwise*, [an] . . . apportionment scheme . . . would operate to minimize or cancel out the voting population."[46] The Seventh Circuit followed *Wright* by considering the findings of the trial court concerning racial motivation. In addition, it followed *Wright* by using a map prepared by the plaintiffs to determine if the defendant's redistricting plan was in fact drawn along racial lines. By the use of plaintiffs' map, the court of appeals in the second *Cousins* decision also implemented what could be termed an objective map test. In essence, the court allowed plaintiffs to prepare a map "which might equally reasonably be drawn,"[47] and then

44. 376 U.S. 959 (1964).
45. 379 U.S. 433 (1965).
46. Burns v. Richardson, 384 U.S. 78, 88 (1966); Fortson v. Dorsey, 379 U.S. 433, 439 (1965).
47. 503 F.2d at 914, n.1.

compared plaintiff's map with defendant's to determine whether defendant's map diluted racial and ethnic vote.

In the second *Cousins* decision, the plaintiffs objected to the burden of proof applied in the district court. The plaintiffs contended that the district court should have shifted to the defendant the burden of establishing the absence of discrimination following the plaintiffs' introduction of historical and statistical evidence of a pattern of bias. The plaintiffs argued that the district court should have applied the "strict scrutiny"[48] test formulated in *San Antonio School District v. Rodriguez.*

> If, as previous decisions have indicated, strict scrutiny means that the State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a 'heavy burden of justification,' that the State must demonstrate that its [legislation] has been structured with 'precision,' and is 'tailored' narrowly to serve legitimate objectives and that it has selected the 'less drastic means' for effectuating its objectives.[49]

The plaintiffs in effect contended that the district court should have placed the burden of justifying the 1970 reapportionment ordinance on the defendant City Council.

The court in *Cousins* noted that the Supreme Court has not shifted the burden of proof in similar cases to the defendant. Although fundamental constitutional concerns about racial discrimination would appear to be involved in racial gerrymandering cases, the plaintiffs were unable to cite any decision in which the *Rodriguez* strict scrutiny test was applied. Furthermore, in *Whitcomb v. Chavis,*[50] the Supreme Court maintained that the "challenger (must) carry the burden of proving that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial . . . elements."[51] The Supreme Court has affirmed a number of district court decisions, involving both multi-member and single-member districts, in which no burden of justification was placed upon the state.[52] The Supreme Court has nonetheless noted that *Whitcomb* would not control where there was no concession that the state's preference for a certain type of districting was not rooted in racial discrimination.[53] The Supreme Court has not indicated to what extent *Whitcomb* would not control. Thus, it has not made a precise statement for cases involving no such concession or in cases concerning a long history of bias. Where a redistricting map has been found violative of the equal protection clause, the Supreme Court

48. *Id.* at 922.
49. 411 U.S. 1, 16-17 (1973).
50. 403 U.S. 124 (1971).
51. *Id.* at 145.
52. White v. Regester, 412 U.S. 755 (1973); Kilgarim v. Hill, 386 U.S. 120 (1967); Wright v. Rockefeller, 376 U.S. 52 (1964).
53. Taylor v. McKeithen, 407 U.S. 191, 194 n.3 (1972).

has affirmed a district court decision which allocated the burden to the plaintiffs to establish a dilution of voting strength of racial and ethnic minorities.[54] Consequently, the conclusion of the second *Cousins* appellate decision, which affirmed the trial court's allocation of the burden of proof cannot be said to be inconsistent with previous Supreme Court holdings.

While the second *Cousins* decision follows the Supreme Court's mandates in placing the burden of proof on plaintiffs, the Supreme Court has not gone without criticism for its position in this regard.[55] Although states must carry the burden of justifying any population variations in their districting plans, the burden of proof in cases of racial vote dilution rests with the plaintiffs, and such proof has in fact been a substantial burden.[56] Mr. Justice Goldberg, dissenting in *Wright,* suggested that the defendant's map established a justifiable inference of legislative intent to draw congressional district lines on the basis of race.[57] More importantly, he suggested that a justifiable inference was sufficient to raise a rebuttable presumption of unconstitutionality and to place on the state the burden of going forward and introducing rebuttal evidence.[58] The Supreme Court has never accepted Mr. Justice Goldberg's position, and to date political representation has not been equated with the fundamental right of actual participation in the elective process—voting.

Packing of Black Population into a Single Ward

Although the district court in the second *Cousins* trial did not find the overall reapportionment to be the product of invidious racial or ethnic discrimination, it did find such discrimination in the boundaries of one ward. The type of alleged gerrymandering of which the plaintiffs complained could be described as "packing." A boundary separated two wards, one of which contained 26.9 per cent blacks and the other 77.8 per cent blacks. Because of the compactness of the two wards drawn by the defendant City Council, the court of appeals reversed the district court. The district court concluded that the two wards were drawn with the invidious purpose of minimizing black voting strength. This conclusion was based in part on the finding that if the boundaries had remained substantially similar to the 1961 boundaries, blacks would have remained in a majority in both wards. The court of appeals found that the evidence supported the conclusion that the boundaries were responses to legitimate concerns such as compactness of wards and equality of population. Compactness of wards in the City of Chicago is required by statute.[59] Case law in Illinois has defined "compactness" as

54. White v. Regester, 412 U.S. 755 (1973).
55. Halpin, *supra* note 3. Cox, *Foreward—Constitutional Adjudication and the Promotion of Human Rights,* 8 HARV. L. REV. 91 (1966).
56. Halpin, *supra* note 3, at 41.
57. 376 U.S. at 72.
58. *Id.* at 73.
59. ILL. REV. STAT. ch. 24, § 21-36 (1973).

"closely united," and has recognized the requirement of compactness as a protection against so-called "gerrymandering."[60] The court acknowledged that determination of the boundaries was partially influenced by the desire to keep an incumbent alderman in an allegedly diluted district. In this regard the United States Supreme Court has stated that the "fact that district boundaries may have been drawn in a way that minimizes the number of contests between present incumbents does not in and of itself establish invidiousness."[61]

The one decision in which the Supreme Court has considered an allegedly "packed" redistricting plan was *Wright*. The plaintiffs offered maps, statistics and some oral evidence to prove that it was impossible to have the four congressional districts in question so drawn without regard to race. The percentages of blacks and Puerto Ricans in the four districts were 86.3, 28.5, 27.5, and 5.1. The district court held that no proof was offered that specific boundaries were drawn on racial lines or that the legislature was motivated by racial considerations. The Court noted that the concentration of black and Puerto Rican voters in one area made it difficult to fix districts so as to have an equal division of voters among the districts.

As in *Wright*, the court in *Cousins* was confronted with a map in which blacks were clearly concentrated into one district. The Supreme Court has made this permissible where it would be difficult to draw wards in any other manner. The court in *Cousins* noted that the ward in question and the surrounding wards were compactly drawn and thus concluded that the boundary separating the 26.9 per cent black ward and the 77.8 per cent black ward did not constitute invidious discrimination.

Diluting the Voting Strength of the Spanish-language Group

The plaintiffs on appeal did not press their initial contention that the voting strength of the Puerto Rican population had been purposefully diminished. The court of appeals, nonetheless, commented on the district court's determination of this question. The district court concluded that there were only 49,500 Puerto Ricans scattered over an area consisting of three or four wards and that it would be impossible to create a Puerto Rican majority in any single ward. The court of appeals maintained that the finding of no purposeful diminution of Puerto Rican voting was not clearly erroneous. The court noted that if the 1961 boundaries had been retained, one ward would have been 32 per cent Puerto Rican, while under the new plan it was 25 per cent Puerto Rican.

The plaintiffs in the second trial had not only argued in terms of the Puerto Rican population but sought to broaden the minority group being

60. People v. Thompson, 155 Ill. 451, 40 N.E. 307, 315 (1895).
61. Burns v. Richardson, 384 U.S. 78, 89 n.16 (1966).

considered to that of the Spanish-language group. The Spanish-language group constituted 80,000 and contained an unknown number of aliens. Under the plaintiffs' map, a ward was created containing 42 per cent Spanish-language group. Under the defendant's map the most substantial Spanish-language minority comprised only 33 per cent of the population of a ward. The court was not persuaded by the argument that there had been a dilution of the Spanish-speaking vote.

The district court rejected plaintiffs' argument because of plaintiffs' failure to amend their complaint and to add a named plaintiff representing the Spanish-language group. The Seventh Circuit agreed with the district court in this regard. In adopting this position, the court suggested that the merits of this portion of the case could have been considered if the plaintiffs had only followed the proper procedure. It is significant that courts are prepared to consolidate minorities even though they have no common origin. In *Wright*, neither the United States Supreme Court, nor the district court, objected to grouping blacks and Puerto Ricans. Although the second *Cousins* decision is consonant with the Supreme Court in this regard, the validity of the court's opinion in this area is somewhat tenuous. An underlying assumption in all cases concerning purposeful dilution of ethnic voting is that the members of a single ethnic or minority group will vote substantially the same way. This assumption alone could be questioned, but an even more questionable assumption is that members of different minorities (blacks, Puerto Ricans, Mexican-Americans) will exhibit a similar voting pattern. Although in *Wright* the plaintiffs ultimately lost on the merits of their case, the Court set a precedent for the grouping of minorities.

The court in the second *Cousins* decision in dicta stated that it was not persuaded by the fact that the plaintiffs' map created one ward with 42 per cent Spanish-speaking population and the defendant's map created a ward with 33 per cent. The court implied that it was unpersuaded because the so-called Spanish-speaking language group contained a number of aliens. If this is the reasoning behind the court's position, it is simply stating that the figures of 42 per cent and 33 per cent are meaningless. Possibly the difference of 9 per cent was simply not significant to the court. It is also possible that the court was unpersuaded because the Spanish-speaking group could not constitute a majority in any ward. The Fifth Circuit in *Howard v. Adams County Board of Supervisors* rejected any notion that a minority group is entitled to a districting plan in which it can predominate in specifc districts simply because it commands a population concentration of sufficient size. Similarly, the United States Supreme Court in *Whitcomb* has rejected the contention that a multi-member districting plan is invalid simply because a given group with distinctve interests is compact enough and numerous enough to predominate in a single-member district. In actuality, the court in the second *Cousins* decision has made no definitive statement ex-

plaining the type of redistricting that would violate the equal protection clause by "cracking" a given segment of minority population.

CONCLUSION

Although the court in the first and the second *Cousins* decisions did give special consideration to the rights involved, the plaintiffs were nonetheless unable to prove their case. One of the difficulties that confronted the plaintiffs was that the Supreme Court has in essence made proof of invidious discrimination of ethnic or racial voter strength a distinctly arduous task. The prevention of gerrymandering, especially for racial purposes, is a central concern of critics, who demand that the Supreme Court develop more effective standards to invalidate such practices.[62] While states must carry the burden of justifying any population variances in their plans, the burden of proof in racial gerrymander cases has to date rested with the plainitffs.[63] The Seventh Circuit has followed the Supreme Court in allocating that burden of proof to the plaintiffs. If the Seventh Circuit had placed the burden of justifying the 1970 reapportionment ordinance on the defendant, an entirely different result may have been reached. The Seventh Circuit could have shifted to the defendant the burden of justifying its ordinance by applying the strict scrutiny test recently formulated in *Rodriguez*. In other words, the court of appeals could have required the state to carry a "heavy burden of justification," and demonstrate that its legislation is "tailored" narrowly to serve legitimate objectives and that it has selected the "less drastic means" for effectuating its objectives.[64] Consideration of racial motivation and objective map tests have not proven to be effective standards in preventing invidious discrimination in racial gerrymandering. Shifting the burden of justification of legislation to the defendants could be a more effective means of assuring protection of the special rights involved in the redistricting of racial and ethnic voter strength.

LINDA S. AMDUR

62. G. Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target*, in REAPPORTIONMENT IN THE 1970's (1970).
63. Halpin, *supra* note 3.
64. 411 U.S. at 16-17.