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THE DISCRIMINATORY EFFECTS OF AT-LARGE ELECTIONS

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I. SOPHISTICATED MODES OF DISCRIMINATION

In *Baker v. Carr*,[1] the Court held unconstitutional Tennessee's apportionment statutes and declared that denial of a citizen's right to fair and effective participation in the electoral process was a justiciable issue. And in *Reynolds v. Sims*,[2] decided two years later, Chief Justice Earl Warren wrote for the majority: "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature."[3] This goal of fair and effective representation could be achieved by constructing districts, in both houses of state legislatures, "as nearly of equal population as is practicable."[4]

Baker and *Reynolds* were followed by a number of "one person, one vote"[5] cases designed to make effective representation a reality in American society. The reality exists today, however, only for the numerical majority. Politically effective representation for racial and other minorities has not been achieved. The Supreme Court's emphasis on equality of population among electoral districts and its reluctance to develop realistic restraints on the discretion of districting authorities has threatened to transform the reapportionment revolution into a "Gerrymandering Revolution."[6]

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1. 369 U.S. 186 (1962).
2. 377 U.S. 533 (1964).
3. *Id.* at 565.
4. *Id.* at 577.
5. The expression "one man, one vote" was originally used by Justice Harlan in a concurring opinion in Lathrop v. Donohue, 367 U.S. 820, 856 (1961) (all lawyers in Wisconsin were required to join the politically active state bar and pay dues). It was borrowed by Justice Douglas in Gray v. Sanders, 372 U.S. 368, 381 (1963), an early apportionment case, and changed to "one person, one vote." However, the majority of the Court preferred Justice Harlan's rendition and "one man, one vote" became the more popular alternative until Justice Rehnquist broke with precedent in Mahan v. Howell, 410 U.S. 315, 319 (1973), and again substituted the word "person" for the word "man."
6. Elliott, *Prometheus, Proteus, Pandora, and Procrustes Unbound: The Political Consequences of Reapportionment*, 37 U. CHI. L. REV. 474, 483 (1970).

Gerrymandering[7]—"discriminatory districting which operates unfairly to inflate the political strength of one group and deflate that of another"[8]—can be as invidious as malapportionment of population in depriving voters of an equal voice in choosing their representatives. The objective of gerrymandering is to create an electoral advantage for a particular group by diluting the political effectiveness of competitive groups. One of the most widespread means of diluting the political effectiveness of a disfavored minority group is through the use of multi-member districts. In these districts, a large number of voters choose more than one representative to serve the entire district. Thus, a multi-member district might contain 500,000 people and elect five representatives, while a single-member district nearby might have only 100,000 people and elect one representative. The constitutional imperative of equal population districts is not violated, but the political consequences are vastly different. The dominant political faction in the multi-member district is likely to elect all five representatives. If, however, the district were divided into five single-member districts, representatives from different factions would be much more likely to be elected.[9]

Though multi-member districts can be found at all political levels within a state, their effect is particularly invidious on racial minorities in city elections. In well over half the cities in the United States all representatives are elected at-large.[10] An additional thirteen percent elect at least one or more members of the city council at-large.[11]

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7. The term is derived from wildly-shaped districts created when Governor Elbridge Gerry sought to redistrict the Massachusetts Legislature in 1812. The shape of one proposed district resembled a salamander. Note, Chavis v. Whitcomb: *Apportionment, Gerrymandering, and Black Voting Rights*, 24 RUTGERS L. REV. 521, 524 n.13 (1970). There are two distinct kinds of gerrymandering: delineational and institutional. Governor Gerry was engaging in delineational gerrymandering when he created irrationally-shaped legislative districts in an effort to gain a majority for the Democrats in the Massachusetts Senate. The term institutional gerrymandering refers to the use of multi-member districts to dilute the voting strength of a minority group submerged within a large majority-controlled district. Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277, 279-81.

8. Dixon, *The Court, the People, and "One Man, One Vote"* in REAPPORTIONMENT IN THE 1970's 7, 29 (N. Polsby ed. 1971).

9. The effect of multi-member districts in underrepresenting minority interests has been the subject of much commentary. *See* Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?* in REAPPORTIONMENT IN THE 1970's 121, 123 (N. Polsby ed. 1971); Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 671 (1972); Engstrom, *supra* note 7, at 280-81; Rosenberg, *Reapportionment and Minority Politics*, 6 COLUM. HUMAN RIGHTS L. REV. 107, 108 (1974); and Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577, 1578 (1970).

10. *City Governments: Form, Structure, Election of Mayor and Council*, 8 URB. DATA SERV. REP. 1, 8 (1976). "At-large" is the term used when all of the councilmen are elected by the entire city. The city is one large multi-member district. A single-member district in a city is called a ward.

11. *Id.*

The trend in recent decades, as part of the reform movement in municipal government, has been toward the increased use of at-large elections in the cities.[12] This trend may well accelerate as cities turn to at-large elections to meet the Court's demands that legislative districts have equal populations.[13] In contrast the trend in state legislative districts is toward single-member districts. According to the Council of State Governments, in 1968 forty-six percent of the states used some multi-member districts to elect their state senators and sixty-six percent to elect their state representatives. By 1978 the percentage of states had declined to twenty-six percent for the senators and forty percent for representatives. In 1968 twenty-seven percent of state senators and fifty-three percent of state representatives were elected from multi-member districts. The percentages decreased to fifteen percent and thirty-six percent respectively by 1978.[14]

Not only is the use of at-large elections more widespread for cities than for state legislatures, but at-large elections in cities have a more discriminatory effect than they do statewide. In statewide elections, it is possible that a large minority group in one multi-member district will be unable to elect any legislators, while in another multi-member district where the same group is a slight majority, they will elect the entire slate of legislators. Thus, the multi-member electoral system may hinder a group in one district but prove an advantage in another. In at-large elections in cities this is not possible. There is no way to balance out the discrimination against a particular minority group because the entire city is one huge election district. The minority's loss is absolute. The same results would occur if all representatives to a state legislature were elected statewide.[15]

12. Data from the International City Managers Association indicate that in 1951, 56.5% of reporting cities over 5,000 population used at-large elections. That percentage had increased to 69% by 1976. For the 1951 data see THE MUNICIPAL YEAR BOOK 1951 at 42 (C. Ridley & O. Nolting eds.). For 1976, see *City Governments: Form, Structure, Election of Mayor and Council, supra* note 10, at 8.

13. In Whitcomb v. Chavis, 403 U.S. 124, 157 n.37 (1971), the Supreme Court indicated that there had been a slight increase in the use of multi-member districts by the states and that undoubtedly one of the reasons for this increase was that some states switched to multi-member districts as a result of the apportionment cases. Although the Court's data are incorrect, *see* note 14 *infra* and accompanying text, its reasoning is valid. In Avery v. Midland County, 390 U.S. 474 (1968), the Court applied the "one man, one vote" standard to local governments. As districting authorities have been prohibited from favoring those in power by unequal legislative districts they have had to turn to other electoral devices such as at-large elections.

14. For the 1968 data see THE COUNCIL OF STATE GOVERNMENTS, 17 THE BOOK OF THE STATES 66-67 (1968-69). For the 1978 data, see THE COUNCIL OF STATE GOVERNMENTS, 22 THE BOOK OF THE STATES 14-15 (1978-79).

15. Derfner, *Multi-Member Districts and Black Voters*, 2 BLACK L.J. 120, 128 (1972);

The minority most affected by at-large elections in American cities is the blacks.[16] Concentrated in a few ghetto areas, blacks often have the votes to determine the outcome of an election in a ward system.[17] But in an at-large system, they remain a minority and their candidates are defeated. Often, other minority groups have responded to election losses by forming coalitions with like-minded groups, but because of racial hostility, blacks have generally been unable to form effective coalitions with other minority groups.[18]

Moreover, because it is necessary in at-large elections to appeal to a larger electorate, such elections require greater financial resources and put a premium on the endorsement of civic associations and, most important, local newspapers.[19] Blacks have frequently been unable to obtain the support necessary to run a successful citywide campaign. Those blacks who have appealed successfully to the larger white vote are often not the most effective advocates of black interests.[20] Although ward elections do not guarantee representation for blacks on city councils, this article will demonstrate empirically that at-large elections are directly responsible for black underrepresentation on the councils of large cities.

II. THE SUPREME COURT AND MULTI-MEMBER DISTRICTS

A. Baker v. Carr *and the Reapportionment Decisions*

Until *Baker v. Carr*[21] was decided in 1962, even gross inequities in the population of legislative districts did not present a justiciable controversy. But in *Baker,* the Court overruled a line of cases holding that legislative apportionment was a political question.[22] This opened the door to one of the most bitter and protracted political controversies to face our nation. The Court based its decisions on the equal protection clause of the fourteenth amendment. At issue

Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices,* 36 GEO. WASH. L. REV. 790, 800 (1968).

16. The data contained in this paper focus on the issue of the dilution of the black vote in city elections. For a discussion of the related problem of the dilutive effect of multi-member districts on the black vote in the election of state legislatures, *see* Smith, *The Failure of Reapportionment; The Effect of Reapportionment on the Election of Blacks to Legislative Bodies,* 18 How. L.J. 639 (1975).

17. Bonapfel, *Minority Challenges to At-large Elections: The Dilution Problem,* 10 GA. L. REV. 353, 355 (1976); Jewell, *supra* note 15, at 800.

18. Derfner, *supra* note 15, at 127-28.

19. *See* E. BANFIELD & J. WILSON, CITY POLITICS 94-96, 307-08 (1963).

20. Karnig, *Black Representation on City Councils: The Impact of District Elections and Socioeconomic Factors,* 12 URB. AFF. Q. 223, 237 (1976).

21. 369 U.S. 186 (1962).

22. The leading case in the area was Colegrove v. Green, 328 U.S. 549 (1946), in which the Court held that the federal courts did not have jurisdiction in cases concerning legislative apportionment and that the issues were not justiciable.

in these cases was the very nature of representative government and the role the judiciary should play in guaranteeing the individual's rights in the electoral process.

In *Reynolds v. Sims,*[23] the Court articulated the first judicial standard to be applied in reapportionment cases: the equal protection clause required that districts for both houses of state legislatures be as nearly equal in population as practicable.[24] The essence of representative government, according to the *Reynolds* Court, is self-government. "[E]very citizen has an inalienable right to full and effective participation in the political process of his State's legislative bodies."[25] The Court unhesitatingly thrust itself into the "political thickets and mathematical quagmires"[26] of reapportionment and declared that any denial of the constitutionally protected right of fair and effective representation demands judicial protection.[27] Deviations from the strict population standards of *Reynolds* were acceptable only if "based on legitimate considerations incident to the effectuation of a rational state policy . . . ."[28] Four years later, the Court held in *Avery v. Midland County,* that the *Reynolds* standard of population equality applied to local government units as well.[29]

There has been increasing realization by blacks and whites alike that fair and effective representation of minority interests can be diluted in very sophisticated ways. Early in its consideration of apportionment the Supreme Court committed itself in principle to eradicating " 'sophisticated as well as simple-minded modes of dis-

23. Reynolds v. Sims, 377 U.S. 533 (1964), was the leading case of six decided the same day. The others are: Lucas v. Forty-fourth General Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964); Davis v. Mann, 377 U.S. 678 (1964); Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656 (1964); WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964).

24. 377 U.S. at 577.

25. *Id.* at 565.

26. *Id.* at 566.

27. *Id.*

28. *Id.* at 579. Such justifications might include: maintaining the integrity of political subdivisions, maintaining the compactness and contiguousness of districts, and recognizing natural boundaries. *Id.* at 580-81. In Mahan v. Howell, 410 U.S. 315 (1973), the Burger Court upheld an apportionment plan which diverged from mathematical equality by 16.4%, justified by the state's desire to keep political subdivisions intact. The Court noted that while such a deviation "may well approach tolerable limits, we do not believe it exceeds them." *Id.* at 329.

The Burger Court has also allowed "de minimus" variations from population equality without justification. Gaffney v. Cummings, 412 U.S. 735 (1973). In White v. Regester, 412 U.S. 755 (1973), the Court held a maximum deviation of 9.9% from the ideal to be de minimus.

29. 390 U.S. 474 (1968). In Abate v. Mundt, 403 U.S. 182 (1971), the Court allowed a 11.9% deviation for the election of Rockland County board of supervisors, thus indicating that historical patterns in certain cases might be sufficient to justify some differences.

crimination.' "[30] In practice, however, the Court has not dealt effectively with one of the most sophisticated means of diluting minority votes—multi-member districts.

Black challenges to electoral practices which discriminate against their constitutional right to vote are not new. The fifteenth amendment, which prohibits the "denial or abridgement" of the right to vote on racial grounds,[31] has been used by the Court to invalidate the failure of election officials to count ballots of black voters,[32] the grandfather clause,[33] the white primary,[34] and, most recently, the redrawing of the city limits of Tuskegee, Alabama, to exclude almost all black residents.[35]

Racial minorities have also been helped by challenges to limitations on voting brought under the equal protection clause on other than racial grounds. In *Harper v. Virginia Board of Elections*,[36] the Court declared voting a fundamental right. Indeed voting is *the* fundamental right because it is preservative of all other basic civil and political rights.[37] The poll tax,[38] property qualifications,[39] and lengthy residency requirements[40] were struck down by the Court as unduly restricting the franchise. The state was unable to meet its burden of proving that such requirements served a compelling state interest.

What is new is an equal protection challenge by racial minorities that certain electoral devices *dilute* the black vote. Blacks are no

30. 377 U.S. at 563 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

31. The fifteenth amendment has seldom been used in recent decades except as a source of congressional power "because of the difficulty in proving that a given 'denial or abridgement' of the right to vote is on account of race." Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV. 523, 560 (1973). For a discussion of the fifteenth amendment, see *id.* at 561-63. *See also* Bonapfel, *supra* note 17, at 360-65.

32. United States v. Reese, 92 U.S. 214 (1875).

33. Guinn v. United States, 238 U.S. 347 (1915).

34. Terry v. Adams, 345 U.S. 461 (1953).

35. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

36. 383 U.S. 663 (1966).

37. The idea that the right to vote is fundamental was first articulated by the Court in Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). It was reaffirmed in *Harper*, 383 U.S. at 667, as well as in *Reynolds*, 377 U.S. at 562.

38. 383 U.S. at 663.

39. Kramer v. Union Free School District, 395 U.S. 621 (1969) (unconstitutional to limit voting in school board elections to parents of students or owners of taxable real property in the district). *See also* Hill v. Stone, 421 U.S. 289 (1975); Phoenix v. Kolodziejski, 399 U.S. 204 (1970); Cipriano v. City of Houma, 395 U.S. 701 (1969). The Court has been less demanding of elections in special purpose districts. *See* Salyer Land Co. v. Tulare Lake Basin Water Storage Dist., 410 U.S. 719 (1973) (allowed voting limited to land owners in water storage district).

40. A law limiting voting to persons who have been in the state one year was invalidated in Dunn v. Blumstein, 405 U.S. 330 (1972). The Court upheld a 50-day registration period in Burns v. Fortson, 410 U.S. 686 (1973).

longer claiming that they are being denied the right to cast their votes. Rather, they are claiming that at-large elections have the effect of diminishing the impact that their votes have on electing candidates to public office. It is in the area of multi-member districting that this issue of the dilution of black votes is most clearly drawn in the continuing reapportionment struggle. Thus far, the Supreme Court has been unable to conclude that multi-member districts impermissibly infringe on the right to vote or that the infringement which occurs falls disproportionately on blacks. Nevertheless, the argument posed by the black voters presents legitimate grounds for invoking the equal protection clause.

Before turning to an analysis of how the Court has dealt with multi-member districts and why they have dealt with them as they have, it is helpful to keep in mind the thesis of this article. Available judicial methods are not adequate to evaluate the impact that at-large elections have on the black vote in city elections. Initially the Court hesitated to enter the apportionment controversy at all because of a lack of "judicially discoverable and manageable standards for resolving it."[41] But the inequities of unequal legislative districts compelled the Court to act. The Court invoked the equal protection clause and held that anything short of strict numerical equality among legislative districts was constitutionally suspect.[42]

However, the inherent inequities of multi-member districts are not as obvious to the Court as are the inequities of malapportioned legislative districts. The Court has recognized the potential of multi-member districts to dilute black votes, but the Justices have been unwilling to this point to rely on their own sense of fundamental unfairness to declare them per se unconstitutional. It is unnecessary for the Court to rely on its own perception of complex political and social problems. Political scientists and social scientists generally have concentrated their efforts in the past few decades on analyzing just such problems empirically.

At-large elections are associated with the municipal reform movement. In general, the reform movement sought to eliminate parti-

41. *Baker*, 369 U.S. at 217. Mr. Chief Justice Hughes in Coleman v. Miller, 307 U.S. 433 (1939) used the phrase, "the lack of satisfactory criteria for a judicial determination." *Id.* at 454-55.

42. Justices Frankfurter and Harlan dissenting in *Baker* emphatically denied that equality demanded districts of equal population. Mr. Justice Frankfurter said:

> The notion that representation proportioned to the geographic spread of population is so universally accepted as a necessary element of equality between man and man that it must be taken to be the standard of a political equality preserved by the Fourteenth Amendment—that it is, in appellants' words "the basic principle of representative government"—is, to put it bluntly, not true.

369 U.S. at 301.

sanship, "machines," and "bosses" from municipal government. Supporters of the movement offered a variety of structural changes designed to achieve these ends.[43] These structural reforms included the city manager form of government, nonpartisan elections, municipal civil service systems, modern city planning, and metropolitan governmental consolidations, as well as at-large election districts. Today a majority of American cities elect their councilmen in nonpartisan elections in at-large districts. Sixty-nine percent of American cities elect their councilmen in at-large districts, nineteen percent in ward districts, and thirteen percent use a combination of at-large and ward districts.[44] This reflects the general success of the municipal reform movement in America.

There is no evidence that at-large elections were designed purposefully to discriminate against racial minorities. Instead, at-large districts were intended to promote a citywide approach to municipal problems among councilmen. Reformers believed that ward constituencies encouraged parochial views, neighborhood interests, "logrolling," and other characteristics of "ward politics." These supposedly undesirable characteristics occurred because councilmen were responsible to local majorities in the particular sections or wards from which they were elected. In contrast, councilmen elected at-large are responsible to citywide majorities. In theory, this should encourage impartial, cosmopolitan, and communitywide attitudes. Moreover, in municipalities with the city manager form of government, it is argued that the manager can be more effective in serving the "general good" of the whole community if he is responsible to councilmen elected at-large rather than by wards. Occasionally, it is even argued that at-large elections result in the selection of "better men" for the council, although recent research suggests that there are no significant differences in the social status, occupations, or experience of councilmen elected at-large and councilmen elected by wards.[45]

However, black representation is significantly[46] greater in cities with ward elections than in cities with at-large elections. From a study of the data contained in this article we concluded that blacks living in cities with at-large elections have half the chance of elect-

43. T. DYE, POLITICS IN STATES AND COMMUNITIES 248-76 (2d ed. 1973). *See generally* R. HOFSTADTER, THE AGE OF REFORM (1955).

44. *See* note 10 *supra.*

45. Rehfus, *Are At-Large Elections Best for Council Manager Cities,* 61 NAT'L CIVIC R. 236-41 (1972).

46. The term "significance" is used in social science statistical analysis to indicate that the observed relationship has a probability of occurring by chance only five percent of the time or less.

ing a member of their own race as blacks in cities using wards. Blacks received only forty-two percent of the representation their population warranted in at-large election cities and eighty-five percent of their deserved representation in ward cities.[47] But this study goes one step beyond demonstrating that there is a relationship between the type of election and black representation on city councils. It also shows that the major cause of black underrepresentation is at-large elections. We looked at a variety of socioeconomic variables that might have explained the disparity in black representation[48] and found that at-large elections were the single most influential variable. This kind of causal analysis can be equated with the causation-in-fact analysis that arises in the law of torts.[49] The other element of causation, proximate cause, requires that the cause be closely enough related to the effect so that those affected have a legal right to relief. While our findings showed that other socioeconomic variables had an impact on black underrepresentation, at-large elections, independent of these other variables, significantly reduced black representation on city councils. In summary, our data indicate that: (1) there is a significant relationship between at-large elections and black underrepresentation; (2) at-large elections are the major cause of black underrepresentation on city councils; and (3) at-large elections significantly reduce black representation on city councils.

47. The first comprehensive study of cities across the nation, by political scientist Albert K. Karnig, found that blacks received only forty-six percent of the representation they deserved, based on their proportion of the population, in at-large cities, compared to seventy-seven percent of their deserved representation, based on population, in ward cities. Karnig, *supra* note 20, at 229. Karnig examined black representation in 139 municipalities of 25,000 population or more across the country in which blacks constituted fifteen percent or more of the population. *Id.* at 225. He concluded that "[a]t-large elections distill minority voting power." *Id.* at 235.

The differences between Karnig's data and our data can easily be explained. First, Karnig's data are based on a sample of 139 cities of the 185 with more than 25,000 population in which blacks constitute fifteen percent of the population. *Id.* at 225. Our data are based on all 105 cities with more than 50,000 population in which blacks constitute fifteen percent of the population. Second, Karnig's data on black councilmen were taken from the NATIONAL ROSTER OF BLACK ELECTED OFFICIALS, 1972, while our data were obtained from telephone interviews with city attorneys and blacks in all designated cities. *See* section III. *infra.*

48. *See* notes 180-86 *infra* and accompanying text.

49. The idea of using a causational approach to evaluate an equal protection case originated with Eisenberg, *Disproportionate Impact and Illicit Motive: Theories of Constitutional Adjudication*, 52 N.Y.U.L. REV. 36 (1977). "Mr. Eisenberg develops a new theory of disproportionate impact, the 'causation principle,' which will permit courts to find equal protection violations when uneven impact is accompanied by factors more susceptible to proof than intentional discrimination." *Id.* at 36 [editorial note]. We commend it as an extremely provocative article. The problem of unmanageable legal standards in equal protection cases would in large part be solved if the Supreme Court adopted Eisenberg's approach.

B. The Early Multi-Member District Cases

The first Supreme Court case to mention multi-member districts was *Reynolds v. Sims.*[50] In that lengthy decision, in which the Supreme Court announced that both houses of state legislatures must be apportioned on an equal population basis, multi-member districts were mentioned only twice.[51] While rejecting the federal analogy for state legislatures, the Court wrote that bicameralism is not rendered "anachronistic and meaningless."[52] The differences in the "composition and complexion"[53] of the two bodies of a state legislature could be maintained by one body having "at least some multi-member districts."[54] The Supreme Court did not discourage the use of multi-member districts. So long as the requirements of the equal protection clause were met, the states were free to use other electoral devices to respond to uniquely local interests not reflected in population statistics. Multi-member districts were one device to give the states that flexibility.

The Court again mentioned multi-member districts later in the opinion: "Single-member districts may be the rule in one State, while another State might desire to achieve some flexibility by creating multimember or floterial districts."[55] The Court saw multi-member districts as a means of ameliorating the restrictive impact that the *Reynolds* decision was going to have on the states' control of their electoral process. But multi-member districts were mentioned only tangentially in *Reynolds,* and the Court's statements were not taken as dispositive of the issue.

Though the Court in *Reynolds* did not view multi-member districts as constitutionally defective, it was sensitive nevertheless to the possibility that other electoral devices might violate the equal protection requirement of fair and effective representation. "[C]areful judicial scrutiny must of course be given, in evaluating state apportionment schemes, to the character as well as the degree of deviations from a strict population basis."[56] Unequal legislative districting was struck down because it violated the equal protection standard of fair and effective representation. But the Court did not foreclose the possibility that multi-member districts, in the right circumstances, might also violate that standard.

50. 377 U.S. 533 (1964).
51. *Id.* at 576-77, 579.
52. *Id.* at 576.
53. *Id.*
54. *Id.* at 577.
55. *Id.* at 579 (footnotes omitted).
56. *Id.* at 581.

In *Lucas v. Forty-fourth General Assembly of Colorado*,[57] a companion case to *Reynolds*, the Court also mentioned multi-member districts. The Court held that Colorado's state legislative reapportionment plan was unconstitutional because it "clearly involves departures from population-based representation too extreme to be constitutionally permissible . . . ."[58] In dicta, the Court for the first time expressed the view that multi-member districts were potentially undesirable.

The district court in *Lucas* had asserted that the apportionment scheme should be accepted because "the Colorado voters made a definitive choice between two contrasting alternatives and indicated that 'minority process in the Senate is what they want' . . . ."[59] The Supreme Court rejected that assertion because "the choice presented to the Colorado electorate, in voting on these two proposed constitutional amendments, was hardly as clear-cut as the court below regarded it."[60] The plan rejected by the voters, although it met the equal population districting standard of *Reynolds*, contained the "undesirable feature" of multi-member districts.[61] "[N]either of the proposed plans was, in all probability, wholly acceptable to the voters . . . ."[62]

The Court was making the very narrow point that the Colorado voters were not offered a broad enough choice. The resolution of the issue was irrelevant to the holding in the case, because the Court went on to say that, whether or not the electorate approved the plan, it would be struck down by the Court if it failed to meet equal protection standards.[63] However, the Court's comments on multi-member districts indicated, for the first time, a judicial awareness that such districts do have some undesirable characteristics. Specifically, the Court found multi-member districts objectionable because, first, an intelligent choice among candidates was difficult for the voter because ballots were long and cumbersome; second, the representatives had no identifiable constituencies within the popu-

57. 377 U.S. 713 (1964).

58. *Id.* at 734-35. The variation in the senate legislative districts was 3.6 to 1, *id.* at 728, and in the house legislative districts 1.7 to 1, *id.* at 727. Although the Court did not specifically hold that the maximum population variance ratio in the house was constitutionally defective, the ratio in the senate clearly was and that was enough to invalidate the entire plan.

59. *Id.* at 732.

60. *Id.* at 731.

61. *Id.*

62. *Id.* at 732.

63. *Id.* at 736. In the Court's words: "An individual's constitutionally protected right to cast an equally weighted vote cannot be denied even by a vote of a majority of a State's electorate, if the apportionment scheme adopted by the voters fails to measure up to the requirements of the Equal Protection Clause." *Id.*

lous counties; and, third, the residents of the populous counties had no single representative to represent them.[64] Though it recognized these undesirable features, the Court made quite clear that multi-member districts were not per se unconstitutional.[65]

The first case in which the Court squarely confronted the issue of the constitutionality of multi-member districts was *Fortson v. Dorsey*.[66] Two challenges to multi-member districts were raised in *Fortson*. The Court's attention was focused primarily on the issue of whether use of both single-member districts and multi-member districts in elections for the Georgia Senate resulted in invidious discrimination against the residents of multi-member districts. The large counties of Georgia had been divided into districts. The candidates were voted on at-large in these counties, but state law required that one representative be elected from each district. The voters in the districts in the large counties contended that they had to join with other districts in the county to elect their representative, whereas voters in the single-member districts were allowed to elect their own senator.[67] The district court held that this system violated the equal protection clause.[68] In reversing,[69] the Supreme Court emphasized that "substantial equality of population"[70] was the test and that that standard was met.

While generally unsympathetic to the argument that there are differences in representational effectiveness between single-member and multi-member districts,[71] the Court has been more sympathetic

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64. *Id.* at 731.

65. In a footnote following the listing of these undesirable features the Court wrote:

> We do not intimate that apportionment schemes which provide for the at-large election of a number of legislators from a county, or any political subdivision, are constitutionally defective. Rather, we merely point out that there are certain aspects of electing legislators at large from a county as a whole that might well make the adoption of such a scheme undesirable to many voters residing in multimember counties.

Id. n.21.

66. 379 U.S. 433 (1965).

67. Dorsey v. Fortson, 228 F. Supp. 259, 263 (N.D. Ga. 1964).

68. *Id.* at 261.

69. Specifically the Supreme Court held:

> In reversing the District Court we should emphasize that the equal-protection claim below was based upon an alleged infirmity that attaches to the statute on its face. 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 that in all circumstances or under all circumstances such a system as Georgia has will comport with the dictates of the Equal Protection Clause.

379 U.S. at 438-39.

70. *Id.* at 436 (quoting Reynolds v. Sims, 377 U.S. 533, 579 (1964)).

71. White v. Regester, 412 U.S. 755 (1973); Kilgarlin v. Hill, 386 U.S. 120 (1967); Burns

to the claim that multi-member districts dilute the voting power of racial minorities. In *Fortson,* the appellees (plaintiffs below) asserted "that the county-wide election method was resorted to by Georgia in order to minimize the strength of racial and political minorities in the populous urban counties."[72] However, as the Court pointed out, that "bald assertion" was raised in only one short paragraph of the appellees' brief. It was never seriously pressed, and no proof was offered to support it.[73] Because the dilution claim had not been properly raised and argued, the Court stressed that its decision in *Fortson* had no bearing on the dilution challenge.[74]

Therefore, multi-member districts were not to be per se unconstitutional, but the Court left open the possibility that such districts might function in an unconstitutional manner. The Court stated:

> It might well be that, designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population. When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[75]

This statement became the basis for all future dilution challenges to multi-member districts. *Fortson* opened the door by making the potential minimization of the voting strength of racial minorities by multi-member districts a justiciable issue. Morever, unlike the argument that there are differences in representational effectiveness between single-member and multi-member districts, the dilution

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v. Richardson, 384 U.S. 73 (1966). In *White,* the plaintiffs argued that the use of single-member and multi-member districts invidiously discriminated against voters in single-member districts. For a discussion of that view, see Baker, *supra* note 9, at 128-29; Banzhaf, *Multi-Member Electoral Districts—Do They Violate the "One Man, One Vote" Principle,* 75 YALE L.J. 1309 (1966).

72. 379 U.S. at 439 (Harlan, J., concurring).

73. *Id.* The plaintiff in *Fortson* overlooked his most persuasive argument. Though hardly mentioned by plaintiff, the dilution theory received a very positive response from the Court. This is another example of how the right case, at the right time, but with the wrong argument, can profoundly influence the development of law. Consider Gordon E. Baker's comment:

> *Fortson v. Dorsey* is a perplexing case, in view of the fact that one ostensible purpose of Georgia's multi-member provision was to prevent the election of a Negro senator from Atlanta. The use of seven separate districts in 1962 resulted in the election of the first Negro legislator since the Reconstruction. When *Fortson v. Dorsey* restored the at-large provision, an all-white delegation emerged after the next election. This would seem to be one example of the kind of evidence that might still, in a case more skillfully argued and presented than *Fortson,* bring about judicial invalidation of the Georgia multi-member practice.

Baker, *supra* note 9, at 125.

74. 379 U.S. at 439 (Harlan, J., concurring).

75. *Id.*

challenge could not be swept aside by invoking the equality of population requirements of *Reynolds v. Sims.*[76]

The *Fortson* opinion gave little indication of the kind of proof necessary to invalidate a multi-member constituency apportionment scheme; that was left to *Burns v. Richardson.*[77] Though the *Burns* Court upheld such a scheme in 1966, it did so because of an insufficiency of proof. According to the Supreme Court, the district court's ruling of the invalidity of a multi-member senatorial districting scheme[78] had been based on conjecture and not on demonstrated fact.[79] As long as the standard of equality of legislative districts was met, the only way to prove the invidiousness of multi-member districts was from facts presented in the record.

The facts required by the Court did not include proof of both intent and effect; either would be sufficient. According to the *Burns* Court, echoing *Fortson,* a multi-member districting scheme was subject to constitutional challenge if it "was designed to or would operate to minimize or cancel out the voting strength of [minorities]."[80] The Court indicated some specific ways an invidious effect could more easily be shown: if "districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one."[81]

Though the Court spent much of its time in *Burns* criticizing the appellants for failing to prove the invidious effect of multi-member districts, an examination of the record shows that all three of the Court's elements of proof were present in the Hawaiian reapportionment scheme.[82] However, the Court was not ignoring its own standard of proof. It is incumbent upon the challenger to demonstrate that multi-member districts dilute minority votes. To subject the state's use of such districts to strict judicial scrutiny, the proof must show a "real and appreciable impact"[83] on the voting rights of minorities. The Court had no evidence to prove the impact was appreciable.

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76. 377 U.S. 533 (1964). It is implicit in *Fortson* that the *Reynolds* standard would not be a defense to a dilution challenge. The Court pointed out that the dilution issue was wholly separate from the representational differences issue and their holding had "no bearing on that wholly separate question." 379 U.S. at 439 (quoting Wright v. Rockefeller, 376 U.S. 52, 58 (1964)). It was made quite explicit in Burns v. Richardson, 384 U.S. 73, 88 (1966).

77. 384 U.S. 73 (1966).

78. Holt v. Richardson, 240 F. Supp. 724 (D. Hawaii 1965).

79. 384 U.S. at 88.

80. *Id.* at 89.

81. *Id.* at 88.

82. *Id.* at 81.

83. Bullock v. Carter, 405 U.S. 134, 144 (1972).

The data contained in this article show that, at least for blacks in city elections, multi-member districts do significantly reduce minority representation. Without benefit of that proof, the *Burns* Court was trying to identify under precisely what circumstances the effect of multi-member districts would be most invidious. The Court sensed that the potential dilutive effect was greatest where the districts were large and there was no requirement that candidates reside in particular areas of the district. If such districts were used for both houses of a state legislature the discriminatory effect was compounded. Not only does the data in this study substantiate the Court's perception that in certain situations multi-member districts have a greater dilutive effect on black representation, but also the data show that these districts have a "real and appreciable impact" on voting rights of minorities.[84]

If *Burns* had been the Court's final pronouncement on multi-member districts, it is clear that the evidence contained in this study would be sufficient to demonstrate that multi-member districts have a substantial impact on the voting rights of blacks. Unfortunately the Court reentered the "political thicket"[85] in 1971, in *Whitcomb v. Chavis,*[86] and in 1973, in *White v. Regester.*[87] The *Chavis* Court rejected the standard of proof delineated in *Burns.* In fact, when faced with the same allegation as was raised in *Burns,* the *Chavis* Court refused to view the case as an infringement of the fundamental right to vote but rather viewed it as a case of race discrimination. This is significant because the pronouncement of *Fortson* and *Burns,* that invidious discrimination could be shown if multi-member districts "designedly or otherwise"[88] minimized the voting strength of racial minorities, was replaced by the necessity

84. It is useful to view the four types of electoral systems on a kind of continuum. At one extreme is the exclusive use of large multi-member districts which, as the Court points out in *Burns* and the data substantiate, is clearly the most invidiously discriminatory. If the residency requirement is added, the discriminatory effect decreases. If multi-member districts are combined with single-member districts, the discriminatory effect again decreases. With the exclusive use of single-member districts, black representation approaches proportionality. It was this kind of scheme the Court articulated in *Burns,* and as the data show, they were correct. The question that remains is whether the discriminatory effect of multi-member districts is "real and appreciable." Ultimately this is a question to be answered by the Court. Blacks in ward cities receive twice the level of representation on city councils as those in at-large cities. Analogizing to the apportionment cases, a population variance ratio of 2:1 clearly would be unacceptable to the Court.

85. The Court was first warned of the danger of entering the "political thicket" by Justice Frankfurter in Colegrove v. Green 328 U.S. 549, 556 (1946). He believed the remedy for unfairness in districting is to secure state legislatures' willingness to apportion. There are some constitutional commands that are not enforceable by the Courts. *Id.*

86. 403 U.S. 124 (1971).

87. 412 U.S. 755 (1973).

88. 384 U.S. at 88 (quoting *Fortson,* 379 U.S. at 439).

of showing both effect and purpose.[89] To appreciate fully this additional burden of proving discriminatory purpose, it is necessary to examine the requirements of the equal protection clause.

C. *Judicial Scrutiny Under the Equal Protection Clause*

1. *Standards of Review*

The Supreme Court has applied at least two different standards of review to challenged legislation: the compelling state interest standard and the rational basis standard. If the Court can be persuaded that the legislation under review involves an individual's "fundamental rights" or creates a "suspect classification," the governmental body responsible for the legislation must justify it as necessary for achieving a legitimate and "compelling state interest."[90] Otherwise the Court will use the rational basis standard and accept any justification that is reasonably related to a legitimate state interest.

The Supreme Court has characterized voting as a "fundamental right."[91] It is preservative of all civil and political rights.[92] Any legislative classifications that invaded or restrained the right to vote would be "closely scrutinized and carefully confined"[93] by the Court.

Race, on the other hand, has been characterized as a "suspect classification."[94] As the Court declared in *Korematsu v. United States* in 1944, "[A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect. That is not to say that all such restrictions are unconstitutional. It is to say that courts must subject them to the most rigid scrutiny."[95]

In both voting rights and racial discrimination cases, once the compelling state interest standard is triggered, a presumption arises that the plaintiff's rights were violated, and the burden shifts to the state to justify the compelling necessity of its restriction of those

89. 403 U.S. at 149.

90. The Supreme Court first articulated the compelling state interest standard in United States v. Carolene Products Co., 304 U.S. 144, 152-53 n.4 (1938).

91. In Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), the Court held that Virginia's $1.50 poll tax as a prerequisite to vote was constitutionally impermissible and articulated the fundamental nature of the right to vote.

92. *Id.* at 667 (quoting Yick Wo v. Hopkins, 118 U.S. 356 (1886)).

93. *Id.* at 670.

94. Korematsu v. United States, 323 U.S. 214 (1944). In this case the Court upheld the government order to exclude Japanese from living in West Coast communities during World War II. *Korematsu* is one of the few cases where once the compelling state interest standard was invoked, the state was able to meet the burden of justifying the restriction.

95. *Id.* at 216.

rights. In practice, the restriction is almost always struck down by the Court. The critical question is: what triggers the compelling state interest standard?

A fundamental rights case does not require proof of both discriminatory purpose and disproportionate impact.[96] A violation of the fundamental right of an equal vote is triggered by a showing of disproportionate impact alone. However, "not every limitation or incidental burden on the exercise of voting rights"[97] is constitutionally impermissible. Only those limitations which put a "real and appreciable burden" on the right to vote are subject to strict judicial scrutiny.[98] This is the approach employed in the apportionment cases. Once a showing is made that the population of state legislative districts deviates from Court-imposed standards, the state is compelled to justify the deviations.

It is clear that in *Burns v. Richardson* the Court viewed the claim that multi-member districts dilute the black vote as a fundamental rights challenge. Only a showing of disproportionate impact was required, and when the Court specified three ways by which an invidious effect could more easily be shown, it was indicating to future litigants precisely when a substantial burden on the right to vote would be present.[99]

A race discrimination case can be challenged under one of three equal protection doctrines. First, the law may be facially discriminatory. Any legislative classification that discriminates against a disadvantaged racial group, absent a compelling state interest, violates the equal protection clause.[100] Second, the law may disproportionately affect a racial minority. In addition to effect, the Court has generally required proof of an official intent to discriminate. Third, the law in a few instances may have such an egregious impact on a racial minority that intent can be inferred or is irrelevant.[101]

This is a confused area of the law. In 1976, in *Washington v. Davis*,[102] the Supreme Court made clear that proof of purpose was necessary. Disproportionate impact, "[s]tanding alone, . . . does

96. The method of identifying a fundamental right is unclear. They include those rights explicitly guaranteed by the Constitution, but they also include rights the Court believes are implicit in the Constitution, *i.e.* the right to vote, the right of privacy, and the right to travel. Because these rights are constitutionally based, a lesser standard of proof of violation is required.

97. Bullock v. Carter, 405 U.S. 134, 143 (1972).

98. *See* Bullock v. Carter, 405 U.S. 134 (1972).

99. See *supra* notes 77-83 and accompanying text.

100. Loving v. Virginia, 388 U.S. 1, 11 (1967).

101. Lane v. Wilson, 307 U.S. 268, 274 (1939); Guinn v. United States, 238 U.S. 347, 358 (1915); Yick Wo v. Hopkins, 118 U.S. 356, 374 (1886).

102. 426 U.S. 229 (1976).

not trigger the rule . . . that racial classifications are to be subjected to the strictest scrutiny and are justifiable by the weightiest of considerations."[103] Many commentators have been very critical of the *Davis* decision.[104] Proof of a racially discriminatory purpose, short of an admission, is a difficult standard to meet and has placed many racial equal protection cases beyond the reach of existing fourteenth amendment doctrines. A person who is suffering a relative disadvantage at the hands of government because of a facially neutral law is nearly always without judicial remedy unless he can prove present illicit intent. There is one exception.

Despite the implications of *Davis,* the Court did recognize that the disproportionate impact of a law may be so egregious as to show intentional discrimination.[105] The egregious impact doctrine was specifically endorsed by the *Court* in 1977 in the sequel to *Davis, Village of Arlington Heights v. Metropolitan Housing Development Corp.*[106] "Sometimes a clear pattern, unexplainable on grounds other than race, emerges from the effect of the state action even when the governing legislation appears neutral on its face."[107] The data contained in this article indicate that multi-member districts have just such an egregious impact on the voting rights of the black minority in city elections.[108] Once this impact is shown the burden of proof shifts to the state to justify the use of multi-member districts " 'by showing that permissible racially neutral selection criteria and procedures have produced the monochromatic result.' "[109] It seems more reasonable, in light of past Supreme Court decisions, to view the invidious discrimination of multi-member districts on the voting rights of the black minority as a fundamental rights case. However, if the Court persists in viewing it as a race discrimination case the egregious impact would trigger the application of the compelling state interest standard.

2. *The* Whitcomb *Case*

The Supreme Court first applied the suspect classification criteria to a multi-member district case in *Whitcomb v. Chavis.*[110] While it is important to understand what the Court did in

103. *Id.* at 242 (citation omitted).
104. *See, e.g.,* Eisenberg, *supra* note 49.
105. 426 U.S. at 241-42.
106. 429 U.S. 252 (1977). For a discussion of egregious impact, *see* Eisenberg, *supra* note 49, at 62-63.
107. 429 U.S. at 266.
108. See section III.C. *infra.*
109. 426 U.S. at 241 (quoting Alexander v. Louisiana, 405 U.S. 625, 632 (1972)).
110. 403 U.S. 124 (1971).

Whitcomb, it is equally important to understand why. There was no misunderstanding on the part of the Court of what standards were set in *Burns*. *Burns* and *Whitcomb* are irreconcilable. The holdings rest on two different equal protection doctrines. The views of the Burger Court on the effect of multi-member districts on the black vote differ from the views of the Warren Court. Those differences have become a part of our law.

In *Whitcomb*, the Supreme Court reversed an Indiana district court which found that the use of multi-member districts in Marion County (Indianapolis) impermissibly diluted the black vote. Although every conceivable objection to multi-member districts was raised in the case, the district court focused mostly on the claim that blacks had no control over legislators " 'because the effect of their vote is cancelled out by other contrary interest groups' in Marion County."[111]

The district court's opinion had meticulously identified each element of proof required by *Fortson* and *Burns*. The first requirement was to show an "identifiable racial or political element within the multi-member district . . . ."[112] The court found that there was an identifiable area within the county, Center Township Ghetto, inhabited by blacks and differing from the surrounding white area in housing conditions, education level, number of welfare recipients, unemployment, and rate of juvenile delinquency.[113] The court found that these socioeconomic differences between the ghetto and white areas led to different interests in substantive areas of the law such as housing regulations, sanitation, welfare programs, garnishment statutes, and unemployment compensation.[114]

The second requirement was that the voting strength of this identifiable racial element be minimized or cancelled out. Marion County was one large multi-member district which elected fifteen state representatives and eight state senators.[115] The black minority, with 17.8 percent of the population,[116] could have elected two representatives and one senator in a single-member district system.[117] However, from 1960 to 1968 only 5.97 percent of the representatives and 4.75 percent of the senators were elected from the Center Ghetto Area.[118] By comparison, Washington Township, an upper middle

111. *Id.* at 129.
112. Chavis v. Whitcomb, 305 F. Supp. 1359, 1386 (S.D. Ind. 1969). *See* 403 U.S. at 134.
113. 305 F. Supp. at 1375-80.
114. *Id.* at 1386.
115. *Id.*
116. *Id.* at 1383.
117. *Id.* at 1385.
118. *Id.* at 1383.

class suburban area with 14.6 percent of the population elected 52.27 percent of the senators and 41.79 percent of the representatives.[119] The court also found evidence that the district's legislative delegation tended to take common positions on proposed legislation, reflecting the interests of the district's majority and consequently ignoring minority interests.[120]

The district court also noted that all three of the elements that, according to *Burns*, can help show invidious discrimination were present in the apportionment scheme.[121] The Marion County district was large in relation to the total number of legislators. It elected fifteen percent of the state representatives and sixteen percent of the state senators.[122] It was not subdivided to assure distribution of legislators over the entire county.[123] And finally, both houses of the General Assembly used multi-member districts, foreclosing the possibility that the adverse effect of multi-member districts in one house would be balanced by the advantageous effect of single-member districts in the other house.[124]

The Supreme Court in *Whitcomb* disagreed with the factual findings and the legal conclusions of the district court. The Court mumbled the magic words of *Reynolds, Fortson,* and *Burns* about effective representation and minimization of voting strength[125] and concluded that the plaintiff had failed to meet the burden of proof because "there is no suggestion here that Marion County's multi-member district . . . [was] conceived or operated as [a] purposeful [device] to further racial or economic discrimination."[126] Justice Harlan, although concurring in the judgment, wrote a scathing separate opinion chastising the Court for surreptitiously rejecting the entire reapportionment theory developed over the last twenty years.[127] While Harlan did not object to such a rejection, he did object to the manner in which it was done.[128] He pointed out that according to precedent multi-member districts were unconstitutional if they minimized the voting strength of racial or political minorities, but when the district court invalidated the Marion

119. *Id.*
120. *Id.* at 1385.
121. *Id.* at 1386.
122. *Id.*
123. *Id.* at 1387.
124. *Id.*
125. It is interesting to note that when the Court mentioned the legal standard set out in *Fortson*, see *supra* notes 66-76 and accompanying text, it failed to quote the phrase "designedly or otherwise." 403 U.S. at 136, 142 n.22, 143.
126. *Id.* at 149.
127. *Id.* at 167.
128. *Id.*

County apportionment scheme for just that reason the Supreme Court held that it had "'misconceived the Equal Protection Clause.'"[129]

The Court did not explain what evidence was necessary to prove multi-member districting had a discriminatory purpose, but pointed out that just because the number of legislators was not in proportion to ghetto population did not prove invidious discrimination.[130] Short of a finding that ghetto residents had less opportunity to participate in the political process than other Marion County residents, the requirements of the equal protection clause were unmet.[131] After all, in our political system "one candidate wins, the others lose."[132] "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."[133]

The opportunity to participate in the political process was the new theme struck by the *Whitcomb* Court. To support its conclusion that no discrimination was present in Marion County, the Court noted it found nothing in the record indicating blacks were not allowed to register to vote, to support the political party of their choice, or to participate in party affairs and be equally represented when candidates were selected.[134] *Reynolds v. Sims* did not view the infringement of the right to vote as a denial of that right, but rather as a dilution of the effectiveness of the vote.[135] The emphasis of the fifteenth amendment is a denial or an abridgment of the right of blacks to cast their ballots. But the fourteenth amendment is sensitive to the unequal impact of state imposed legislation.

This view of the right to vote is reminiscent of Justice Stewart's comments in dissent in *Lucas v. Forty-fourth General Assembly of Colorado.*[136] He pointed out that no one's right to vote had been denied.[137] Our system of representative government was not based on one person casting one vote on election day. Political effectiveness also encompassed the ideas of individuals forming groups, attempting to influence governmental actions, and rewarding or punishing government response. But his view was rejected. The majority of the Court felt there was more to the constitutional guarantee

129. *Id.* at 165 (quoting *id.* at 160).
130. *Id.* at 149.
131. *Id.*
132. *Id.* at 153.
133. *Id.*
134. *Id.* at 149.
135. 377 U.S. at 555.
136. 377 U.S. 713, 744 (1964).
137. *Id.*

of the right to vote[138] than being allowed to enter the voting booth on election day. For certain minority interests, no matter how they cast their ballots, the existence of multi-member districts as part of the electoral system forecloses the possibility that they will be fairly represented.

The *Whitcomb* Court's emphasis on discriminatory purpose, and on the right to vote equaling the right to cast a ballot, is difficult to reconcile with the usual equal protection analysis in a fundamental rights case. The Court did not view *Whitcomb* as a fundamental rights case at all, but rather as a suspect classification case. It recognized in its opinion that the Civil War Amendments were designed to protect the rights of blacks.[139] Whenever schemes are devised by the states to disadvantage racial minorities, "[t]here has been no hesitation in striking down those contrivances that can fairly be said to infringe on Fourteenth Amendment rights."[140] The Court viewed multi-member districts as such a contrivance. Multi-member districts potentially deny to black minorities one of their civil rights, the right to vote. If it were proven to the satisfaction of the Court that multi-member districts infringed blacks' right to cast a ballot, the Court would invoke the compelling state interest standard and require the state to prove that the use of the districts was necessary to achieve a legitimate and compelling state interest. But as the Court pointed out there was no suggestion that multi-member districts were conceived as "purposeful devices to further racial or economic discrimination."[141] To trigger the compelling state interest standard in a suspect classification case, it is necessary to show proof of both effect and purpose.

The Court gave little indication in *Whitcomb* of how purpose was to be proved. In 1973, in *White v. Regester*,[142] the first Supreme Court case to invalidate the use of multi-member districts, the Court indicated that proof of intent to deny blacks the right to participate in the political process can be shown by the existence of a history of official racial discrimination.[143] The existence of past discrimination raises the probability that multi-member districts are also a purposeful device to infringe on minority rights.[144] Of considerable importance to the Court in *Regester* was the fact that there had been only two blacks in the Dallas County legislative

138. See *supra* note 96.
139. 403 U.S. at 149.
140. *Id.*
141. *Id.*
142. 412 U.S. 755 (1973).
143. *Id.* at 766.
144. *Id.* at 767.

delegation since Reconstruction and both had been slated by the pervasive Dallas Committee for Responsible Government (DCRG).[145] Also, the DCRG did not need the support of blacks to win elections nor did it show concern for black interests.[146] As recently as 1970 the DCRG used racial campaign tactics to defeat black supported candidates.[147] This history of racial discrimination in combination with anti-single shot voting devices[148] was enough to persuade the Court that blacks were unable to participate in "the political process in a reliable and meaningful manner."[149]

Regester is the last case in which the Supreme Court ruled directly on the effect of multi-member districts in diluting the black vote. However, the Court has recently granted a writ of certiorari to review the Fifth Circuit's holding in *Bolden v. City of Mobile*[150] that at-large elections for the city commission "unconstitutionally depreciates the value of the black vote."[151]

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145. *Id.* at 766.

146. *Id.* at 767.

147. *Id.*

148. *Id.* at 766. Dallas County used the anti-single shot device. It is a place system which:

> separate[s] the candidates within a multi-member district into designated representational seats. A separate electoral contest occurs for each seat within the district, ... This system is usually combined with a requirement that the winning candidate receive a majority of the votes cast for the seat, not simply by *[sic]* a plurality. If a majority is not received in an initial election, then a runoff election is held between the two highest vote recipients.

Engstrom, *supra* note 7, at 281 n.22.

149. 412 U.S. at 767. The reliance on past discrimination in *Regester* to show invidious effect raises the question of whether the Court has two standards of proof in multi-member district cases. The more rigorous *Whitcomb* standard is applied in the North where, it is popularly believed, racial discrimination is less prevelant. In the South, with its history of racial injustice, the Court presumes that multi-member districts are more likely to have a discriminatory purpose. This presumption is ill-founded. Aside from multi-member districts the most important variable in explaining the underrepresentation of blacks in cities is region of the country, and it is the North and not the South where blacks have the lowest proportional representation on city councils. *See supra* section III.*D*.

150. 571 F.2d 238 (5th Cir. 1978).

151. *Id.* at 245.

The Supreme Court's resolution of the Bolden v. City of Mobile controversy should be interesting for at least two reasons: first, it requires the Court for the first time to face directly the issue of the dilutive effect of at-large elections on the black vote, and second, it should help clarify what proof is necessary to show discriminatory purpose. White v. Regester predates the Court's holding in Washington v. Davis that proof of racially discriminatory purpose is a necessary element in a race discrimination case. *See* notes 106-13 *supra* and accompanying text. Presently it is unclear whether the *Regester* approach to proving purpose is still valid. Bolden v. City of Mobile raises that issue.

> A city commission consisting of three members, all of whom are elected at-large, governs the City of Mobile. Government by commission of this type was established in 1911 by state law . . . which requires commission candidates to run for numbered positions and win by majority vote. Commission elections are non-partisan, and therefore there are no primaries. There is no requirement that commissioners reside in specified subdistricts.

3. *The Reasons for* Whitcomb

The Court's shifting of standards in *Whitcomb v. Chavis* can be explained in large part by the attitudes and values of the men who now sit on the Supreme Court. In the mid-1960's a liberal coalition charted the course of the Court.[152] The Court delivered startling new decisions not only in the area of political rights, but also in civil and criminal rights as well. The coalition was led by Chief Justice Earl Warren, who wrote both *Reynolds*[153] and *Lucas*,[154] and was supported by Justices Douglas,[155] Goldberg,[156] and Brennan, who wrote *Baker*,[157] *Fortson*,[158] and *Burns*.[159] But four justices are not a majority and the liberal coalition relied on the support of Justices Black and White to defeat the conservative coalition, led by Justice Harlan. Harlan dissented in *Baker* and *Reynolds* and was joined by Justices Stewart and Clark in *Lucas*.[160] Though the standards for dealing with multi-member district cases were articulated in *Fortson* and *Burns*, the actual holdings were against the challengers, who failed

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571 F.2d at 241.

Plaintiffs in *Bolden* contend that White v. Regester, 412 U.S. 755 (1973), and Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), the Fifth Circuit's interpretation of *Regester*, are controlling. *Zimmer*'s multifactor circumstantial evidence test for dilution requires the district courts to consider in dilution cases four primary factors: "the group's accessibility to political processes, the responsiveness of representatives to the needs of the group, the weight of the state policy behind at-large districting, and the effect of past discrimination upon the electoral participation of the group." 571 F.2d at 242-43 n.5 (citing 485 F.2d at 1305). Additional criteria that may enhance the underlying dilution include: "the size of the district, the portion of the vote necessary for election; if the positions are not contested for individually, how many candidates an elector must vote for (i.e., whether there is an anti-single shot rule); and whether candidates must reside in subdistricts." *Id.*

Defendants contest the claim of unconstitutionality of Mobile's government. "They contend Washington v. Davis, 426 U.S. 229 . . . (1976), erects a barrier since the 1911 legislative act forming the multi-member, at-large election of the commissioners was without racial intent or purpose." Bolden v. City of Mobile, 423 F. Supp. 384, 386 (S.D. Ala. 1976).

The court accepts the plaintiff's standard of proof. Implicit in that acceptance is that *Davis* adds nothing to the *Zimmer* multifactor circumstantial evidence test for dilution. The next move is up to the Supreme Court.

152. When Reynolds v. Sims was decided the Court membership included: Chief Justice Earl Warren, and Associate Justices Brennan, Black, Goldberg, Douglas, Clark, White, Stewart, and Harlan.

153. 377 U.S. 533 (1964).

154. 377 U.S. 713 (1964).

155. Douglas dissented in Fortson v. Dorsey. He was willing to accept plaintiff's argument that the differences in representational effectiveness between single-member and multi-member districts were grounds for constitutional invalidation. 379 U.S. at 441-42.

156. By the time Burns v. Richardson was decided, Justice Goldberg had been replaced by Justice Fortas. However, new to the Court, Justice Fortas took no part in the decision. 384 U.S. at 98.

157. Baker v. Carr, 369 U.S. 186 (1962).

158. 379 U.S. 433 (1965).

159. 384 U.S. 73 (1966).

160. 377 U.S. at 741, 744.

to meet the standards. Harlan concurred in *Fortson,* but only in the judgment.[161] Stewart joined Harlan in *Burns,* but only out of respect for precedent.[162]

By the early 1970's the membership of the Court had changed.[163] Chief Justice Earl Warren had retired and Warren Burger, a conservative, was appointed in his stead. Justice Blackmun, also a conservative, replaced the liberal Fortas, and Justice Marshall, the first black member of the Court, replaced Clark who stepped down to forestall any claim of conflict of interest because his son Ramsey had been appointed attorney general. While in *Reynolds* a four-member liberal coalition relying on the support of Justices Black and White was able to carry the day, in *Whitcomb* the newly formed four-member conservative coalition was joined by Justices White and Black and the liberals found themselves in dissent.

Since *Whitcomb* the conservatives have lost Justice Harlan, but gained Justices Powell and Rehnquist, while the liberal coalition has dwindled to two with the loss of Justice Douglas for a more moderate jurist, Justice Stevens. The new Court's conservatism is not only reflected in how it decides cases, but also in its perception of its own role. One of the recurring themes in the *Whitcomb* decision is that the Court must examine not only the merits of the legal claims raised, but also the consequences of the decision made. The *Whitcomb* Court rejected the standard that disproportionate impact alone was enough to invalidate multi-member districts because it was fearful of what the legal and political consequences of a contrary decision would be.[164]

The Court pointed out that multi-member districts are widely employed in this country. The Court reasoned that if it accepted the claim in *Whitcomb,* it would "spawn endless litigation."[165] Every political, religious and ethnic group would be before the Court claiming that they too had a right to representation.[166] However, it hardly seems responsive to blacks who have been shut out of the political process for the Court to say they cannot guarantee the right of blacks to fair and effective representation because other groups might also claim they have such a right. Evidently the Court overlooked its earlier pronouncement in *Whitcomb* that the Civil War

161. 379 U.S. at 439.

162. 384 U.S. at 99.

163. When Whitcomb v. Chavis was decided the Court membership included: Chief Justice Warren Burger, and Associate Justices Brennan, Black, Blackmun, Douglas, Marshall, White, Stewart and Harlan.

164. 403 U.S. at 156-57.

165. *Id.* at 157.

166. *Id.* at 156.

Amendments were designed specifically to protect the rights of blacks.[167] The reason for those amendments is that blacks had been the object of social and legal discrimination unmatched by any other group in our political system. It is our impression that the endless litigation argument is part of a larger concern on the part of the Court.

When the Warren Court made its decisions in the reapportionment cases, *Baker v. Carr* and *Reynolds v. Sims*, it was severely criticized for involving the Supreme Court in an area that had traditionally been within the domain of state interest. The Court had become the final arbiter in intrastate disputes over inequality in the population of legislative districts. The Burger Court is unwilling to assume the same role in the gerrymandering area, of which the multi-member district issue is a part. In *Reynolds v. Sims*, Justice Brennan, who wrote the majority decision, recognized that the Court was being criticized for its new activism. He wrote: "Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us."[168] There was little hesitation in involving the Court in an area of traditional state concern, or in opening the doors of the Court to the future litigation necessary to develop specific standards.

More than a decade later, the Burger Court has been unwilling to take the needed first step by raising single-member districts to a constitutional imperative. Worried about infringing on states' rights by setting itself up as a federal arbiter of local electoral disputes, the Court by judicial sleight of hand unveiled its new standard for evaluating the claim that multi-member districts dilute black votes. Using a suspect classification approach instead of a fundamental rights approach accomplished two things for the conservative Court. First, it minimized the Court's intrusion into the right of states to govern their own affairs. The right of a state to control its own electoral process is the key to its autonomy. The reapportionment decisions, until equal population districting was accomplished, turned over the responsibility of monitoring the state electoral process to federal district courts. The intrusion of the federal government was often met with hostility. With the widespread use of multi-member districts, the courts would again be omnipresent in the states' political process. However, a race discrimination case, with the additional burden of proving the purpose of state officials, would tend to minimize the pervasiveness of judicial control.[169] Sec-

167. *Id.* at 149.

168. 377 U.S. at 566.

169. We recognize that it is possible to require proof of purpose and still have pervasive judicial control. Judicially monitored school desegregation beginning with Brown v. Board of

ond, because the judicial standards that must be met in race discrimination cases are well-developed, it would be unnecessary for the Court to entertain a panoply of new cases to develop an appropriate judicial standard.

In addition to endless litigation, the Court also feared that its acceptance of the claim that multi-member districts dilute black votes would require that it accept the proposition that all interest groups are guaranteed representation in proportion to their numbers in society.[170] The goal set out in *Reynolds v. Sims* was not proportional representation but fair and effective representation. The Court adopted the "one person, one vote" standard because anything less would mean that one person's vote counted for less than another's—that every citizen did not have an equally effective voice in the election of members of the state legislature. The claim in multi-member district cases is not that blacks should be guaranteed proportional representation but rather that multi-member districts *foreclose the possibility* that blacks will ever be represented in proportion to their population—that blacks will not have an equally effective voice in election of members of the state legislatures so long as multi-member districts exist. The Court intimated in *Whitcomb* that it does not agree with those who contend that the only way a group will be heard is by being represented in the legislative forum.[171]

But how can a group which has been frozen out of the political process, which cannot elect members from its own interest group, influence state legislators who have not had to depend on them for their own election? It is unrealistic to believe that legislators who are the beneficiaries of the status quo are going to change the electoral process to allow blacks a more effective voice. This was one of the reasons the Court gave in *Reynolds v. Sims* for striking down Alabama's reapportionment scheme.[172] The Alabama Legislature had not reapportioned itself in sixty years—despite a state constitutional guarantee of periodic reapportionment. This "[l]egislative inaction, coupled with the unavailability of any political or judicial remedy"[173] was one thing that moved the Court to act. If the Court rules *against* multi-member districts, it will not be forced to rule *for* proportional representation. Instead, the Court would be requiring

Education, 349 U.S. 294 (1955), is the classic example of exactly that. However, that does not dispel the argument that it is more difficult to make a case if it is necessary to prove purpose in addition to effect.

170. 403 U.S. at 156-57.

171. *Id.* at 159-60.

172. 377 U.S. at 569-70.

173. *Id.* at 570.

the state to justify the compelling necessity of an institutional arrangement which denies racial minorities fair and effective representation.

The third reason the Court has been reluctant to find multimember districts per se unconstitutional is that by doing so it would be requiring states to use single-member districts. The Court is not at all certain that single-member districts are not without their own potential discriminatory effects.[174] The boundaries of legislative districts can be drawn in such a way as to underrepresent or overrepresent groups that the districting authorities might disfavor or favor. The realization that delineational gerrymandering might also dilute black votes should prompt the Court to greater vigilance in carefully reviewing such cases as they come before the Court. It should not, however, be used as an excuse for tolerating the discriminatory effects of multi-member districts. But even with their potentially discriminatory effect, our data show that the use of single-member districts results in blacks' receiving eighty-five percent of the representation their proportion in the population warrants, while multimember districts significantly reduce black representation to forty-two percent.[175] But the Court has not been willing to invoke the compelling interest standard of review because in its view, "experience and insight have not yet demonstrated that multimember districts are inherently invidious and violative of the Fourteenth Amendment."[176] The data contained in this study provide that insight in the context of city elections.

The Supreme Court has never considered the effect multimember districts have in diluting black voting potential in city elections. All of the cases discussed in this article concern representation in state legislatures. The discriminatory effects of multimember districts considered in those cases are amplified in city elections. Blacks have the greatest potential and the greatest need for representation in cities. Blacks are becoming an increasingly large percentage of the population in the nation's cities. They live in concentrated geographical areas that would give them greater representation if single-member districts were used. As the district

174. In *Whitcomb*, the Court said:

> Moreover, if the problems of multi-member districts are unbearable or even unconstitutional it is not at all clear that the remedy is a single-member district system with its lines carefully drawn to ensure representation to sizable racial, ethnic, economic, or religious groups and with its own capacity for overrepresenting and underrepresenting parties and interests and even for permitting a minority of the voters to control the legislature and government of a State.

403 U.S. at 160.

175. *See* Table 2 in section III.C. *infra*.

176. Whitcomb v. Chavis, 403 U.S. at 159-60.

court pointed out in *Whitcomb,* blacks have unique problems in housing, employment, sanitation, and welfare[177] which are not shared by the white majority and are in large part the responsibility of city government. As a result, blacks have been unable to form coalitions with those who share their interests. Relegated to minority status in an electoral process that responds only to majorities, blacks have been denied fair and effective representation.

If the Court handles the dilutive effect of multi-member districts as a fundamental rights case, it will be incumbent upon the black plaintiff to show that multi-member districts significantly infringe on the right of blacks to fair and effective representation. If the Court persists in handling the dilutive effect of multi-member districts as a suspect classification case, the plaintiffs must either show a discriminatory purpose or show that the effects of multi-member districts are so egregious that proof of discriminatory purpose is unnecessary. But in either a fundamental rights case or a race discrimination case, the Court will not automatically outlaw multi-member districts. The Court will require the districting authority to justify the compelling necessity of the use of multi-member districts in city elections.

As will be shown in detail in the next section, this study indicates first that there is a relationship between multi-member districts and black underrepresentation. Second, the study shows that multi-member districting is the *single most important variable* in explaining black underrepresentation on city councils. And finally, the study shows that multi-member districts *independently* contribute to a significant reduction of black representation on city councils. The dilutive effect is clear.

III. The Social Science Evidence

This research provides systematic evidence that the choice of at-large elections has an adverse impact on the representation afforded blacks on city councils in 243 central cities of Standard Metropolitan Statistical Areas (SMSA's).[178] We identified all blacks serving on the councils of these cities in October, 1976, by means of direct telephoning, usually to the office of the city attorney or city clerk.[179]

177. Chavis v. Whitcomb, 305 F. Supp. 1364, 1386 (S.D. Ind. 1969).

178. A Standard Metropolitan Statistical Area [SMSA] "must include 1 city with 50,000 inhabitants or more or 2 cities having contiguous boundaries and constituting . . . a single community with a combined population of at least 50,000 the smaller of which must have a population of at least 15,000." The International City Managers' Association, The Municipal Year Book at 3 (1973).

179. We decided against using Joint Center for Political Research, National Roster of Black Elected Officials (1976) when it became clear to us on spot checking that this

All 243 cities were reached and information was gathered on the number and percent of blacks and other minorities serving on the city council on that date, as well as the type of districts from which they and other council members were elected. This data was integrated into a larger data base which included demographic characteristics for these same cities.

A. Measuring Black Representation on City Councils

According to our direct survey of the 243 cities of SMSA's, there were a total of 2,378 elected councilmen. Of these councilmen, 276 were black, or 11.6 percent. Since the population of all central cities is 20.4 percent black, this aggregate comparison was our first indication of black "underrepresentation."

The notion of "underrepresentation" implies that blacks should be represented on the council in rough proportion to their percentage in the city's population—and that "representation" means physical presence on the council and not just influence with white councilmen. This notion of representation is not above challenge on theoretical or legal grounds. The United States Supreme Court in *Whitcomb* rejected the notion that blacks are entitled to representation in proportion to their population, but to measure the effect of multi-member districting, it is necessary to establish some identifiable standard. The objective is not to guarantee blacks proportional representation but to determine the reasons why they have not achieved representation in proportion to their numbers.

We have computed the black percentage of the city council for each of our 243 central cities. We shall refer to this figure as "Black Incumbency." More importantly, we have computed a "Black Representation Index" for each city. This Black Representation Index is the percentage of blacks on the city council, divided by the percentage of blacks in the city's population. This Index has several properties. If the Index is 1.00, then blacks have council representation in exact proportion to their percentage of the population. If the Index is less than 1.00, then blacks are "underrepresented"; if it is over 1.00, they are "overrepresented" on the council. The value of the Index is its convenience and ease of interpretation. An Index of .50 indicates that blacks are receiving one-half of the representation they are entitled to given their proportion of the population. If there are *no* black councilmen, the Black Representation Index is zero. The Index is not a direct function of the size of the black population

publication does not include all of the nation's black councilmen and fails to keep up-to-date. Further, we learned that THE MUNICIPAL YEARBOOK does not classify cities in the same fashion as city officials classify their cities—particularly with regard to types of election district.

in the city, but rather of the black population *in relation to* blacks on the city council.

For most of the following observations, we have also introduced a "threshold" notion for black population percentages in cities. The threshold was set at fifteen percent, and most of our calculations of black representation are made only for those cities which have a black population of at least fifteen percent. The rationale for such a "threshold" is that we might not reasonably expect black representation on a city council until the black population reached this level, justifying representation on a seven-member council. While this "threshold" notion is an awkward one, the alternative is to list all cities without black councilmen as zero on the Black Representation Index, even if there are relatively small numbers of blacks living in some of those cities.

B. Black Representation on City Councils

Before turning to the impact of at-large elections on black representation, it is interesting to observe national figures on black representation on city councils. Table 1 shows that 11.6 percent of all the council seats in 243 central cities of SMSA's were held by blacks. The Black Representation Index for all 243 central cities was .50, indicating that blacks in 1976 occupied only half of the council seats that their city population percentages warranted. Stated another way, blacks would have to double their number of city councilmen in order to acquire representation in proportion to their percentage of central city populations.

TABLE 1

BLACK REPRESENTATION ON COUNCILS OF CENTRAL CITIES OF SMSA'S IN THE UNITED STATES

	All Cities N=243	Cities with 15% Black Population N=105
Black Incumbency		
Percentage of Black Councilmen	11.6	20.8
Black Representation Index		
Black Percent of Council ÷ Black Percent of City Population	.50	.60
Cities With No Black Councilmen		
Number	115	18
Percent	47.7	17.1

If we introduce our "threshold" concept of fifteen percent black population, the extent of black underrepresentation across the nation improves somewhat—but not much. Table 1 shows that the Black Representation Index for the 105 central cities with fifteen or more percent black population is .60, compared to .50 for all 243 cities. This means that even in cities where blacks constitute a significant portion of the population, blacks receive less than two-thirds of the representation on city councils that their population warrants. Eighteen of the 105 cities with fifteen percent black populations have all-white councils.

C. Black Underrepresentation and At-Large Elections

To ascertain the impact of at-large versus ward elections on the representation afforded blacks in large cities, we first had to classify cities according to the type of election district employed in councilmanic elections. On the basis of our 243 telephone interviews with city attorneys and blacks, we established the following classifications:

> At-Large: 108 cities in which any resident may run for any seat. Forty-one of these cities exceeded the "threshold" requirement of fifteen percent black population.
> At-Large with Residency Requirements: Twenty cities in which residents must live in a prescribed district but the entire city votes in their election; ten of these cities exceeded the "threshold" requirement.
> Mixed: Sixty-four cities where one or more council members are elected at-large and one or more elected by districts or wards. (This includes fifteen cities where the mayor is the at-large council member.) Thirty-seven of these cities met the "threshold" requirement.
> Ward: Thirty-six cities where all council members are elected by district. Seventeen of these cities met the "threshold" requirement.

Black representation is significantly greater in cities with ward elections than in cities with at-large elections. Even when we examine only those cities with fifteen or more percent black populations, the representation of the blacks in at-large cities is significantly less than in ward cities. (See Table 2). In at-large cities, blacks received only .42 of the representation warranted by their population. But in ward cities, blacks received .85 of the representation warranted by their population. In other words, in the average ward election city, blacks were approaching "fairness" in representation—a black percentage on councils which was roughly equivalent to the black percentage of the city's population. But in at-large cities, blacks re-

ceived less than half the representation their population percentages warranted.

TABLE 2

"REFORMISM" AND BLACK UNDERREPRESENTATION IN CITIES WITH MORE THAN FIFTEEN PERCENT BLACK POPULATION

		Black Representation Index			
	Mean	Number of Cities			
Type of District (total = 105)		0	0-.50	.50-1.00	1.00+
At-Large (N=41)	.42	14	9	13	5
At-Large with Residency (N=10)	.48	3	2	4	1
Mixed (N=37)	.73	2	5	23	7
Ward (N=17)	.85	0	1	10	6

Residency requirements in at-large elections apparently have no significant effect on the Black Representation Index of at-large cities (.42) and at-large-with-residency-requirements cities (.48). On the other hand, mixed (ward and at-large) elections improved black representation significantly. In mixed election cities, with fifteen percent or more black population, blacks received .73 of the representation warranted by their population—lower than the .85 in ward cities but much better than the .48 in at-large cities.

One should note that there is *some* black "overrepresentation" in certain central cities. By "overrepresentation" we mean black council member percentages which are greater than the black population percentage of the city. Indeed, in nineteen cities (out of 105 cities with fifteen percent or more black populations) the black percentage of the city council exceeded the black percentage of the city population.

D. Multi-variable Analysis: At-large Elections, Socioeconomic Status, and Black Representation

It is clear that multi-member districts are related to "black representation" on city councils. However, there are probably many factors that contribute to the success or failure of black candidates in city elections—factors other than the structural characteristics of municipal elections.[180] We wanted to be certain that at-large elec-

180. Moreover, there is the troublesome problem of the interrelatedness of structural characteristics of municipal elections and the socioeconomic composition of urban populations. We know, for example, that low ethnicity, higher income, white collar occupations,

tions *independently* contribute to the underrepresentation afforded blacks on city councils—that black underrepresentation is *directly* attributable to reformed structures and not merely a product of the socioeconomic composition of the population.

To test the effect of our structural variable on black representation, *in relation to* other social and economic variables which might influence black representation, we constructed a variety of regression problems with the Black Representation Index as the dependent variable.[181] Our independent variable included measures of:

size (population logged)
region (northeast, south, midwest, west, as separate dummy variables)
percent non-white
education (median school completed by population over age 25)
occupation (percent of work force professional, managerial, or sales)
income (median family income)

for the entire city. We also included measures of the socioeconomic condition of the *black* population of the city:

black education (median school year completed by black population over age 25)
black occupation (percent of black work force in professional, managerial, or sales)
black income (median black family income)

We felt that the socioeconomic status (SES) level of the black population may be more important in determining the Black Representation Index than the SES level of the entire city population. Finally, we of course included our structural variables in different problems.

In every regression problem on the Black Representation Index, at-large elections turned out to be the single most influential independent variable. At-large elections, independently of any other

higher education levels, densities, age, and size of city are all related to "reformed" governmental structures. *See* Alford & Scoble, *Political and Socioeconomic Characteristics of American Cities*, INTERNATIONAL CITY MANAGEMENT ASSOCIATION, in THE MUNICIPAL YEARBOOK 82 (1965); Dye & MacManus, *Predicting City Government Structure*, 20 AMER. J. POL. SCI. 257 (1976); Kessel, *Governmental Structure and Political Environment: A Statistical Note about American Cities*, 56 AMER. POL. SCI. REV. 615 (1962).

181. Regression analysis is a general statistical technique through which one can analyze the relationship between a dependent variable (Black Representation Index) and a set of independent variables (those listed in the text as well as at-large elections). The ideal is to explain the level of black representation in cities. A number of variables (the independent variables) will help to explain the Black Representation Index (dependent variable). Regression analysis determines how useful each of the independent variables is in explaining the level of black representation in cities.

socioeconomic or structural variable, significantly reduce black representation on city councils. Table 3 presents one of the many regression problems which were run.

TABLE 3

DETERMINANTS OF BLACK REPRESENTATION ON CITY COUNCILS FOR CITIES WITH AT LEAST FIFTEEN PERCENT BLACK POPULATION[182]

	Dependent Variable = Black Representation Index			
	R[183]	R^2 [184]	Sign[185]	B[186]
At-Large Elections	.34	.12	—	.46
Mayor Council Government	.41	.17	+	.26
Northeast Region	.45	.20	—	.26
Black Education	.49	.24	+	.28
Partisanship	.55	.30	+	.13
Size	.56	.31	—	.15
Black Percent of Population	.57	.32	+	.10
Income	.58	.34	+	.20
Education	.58	.34	+	.12
Black Income	.60	.37	+	.11
Occupation	.61	.37	+	.03

182. Structural variables and region are presented as dummy variables. Variables enter stepwise according to their contribution to R^2. Only significant variables are entered; others are dropped. Analysis is based on all 105 cities of 50,000 or more population, which are central cities of SMSA's, and which have at least fifteen percent black population. R and R^2 are cumulative. B is the standardized b value.

183. The Pearson correlation coefficient, R, is used to measure the strength of the relationship between two variables. There is a perfect relationship if variable X increases by one unit as variable Y increases by one unit and R would take on the value of 1.0. If X and Y are unrelated, R would be O. The correlation between multi-member districts and the Black Representation Index is .34 which indicates a moderately strong relationship. Remember that both R and R^2 are cumulative. The correlation between Mayor Council Government and Black Representation Index is .07 and when added to .34 totals .41.

184. Squaring the Pearson R results in the statistic denoted by R^2. Its usefulness derives from the fact that R^2 is a measure of the proportion of variance in one variable explained by another. In other words, 12% of the variance in the Black Representation Index is explained by the existence of at-large elections in a city. The at-large election plus a mayor council government explain 17% of the variance in the Index.

185. The Pearson R not only indicates the strength of the relationship between two variables, but also the direction of the relationship. A negative relationship means that where at-large elections are present, black representation decreases. A positive relationship between the Black Representation Index and, for example, black education means that as black education increased black representation also increased.

186. B is used here to indicate the relative weight of the independent variables on the Black Representation Index. Clearly the at-large election with a B of .46 has a greater effect on black representation than any other independent variable. More technically B is a beta weight, a standardized b. The b in the regression formula is the slope of the regression line and indicates the expected change in the dependent variable with a change of one unit in

Interestingly, *region* also ranks high as an independent determinant of black underrepresentation—with the Northeast contributing to a decline in black representation. This regional finding was unexpected—especially the finding that the Northeast, and not the South, is a major "culprit" in lowering black representation.

Size and *black percentage* of the population were positively associated with black representation: large cities with large black populations have better ratios of blacks on their councils vis-a-vis blacks in the population than small cities with smaller black populations. (This is true even when we exclude all cities with less than fifteen percent black population.)

Finally, *black education level* ranks as a significant and independent determinant of black representation in cities. This variable appears to be the most important SES variable—more important than the socioeconomic level of the community as a whole. In other words, the educational level of blacks is more important in gaining equity in representation than the SES level of the whole (or white) community.

E. Increasing Black Representation on City Councils

Admittedly, much of the variation in the Black Representation Index remains unexplained. In all of our regression problems, R^2 remained at or slightly below .40. Fully sixty percent of inequality in representation remains unexplained. We suspect that, in addition to the variables noted here as important determinants of black representation, many other factors are at work in our cities affecting black politics, including the degree of organization and ease of communication among black groups, the extent of factionalism among black groups, the existence of crystallizing issues, and variations among the white populations of cities in their degree of prejudice toward black candidates.

The evidence among the aggregate of cities (all cities of 50,000 or more with at least fifteen percent black population) is clear: at-large elections are the single most important obstacle to blacks achieving representation on city councils commensurate to their numbers in the population.

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the independent variable; b would therefore reflect the units in which the independent variable was measured and would make it impossible to compare the effect of different independent variables measured in different units. By standardizing the b, by putting all of the different b's into one common unit, it becomes possible to compare the relative strength of a variety of independent variables.

V. Conclusion: On the Discriminatory Effects of At-Large Elections

This study indicates, first, that there is a relationship between at-large elections and black underrepresentation. In at-large election cities, blacks received forty-two percent of the representation warranted by their percent of the population. But in ward cities, blacks received eighty-five percent. In neither ward nor at-large election cities are blacks represented on city councils in proportion to their numbers in the population. But in ward cities blacks are approaching proportionality in representation. In at-large election cities blacks receive slightly less than half of the representation they receive in ward cities.

Second, the study shows that an at-large election is the single most important variable in explaining black underrepresentation on city councils. Once it is determined that there is a relationship between two variables, at-large elections and black underrepresentation, it is then important to determine the form of the relationship. At-large elections are not, of course, the only factor contributing to black underrepresentation. Many factors contribute to the success or failure of black candidates in city elections. The study examined ten other factors, mainly socioeconomic variables that might also be important in explaining black underrepresentation, and measured the relative importance of each of those variables. At-large elections remained the single most significant variable in explaining black underrepresentation.

Third, the study shows that at-large elections independently contribute to a significant reduction of black representation on city councils. Although at-large elections are the most important variable in causing black underrepresentation it is important to determine whether or not at-large elections alone cause a significant reduction in black representation. In other words, if at-large elections significantly reduce black representation only when they are found in a particular combination with other socioeconomic variables, then declaring at-large elections unconstitutional would not result in a significant increase in black representation. Statistically it is possible to hold constant these other socioeconomic variables and to measure only the effect of at-large elections. When that was done it was found that the existence of at-large elections causes a statistically significant reduction in black representation independent of the other variables.

"Fair and effective" representation cannot be achieved without eliminating the use of at-large elections as a device for diluting the voting strength of racial minorities in American cities. Inequality of representation is built into the basic structure of at-large elections.

The Supreme Court should adopt a per se standard of proof analogous to that developed in the malapportionment cases. An invidious discrimination in violation of the fourteenth amendment should be presumed and the burden of proof would shift to the state to justify the compelling necessity of at-large elections. The plaintiffs would not be required to show that the districting authorities purposely discriminated against a particular minority group. A finding of unconstitutionality would therefore be based on the rationale that the effect of at-large elections is so invidious and so well-known that the districting authorities could have no other purpose but to discriminate. At-large election systems are inherently discriminatory. Fair and effective representation cannot be achieved so long as the at-large system is the basic method of election in the cities.