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Taking Voting Rights Seriously: Rediscovering the Fifteenth Amendment

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I. INTRODUCTION

This Article presents an approach, a perspective for analyzing the racial dilution strand of voting rights cases. Emphasizing the fifteenth amendment, it suggests that the conceptual failure of the United States Supreme Court and commentators to fulfill the promise of fair and effective representation is due to a persistent refusal to embrace fully the independent rights afforded by the fifteenth amendment. The fifteenth amendment alone offers a unique vantage point, in which the special protection of the Constitution is extended to racial minorities who seek to participate in this democracy by voting. By virtue of the fifteenth amendment, we can approach the questions arising from the loss of political representation for minorities as separate from the loss of representation to all voters arising from malapportioned districts of unequal population.

The Court has recognized that racially conscious measures may be required to insure truly fair and effective representation.[1] Thus, the Court has ventured, albeit indecisively, toward recognition of the constitutional value of special measures to preserve or enhance the polit-

1. A recent case, in which approval was given to a race conscious remedy is Mississippi Rep. Exec. Comm. v. Brooks, 105 S. Ct. 416 (1984) (summary affirmance (7-2) of district court decision to set aside its own earlier redistricting plan for Mississippi's congressional districts, designed to remedy population disparities of up to 17 percent). A second plan was adopted after the case had been remanded by the Supreme Court for reconsideration in the light of the 1982 amendments to the Voting Rights Act of 1965, 42 U.S.C. § 1973 (1982). *See* Brooks v. Winter, 103 S. Ct. 2077 (1983). On remand, the district court redrew the district map so that the percentage of black citizens of voting age would be increased from 48.05 percent to 52.83 percent. The district court sought to apply the new amendments of § 2, which it concluded required the establishment of a "clear black voting age population majority." The court found that this remedy was required because of the continuing and present effects of Mississippi's "long history of de jure and de facto race discrimination, [the presence of racial block voting, and] political processes [which] have not been equally open to blacks." Mississippi Rep. Exec. Comm. v. Brooks, 105 S. Ct. 416, 417 (Stevens, J., concurring) (quoting App. to Motion to Dismiss or Affirm of Owen H. Brooks 14).

Justices Rehnquist and Burger argued in dissent that the district court misconstrued the requirements of the amendments of § 2. In their view the present effects of the history of prior discrimination could not justify the creation of a safe district. They argued that "in amending § 2 Congress did not intend courts to supersede state voting laws for the sole purpose of improving the chance of minorities to elect members of their own class . . . [and also that] 'past discrimination cannot, in the manner of original sin, condemn governmental action that is

ical effectiveness of racial minorities. The Court has, on at least three occasions,[2] found itself sharply divided over the rationale for race conscious remedies to preserve or enhance minority voting power. Thus, we have been left with a series of decisions that buttress the political cohesiveness of racial minorities without a coherent rationale to guide future cases. These decisions have been especially disappointing because the Court has seemed to strain to avoid placing any significant reliance on the fifteenth amendment. Indeed, after *Mobile v. Bolden*,[3] one could fairly conclude that the Court had sounded the death knell for the fifteenth amendment,[4] thus confining its implementation to Congress under the Voting Rights Act. As a consequence, fourteenth amendment theory dominates the disposition of voting rights claims today.

If the fifteenth amendment embodies our constitutional commitment to ensure that the history of racial violence and political deprivation not persist into the indefinite future, then we must make the effort to reconstruct its purpose and determine the appropriate range of its application. The fifty words of the fifteenth amendment express a constitutional recognition of the necessity to provide remedies for the years of political, social, and economic terror that have been visited upon Black citizens. The powerful injunction of the amendment was, however, neutralized soon after its adoption by early judicial hostility.[5] Recent cases have further diminished the role of the fifteenth

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not itself unlawful.' " *Id.* at 423 (Rehnquist, J., dissenting) (quoting City of Mobile v. Bolden, 446 U.S. 55, 74 (1980).

See also United Jewish Orgs. v. Carey, 430 U.S. 144 (1977) (upholding state districting designed to comply with § 5 of the Voting Rights Act creating a "safe district" for racial minorities, but decreasing the voting strength of Hasidic Jews); White v. Regester, 412 U.S. 755, 767 (1973) (invalidating multimember district found to discriminate against blacks and Mexican-Americans on the basis of proof that the "political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents . . . to participate in the political processes and to elect legislators of their choice").

2. *See, e.g.*, Mississippi Rep. Exec. Comm. v. Brooks, 105 S. Ct. 416 (1984); United Jewish Orgs. v. Carey, 430 U.S. 144 (1977); White v. Regester, 412 U.S. 755 (1983). See *infra* notes 208-10 and accompanying text.
3. 446 U.S. 55 (1980).
4. The intent requirement of that case was the primary motivation for the amendments to § 2 of the Voting Rights Act, which permit states to take account of the discriminatory results of legislative districting. Section 2, unlike section 5, has now been made permanent and need not be renewed. Even Justice Rehnquist recognizes that *Mobile's* narrowing of the bases for racial dilution challenges to proof of discriminatory intent has been successfully overturned by the 1982 amendments of § 2. He seems to concede, with some difficulty, that "I need not agree 100 percent with appellants position—that Sec. 2 only proscribes intentionally discriminatory conduct. . . . " Mississippi Rep. Exec. Comm. v. Brooks, 105 S. Ct. 416, 420 n.1 (1984) (Rehnquist, J., dissenting).
5. The first judicial assessments of the amendment emphasized the antidiscrimina-

amendment in judicial review of voting discrimination cases.[6] Thus, the amendment has been rendered largely ineffective as a source of constitutional power for direct judicial review.[7] The future of the fifteenth amendment will turn, therefore, on two fundamental questions. First, what is the scope of congressional power under the amendment? Second, to what extent may the Court review state and federal voting structures or practices directly, without regard to fed-

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tion principle, rejecting the view that the amendment conferred a right to vote upon any citizen. In United States v. Reese, 92 U.S. 214, 217-18 (1876), the Court invalidated the Enforcement Act of 1870, which had been enacted pursuant to § 2 of the amendment on the ground that it reached both refusals to receive ballots because of the race of the voter and refusals not covered by the fifteenth amendment. *See infra* note 14 and accompanying text. *See generally* 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS 367-538 (1970). *See also* Jordan, *The Future of the Fifteenth Amendment*, 28 HOWARD L.J.__ (1985).

Only later did the Court concede that "under some circumstances [the fifteenth amendment] may operate as the immediate source of a right to vote. In all cases where the former slave-holding States had not removed from their constitutions the words 'white man' as a qualification of voting, this provision did, in effect, confer on him the right to vote, [by nullifying the word 'white']." *Ex parte* Yarbrough, 110 U.S. 651, 665 (1884).

6. Justice Stewart's opinion for the plurality in City of Mobile v. Bolden, 446 U.S. 55 (1980), *see infra* notes 214-23 and accompanying text, is surely a highwater mark on contemporary judicial misinterpretation. In so far as he relied upon Guinn v. United States, 238 U.S. 347 (1915), in which the Court invalidated Oklahoma's grandfather clause, and upon Gomillion v. Lightfoot, 364 U.S. 339 (1960), in which the Court invalidated the racially gerrymandered district created by the city of Tuskeegee, Alabama, he misconstrued the holdings of those two cases. Justice Stewart asserted that these cases stood for the proposition that the fifteenth amendment *required* proof of discriminatory intent. In fact, the cited cases were clearly instances in which no purpose other than a discriminatory one could be found. Therefore, in neither case did the Court reach the question of whether such intent was required.

This misinterpretation might fairly be considered a contemporary equivalent of the earlier judicial hostility to the spirit of the amendment.

7. Although the holding of *Mobile v. Bolden*, that § 2 of the Voting Rights Act requires proof of discriminatory purpose, was rejected by the Congress in the 1982 amendments to the Act, the plurality view of the constitutional doctrine requiring proof of discriminatory intent to establish a violation of the fifteenth amendment has not been set aside by the Court.

The divergence between the statutory and constitutional standards may become the source of confrontation between the Court and Congress. This argument has been made in Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict between the Judicial "Intent" and the Legislative "Results" Standards*, 50 GEO. WASH. L. REV. 689 (1982). Such a confrontation appears unlikely, however, since in the cases arising since the amendment the Court has assiduously applied the new "results" standard of § 2, without taking up the constitutional question. Rogers v. Lodge, 458 U.S. 613 (1982), comes closest to endorsing *Mobile*. But even there, the Court retreated from the strict application of *Mobile* by accepting circumstantial evidence of intent under the revived standards of Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub. nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976), and White v. Regester, 412 U.S. 755 (1973).

eral statutes adopted pursuant to the enforcement clause of the amendment? Beyond these significant, but narrow, questions of constitutional authority lie the emerging arguments for recognition of group rights.[8]

This Article joins this debate, adds an argument derived from the historical vantage point of fifteenth amendment theory, and concludes with proposals for enhancing the role of that amendment in the future. Thus, in Part I it traces the development of fifteenth amendment theory from the early access to the ballot box cases through the origins of judicial intervention to protect minority political participation. Part II criticizes the fourteenth amendment emphasis of equal population theory. Part III contains an assessment of the independent role of Congress in protecting minority voting rights. In Part IV, the Article concludes with an assessment of the future of the fifteenth amendment, taking up two problematic questions: the safe district and proportional representation.

II. TRACING THE DEVELOPMENT OF FIFTEENTH AMENDMENT THEORY

The fifteenth amendment is majestic in its simplicity. It provides:

> Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.
> Section 2. The Congress shall have power to enforce this article by appropriate legislation.[9]

It is self-executing, and permits both courts and Congress to remedy discrimination in voting. The first cases in which the amendment was considered were primarily concerned with the constitutional authority for federal statutes.

A. Early Efforts to End the Reign of Terror at the Ballot Box

On July 25, 1883, Berry Saunders, a citizen of African descent, tried to vote in Georgia's congressional election. Three white conspirators disguised themselves and assaulted Saunders on the highway and in

8. *See, e.g.*, Justice Stevens writing in Karcher v. Daggett, 103 S. Ct. 2653 (1983): "The major shortcoming of the numerical standard is its failure to take account of other relevant—indeed more important—criteria relating to the fairness of group participation in the political process. To that extent, it may indeed be counterproductive." *Id.* at 2671. *See also* Note, *United Jewish Orgs. v. Carey and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571 (1978) (arguing that recognition of an aggregate right to vote is necessary to prevent denial representation to minorities).

Even the most ardent advocates of individualism as a political right recognize that racial groups have a special constitutional claim. *See* DWORKIN, TAKING RIGHTS SERIOUSLY 91 (1977).

9. U.S. CONST. amend. XV.

his home. They were arrested, convicted, and sentenced for conspiring to violate Saunders constitutional rights, as protected by the Civil Rights Act of 1870.[10]

The Supreme Court opinions unholding the convictions address many of the issues litigated and relitigated in the next one hundred years of voting rights cases. In *Ex parte Yarbrough*,[11] the Court considered the consitutional authority for federal legislation concerning the franchise in general, and the right to vote in congressional elections specifically. The Court held that the right to vote for a member of Congress is "fundamentally based upon the Constitution which created the office of member of Congress, and declared it should be elective, and pointed to the means of ascertaining who should be electors."[12] In upholding the congressional power, the Court noted: "The exercise of the right [to vote] . . . is guaranteed by the Constitution, and should be kept free and pure by Congressional enactments whenever that is necessary."[13]

The Court expanded its earlier statement of fifteenth amendment rights in *United States v. Reese*.[14] In *Reese*, the Court found that the fifteenth amendment conferred no affirmative right to vote, only a new constitutional right, within the protection of Congress, to be free from discrimination in the exercise of the franchise. The Court noted that, in certain cases, the amendment operated as the immediate source of the right to vote, capable of direct judicial enforcement. An example of the fifteenth amendment authority for invalidating state authorized discrimination could be found in the white-only vote qualification clauses in the southern states' constitutions that were nullified in *Nixon v. Herndon*,[15] and *Nixon v. Condon*.[16] The Court thus moved closer to the fundamental right approach to voting rights when it stated:

> This new constitutional right [referring to the *United States v. Reese* language] was mainly designed for citizens of African descent. The principle however, that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination.[17]

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10. The Enforcement Act of 1870, 16 Stat. 140 (codified as amended at § 42 U.S.C. 1971(a)(1) (1982)).
11. 110 U.S. 651 (1884).
12. *Id.* at 664.
13. *Id.* at 665.
14. 92 U.S. 214 (1876).
15. 273 U.S. 536 (1927).
16. 286 U.S. 73 (1932).
17. *Ex parte Yarbrough*, 110 U.S. 651, 665 (1884). The Court continued:
> For, while it may be true that acts which are mere invasions of private rights, which acts have no sanction in the statutes of a State, or which are not committed by any one exercising its authority are not within the scope of that [the 14th] amendment, it is quite a different matter when

One year after *Ex parte Yarbrough*, the Court delivered its opinion in *Yick Wo v. Hopkins*,[18] with the now famous dicta concerning the political franchise of voting: "Though not regarded strictly as a natural right, but as a privilege merely conceded by society according to its will, under certain conditions, nevertheless it is regarded as a fundamental political right, because preservative of all rights."[19] Both *Ex parte Yarbrough* and *Yick Wo* embody two concepts that have been consistent features of analysis of voting rights within the United States Supreme Court. The first is a recognition of the "fundamental right" nature of voting. As Justice Marshall reiterated in *Mobile v. Bolden*,[20] there is a substantial constitutional right to participate on an equal basis in the state elections process. A second basic proposition is that since the right to vote is derived from the Constitution and not the states, Congress can legislate to protect the right.

This concept appeared to be settled by the time of *Ex parte Yarbrough* and another early case upholding federal regulation of elections, *Ex parte Siebold*.[21] In fact, as one commentator has pointed out, the expansive grant of congressional power in these cases was a seed planted for the future, struggling for life in the harsh soil of post-reconstruction voting rights repression.[22]

A group of nineteenth century cases established the constitutionality of federal legislation to protect the franchise. The Supreme Court assumed an active role in reviewing both state and federal voting legislation, in protecting individual access to the ballot box, and in assuming that each vote counts equally. However, when the questions become more complex than simple access or mathematical equality the judicial and political consensus breaks down. The starting point of simple access, however, has provided the point of departure for the development of an expansive judicial role in invalidating discriminatory state practices, such as the poll tax,[23] unequal distribution of population among legislative districts,[24] and multi-member districts that have the effect of diluting the strength of minority voters.[25]

Three analytic elements have been identified thus far: the funda-

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> Congress undertakes to protect the citizen in the exercise of rights conferred by the Constitution of the United States essential to the healthy organization of the government itself.

Id. at 666.

18. 118 U.S. 356 (1885).
19. *Id.* at 370.
20. 446 U.S. 55, 113-21 (1980).
21. 100 U.S. 371 (1880).
22. Derfner, *Racial Discrimination and the Right to Vote*, 26 VAND. L. REV., 523, 533 (1973).
23. Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).
24. Baker v. Carr, 369 U.S. 186 (1962).
25. Whitcomb v. Chavis, 403 U.S. 124, 180-81 (1971) (Douglas, J., dissenting in part and concurring in part in the result).

mental constitutional basis of voting rights; the power of Congress to legislate to protect these rights; and the power of the Supreme Court to review protective congressional legislation and to strike down unconstitutional state and local actions. These concepts comprise the first and most uncomplicated approach to voting rights analysis. Thus, a basic consensus exists to support an explicitly constitutional role for congressional action based upon the fifteenth and fourteenth amendments and Article I, section 4. Beyond this rudimentary first level of agreement, attempts to characterize the analytic premises of the Court are much less successful.[26]

A significant polarity within the Court concerns the proper protection to be accorded invididual versus group rights. The liberal perspective has been, quite properly, criticized for its virtually blind insistence on treating individual voters as fungible units of democracy in the reapportionment decisions. This adherence to the one-person, one-vote construct is largely dictated by concern for manageable standards that preserve the Court's limited role in reviewing disputes arising from the political aspects of legislative reapportionment. However, the emphasis on judicial management has produced an especially troubling failure to recognize the unique constitutional dilemma created by the politically important victims of racial hatred.[27] In this Article, I join those who have concluded that the majority in the Warren Court and the remaining liberal Justices on the Burger Court have proven to be disappointingly unimaginative in responding to the petitions of Blacks and minority groups whose political effectiveness has been diluted by the present effects of past racial hatred. I conclude that the Court seems wedded to the conceptual straitjacket of one-person, one-vote majoritarianism. I have accepted the responsibility that necessarily accompanies criticism, and argue here that the Court's persistent concern for the absence of judicially manageable standards can be met by reviving the fifteenth amendment.

The virtue of elevating the fifteenth amendment to equal status with the fourteenth, and the one-person, one-vote cases based upon that amendment, is that due recognition will be given to the unique significance of political participation for the formerly disenfranchised. I conclude that after the one-person, one-vote theory first emerged as a judicial interpretation of the line of precedent beginning with the early access to the ballot cases, such as *Guinn v. United States*,[28] fifteenth amendment theory has been badly neglected, with the excep-

26. The task has led at least one commentator to label the Warren Court's reapportionment decisions a "full-blown populist majoritarianism." A. BICKEL, THE SUPREME COURT AND REAPPORTIONMENT IN THE 1970'S 60, 67 (N. Polsby ed. 1971).

27. *See, e.g.*, Note, *supra* note 8. *Cf.* Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287 (1982).

28. 238 U.S. 347 (1915).

tion of the application of that amendment to judicial review of congressional enforcement efforts pursuant to the Voting Rights Act.[29]

This Article concludes that majority rule, and the fourteenth amendment analysis upon which it is based, have created havens for racial and political gerrymandering, while at the same time providing inadequate protection for the rights of representation of Blacks and other discrete and insular minorities. In short, the one-person, one-vote theory has proven to be a fragile shield for the protection of Black voting rights. The following review of the development of the majoritarian one-person, one-vote theory will assess how and why that is so. I conclude this Article with a proposal for reviving the fifteenth amendment as an independent source for reviewing minority dilution and gerrymandering claims.

B. Origins of Judicial Intervention to Protect Black Voting Rights

Ex parte Yarbrough,[30] *Ex parte Siebold*,[31] and *Yick Wo v. Hopkins*,[32] were decided during the waning years of Reconstruction. Other Supreme Court decisions had decimated the fifteenth amendment's Enforcement Act of 1870.[33] In the South, state and local governments began to use gerrymandering, poll taxes, literacy tests, "grandfather clauses," white primaries, malapportionment, residency requirements, property ownership requirements, fraud, and violence to bring about the total disenfranchsement of Black voters. From 1900 to 1969, the Supreme Court issued only ten opinions that challenged this pervasive state-sanctioned denial of Black voting rights.[34] Predictably, this limited number of cases did little to alter the reality of Black disenfranchisement. They are significant, however, as early interpretations of the fourteenth and fifteenth amendments, and the power of Congress to regulate federal elections and primaries. Some of these cases have been cited to buttress current positions within the Court; it is therefore helpful to analyze these precedents to set the

29. I certainly do not suggest that the statutory protection of voting rights is unimportant in comparison to the protection available through judicial review. Rather, I lament the dimunition of the judicial role. *See* South Carolina v. Katzenbach, 383 U.S. 301 (1966).

30. 110 U.S. 651 (1884).

31. 100 U.S. 371 (1880).

32. 118 U.S. 356 (1886).

33. *See, e.g.*, United States v. Reese, 92 U.S. 214 (1876).

34. Terry v. Adams, 345 U.S. 461 (1953); Schnell v. Davis, 336 U.S. 933 (1949); United States v. Classic, 313 U.S. 299 (1941); Lane v. Wilson, 307 U.S. 268 (1939); Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536 (1927); United States v. Mosley, 238 U.S. 383 (1915); Meyers v. Anderson, 238 U.S. 368 (1915); Guinn v. United States, 238 U.S. 347 (1915).

stage for a critique of the Court's contemporary revisionist interpretation of these early precedents.

1. *The Fifteenth Amendment Challenges of 1915*

Eight of the ten cases decided before 1960 rest on fifteenth amendment grounds.[35] *Guinn v. United States*,[36] challenged an amendment to the Oklahoma Constitution requiring all those not qualified to vote on January 1, 1866, or descended from those qualified on that date, to be able to read and write any section of the Oklahoma Constitution. The Court found the grandfather clause unconstitutional. It also voided the literacy provision because it was so interconnected with the grandfather clause that the unconstitutionality of that clause rendered the whole amendment invalid.[37] In *Guinn*, the Court relied upon the precedent of *Ex parte Yarbrough* to hold that the fifteenth amendment was *self-executing without legislative action*. Thus, *Guinn* clearly stands for the proposition that the fifteenth amendment may provide judicial authority for direct review, without enabling legislation, of racial discrimination that denies or abridges the right of Black citizens to vote. As for the grandfather clause, the Court could find no "ground which would sustain any other interpretation but that the provision, recurring to the conditions existing before the fifteenth amendment was adopted,"[38] was an attempt to impede operation of the fifteenth amendment.

The United States took a position that was ultimately adopted by the Court. The petitioners argued that the Oklahoma amendment was constitutional because it was facially neutral. They insisted that legislative motivation was beyond judicial review, stating that the "purpose and motive which moved the legislature to submit and the people to adopt the amendment are not subject to judicial inquiry."[39] The Solicitor General responded that it was appropriate to undertake judicial review focused upon the effect of the amendment. He argued that: "The necessary effect and operation of the Grandfather Clause is to exclude practically all illiterate Negroes and practically no illiterate white men and, from this its unconstitutional purpose may legitimately be inferred."[40] The N.A.A.C.P. also argued that the effect and purpose of the provision could properly be examined. Counsel for the N.A.A.C.P. observed: "Whether the Oklahoma amendment constitutes such a discrimination is to be determined by its purpose and ef-

35. The exceptions are Nixon v. Condon, 286 U.S. 73 (1932), and Nixon v. Herndon, 273 U.S. 536 (1927).
36. 238 U.S. 347 (1915).
37. *Id.* at 366-67.
38. *Id.* at 365.
39. *Id.* at 350.
40. *Id.* at 352.

fect, and not by its phraseology alone."[41]

The Supreme Court approached the question of purpose by considering "[w]hether it is possible to discover any basis of reason for the standard thus fixed other than the purpose above stated [to overturn the fifteenth amendment]."[42] In effect, the Court applied the equivalent of the contemporary rational basis analysis. Thus, the Court strained to find any non-discriminatory purpose contrary to the inescapable conclusion that purpose and effect were united in pursuit of racial discrimination.

Myers v. Anderson,[43] a second case decided at the same time as *Guinn*, also upheld a challenge to a grandfather clause. Here, a Maryland statute setting voter qualifications for the City of Annapolis was held unconstitutional. The statute required that voters be either property taxpayers with an assessment greater than $500, naturalized citizens entitled to vote, or descended from one entitled to vote in the United States prior to January 1, 1868. The Court found this last criterion for voting eligibility "repugnan[t] to the prohibition of the Fifteenth Amendment."[44] As in *Guinn*, the three requirements were so intertwined that they were all struck down.

In a third case, *United States v. Mosley*,[45] the defendants conspired to refuse to receive and count the votes of eleven precincts in Blaine County, Oklahoma. They were charged under Section 19 of the Criminal Code (the Ku Klux Klan Act). The Court found their indictment under the Act constitutional. The Court rejected the argument that the Act only covered Klan threats to Black voters and was therefore not applicable in this case, holding that the Act dealt at the time with the federal rights of all citizens and protected them all and still continued to do so.[46] As Justice Holmes stated:

> It is not open to question that this statute is constitutional, and constitutionally extends some protection at least to the right to vote for Members of Congress . . . . We regard it as equally unquestionable that the right to have one's vote counted is as open to protection by Congress as the right to put a ballot in a box.[47]

The fifteenth amendment cases deserve special analysis because the amendment is self-executing. The Court is empowered to find that state action has impinged upon rights protected by the amendment, even when Congress has not adopted implementing legislation. Today, opportunity for direct judicial review of state action without an

41. *Id.* at 353.
42. *Id.* at 365.
43. 238 U.S. 368 (1915).
44. *Id.* at 380.
45. 238 U.S. 383 (1915).
46. *Id.* at 387-88.
47. *Id.* at 386 (citing *Ex parte* Yarbrough, 110 U.S. 651 (1884), and Logan v. United States, 144 U.S. 263, 293 (1892)).

intervening federal statute assumes special significance. During periods of political retrenchment from protection of the rights of minorities, who may indeed be underrepresented in Congress itself, the Court may under the amendment directly activate review of federal and state action. Unfortunately, this has never happened. During the period immediately following adoption of the fifteenth amendment, Congress passed a significant group of statutes enforcing the amendment.[48] However, the Court turned the clock back to the era of prior repression by construing this early enforcement legislation restrictively, thus invalidating most of it.[49] Moreover, Congress simply reflected the political climate of the period when it acted to repeal the remaining statutes not already set aside by the Court.[50] Thus, pervasive racism of the period from 1866 until nearly a century later[51] thwarted the development of a full set of precedents under the fifteenth amendment.

Despite their limited number and the racially antagonistic climate in which they arose, the fifteenth amendment cases did serve as the foundation for an increasingly more active role for the judiciary in eliminating the most outrageous manifestations of racism. In contrast to what can now be viewed as a promising, although limited beginning, the amendment stands silent today, by judicial fiat, as a result of less obvious but no less effective techniques for delimiting the electoral influence of Black citizens. It is ironic, therefore, that the amendment should fall into disuse when the fourteenth amendment equal protection cases, which were based largely upon the precedents established under the fifteenth amendment, have come to dominate voting theory.

2. *The Two Fourteenth Amendment Cases*

On July 26, 1924, L.A. Nixon, a Black citizen of El Paso, Texas, tried to vote in a primary for congressional and state candidates. He was denied this right under a 1923 Texas statute that stated that "in no event shall a negro be eligible to participate in a Democratic party primary election held in the State of Texas."[52] Nixon challenged his exclusion from the white primary, first in the district court and, following dismissal there, in the Supreme Court. He began what was

48. *See* L. TRIBE, AMERICAN CONSTITUTIONAL LAW 256-57 (1978).
49. *Id.*
50. The suffrage provisions of the Enforcement Act and the Force Act of 1871, 16 Stat. 433, intended to enforce the fifteenth amendment, were repealed in 1894. *See* Tribe, *supra* note 48, at 257 nn.2 & 5 (*citing* 1 B. SCHWARTZ, STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS (1970)).
51. The following cases are among the early invalidations of civil rights enforcment legislation: The Civil Rights Cases, 109 U.S. 3 (1883) (invalidating the Civil Rights Act of 1875); United Staes v. Reese, 92 U.S. 214 (1876) (setting aside the Enforcement Act).
52. Nixon v. Herndon, 273 U.S. 536, 540 (1927) (quoting Article 3093a).

to be a twenty-nine year struggle by Black voters to participate in Texas primaries.

The two cases involving Nixon are of particular interest because they rest on fourteenth amendment grounds. Justice Holmes, speaking for the majority in *Nixon v. Herndon*,[53] rejected the district court's finding that the case involved a non-justiciable political question: "The objection that the subject matter of the suit is political is little more than a play upon words. Of course, the petition concerns political action but it alleges and seeks to recover for private damage."[54] Justice Holmes found it unnecessary to reach the fifteenth amendment issue of whether the statute denied Blacks the right to vote, because "it seems to us hard to imagine a more direct and obvious infringement of the Fourteenth. That Amendment, while it applies to all, was passed, as we know, with a special intent to protect the blacks from discrimination against them."[55] Justice Holmes concluded: "States may do a good deal of classifying that it is difficult to believe rational, but there are limits, and it is too clear for extended argument that color cannot be made the basis of a statutory classification affecting the right set up in this case."[56]

When Mr. Nixon returned to the Supreme Court to challenge Texas' new version of the white primary in 1932,[57] the precedent of the first *Nixon* case was controlling. After his earlier efforts had resulted in the abolition of the state-mandated white primary, Nixon was again denied the right to vote in a Texas primary because of a new law that delegated power to prescribe voter qualifications to the Democratic Party Executive Committee. The state Executive Committee adopted a resolution allowing only whites to vote. Again, Nixon's challenge was dismissed by the district court in Texas, and the United States Supreme Court reversed.[58]

Justice Cardozo delivered the Court's opinion. He found that the state Executive Committee was acting as an organ of Texas because it was "invested with an authority independent of the will of the association in whose name they undertake to speak . . . ."[59] These delegates of the state's power had discharged their official functions in such a way as to discriminate invidiously between Black and white voters. Justice Cardozo agreed with Justice Holmes' view of the first *Nixon* case: "The 14th Amendment, adopted as it was with special solicitude

53. 273 U.S. 536 (1927).
54. *Id.* at 540.
55. *Id.* at 541.
56. *Id.*
57. 1927 Tex. Gen. Laws, chap. 67, which authorized the State Executive Committee to prescribe "who shall be qualifed to vote or otherwise participate in [the] political party . . . ."
58. Nixon v. Condon, 286 U.S. 73 (1932).
59. *Id.* at 88.

for the equal protection of members of the Negro race, lays a duty upon the court to level by its judgment these barriers of color."[60]

Thus, the *Nixon* cases provide two important harbingers of the Court's future direction in racial discrimination in voting cases. First, the Court rejected the justiciability argument that later came to dominate the judicial and academic analysis of voting cases. Second, the Court treated the explicit racial reference in the Texas statute as a violation of the fourteenth amendment rather than the fifteenth. We can suppose that this choice was more attractive because it provided an opportunity for Justice Holmes to reinforce the development of the due process and equal protection doctrines of the fourteenth amendment. It should be noted, however, that Justice Frankfurter would return to reliance on the fifteenth amendment in the 1960 case of *Gomillion v. Lightfoot*.[61]

3. New Grandfather Clauses, Vote Fraud, "Understand and Explain" Tests, and White Party Primaries

The states' tenacity in pursuing illegal voter discrimination is a uniquely disturbing chapter in the history of United States racism. After the victory against the Oklahoma grandfather clause in *Guinn v. United States*,[62] Oklahoma responded with a statute that required all those who had not voted in the 1914 election to register between April 30, 1916 and May 11, 1916 or be permanently disenfranchised. The 1914 election had been held with the old grandfather clause still in effect, so the new statute again disenfranchised mainly Black voters who could not complete registration within the brief time period. The registration scheme was challenged by a Black citizen in *Lane v. Wilson*.[63] Lane had been present in the county in 1916, but he did not register in the brief interval permitted then. The district court found no discrimination or unconstitutionality under the fifteenth amendment; the circuit court of appeals affirmed, and the Court reversed.

Justice Frankfurter's opinion for the Court, on fifteenth amendment grounds, held that the amendment "secures freedom from discrimination on account of race in matters affecting the franchise. Whosoever 'under color of any statute' subject another to such discrimination thereby deprives him of what the fifteenth amendment secures and . . . becomes 'liable to the injured party in an action of law.' "[64] The Court also held that the plaintiff did not have to exhaust

60. *Id.* at 89.
61. 364 U.S. 339 (1960). *See* Baker, *Gerrymandering: Privileged Sanctuary or Next Judicial Target?*, in REAPPORTIONMENT IN THE 1970'S, 132 n.20 (N. Polsby ed. 1971) [hereinafter cited as Polsby].
62. 238 U.S. 347 (1915).
63. 307 U.S. 268 (1939).
64. *Id.* at 274 (quoting The Act of Apr. 20, 1871, ch. 22, 17 Stat. 13 (1871)).

all his state court remedies before going to the federal courts.[65] Justice Frankfurter reluctantly reached the conclusion that the new scheme too closely resembled the traditional grandfather clause to survive constitutional scrutiny.[66] His opinion does, however, contain the memorable statement of the scope of protection afforded by the fifteenth amendment: "The Amendment nullifies sophisticated as well as simpleminded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race."[67]

The decision of *United States v. Classic*,[68] advanced the fight against primaries. Election officials in Louisiana holding the Democratic Party primary were indicted under sections 19 and 20 of the United States Criminal Code for wilfully altering and falsifying ballots. These sections of the Code protect citizens in the enjoyment of their constitutional rights. Thus, the issue in *Classic* was whether voting in a primary was a right secured by the Constitution. The Court recognized the right, and upheld congressional authority to enforce it under article I, section 4.

Justice Stone, writing for the majority, noted that the language of article I, section 2, "[c]ongressmen shall be chosen by the people of the several states by electors,"[69] obviously included "the right of qualified voters within a state to cast their ballots and have them counted at congressional elections."[70] The Democratic Party primary in Louisiana was conducted at public expense and provided that only real time in the election process that voters choose their representative. Justice Stone concluded therefore that:

> [A] primary election which involves a necessary step in the choice of candidates for election as representative in Congress and which in the circumstances of this case controls that choice, is an election within the meaning of the constitutional provision and is subject to congressional regulation as to the manner of holding it.[71]

Interestingly, Justice Douglas dissented. Although he agreed with the opinion's statement concerning federal authority to control congressional primary and general elections, he found the imposition of criminal penalties under sections 19 and 20 "does not comport with the strict standards essential for the interpretation of a criminal law. . . . A crime, no matter how offensive, should not be spelled out from such

65. *Id.*
66. *Id.* at 275.
67. *Id.*
68. 313 U.S. 299 (1941).
69. *Id.* at 314.
70. *Id.* at 315.
71. *Id.* at 320.

vague inferences."[72] Justice Douglas emphasized the same point in his dissent in the *United States v. Saylor*,[73] a 1943 ballot box stuffing case prosecuted under section 19.

Classic held that the right to vote in the primary election without state interference was secured under article I, section 2 of the Constitution. This holding later provided the basis for *Smith v. Allright*.[74] *Smith* was one of the multiple challenges to the indefatigable discriminatory campaigns of the state of Texas. After *Nixon v. Condon*,[75] the Democratic party tried to thwart potential constitutional attack by passing a resolution of their state convention limiting party membership to whites. Texas legislation regulating primaries added strength to the ongoing effort to disenfranchise Black voters by limiting access to nominating procedures to members of the party.

The Democrats defended against the challenge by a Black voter who was denied the right to vote in their primary by asserting that the party was a private voluntary association not reached by the fourteenth amendment. This "private party action" ploy had previously been upheld by the Court in *Grovey v. Townsend*.[76] In *Grovey*, the Court regarded the denial of a vote in a primary as a mere refusal to extend membership in a private association. However, in *Allright* the Court relied upon *Classic* to reexamine the reasoning in *Grovey*. The Court rejected the earlier private action classification, "fusing by the Classic Case of the primary and the general elections into a single instrumentality for choice of officers . . . ."[77] The Court then found that statutory provisions for the selection of party nominees for inclusion in the general election made the Democratic party "an agency of the state insofar as it determines the participants in a primary election."[78] It thus brought the party's activities into state action "within the meaning of the Fifteenth Amendment."[79] The opinion concluded by overruling *Grovey* on the ground that the fifteenth amendment forbade state abridgement of a citizen's right to vote.[80]

The Texas Democrats responded to *Smith* by establishing "private" clubs, such as the Jaybird Club. They initiated all-white preprimaries, thus setting up a three-stage process of exclusion to deny Blacks the right to vote. This process was eventually challenged in *Terry v. Adams*.[81] The Court found that this too, was a violation of the

72. *Id.* at 341 (Douglas, J., dissenting).
73. 322 U.S. 385 (1944).
74. 321 U.S. 649 (1944).
75. *See supra* text accompanying notes 58-60.
76. 295 U.S. 45 (1935).
77. Smith v. Allright, 321 U.S. 649, 660 (1944).
78. *Id.* at 663.
79. *Id.* at 664.
80. *Id.* at 666.
81. 345 U.S. 461 (1953).

fifteenth amendment. Justice Black, writing for the majority, held that the fifteenth amendment prohibited a state from permitting an organization, private or not, to duplicate the state's election process for the purpose and with the effect of stripping Blacks of any influence in selecting county officials.

The white primary and the grandfather clause were not the only two official practices employed to strip blacks of the residual of voting power that had not been lost to vigilante terrorism and intimidation. They were, however, the only two to be held unconstitutional by the Supreme Court in the period from 1915 to 1960. The literacy test, one of the most widespread tools of discrimination, was on occasion held to be unconstitutional if it was connected to an illegal grandfather clause. For example, a variation of the literacy test was struck down by the Court in 1949. In *Davis v. Schnell*,[82] ten Black voters from Mobile, Alabama challenged the "Boswell Amendment to the Alabama Constitution." This amendment required all those registering to vote to be able to "understand and explain" any article of the Federal Constitution. In a memorandum opinion, the Court affirmed the district court's finding of unconstitutionality under the fifteenth amendment. The district court held that while states have a right to prescribe a literacy test for their voters, the fourteenth amendment protected against violations of equal protection or due process. In addition, the Court found that the fifteenth amendment protected voters from state discrimination based on race or color.

Unfortunately, the general rule that a state may prescribe a literacy test to determine voter qualification prevailed in the one direct, constitutional attack on such tests. In *Lassiter v. Northampton County Board of Elections*,[83] a Black woman, Louise Lassiter, refused to take a literacy test as required by North Carolina state statute. She challenged the test as an unconstitutional violation of the fourteenth, fifteenth, and seventeenth amendments. The literacy test statute had originally been bound to a grandfather clause, but in 1957 the grandfather clause section had been repealed. The literacy statute thus stood as a separate and racially neutral qualification. Justice Douglas, writing for a unanimous Court, upheld the test, although he seemed to do so reluctantly. He conceded that there was no evidence offered that the test discriminated. He then went so far as to point out the way the appellant could make a case to use in the federal proceedings that were then pending until the conclusion of the state court litigation. He stated that "literacy and intelligence are obviously not synonymous,"[84] but conceded the state could rationally conclude it wanted literate voters. The test was upheld because it was neither unconstitu-

82. 336 U.S. 933 (1949).
83. 360 U.S. 45 (1959).
84. *Id.* at 51-52.

tional on its face, as was the "understand and explain" provision of *Davis v. Schnell*,[85] nor was it being employed to "perpetrate that discrimination which the fifteenth amendment was designed to uproot."[86] One can only speculate about the difference that convincing evidence of discriminatory effect might have had in this case.

C. Gomillion v. Lightfoot: A Crossroads?

Gomillion v. Lightfoot,[87] challenged the constitutional validity of an Alabama law redefining the City of Tuskegee's boundaries. In a 1957 act, the map of Tuskegee was changed from a square to a "strangely irregular twenty-eight sided figure."[88] The gerrymander cut from the city virtually its entire Black population and the influential Tuskegee Institute, but did not remove a single white voter or resident. The Black citizens went to court claiming fourteenth amendment violations of the due process and equal protection clauses, and the fifteenth amendment violation of their right to vote.

The *Gomillion* opinion is perhaps more significant for what it doesn't do than for what it actually does. Justice Frankfurter, writing for the majority, had the opportunity to use the precedents of the two *Nixon* cases to find that the gerrymander violated the fourteenth amendment. This would have established the important principle that redistricting that had discriminatory racial effects would not be protected under the fourteenth amendment, thus paving the way for the modern racial dilution cases. Instead, Justice Frankfurter based the decision on the fifteenth amendment. He reasoned that because the gerrymandered Black voters could not vote in Tuskegee municipal elections anymore, they had been deprived of their right to vote.[89]

While the decision on these grounds was a victory for the Black Tuskegeeans, it could have been a larger one. A stronger statement that the fifteenth amendment protected against redistricting with racially discriminatory effects as an unconstitutional abridgement of the right to vote would have greatly advanced the fight against all species of racial gerrymander.

Justice Frankfurter, however, was walking a tight rope. Judicial expansion of either fourteenth or fifteenth amendment protection ran contrary to his view that the Supreme Court should stay out of districting disputes. Justice Frankfurter feared cutting into his slim majority in *Colegrove v. Green*.[90] In *Colegrove*, Justice Frankfurter's view that the courts ought not to enter the "political thicket" of appor-

85. 81 F. Supp. 872 (S.D. Ala), *aff'd*, 336 U.S. 933 (1949).
86. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45, 53 (1959).
87. 364 U.S. 339 (1960).
88. *Id.* at 348.
89. *Id.* at 363.
90. 328 U.S. 549 (1946).

tionment cases had prevailed.[91] The parallels between the *Gomillion* gerrymander and the "political question" deemed nonjusticiable in *Colegrove* were obvious,[92] although Justice Frankfurter tried to distinquish the cases.

Justice Frankfurter could not insist on the non-justiciability of population malapportionment claims for long. The liberal, majoritarian view of Justice Douglas, who concurred in *Gomillion* and dissented in *Colegrove*, was soon to prevail. The essence of the liberal view will be discussed below. However, it is important to put *Gomillion* in the perspective of the full line of post-*Gomillion* cases.

Before *Gomillion*, a thin line of voting rights cases had emanated from the Supreme Court. Most of these cases, described above, were courageous efforts to demand for Blacks the right to cast a vote on the terms that the Constitution was supposed to guarantee to all citizens. After *Gomillion*, this line of cases developed into several different but related approaches. A few purely constitutional access-to-the- ballot cases carried on the original approach to voting discrimination. One of the most notable of these outlawed poll taxes under the fourteenth amendment's equal protection clause. Other cases challenged state durational residency laws and restrictions on candidacy, such as filing fees.

After 1960, the principal route for challenging access-to-the-ballot devices or techniques was through litigation enforcing federal statutes. Beginning with the Civil Rights Act of 1957,[93] Congress began an assault on Black disenfranchisement. The Civil Rights Acts of 1960[94] and 1964,[95] provided increasingly stringent judicial remedies for racially discriminatory election practices. Finally, the Voting Rights Act of 1965[96] gave Congress sweeping powers to protect the right to vote in federal and state elections.

These federal statutes created a new line of access-to-the-ballot cases in the Supreme Court in the 1960's and 1970's. The basic constitutionality of the Acts was established and a review of specific provisions was undertaken. At the same time that the Civil Rights Acts

91. *Id.* at 553-54.

92. As Robert Dixon wrote at the time *Gomillion* was making its way to the Court:

> If a majority of the court should vote to hold the Statute unconstitutional it could be a very important case from the municipal-urban viewpoint. . . . From the Fourteenth Amendment it would be difficult to distinguish between "unconstitutional" disenfranchisement of Negroes and "unconstitutional" disenfranchisement of the urban voter in regard to legislative districts generally.

R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS 464-65 n.15 (1968).

93. 71 Stat. 637 (codified as amended at 42 U.S.C. 1971(b)(1982)).

94. 74 Stat. 86.

95. 78 Stat. 241.

96. 42 U.S.C. § 1973 (1982).

and the Voting Rights Acts were tackling racial and language minority disenfranchisement, another strand of cases spun off from the pre-*Gomillion* voting rights cases. These were the one-person, one-vote reapportionment decisions that surmounted Justice Frankfurter's "non-justiciable political question" barrier in 1962. These cases were derived directly from earlier right-to-vote cases. Evolving out of the one-person, one-vote case line was yet another approach, the constitutional racial dilution cases. A cluster of dilution cases also evolved out of the Voting Rights Act of 1965. Both the constitutional and statutory dilution cases attack the abridgement of the right to vote through the use of multi-member districts, at-large elections, numbered posts, and other of the more subtle, yet equally devastating forms of discrimination in the electoral process. The main differences between the constitutional and statutory cases are the standard of proof required and the remedies available. There is yet another small group of cases that must be included in the post-*Gormillion* voting rights spectrum. These involve gerrymanders which, while they may appear to follow directly from *Gomillion*, are better understood as a hybrid of the reapportionment and dilution case line.

III. THE PENUMBRA OF THE FOURTEENTH AMENDMENT: THE ONE-PERSON, ONE-VOTE APPORTIONMENT CASES

Among voting rights cases decided after *Gomillion*, the apportionment cases have been the most notable. Moreover, these cases are most closely identified with liberal analysis within the Court. The origins of the basic liberal view, that dilution of the vote through malapportionment of population violates the fourteenth amendment and article I of the Constitution, pre-date *Baker v. Carr*,[97] the first instance in which majoritarianism, earlier espoused by Justice Douglas, was adopted by a majority of the court. The conceptual foundations of the apportionment cases can be traced to a series of dissents by Justice Douglas and others in opinions in which the Court refused to hear apportionment cases for lack of justiciability.

A. The Concern for Judicial Manageability

Colegrove v. Green,[98] considered whether the state of Illinois could be stopped from holding congressional elections under its 1901 apportionment statute. The case was brought by voters from three of the most populous Illinois districts. The plaintiffs charged that the districts created under the statute lacked compactness of territory and

97. 369 U.S. 186 (1962).
98. 328 U.S. 549 (1946).

proximate equality of population. They claimed these inequities violated article I and the fourteenth amendment of the Constitution.

For the majority, Justice Frankfurter found that "[v]iolation of the great guaranty of a republican form of government in states cannot be challenged in the courts."[99] The political nature of the case made it, in Justice Frankfurter's view, "not meet for judicial determination."[100] Writing for the dissenters, Justice Black, joined by Justices Douglas and Murphy, argued for justiciability.[101] Notable in the dissent was Justice Black's reliance upon *fifteenth* amendment precedents of the early voting right access cases. Justice Black, speaking of the gross inequities in the voting power of urban citizens, likened the malapportionment of districting to the denial of access to the ballot box.[102] Justice Black noted that, "it thus gives those qualified a right to vote and a right to have their vote counted."[103] Citing the early access cases,[104] Justice Black endorsed the view introduced earlier by Justice Douglas, that malapportionment was as much a violation of the equal protection clause as complete denial of the opportunity to cast a ballot. Thus, the central anology of the malapportionment decisions rested upon the successful comparison to the early fourteenth and fifteenth amendment racial discrimination cases.[105]

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99. *Id.* at 556.
100. *Id.* at 552.
101. *Id.* at 568 (Black, J., dissenting).
102. Justice Black wrote: "The Equal Protection Clause of the Fourteenth Amendment forbids such discrimination. It does not permit the states to pick out certain qualified citizens or groups of citizens and deny them the right to vote at all." *Id.* at 569 (Black, J., dissenting). *See* Nixon v. Condon, 286 U.S. 73 (1932); Nixon v. Herndon, 273 U.S. 536, 541 (1927).
103. Colegrove v. Green, 328 U.S. 495, 569 (1946) (Black, J., dissenting).
104. *See, e.g.*, United States v. Classic, 313 U.S. 299 (1940); United States v. Mosley, 283 U.S. 383 (1915); *Ex parte* Yarbrough, 110 U.S. 666 (1884).
105. For instance, in his dissent in MacDougall v. Green, 335 U.S. 281 (1948), Justice Douglas wrote: "It would, of course be palpably discriminatory in violation of the Equal Protection clause if this law were aimed at the Progressive Party in the manner that the state law in *supra*, was aimed at negroes." *Id.* at 289 (Douglas, J., dissenting). Justice Douglas rejected the view that all voting access cases were instances of intentional discrimination. He noted that the "effect of a state law may bring it under the condemnation of the Equal Protection Clause, however innocent its purpose. It is invalid if discrimination is apparent in its operation. The test is whether it has some foundation in experience, practicality, or necessity." *Id.* (Douglas, J., dissenting). In another dissent in South v. Peters, 339 U.S. 276 (1950), Justice Douglas was joined by Justice Black, as he had been in *MacDougall*. In the *South* case a challenge was made to Georgia's county unit system of awarding all a county's units to whoever got the majority of votes in the country primary. The plaintiffs, from Georgia's most populous county, claimed their votes were being diluted because the range of units assigned to each county was not done in real proportion to the population. While the earlier denial of access cases were based on both the fourteenth and fifteenth amendments, Justice Douglas did not emphasize the distinction. In fact he blurred the invidious racial discrimination cases by noting that urban Black were disadvantaged by malappor-

For many years Justices Douglas and Black were unable to persuade a majority of the Court to adopt their unique perspective regarding either the justiciability or the constitutional foundation of malapportionment claims.[106] Finally, in *Baker v. Carr*,[107] Justice Brennan reasoned that malapportionment was akin to dilution by a false tally, or a refusal to count votes from arbitrarily selected precincts, or by stuffing the ballot box. While the cases relied upon to support this conclusion are not exclusively racial discrimination cases, the fifteenth amendment cases dominate, as discussed above.[108] Justice Douglas' insistence that racial discrimination in voting was constitutionally indistinguishable from any other basis for diluting the vote of qualified voters did serve to blur the true basis for racial dilution claims. In fact, the merger of the two types of dilution cases is an important source of the difficulty of more recent efforts to articulate standards for racial dilution claims that are independent of equal apportionment violations.

B. Mathematical Equality: A Substitute for Representation

Gray v. Saunders,[109] held that the state's use of a county unit system violated the fourteenth amendment. The Court found that the use of a county unit system in a democratic party primary was state action that ran afoul of the fourteenth amendment unless "all who participate in the election . . . have an equal vote whatever their race, whatever their sex, whatever their occupation, whatever their income, and wherever their home may be in that geographical unit."[110] Justice Douglas, writing for the majority, concluded that the "conception of political equality . . . can mean only one thing—one person, one vote."[111] This concept was then held to extend to congressional elec-

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tionment. This fact was doubly important since, unlike their rural counterparts, urban Blacks voted more reliably and in larger numbers. In Justice Douglas' view the "racial angle of the case only emphasize[d]" the "bite" of "discrimination against citizens in the more populous counties." *Id.* at 278 (Douglas, J., dissenting).

106. The Supreme Court decided many cases before the liberal analysis offered by Justices Black and Douglas prevailed. *See, e.g.*, Mathews v. Handley, 361 U.S. 127 (1959); Hartsfield v. Sloan, 357 U.S. 916 (1958); Radford v. Gary, 352 U.S. 991 (1957); Kidd v. McGanless, 352 U.S. 920 (1956); Anderson v. Jordan, 343 U.S. 912 (1952); Cox v. Peters, 342 U.S. 936 (1952); Remmey v. Smith, 342 U.S. 916 (1952); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Colgrove v. Barrett, 330 U.S. 804 (1946); Cook v. Fortson, 329 U.S. 675 (1946).

107. 369 U.S. 186 (1962).

108. This point is forcefully argued in Blacksher & Menefee, *From Reynolds v. Sims to City of Mobile: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 6 (1982).

109. 372 U.S. 368 (1963).

110. *Id.* at 379.

111. *Id.* at 381.

tions in *Wesberry v. Sanders*.[112] The Court held that for congressional elections, an independent constitutional basis for the antidulution principle could be found in the requirement of article I, section 2, that representatives be chosen "by the People of the several states."[113]

In 1964, the Court decided six reapportionment cases that firmly established the one person, one vote standard for state legislative apportionment. *Reynolds v. Sims*,[114] the central case in this group, arose from a challenge to Alabama senate and house apportionment plans that were based on the 1960 census. The challenged plans contained population variance ratios of forty-one to one for the state senate and sixteen to one for the house, producing a dramatic underrepresenation of urban voters. Chief Justice Warren's opinion for the Court began with a sweeping assertion of the "fundamental right" of voting. The authority for this expansive view could be found in both the fourteenth and fifteenth amendment racial discrimination precedents from *Ex parte Yarbrough* through *Gomillion v. Lightfoot*. Chief Justice Warren continued the theme introduced by Justice Douglas:

> The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restriction on that right strikes at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.[115]

Thus, the view that dilution through population malapportionment was equivalent to complete denial of access to the ballot box was now firmly established in Supreme Court jurisprudence. However, the absence of any meaningful analysis of the standards for assessing representation signalled the conceptual difficulties that lay ahead.

The Chief Justice emphasized the view that both houses of a state legislature must be apportioned according to population parity. States were required to make an "honest and good faith" effort to construct districts in both houses"[116] as nearly of equal population as was practicable. However, Chief Justice Warren recognized that "mathematical exactness is hardly a workable constitutional standard."[117] He further cautioned that somewhat more flexibility may be constitutionally permissible with respect to state legislative apportionment than in congressional districting. The particular circumstances of a state should be considered, and detailed constitutional requirements determined on a case-by-case basis.

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112. 376 U.S. 1 (1964).
113. *Id.* at 4, 7. See R. DIXON, *supra* note 92, at 187-88 for an argument that Justice Black mangled the history to find support for his position.
114. 377 U.S. 533 (1964).
115. *Id.* at 555.
116. *Id.* at 577.
117. *Id.* at 557.

Chief Justice Warren did, however, offer some general guidance in selecting the factors that might satisfy constitutional requirements. He noted that a state might desire to maintain the integrity of various political subdivisions or provide for compact, contiguous districts. Some states might use only single-member districts, while others "might desire to achieve some flexibility by creating multimember or floterial districts,"[118] as long as the overriding objective was substantial equality of population. Deviations from a strict population standard might be constitutionally permissible, if based on "legitimate considerations incident to the effectuation of a rational state policy."[119] Chief Justice Warren warned that "[i]ndiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[120] Thus, Chief Justice Warren's remark foreshadowed the single most significant challenge to the integrity of the majoritarian principle of one-voter, one vote: the political gerrymander consisting of equal population districts.[121]

In one sense, *Reynolds* was a victory for the liberal perspective that reaffirmed the fundamental nature of the right to vote. The expansive reading of the protection of the right of suffrage became the point of departure for the racial dilution challenges that were to follow in the aftermath of *Reynolds*.[122] Regretably, on the other hand, the case provided legitimation for the view that multi-member districts were not per se unconstitutional, despite their use to dilute the Black and Hispanic vote. In addition, Chief Justice Warren's observation that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote,"[123] became the central concept of the racial dilution cluster of voting rights cases. On the other hand, the case also contained fuel for more conservative applications in which racial claims would be subject to a more substantial burden of proof under *both* the fifteenth and fourteenth amendments.

1. The Talisman of Mathematical Precision

After *Reynolds*, the one-person, one-vote concept developed in two

118. *Id.* at 579.
119. *Id.*
120. *Id.* at 578-79.
121. Good discussion of this issue can be found in the following: Dixon, *The Court, the People, and One Man Vote*, in POLSBY, *supra* note 61, at 7 & 29; Engstrom, *The Supreme Court and Equipopulous Gerrymandering: A Remaining Obstacle in the Quest for Fair and Effective Representation*, 1976 ARIZ. ST. L.J. 277; Schwartzberg, *Reapportionment, Gerrymanders, and the Notion of "Compactness,"* 50 MINN. L. REV. 443 (1966).
122. This line of cases begins with Fortson v. Dorsey, 379 U.S. 433 (1965), and extended through Rogers v. Lodge, 458 U.S. 613 (1982).
123. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

distinct ways. First, the standard was extended to units of local government. Second, precise mathematical equality of districts became a virtually inflexible ideal. Although the extension to local districts did not occur without some variation, the Court in two early cases upheld two local systems that were not equally apportioned.[124] This view was eventually rejected in *Avery v. Midland County Texas*[125] where the Court held: "[The Federal] Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by such a body."[126] In a later case, *Hadley v. Junior College District*,[127] the Court confirmed its view that the one-person, one-vote standard covered all popular elections for individuals who were to perform government functions under the equal protection clause. This reading of the full reach of one-person, one-vote prevails today, with one minor exception.[128]

The precise mathematical equality ideal has spawned intense controversy within the Court[129] and without.[130] Two sources of disagreement emerge. First is the question of whether some deviation from the ideal will be overlooked as de minimis. If a de minimis standard is acceptable for state apportionment plans, is it equally acceptable for congressional elections? The Court was willing to insist on adherence to the ideal and to require good faith effort to achieve precise equality as nearly as practicable. What was deemed to be practicable in state elections turned out to be unacceptable in federal elections.

In two cases decided in 1969,[131] Justice Brennan made it clear that

124. In Sailors v. Kent Bd. of Educ., 387 U.S. 105 (1967), the challenge was to an unusual scheme for selecting the Board of Education in a Michigan community. Justice Douglas, writing for the Court, refused to apply the one-person, one-vote standard and noted that "flexibility in municipal arrangements" should not be discouraged through a strict application of one-person, one-vote. *Id.* at 110-11. In Dusch v. Davis, 387 U.S. 112 (1967), the plaintiffs challenged the consolidation of a small Virginia town with a semi-rural area.

125. 390 U.S. 474 (1968).

126. *Id.* at 484-85.

127. 397 U.S. 50 (1970).

128. SalyerLand Co. v. Tulare Lake Basin Water Storage Dis., 410 U.S. 719 (1973). Justice Rehnquist, writing for the majority, carved out a small exception for government units that provide no general public services and whose costs are assessed against those who receive the direct benefits.

129. In *Reynolds v. Sims*, 377 U.S. 533 (1964), Justices Harlan, Stewart, and Clark voiced strong objection to the implication of a fourteenth amendment protection against malapportioned legislative districts. *See, e.g.*, Brown v. Thomson, 103 S. Ct. 2690 (1983); Karcher v. Daggett, 103 S. Ct. 2653 (1983).

130. *See, e.g.*, R. DIXON, *supra* note 92; Washington, *Fair and Effective Representation Revisted—the Shades of Chivco v. Whitcomb*, 17 HOW. L.J. 383 (1972); Note, *Affirmative Action and Electoral Reform*, 90 YALE L.J., 1811 (1981).

131. Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Preisler, 394 U.S. 526 (1969).

the "nearly as practicable" standard of *Wesberry* and *Reynolds* meant that "the state make a good-faith effort to achieve precise mathematical equity."[132] In *Kirkpatrick*, the Court affirmed a district court rejection of the congressional reapportionment efforts of the state of Missouri. The state, in its appeal of the district court's refusal to approve the two submissions, argued that certain population variations were so small that they should be considered de minimis, or in the alternative, justified by regard for legitimate factors such as the representation of distinct interests and groups.

Justice Brennan, writing for the majority, observed that there was no way to establish a point at which population variances became de minimis. To select such a range would simply introduce a measure of arbitrariness that would encourage legislators to strike for the range rather than for truly precise mathematic equality.[133] Missouri argued that the deviations could be explained by their effort to design compact districts. However, Justice Brennan concluded that: "A state's preference for pleasingly shaped districts can hardly justify population variances."[134]

In the companion case of *Wells v. Rockefeller*,[135] the Court emphasized its holding in *Kirkpatrick* that population variances, no matter how small, could not be justified by the state's desire to maintain the geographic and interest group characteristics of the existing political subdivisons.[136] There was one important dilemma inherent in the *Kirkpatrick* and *Wells* holdings. Both cases dealt with congressional districting and were based on article I, section 2 of the Constitution, rather than the fourteenth amendment. Thus, the door was left open for an erosion of the fourteenth amendment requirement of precise mathematical equality in cases involving state legislative apportionment. What emerged in the aftermath of *Wells* and *Kirkpatrick* was a dual standard. This permitted the more conservative members of the Court to avoid the full impact of the fourteenth amendment standard announced in *Reynolds v. Sims.*

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132. Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969).

133. The Court noted that: "We can see no nonarbitrary way to pick a cut off point at which population variances suddenly become *de minimis.* Moreover, to consider a certain range of variances *de minimis* would encourage legislators to strike for a range rather than for equality as nearly as practicable." *Id.* at 531.

134. *Id.* at 536.

135. 394 U.S. 542 (1969).

136. Relying on *Kirkpatrick*, Justice Brennan noted that: "[W]e made clear in *Kirkpatrick* that 'to accept population variances, large or small, in order to create districts with specific interest orientation is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people.'" *Id.* at 546 (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 533 (1969)).

2. The Double Standard of Apportionment

The opening wedge for the double standard came in a case dealing with local apportionment, *Abate v. Mundt*.[137] Strangely enough, Justice Marshall wrote the majority decision upholding the apportionment plan of Rockland County, New York. In *Abate*, the plan for electing Rockland County supervisors contained districts with 11.9 per cent population deviations. The Court upheld the apportionment, finding the county had justified the deviations. The plan served the historical local government practice of having town supervisors serve on the county board. Justice Brennan was, however, not convinced. In a dissent joined by Justice Douglas, he noted:

> It is not clear to me why such a history, no matter how protracted, should alter the constitutional command to make a good-faith effort to achieve equality of voting power as near to mathematical exactness as is possible. Today's result cannot be excused by asserting that local governments are somehow less important than national and state governments.[138]

For Justice Brennan, the worst was yet to come. In a series of 1973 decisions, authored by Justices White and Rehnquist, a de facto, de minimis standard was set for allowable variations in state legislative districting. The Court made a distinction, in these decisions, between the article I, section 2 standard for congressional apportionment, and what the equal protection clause of the fourteenth amendment required for state legislative apportionment. The dicta in *Reynolds v. Sims*,[139] conceding that more flexibility was constitutionally permissible with respect to state legislative reapportionment than in congressional redistricting, had come to fruition.

The dual standard was established firmly in three cases. In *Mahan v. Howell*,[140] Justice Rehnquist asserted that Virginia's state legislative redistricting plan should not be judged by *Kirkpatrick* and *Wells*, but by the "equal protection test enunciated in *Reynolds v. Sims*."[141] In addition, *Mahan* held that Virginia's policy of apportioning its House of Delegates to reflect the integrity of political subdivisions was a rational state policy justifying the deviations.

The opinions in *White v. Regester*,[142], and *Gaffney v. Cummings*,[143] added further impetus to the development of the double standard.[144] In *Gaffney*, the Court held that minor deviations from

137. 403 U.S. 182 (1971).
138. *Id.* at 189 (Brennan, J., dissenting).
139. 377 U.S. 533, 578 (1964).
140. 410 U.S. 315 (1973).
141. *Id.* at 324.
142. 412 U.S. 755 (1973).
143. 412 U.S. 735 (1973).
144. "We concluded that there are fundamental differences between congressional districting under Art. I and the *Wesberry* line of cases on the one hand, and, on the other, state legislative reapportionments governed by the Fourteenth

mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the fourteenth amendment so as to require state justification.

The liberal position on the standard for state legislative apportionment was forcefully articulated in Justice Brennan's dissents, in which he was joined by Justices Douglas and Marshall. In *Mahan*, Justice Brennan reiterated that the equal protection clause requires states to make an honest and good faith effort to construct districts in both houses as nearly of equal population as possible.[145] Deviations from the goal of equality must be justified, even in the case of small variations. In comparing congressional and state reapportionments, Justice Brennan wrote: "Prior to today's decision, we have never held that different constitutional *standards* are applicable to the two situations. True, there are significant differences between congressional districting and legislative apportionment. . . . But the recognition of these differences is hardly tantamount to the establishment of two distinct controlling standards."[146] The dissenters also discounted the state's rationalization of the differences between districts, noting that authority for preserving county lines or providing representation of political subdivisions was not to be found in Virginia's Constitution or any act of its Assembly.[147] The dissenters were concerned not only with the justifications advanced to excuse deviations, they were also sceptical of the line drawing process itself. In his dissent in both *Gaffney v. Cummings* and that part of *White v. Regester* concerning reapportionment, Justice Brennan charged the majority with drawing a line of 10 percent: "[D]eviations in excess of that amount are apparently acceptable only on a showing of justification by the State; deviations less than that amount require no justification whatsoever."[148]

In accepting deviations under 10 percent the Court had undermined *Kirkpatrick* and *Wells*. Justice Brennan displayed a pragmatic interest in the impact of these two cases on state legislators, who, while not governed by article I, section 2 for state plans, had nevertheless sought to comply with the higher standard of congressional apportionment. He observed that in the aftermath of *Kirkpatrick* "[s]tate legislatures and the state and federal courts have viewed *Kirkpatrick* as controlling on the issue of legislative apportionment, and the outgrowth of the assumption has been a truly extraordinary record of compliance with the constitutional mandate."[149] While the liberals

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Amendment and *Reynolds v. Sims*. . . ." Gaffney v. Cummings, 412 U.S. 735, 741-42 (1973).

145. *Id.* at 339-40 (Brennan, J., dissenting).

146. *Id.* at 340-41 (Brennan, J., dissenting).

147. *Id.* at 345 (Brennan, J., dissenting).

148. White v. Regester, 412 U.S. 755, 777 (1973) (Brennan, J., dissenting).

149. *Id.* at 779 (Brennan, J., dissenting).

had in fact lost the battle for a single standard in 1973, they did not concede defeat until ten years later in the two most recent decisions, *Karcher v. Daggett*,[150] and *Brown v. Thomson*.[151] In *Karcher*, Justice Brennan, writing for the majority, found New Jersey's congressional reapportionment plan unconstitutional even though the deviations between districts were at the most seven tenths of one percent.[152] The opinion is notably spare, hewing assiduously to the constitutional requirement of article I, section 2 as the basis for the decision.[153]

In *Karcher*, Justice Brennan set out the two step test for congressional apportionments he first developed in *Kirkpatrick*. First, the Court must consider whether the population variations among districts could have been reduced or eliminated altogether by a good faith effort to draw districts of equal population. Parties challenging the apportionment legislation bear the burden of proof. Second, if plaintiffs can establish that the population differences were not the result of a good faith effort to achieve equality, the state must bear the burden of proving that each significant variation between districts was necessary to achieve some legitimate goal.[154]

What did Justice Brennan trade for establishing a clear, definitive standard for congressional reapportionment? First, and most obvious, he abandoned his earlier insistence that a single standard for state and congressional apportionments was constitutionally necessary.[155] In his dissent in *Brown v. Thomson*,[156] Justice Brennan, joined by Justices White, Marshall, and Blackmun, also capitulated in the fight against the 10 percent de minimis variations for state legislative districts. The dissent conceded, in marked contrast to the *Mahan* and *Gaffney* dissents, that the line of cases since *Reynolds* have established a "rough threshold of 10 percent maximum deviation from equality, . . . below that level, deviations will ordinarily be considered *de minimis*."[157] Perhaps the most regrettable implication of *Karcher*

150. 103 S. Ct. 2653 (1983).
151. 103 S. Ct. 2690 (1983).
152. Karcher v. Daggett, 103 S. Ct. 2653, 2657 (1983).
153. *Id.* at 2658-60. *See also* White v. Weiser, 412 U.S. 783 (1973). *White* was a congressional apportionment case decided at the same time as *Gaffney*. Justice White writing for the majority, invalidated a Texas reapportionment with district population that had average deviations of .745 percent, with a maximum deviation of 2.43 percent above and 1.7 percent below the ideal district size. *See also* Kirkpatrick v. Preisler, 394 U.S. 526 (1969).
154. Karcher v. Daggett, 103 S. Ct. 2653, 2658 (1983).
155. "[W]e have required that absolute population equality be the paramount objective of apportionment only in the case of congressional districts for which the command of Art. I, § 2 as regards the national legislature outweighs the local interests that a State may deem relevant in apportioning districts for representatives to state and local legislatures. . . ." *Id.* at 2659.
156. 103 S. Ct. 2690 (1983).
157. *Id.* at 2701 (1983) (Brennan, J., dissenting). In marked contrast to his dissents in

and *Brown* is that these cases are engraved invitations to those who wish an equipopulous gerrymander. The Court declined to take the opportunity to address this persistent and growing problem. Justice Brennan referred to the use of computer technology as a reason why precise mathematical equality can be expected and attained, while ignoring the fact that gerrymandering too is now more easily accomplished with the use of computers. Finally, *Karcher* and *Brown* are unsatisfying because they offer no reasoned justification for insisting on population equality, without considering the conditions that might be necessary for "fair and effective representation." Thus, we are left with the wooden logic of mathematical equality, while advancing no closer to fair representation.

C. The Constitutional Dilution Suit

The early fifteenth amendment voting rights access cases paved the way for the one-person, one-vote reapportionment decisions. Initial reapportionment cases, such as *Reynolds v. Sims*, relied heavily on precedents established by fourteenth and fifteenth amendment challenges to racially discriminatory voting procedures that denied access to the ballot box, or otherwise abridged the opportunity to have a ballot, once cast, be counted. In turn, those interested in challenging continuing practices that curtailed minority political participation and representation sought to rely upon the reapportionment cases. This effort has not met with the same success as one-person, one-vote cases. Few of the racial dilution suits attacking undervaluation or submergence of a politically cohesive racial group's voting strength have succeeded in the Supreme Court.[158]

The racial vote dilution suit seeks to reform election procedures

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Mahn and *Gaffney*, Justice Brennan used *Brown* to capitulate to the previously contested dual standard:

> Our cases since *Reynolds* have clarified the structure of constitutional inquiry into state legislative apportionments, setting up what amounts to a four-step test. First, a plaintiff must show that the deviations at issue are sufficiently large to make out a prima facie case of discrimination. We have come to establish a rough threshold of 10% maximum deviation from equality (adding together the deviations from average district size of the most underrepresented and overrepresented districts); below that level, deviations will ordinarily be considered *de minimis*.

Id. (Brennan, J., dissenting).

Justice Brennan's shift on the double standard and de minimis variations seem to be based on a trade-off between an acknowledgement of the double standard's reality, and the opportunity to clarify and sharpen the tests for each type of apportionment. The rest of the dissent in *Brown* is certainly a powerful discussion of the state legislative standard. It may come to carry more weight than the majority opinion, which is based on rather eccentric facts and the limited approach of the plaintiffs.

158. Rogers v. Lodge, 458 U.S. 613 (1982), and White v. Regester, 412 U.S. 755 (1973), are the only two constitutional racial dilution suits won at the Supreme Court

and structures that have largely replaced outright denial of access to the ballot box as a means to minimize minority voting.[159] Two election structures have been the objects of recurring challenges because they are modern vestiges of historical discrimination against minorities in all aspects of voting. The at-large election[160] and the multimember district[161] have become the contemporary analog of the white primary. However, unlike the obviously discriminatory white primary, the Court has been unable to reach a consensus about the appropriate constitutional concepts that apply to review the claims of racial discrimination arising from the use of these structures. In many ways one can attribute these analytical difficulties to the liberal wing of the Court. This charge can be made fairly because they have abandoned the fifteenth amendment's self-executing prohibition against denials and or abridgements of the right of Black citizens to vote. The "liberal" wing of the Court has been unable, except when enforcing the newly amended Voting Rights Act, to prevail against the conservative insistence on a higher standard of proof for racial dilution cases.

In *Reynolds v. Sims*, Chief Justice Warren's statement that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise,"[162] invited the first round of racial

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level. This does not include, of course, successful actions brought under Voting Rights Act.

159. *See* Butler, *Constitutional and Statutory Challenges to Election Structures: Dilution and the Value of the Right to Vote*, 42 LA. L. REV. 851 (1982).

160. In election districts that operate under an at-large system, every voter in the district is permitted to vote for the elected representative. In some cases there may be more than one office at stake; in these cases, all voters are permitted to vote for each of the candidates for office.

161. The Court has consistently refused to hold such districts per se unconstitutional, although the Court has striken particular districts. In White v. Regester, 412 U.S. 755 (1973), a collection of factors suggested that political and racial minorities have been consistently submerged through the use of multi-member districts in which the majority repeatedly refuses to elect minority-aligned candidates. Dissenting in Kilgarlin v. Hill, 386 U.S. 120 (1967), Justice Douglas expressed his concern over the multi-member district issue:

> It is suggested that in multi-member districts each person be able to vote for only one legislator, the theory being that in that way a minority, either political or otherwise, would have a chance to elect at least one representative. I am not sure in my own mind how this problem should be resolved. But in view of the fact that appellants claim that multi-member districts of Texas are constructed in such a manner that Negroes are effectively disenfranchised, I would reserve that question for consideration . . . .

Id. at 126 (Douglas, J., dissenting).

Although the rest of the Court declined to find multi-member districts per se unconstitutional, they became increasingly aware of the problems the districts presented. In a series of decisions, the Court established a higher standard on this issue for district courts fashioning reapportionment plans.

162. Reynolds v. Sims, 377 U.S. 533, 555 (1964).

dilution suits. One corollary of this premise is the proposition for which *Reynolds* is most often cited, i.e., malapportionment of population among legislative districts is a violation of the fourteenth amendment. As a recent commentary has noted,[163] the cases that followed in the aftermath of *Reynolds* have ignored the broader statement, choosing instead to emphasize the prohibition against population dilution. In fact, *Reynolds* condemned undervaluation of citizens' voting power by any method or means. While *Reynolds* is the first case to hold squarely that such claims were not only justiciable, but could be decided on the fourteenth amendment grounds, it simply confirms the position taken in *Gray v. Sanders*,[164] that the fifteenth and nineteenth amendments prohibit a state from overweighing or diluting votes on the basis of race or sex.[165]

Reynolds proved to be a clarion call for future racial dilution suits for several reasons. In addition to the explicit language concerning dilution in general, it speaks of "fair and effective representation for all citizens [as] the basic aim of legislative apportionment,"[166] and states that "the right of suffrage is a fundamental matter in a free and democratic society."[167] In Chief Justice Warren's view this fundamental right is individual and personal, but could suffer substantial dilution when a "favored group has full voting strength and the groups not in favor have their votes discounted."[168]

Reynolds contained very fertile ground for successful racial dilution claims. There is nothing inherent in the concept of one-person, one-vote that is antithetical to the claim that a particular form of districting, such as multi-member, submerges or dilutes the votes of a certain group. Thus, I have not abandoned my beginning premise, that the fourteenth amendment one-voter, one-vote cases have proven to be less sensitive to racial claims. However, I assert that the limitations have not been dictated by logic, but rather by the Court's unwillingness to either embrace fully the fifteenth amendment ideal, or to extend the fourteenth amendment beyond crude forms of racial discrimination. In fact, it seems that *Reynolds* expanded voting rights under the fourteenth amendment by describing the fundamental right to vote as "an inalienable right to full and effective participation in the political processes . . . ."[169] Regrettably, the opinion did not provide a fifteenth amendment analysis. This is all the more unfortunate since the case itself clearly included racial voting dilution as one of the deni-

163. *See* Blacksher & Menefee, *supra* note 108, at 11.
164. 372 U.S. 368 (1963).
165. Reynolds v. Sims, 377 U.S. 533, 557 (1964).
166. *Id.* at 565-66.
167. *Id.* at 561-62.
168. *Id.* at 556 (citing with approval Justice Douglas' dissent in South v. Peters, 339 U.S. 276, 279 (1950) (Douglas, J., dissenting)).
169. Reynolds v. Sims, 377 U.S. 533, 565.

als or abridgements protected by the fourteenth amendment. Why then, has it been so difficult to win dilution suits?

Robert Dixon[170] provides some insightful suggestions in his discussion of *Fortson v. Dorsey*,[171] the first case, after *Reynolds*, to present the issue of racial vote dilution in a challenge to an apportionment scheme. In *Fortson*, the district court overturned Georgia's apportionment plan because some senatorial districts required county-wide voting in multi-district counties (a form of at-large election), while in other districts voters elected a single member. When the case reached the Supreme Court, the appellees asserted "that the county-wide election method was resorted to by Georgia in order to minimize the strength of racial and political minorities in populous urban counties."[172] The plaintiffs in the case were "Fulton County Republicans . . . Goldwater Republicans, and therefore not in good posture to present the [Black] anti-gerrymandering interest."[173] During oral argument, counsel for the plaintiffs, in response to a question by Justice Goldberg about whether the suit involved questions of invidious repression of voting interests on racial or political party grounds, made it clear that he did "not want the Court yet to say that the interest of minorities in effective representation is a Constitutionally protected right."[174] Therefore, despite the fact that the seven-senator at large system disadvantaged both Fulton County Republicans and Fulton County Black voters, neither the racial nor the political group interest was asserted in support of the victory achieved in the district court. Dixon suggests that counsel for the plaintiffs resisted "getting down to the nub" of the one-person, one-vote concept by discussing the overt political realities, for fear of offending the Court.[175]

An equally plausible explanation might be the political conflict of interest apparent in such an argument. If the racial impact of the districting became the focus of analysis, this might set a precedent that might later undercut the Republican Party's opportunity to bolster its political effectiveness in the state. This argument illustrates a corrollary of a general observation made by Dean Derrick Bell, that:

> [T]he contemporary protection of black rights, like that granted in the nineteenth century, may well be closely connected with the defense of interests that are perceived, at least by whites in policymaking positions, as important to them. . . . Self-interest has been described . . . as the most basic and important force underlying white policy and action vis-a-vis blacks.[176]

Despite the lackluster presentation that withdrew the first oppor-

170. R. DIXON, *supra* note 92, at 477.
171. 379 U.S. 433 (1965).
172. *Id.* at 439.
173. R. DIXON, *supra* note 92, at 477.
174. *Id.*
175. *Id.*
176. D. BELL, RACE, RACISM AND AMERICAN LAW 40 (1980).

tunity for the Court to clarify the obvious racial implications of *Reynolds*, Justice Brennan sought to salvage, for future decision, the constitutional basis for racial dilution claims. He wrote that: "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."[177]

Burns v. Richardson,[178] a Hawaii apportionment case, was the next dilution case to reach the Court. The plaintiffs did not fare much better. In *Burns*, the plaintiff, the Governor of Hawaii, appealed the district court's order disapproving the legislature's interim districting scheme. The main failure of the plan was that it did not provide for single-member districts. The district court found that the plan "created monoliths" and did not account for the "community of interests, community of problems, socio-economic status, political and racial factors."[179] At the Supreme Court, the record was inadequate to demonstrate the effect of multi-member districts on particular parties, ethnic, or racial groups.[180] Despite the inadequacy of evidence supporting the dilution claim, the Court did provide some suggestions as to the kind of dilution evidence it might find acceptable.[181]

After *Burns v. Richardson*, the Court considered multi-member districts again in the context of an overall apportionment plan challenge. In *Kilgarlin v. Hill*,[182] a per curiam opinion, the Court found a Texas districting plan unconstitutional. The Texas plan used single-member, multi-member, and floterial districts. The district court upheld all but the floterial district feature of the plan, and found that

177. Fortson v. Dorsey, 379 U.S. 433, 439 (1965). In dissent, Justice Douglas advanced the interesting position that any scheme that mixed single-member and multi-member districts might violate the equal protection clause. In speaking of Georgia's multi-district, county-wide voting scheme he wrote: "But to allow some candidates to be chosen by the electors in their districts and others to be defeated by the voters of foreign districts is in my view an 'invidious discrimination'—the text of unequal protection under the Fourteenth Amendment." *Id.* at 441-42 (Douglas, J., dissenting).

178. 384 U.S. 73 (1966).

179. *Id.* at 87.

180. R. DIXON, *supra* note 92, at 479.

181. Justice Brennan, speaking for the Court, noted that:

> It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, 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. But the demonstration that a particular multi-member scheme effects an invidious result must appear from evidence in the record.

Burns v. Richardson, 384 U.S. 73, 88 (1966).

182. 386 U.S. 120 (1967).

there was no racial or political gerrymander present. Further, the district court found that the plan did not unconstitutionally dilute the Black vote. The Supreme Court's finding of unconstitutionality rested on an equal population ground; the Court affirmed the finding that the record did not support the gerrymander claim. In a footnote mentioning the dilution claim, the Court cited a law review article.[183] This reliance was clearly misplaced. In fact, the Article had nothing to do with the problems of racial dilution. The author considered all voters as fungible, not as members with particular racial or political characteristics.[184] The focus of the cited study was individual voting power, not minority representation in which a politically cohesive minority within a multi-member district can repeatedly be submerged by the majority vote. The Court's misplaced reliance on the research findings of the cited Article is one of the characteristic difficulties of the early dilution suits. Equal population constitutional claims were intermingled with racial and political dilution challenges. More importantly, sometimes the Court and the parties did know the difference.

1. Setting Standards for Court Ordered Plans

The standard for district court plans was established in *Connor v. Johnson*.[185] In *Connor*, the district court invalidated an apportionment plan submitted by the Mississippi Legislature on the ground that it violated the equal protection clause. The Legislature then submitted four other plans to the court in a three day period. All of these plans contained only single-member districts. The court then issued its own plan, with multi-member districts in each house. It claimed that it used the multi-member district only because there was neither the time nor the figures to divide these districts. The Supreme Court granted a stay preventing implementation of the district court's plan. The Court ordered that the multi-member districts be broken up, and stated a preference for single district plans when a court was forced to draw up its own plan.[186]

This principle was affirmed in *Chapman v. Meier*.[187] In that case the Court was called upon to review the constitutionality of a federal court-ordered reapportionment of the North Dakota Legislative Assembly. The district court's plan contained five multi-member senato-

183. Banzhaf, *Multimember Electoral Districts—Do They Violate the "One Man, One Vote" Principle*, 75 YALE L.J. 1309 (1966).

184. The focus of the study was individual voting power, not minority representation in which a politically cohesive minority within a multi-member district can repeatedly be submerged by the majority vote.

185. 402 U.S. 690 (1971).

186. In a per curiam opinion the Court held: "We agree that when district courts are forced to fashion apportionment plans, single-member districts are preferable to large, multimember districts as a general rule." *Id.* at 692.

187. 420 U.S. 1 (1975).

rial districts. Defenders of the plan tried to distinquish it from *Connor v. Johnson* on racial grounds, since their case presented no question of racial vote dilution. The Court, however, reversed, citing the inherent weaknesses of the multi-member plan.[188] Among the weaknesses Justice Blackmun listed was the possibility "that bloc voting by delegates from a multimember district may result in undue representation of residents of these districts relative to voters in single-member districts."[189] Challengers to legislative plans were required to prove that the "plan minimizes or cancels out the voting power of a racial or political group."[190] The Court then explicitly recognized that it has adopted a different standard for evaluating the use of the multi-member district when the plan was the result of the court order. It stated: "Absent particularly pressing features calling for multimember districts, a United States district court should refrain from imposing them upon a State."[191]

In a later case, *Connor v. Finch*,[192] the Court again examined the differential standard for court-ordered and legislative reapportionment plans. Here the racial dilution issue figured prominently. Appellants challenged a district court reapportionment plan for Mississippi on the basis of the population variances and impermissible dilution of Black voting strength. The dilution charges were made by Mississippi voters, and the United States intervened on behalf of the plaintiffs. Another group of appellants, state officials, wanted multimember districts in deference to Mississippi's historic policy of respecting county boundaries. The claims of the state officials illustrate the irony of the arguments of some members of the Court, who contend that the equal population mandate endangers group voting strength by ignoring traditional boundaries and opening the door to gerrymanders.[193] In fact, the conservative adherence to traditional county lines would only result in a perpetuation of historic racial vote dilution.

The Court did not reach the merits of the dilution claim. It invalidated the plan on the equal population ground and reversed because of the district court's use of the multi-member district. However, the Court did provide some guidance for trial courts handling racial dilution challenges. The district court on remand was instructed either to draw legislative districts that are reasonably contiguous and compact,

188. *Id.* at 15.
189. *Id.* at 16.
190. *Id.* at 17.
191. *Id.* at 19.
192. 431 U.S. 407 (1977).
193. Justice White, among others, has argued that the equal population mandate endangers group voting rights by ignoring traditional boundaries and opening the door to gerrymanders. *See* Wells v. Rockefeller, 394 U.S. 542, 553 (1969) (White, J., dissenting).

or explain why in a particular instance this goal could not be accomplished. Further, the Court cautioned that care should be taken to allay suspicion that Black voting strength had diluted.[194] Justices Blackmun and Burger, concurring in part, emphasized the potential dissonance between the majoritarian principles of one-person, one-vote, and the goal of fair representation for minorities. Ironically, the constraint on potential gerrymandering offered by Justice Blackmun was "established political boundaries,"[195] the same boundaries that are most often the source of dilution claims. When we turn our attention to the state of Mississippi, deference to state political traditions is unlikely to produce adequate protection for Black citizens of the state.

In the period since *Connor v. Johnson* the Court consistently maintained the higher standard for district court-ordered apportionment plans described above. In *Wise v. Lipscomb*,[196] however, the Court narrowed the definition of "federal court ordered plan," over the dissents of Justices Marshall, Brennan, and Stevens. *Wise* was originally brought by Black citizens challenging at-large election for the Dallas City Council. The district court invalidated the city charter provisions mandating an at-large election, and retained jurisdiction of the case. The district court then approved a new city plan that still contained some at-large seats. The court of appeals overturned this plan. Justice White, writing for the Court majority (there were four separate opinions), found the plan to be legislative and not "court-ordered," even though the Dallas City Council was responding to a court request.

Justice Marshall's dissent pointed out that the actions of the Dallas City Council were not distinguishable from those the local governing board in *East Carroll Parish School Board v. Marshall*.[197] In *East Carroll*, the court of appeals overturned a district court's ruling allowing at-large elections in an apportionment plan. The plan had been prepared under court order following a lawsuit. The Supreme Court affirmed, holding that the district court had abused its discretion in not ordering a single-member scheme.[198] In *Wise*, the Dallas City Council was responding to a federal district court order just as the Parish had been in *East Carroll*. Thus, Justice Marshall concluded, the standards of federal common law favoring single-member districts should apply.

2. *The Struggle Over Standards of Proof In Dilution Claims*

Burns v. Richardson,[199] provided potential racial dilution claim-

194. Connor v. Finch, 431 U.S. 407, 425-26 (1977).
195. *Id.* at 429 (Blackmun, J., concurring in part).
196. 437 U.S. 535 (1978).
197. 424 U.S. 636 (1976).
198. *Id.* at 639-40.
199. 384 U.S. 73 (1966).

ants with a clearer indication of the evidence sought by the Supreme Court. The plaintiffs in *Whitcomb v. Chavis*,[200] used the *Burns* factors to assemble their case. They won at the district court level, but lost when the case reached the Supreme Court.

In *Whitcomb*, plaintiffs were trying to show that a state legislative apportionment plan diluted the votes of Blacks in Marion County through the use of a multi-member district. The plaintiffs represented Blacks in a ghetto area of Marion County. They used social science data to show that the ghetto residents constituted a cohesive minority group with distinctive interests in specific areas of the law. This group was consistently underrepresented. The plaintiffs also used the Banzhaf theory of the overrepresentation of multi-member districts vis-a-vis single-member districts to their own advantage. The district court was convinced by the plaintiffs' highly technical presentation. The Supreme Court, however, found that too much of the plaintiffs' case was theoretical.[201] The Court concluded that the judgment of the district court should be reversed because the record demonstrated no lack of Black participation in the political process.[202] Again, despite the loss in this particular action, the Court seemed willing to entertain such suits if the proper evidentiary foundation was provided. However, optimism at this point in the development of the racial dilution challenge would prove to be premature. The majority opinion contained the first indication that yet another barrier to these suits would be forthcoming when it stated: "But there is no suggestion here that Marion County's multi-member district, or similar districts throughout the State, were conceived or operated as purposeful devices to futher racial or economic discrimination."[203] Thus, Justice White, writing for the majority, provided a clear signal that all fourteenth and fifteenth amendment challenges to voting practices based upon a claim that the multi-member district diluted minority votes might require a showing of *purposeful* discrimination to be successful.

The *Whitcomb* dissenters addressed the issue directly, contending that where, as in *Whitcomb*, the districting plan favored " 'upper-middle class and wealthy suburbanites' . . . [a] showing of racial motivation is not necessary when dealing with multi-member districts. . . . [T]he test for multi-member districts is whether there are invidious

200. 403 U.S. 124 (1971).

201. *Id* at 147.

202. The court also noted "[n]or does the fact that the number of ghetto residents who were legislators was not in proportion to ghetto population satisfactorily prove invidious discrimination absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." *Id.* at 149.

203. *Id.* at 149.

effects."[204] The dissenters brilliantly brought together the concepts of dilution and the gerrymander. Foreshadowing Justice Marshall's dissent in *City of Mobile v. Bolden*,[205] it was argued that invidious effects, not purpose, be adopted as the test for racial dilution claims, and that the *Whitcomb* plaintiffs had met this test. Justice Douglas reminded the Court that: "Our Constitution has a special thrust when it comes to voting; the Fifteenth Amendment says the right of citizens to vote shall not be 'abridged' on account of 'race, color, or previous condition of servitude.' "[206] In a poignant identification of the basic conflict between the majoritarian principle of one-person-one-vote, and the fifteenth amendment mandate to protect minority voters from abridgements, he stated: "Our cases since Baker v. Carr have never intimated that 'one man, one vote' meant 'one white man, one vote.' "[207]

Before the smoldering standard-of-proof dispute ignited, there was an interlude of progress. In 1973, the Court invalidated for the first time the use of multi-member districts on a racial dilution theory. In *White v. Regester*,[208] Justice White, writing for the majority, found that the district court, which had invalidated the districts for Bexar and Dallas Counties, Texas, had indeed followed half of his suggestion made in *Whitcomb v. Chavis*. The plaintiffs' burden would be to produce "evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question. . . ."[209] After reviewing the evidence of racial discrimination and isolation of the Mexican-American and Black communities, the district court found tht single-member districts were required to remedy the effects of past and present discrimination. Justice White then declined to overturn the findings, which he observed were a blend of history and an intensely local appraisal of the impact of the multi-member district in Bexar County.[210]

On the basis of the general guidance provided in *White v. Regester*, the lower courts began to weigh dilution claims by interpreting and applying the Supreme Court's suggested standards. For example, in *Zimmer v. McKeithen*,[211] the fifth circuit developed a set of criteria that came to be widely used by other courts. *Zimmer* involved a challenge to an at-large election. It rejected the notion that at-large elec-

204. *Id.* at 177 (Douglas, J., dissenting in part and concurring in the result in part) (citations omitted).
205. 446 U.S. 55 (1980).
206. Whitcomb v. Chavis, 403 U.S. 124, 180 (Douglas, J., dissenting in part and concurring in the result in part).
207. *Id.*
208. 412 U.S. 755 (1973).
209. *Id.* at 766.
210. *Id.* at 769.
211. 485 F.2d 1297 (5th Cir. 1973).

tions cannot dilute because there is only one "district" and thus no population variance. *Zimmer* stressed that election plans must both meet a one-person, one-vote standard and at the same time demonstate that they did not operate to cancel or dilute the voting strength of the minority population. In assessing dilution, the court listed four primary factors and four enhancing factors.[212] The Supreme Court affirmed *Zimmer*, but on narrow grounds that did not include approval of the Fifth Circuit's constitutional approach.[213]

For seven years the *Zimmer* criteria dominated the analysis of at-large dilution cases. However, in 1980 the Supreme Court decided *City of Mobile v. Bolden*,[214] and the *Zimmer* factors were rejected by a five-to-four vote. In short, the conservative members of the Court prevailed in their rejection of racial dilution as one form of debasement of the vote found unconstitutional by *Reynolds v. Sims*. The plurality thus separated the one-person, one-vote cases from those challenging vote dilution through at-large elections and multi-member districting. The standard of proof in racial vote dilution cases now required a showing of discriminatory intent. Thus the plurality imported the newly adopted fourteenth amendment intent standard from *Washington v. Davis*,[215] and *Arlington Heights v. Metropolitan Housing Development Corp.*[216] While many would accept the analysis of the precedents regarding the intent standard in fourteenth amendment cases, few would agree with Justice Stewart's use of precedent covering the fifteenth amendment.

Contradicting twenty years of Supreme Court interpretation, Justice Stewart asserted that the fifteenth amendment had always been held to be concerned only with purposeful, overt denial of the right to register and vote. So, at once the Court announced two propositions that signalled the demise of the fifteenth amendment basis for racial dilution claims. First, the intent standard of proof would now be required and second, the fifteenth amendment protected only those acts of intentional discrimination that hindered access to the ballot box.

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212. [W]here a minority can demonstrate a lack of access to the process of slating candidates, the unresponsiveness of legislators to their particularized interests, a tenuous state policy underlying the preference for multi-member or at-large districting, or that the existence of past discrimination in general precludes the effective participation in the election system, a strong case is made. Such proof is enhanced by a showing of the existence of large districts, majority vote requirements, anti-single shot voting provisions and the lack of provision for at-large candidate running from particular geographical subdistricts.

Id at 1305 (footnotes omitted).

213. Zimmer v. McKeithen, 485 F.2d 1297 (5th Cir. 1973), *aff'd sub. nom.* East Carroll Parish Bd. v. Marshall, 424 U.S. 636 (1976).

214. 446 U.S. 55 (1980).

215. 426 U.S. 229 (1976).

216. 429 U.S. 252 (1977).

For all practical purposes the fifteenth amendment was no longer available to parties pressing racial vote dilution claims. This was particularly ironic since *Gomillion* was cited as one of the prior decisons of the Court that held that purposeful discrimination was *required* to establish the violation. However, a close reading of *Gomillion* reveals that Justice Frankfurter went no further than the observation that no other purpose or motive could be inferred from the unique circumstances of the case. The promise of *Gomillion*, that the Constitution protects against both simpleminded and sophisticated methods of discrimination, was now withdrawn, at least as to the sophisticated methods of discrimination.

Justice Marshall's extensive dissent in *City of Mobile* reviewed the history of voting cases in the Supreme Court. Justice Marshall insisted in dissent that the vote dilution cases involve the fundamental interest branch of equal protection analysis; therefore, motivational analysis was completely misplaced in reviewing acts that destroy "a constitutionally protected interest."[217] He argued that the discriminatory impact test—the standard developed from *Fortson v. Dorsey* through *Zimmer*—was the correct test for dilution.

Justice Marshall also refuted the majority's charge that his approach constituted "proportional representation."[218] This, in Justice Marshall's view was a "red herring."[219] In another section of his opinion, Justice Marshall looked at the proof that had convinced the district court to overturn at-large election in Mobile. The Black plaintiffs had been able to establish all the factors required by *Zimmer*, including a grim history of racial discrimination and persistent barriers to political participation for Mobile's black citizens. Justice Marshall's dissent in *Mobile* is a classic, for he spares neither the Court nor his brethren in stating his sense of outrage at both the reasoning and the outcome of the decision:

> It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress' remedial legislation enforcing those Amendments, makes this Court an *accessory to the perpetuation of racial discrimination.* The plurality's requirement of proof of *intentional discrimination, so inappropriate in today's cases, may represent an attempt to bury the legitimate concerns of the minority beneath the soil of a doctrine almost as impermeable as it is specious.*[220]

While Justice Marshall and his brethren who agreed with him lost the day in court, their reasoning prevailed in Congress. In response to *City of Mobile*'s decimation of the fifteenth and fourteenth amendments' protection of Black voting rights, Congress passed amendments to the 1982 extension of the Voting Rights Act. Section 2 of the Voting

217. City of Mobile v. Bolden, 446 U.S. 55, 120-21 (1980) (Marshall, J., dissenting).
218. *Id.* at 122 (Marshall, J., dissenting).
219. *Id.* (Marshall, J., dissenting).
220. *Id.* at 144 (Marshall, J., dissenting).

Rights Act codified the *White-Zimmer* standard for statutory racial dilution cases. It established a results text to "restore the pre-*Bolden* understanding of the proper legal standard which focuses on the result and consequences of an allegedly discriminatory voting or electoral practice rather than the intent or motivation behind it."[221]

Ironically, Justice Marshall's position may have received indirect support from the congressional discussions leading up to the 1982 amendments. In a case handed down only a few days after the amendment passed Congress, the Court issued its ruling in *Rogers v. Lodge*.[222] The district court and the court of appeals had found that the county's at-large election was being maintained for discriminatory purposes and unconstitutionally diluted the black vote. The Supreme Court affirmed.

Ostensibly, the Court upheld the "purpose/intent" test of *City of Mobile*. However, they allowed the plaintiffs to prove intent through the same *White-Zimmer* factors used in the past to prove effect. The Court seemed to place special reliance on the racist history of Burke County, just as they did in *White v. Regester*. The Court, apparently seeking to leave intact the reasoning of *City of Mobile*, simply deferred to the facts as found in the district court.[223] The result has been a veritable patchwork quilt of appraisals of dilution challenges conducted in the district court with only minor opportunities for appellate review. While avoiding review of the merits altogether is certainly one technique of judicial management, the fact-centered approach of *Rogers* only manages to add confusion to what is already a morass of imprecise analysis. More importantly, it prolongs the inevitable, the day when the Court must come to grips with the shortcomings of *Baker v. Carr* and its progeny, and more importantly, the atrophy of the fifteenth amendment.

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221. H.R. REP. NO. 97-227, Voting Rights Act Extension, pp. 29-30.

222. 458 U.S. 613 (1982).

223. One consequence of the fact centered approach of the *Rogers* case has been the creation of an artful shield to protect the Court from constitutional review of post-*Bolden* dilution challenges. By relying on an earlier decision in Pullman-Standard v. Swint, 456 U.S. 273 (1982), the Court managed to uphold the district court's finding, which was based on facts that were virtually indistinguishable from the record in *Bolden* itself. In *Pullman-Standard*, the Court held that a district court's finding that the differential impact of a seniority system reflected an intent to discriminate was purely a question of fact, subject to "clearly erroneous" standard of review. Thus, the court of appeals was not free to consider the question of intent as one of mixed fact and law that could be set aside with less deference than purely factual questions. Curiously, the Court re-embraced the virtually moribund standards of White v. Regester, 412 U.S. 755, 769-70 (1973): "[R]epresenting as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise." Rogers v. Lodge, 458 U.S. 613, 622 (1982).

IV. RACIAL DILUTION CLAIMS UNDER THE VOTING RIGHTS ACT

Under section 5 of the Voting Rights Act of 1965, changes in the election laws of a covered jurisdiction trigger judicial review.[224] Changes, even minor ones, in election procedures, rules, or structures can be precleared in one or two ways. The jurisdiction can submit the change to the Attorney General, who then has sixty days to make an objection and prevent implementation. Or the jurisdiction can obtain a declaratory judgment from the District Court for the District of Columbia.[225]

Allen v. State Board of Elections,[226] extended the types of changes section 5 covered to include dilution devices such as a switch to multi-member districts. *Allen* itself was a consolidation of four appeals from district court decisions. Chief Justice Earl Warren, for the majority, found that an amendment to an election law changing the voting was "a 'voting qualification or pre-requisite . . . practice or procedure' within section 5"[227] of the Voting Rights Act.

In *City of Richmond v. United States*,[228] the Court, in an opinion written by Justice White, found that a ward system of voting recognized the minority's political potential. It also asked the district court to reconsider whether the city had a justification for the annexation. Justice Brennan, in a dissent joined by Justices Marshall and Douglas, asserted that the district court did not err in finding that the City of Richmond failed to prove that its annexation plan did not abridge the voting rights of Blacks. He also rejected the majority's support for a rational justificaton, saying the "taint of impermissible purpose"[229] cannot be removed by dredging up supposed objective justifications. Thus, a split emerged between the liberals and the rest of the Court on what the standards should be for section 5 preclearance.

Under section 5, the problem was not the distinction between discriminatory purpose and discriminatory effect. The language of secton 5 requires that jurisdictions show that a proposed change not have the purpose or effect of abridging or denying the minority vote. Rather, the dispute was about whether a change that did not lead to regression in minority voting strength, but merely maintained the status quo, would always be precleared unless it itself was overtly and purposefully discriminatory.

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224. Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982).
225. For a description of the rules governing preclearance, see Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, as amended, 28 CFR § 51 (1980).
226. 393 U.S. 544 (1969).
227. *Id.* at 569.
228. 422 U.S. 358 (1975).
229. *Id.* at 313 (Brennan, J., dissenting).

Just as the liberal wing of the Court had fought for the effects text in constitutional dilution cases, here they argued against the regression standard. The standard was established in part by *Beer v. United States*.[230] In *Beer*, the City of New Orleans replaced a plan under which no Blacks would be elected to City Council with one in which they would probably win one seat out of the seven. The lower court found the new plan diluted the Black vote, using a *White-Zimmer* kind of analysis. However, the Supreme Court reversed.

Justice Stewart, writing for the majority, found that the plan could be precleared because it made things better for Blacks, not worse.[231] Justices White, Marshall, and Brennan vigorously dissented. However, it was Justice White alone who called for proportional representation. In reviewing the district court's findings on anti-single shot rules and racial bloc voting, Justice White observed that where the election structure combined with a segregated residential pattern, section 5 is not satisfied unless, to the extent practicable, the new electoral districts afford the Black minority the opportunity to achieve legislative representation roughly proportional to their population.[232]

Justice Marshall's dissent in *Beer* forecast his dissent in *City of Mobile*. He rejected the notion that it was even necessary to inquire into whether a plan under section 5 was regressive or ameliorative. In his view the important question was the effect of the *plan*, rather than the effect of the *change* in plans. Justice Marshall believed that the fourteenth and fifteenth amendments emerged badly battered from *Beer*. Section 5 simply adopted the constitutional standard established by *White v. Regester* for dilution claims; it only shifted the burden of proof from discriminatee to discriminator.

In 1974, New York State submitted an apportionment statute to the Attorney General for preclearance (part of New York City and certain other New York counties came under the preclearance requirements of the Voting Rights Act). This was the second attempt to obtain preclearance; the first submission was made in 1972. Although the Attorney General liked the 1974 plan, a group of Hasidic Jews, whose district had been cut up, protested that their vote had been unconstitutionally diluted. The plan in *United Jewish Organization's v. Carey*,[233] devised with conscious attention to insuring Black and Hispanic voting representation, was the product of overt consideration of the racial impact of the district lines. In many ways the plan was similar in method to another New York plan that was unsuccessfully challenged by minority voters in the 1964 case, *Wright v. Rockefeller*.[234]

230. 425 U.S. 130 (1976).
231. *Id.* at 141-42.
232. *Id.* at 143 (White, J., dissenting).
233. 430 U.S. 144 (1977).
234. 376 U.S. 52 (1964).

In *Wright*, Justice Douglas protested the use of racial criteria in drawing district lines. Although there was no hard evidence of purposeful racial line drawing, only visible effects, Justice Douglas wrote in dissent that: "Racial segregation that is state-sponsored should be nullified whatever may have been intended."[235]

One additional point should be made about *Wright*. The case was decided before *Reynolds v. Sims* and the passage of Voting Rights Act. *Wright*, therefore, rested on a segregation theory. The plaintiffs themselves charged the state with purposeful, racially disciminatory conduct. If the case had come up later, it might have been argued along the lines suggested by the dissent in *Whitcomb v. Chavis*.[236] In *Whitcomb*, the liberal members of the Court realized the racial dilution of a minority voting sector was just the flip-side of a racially concentrating gerrymander.[237]

In *United Jewish Organization's v. Carey*,[238] New York revised the district to change from multimember to single-member districts. Justice white approved the change. He noted that even absent the congressional mandate of the Voting Rights Act, New York acted constitutionally. However, most of the analysis was directed the appropriateness of the race conscious remedy under section 5:

> Implicit in *Beer* and *The City of Richmond* then, is the proposition that the Constitution does not prevent a State subject to the Voting Rights Act from deliberately creating or preserving black majorities in particular districts in order to ensure that its reapportionment plan complies with § 5. . . . Contrary to . . . argument, neither the Fourteenth nor the Fifteenth Amendment mandates any *per se* rule against using racial factors in districting . . . .[239]

In an important aside, Justice White held that the permissible use of racial criterion was not confined to eliminating the effects of past discriminatory districting or apportionment.[240]

In *City of Rome v. United States*,[241] section 5 of the Voting Rights Act withstood another attack in a majority opinion written by Justice Marshall. Decided at the same time as *Mobile, City of Rome* is a statutorily complex decision because it challenges a number of aspects of the preclearance procedure.

The City of Rome, Georgia made a series of city annexations between 1964 and 1975, and in 1966 enacted electoral system changes including staggered terms and numbered posts. Because Georgia is covered jurisdiction, the City of Rome was required to submit all these changes for preclearance. When it did so, the Attorney General re-

235. *Id.* at 61 (Douglas, J., dissenting).
236. 403 U.S. 124, 171 (1971).
237. *Id.* at 177 (Douglas, J., dissenting in part and concurring in the result in part).
238. 430 U.S. 144 (1977).
239. *Id.* at 161.
240. *Id.*
241. 446 U.S. 156 (1980).

fused to approve nineteen of the annexations and most of the electoral changes, finding that the city had not proved they didn't have a discriminatory impact on the Black vote. The district court came to the same conclusion, and the Supreme Court affirmed.

The Court held that Rome could not bail-out under section 4(a) of the Voting Rights Act. The bail-out procedure requires a covered jurisdiction that wishes to be relieved of the section 5 preclearance requirment to obtain a declaration from either the District Court for the District of Columbia, or the Attorney General, that it has not used a voting practice with a discriminatory purpose or effect for seventeen years prior to requesting bail-out. Justice Marshall held that Rome was ineligible for bail-out since covered states as a whole must satisfy the requisites, not just a single city within the state.[242]

Rome argued that the Attorney General had exceeded the sixty day limit in deciding that the changes submitted failed to meet preclearance requirements. On the basis of *Georgia v. United States*,[243] the Court tolled the sixty day objection period because the Attorney General needed additional information. As to the constitutionality of section 5 itself, the Court held that the question had been settled in *South Carolina v. Katzenbach*.[244] In the alternative Rome argued that even if the Voting Rights Act and section 5 had been constitutional when reviewed in 1965, they were no longer so because conditions had changed.

This argument was also rejected.[245] Justice Marshall reviewed the evidence of Black vote dilution submitted to the district court. This included the annexation by Rome of white residential areas, racial bloc voting, the at-large electoral system, and residency requirements for office holders. He held that the district court's finding that the city had not met its burden of proving their electoral system "fairly reflects the strength of the Negro community as it exists after the annexation[s]"[246] was not clearly erroneous.

The victory of *City of Rome* was followed by another liberal victory in a section 5 racial dilution case. In the *City of Port Arthur v. United States*,[247] the Court held that a district court had not exceeded its authority in conditioning preclearance of an electoral plan on the elimination of a majority vote requirement.[248] The City of Port Arthur had consolidated with another community and then annexed more territory, reducing the percentage of the city's Black population. It also

242. *Id.* at 167.
243. 411 U.S. 526 (1973).
244. 383 U.S. 301 (1966).
245. City of Rome v. United States, 446 U.S. 156, 180-82 (1980).
246. *Id.* at 187 (quoting City of Richmond v. United States, 422 U.S. 358, 371 (1975)).
247. 459 U.S. 159 (1982).
248. *Id.* at 165-68.

changed its electoral system. The Attorney General refused preclearance for the changes, which involved the at-large election of nine city council members. The city then submitted several electoral plans to the district court, which found that the last plan insufficiently neutralized the dilutive effects of the annexations. However, if the city modified it to eliminate the majority vote requirement for two at-large seats, the court would approve it.

The Supreme Court's opinion affirming the district court rested on several earlier cases of city annexation under section 5.[249] The Court interpreted these decisions to mean that post-annexation electoral plans could not undervalue or underrepresent the minority voting power in the new municipality. This would be a denial or abridgment of the right to vote under section 5.[250] The district court in this instance had some evidence that early versions of the city's electoral scheme had been approved by the city council with the illicit purpose of preventing the election of Black officials. The Supreme Court thus held that the district court's remedy, that the majority vote requirement be eliminated, was a "reasonable hedge" against discriminatory purpose or effect in the new plan.[251] By this time, a more conservative view of voting rights began to prevail in the Court. For instance, in *Beer* the concept was introduced that section 5 only required denial of preclearance to *changes* that affected the regression in minority voting strength. Changes that maintained the status quo, even if that was bad, could be cleared. This perversion of the entire purpose of the Voting Rights Act was brought about in *City of Lockhart v. United States*,[252] in which Justice Powell wrote the majority opinion and Justices Marshall and Blackmun dissented from the opinion's section 5 "non-regression standard" analysis. The district court had refused to preclear the change in the city's election structure from a "general law" to a "home rule city." The new home rule plan kept the staggered terms, at-large elections, and numbered posts, which had effectively underrepresented the Chicano vote in "general law" days. Justice Powell, reversing the district court's decision, wrote:

> The new system may highlight individual races, but so did the old . . . . Under the old system, the voters faced two at-large elections with numbered posts every two years. Now they face two at-large elections with numbered posts every year. . . . Minorities are in the same position every year that they used to be in every *other* year. Although there may have been no improvement in their voting strength, there has been no retrogression either.[253]

Justice Marshall noted with outrage that "the Court completely ig-

249. City of Richmond v. United States, 422 U.S. 358 (1975); City of Petersberg v. United States, 410 U.S. 962 (1973); Perkins v. Matthews, 400 U.S. 379 (1971).
250. City of Port Author v. United States, 459 U.S. 159, 166 (1982).
251. *Id.* at 168.
252. 460 U.S. 124 (1983).
253. *Id.* at 135 (emphasis added).

nores the very reason why Congress imposed preclearance requirement on jurisdictions with a pervasive history of voting discrimination: to prevent the *perpetuation* of past discrimination through the adoption of new discriminatory procedures."[254] He disagreed with the Court's interpretation of *Beer*. He showed that *Beer* held that an *ameliorative* new legislative apportionment cannot violate section 5 unless the new plan itself unconstitutionally discriminates on the basis of race or color.[255]

The cases discussed above do not advance constitutional doctrine directly, since they were decided under the Voting Rights Act. However, these cases have assumed increasing importance because the Court has neutralized the fifteenth amendment and, aside from the twenty-two year old precedent of *Baker v. Carr*, and the temporary setback of *City of Mobile v. Bolden*, there have been few noteworthy conceptual developments directly affecting voting rights. Thus, in what follows I suggest that fifteenth amendment holds significant promise of providing an important perspective on the modern vote discrimination cases.

V. THE FUTURE OF THE FIFTEENTH AMENDMENT

The future of the fifteenth amendment will turn on three fundamental questions. First, what is the scope of congressional power under the amendment? Second, to what extent may the Court review state and federal voting structures or practices directly, without regard to federal legislation adopted pursuant to the enforcement clause of the amendment? Third, does the fifteenth amendment provide an approach to reviewing race conscious remedies designed to protect the political power of racial minorities? We turn first to the scope of congressional authority under the amendment.

A. Congressional Power

1. The Scope of Permissable Action

South Carolina v. Katzenbach,[256] provides the most comprehensive analysis of the scope of authority given to Congress under this amendment. South Carolina invoked the Court's original jurisdiction to challenge the constitutionality of provisions of the Voting Rights Act of 1965 and to seek an injunction against their enforcement by the Attorney General. South Carolina argued that the coverage formula that applied to states that maintained a literacy test or other voting device on November 1, 1964, and in which less than half the voting-age

254. *Id.* at 141-42 (Marshall, J., dissenting) (emphasis in original).
255. *Id.* at 142.
256. 383 U.S. 301 (1966).

residents were registered to vote, was an unconstitutional inequality among the states. They argued that the Act itself was a violation of due process, insofar as it provided for expedited administrative review and confined adjudiciation to the District Court for the District of Columbia.[257] Chief Justice Warren, writing for the Court, undertook a comprehensive review of the history of the fifteenth amendment and the conditions that preceded the adoption of the Voting Rights Act of 1965. The Act was adopted following exhaustive hearings and debates which revealed that:

> Congress felt itself confronted by an insidious and pervasive evil which had been perpetuated in certain parts of our country through unremitting an ingenious defiance of the Constitution. Second: Congress concluded that the unsuccessful remedies which it had prescribed in the past would have to be replaced by sterner and more elaborate measures in order to satisfy the clear commands of the Fifteenth Amendment.[258]

The fifteenth amendment was ratified in 1870. Congress soon sought to enforce it by passing the Enforcement Act of 1870,[259] which initially made it a crime for public officials and private persons to obstruct the exercise of the franchise. The statute was later amended to provide for federal supervision of elections. This period of federal activity was not long lived. The Enforcement Act itself was soon invalidated,[260] and by 1894 Congress had simply repealed most of the other Civil Rights enforcement laws.[261] In the resulting void of federal enforcement, southern states adopted the now infamous cluster of barriers to voting that reserved the power of the ballot "for whites only."

In *Katzenbach*, the southern states[262] mounted a frontal attack on the powers of Congress to enact legislation that concerned matters traditionally considered to be exclusively a matter of states rights. *Katzenbach* presents the clearest interpretation, to date, of the language and purpose of the fifteenth amendment. The Court held that as against the reserved powers of the state, section 1 was "self-executing and has repeatedly been construed, without further legislative specification, to invalidate state voting qualifications or procedures which are discriminatory *on their face or in practice*."[263] The central standard for review of the constitutionality of congressional action under this amendment was declared to be as follows: "As against the reserved powers of the States, Congress may use any rational means to

257. *Id.* at 302.
258. *Id.* at 309.
259. 16 Stat. 140 (1870).
260. United States v. Reese, 92 U.S. 214 (1876) (discussed *supra* notes 10, 51 and accompanying text).
261. 28 Stat. 36.
262. South Carolina's claim was supported by the following states as amicae curiae: Alabama, Georgia, Louisiana, Mississippi, and Virginia. South Carolina v. Katzenbach, 383 U.S. 301, 307 (1966).
263. *Id.* at 325 (emphasis added).

effectuate the constitutional prohibition of racial discrimination in voting."[264]

Thus, the question arises as to what range of remedial powers have been given to Congress. This case provided an ideal vehicle to test the proposition asserted by South Carolina, i.e., that Congress could do no more than forbid violations of the fifteenth amendment in general terms, and that the courts alone had the power to devise specific remedies for particular jurisdictions. We can safely assume that this argument was simply a creature of convenience, since as I will argue below, South Carolina would certainly have raised equal objection to an identical set of remedies if they had originated with a court, rather than Congress. In short, the argument can be fairly read to mean that neither the courts nor Congress could force the South to accept the level of federal intrusion embodied in the Voting Rights Act of 1965.[265]

Thus, *South Carolina v. Katzenbach* established the broad authority granted to Congress under the fifteenth amendment. The standard set there is still valid today. Congressional action pursuant to the fifteenth amendment is constitutional if the means adopted bear a rational relation to the constitutional objective of prohibiting racial discrimination in voting.[266] The Court returned to the first Justice Marshall's broad assertion of congressional power in *Gibbons v. Ogden*,[267] in which it was stated that "[t]his power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations other than are prescribed in the constitution."[268] Thus, the authority of Congress in correcting discrimination in voting is indeed quite broad.

South Carolina v. Katzenbach, however, presented a most appealing case and in many ways an easy constitutional question. The record of abuses in the state of South Carolina was so clear, and the remedies of the Voting Rights Act of 1965 so well tailored to meet the "unremit-

264. *Id.* at 324. This standard is consistent with the general test applied to cases involving the express powers of Congress with relation to the reserved powers of the States: "Let the end by legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 159, 206 (1819).

265. The new remedies provided in the Act included a coverage formula for identifying a small number of states with long histories of racial discrimination, expedited administrative and judicial review of voting changes and violations, suspension of existing voting qualifications, such as the literacy test, and the introduction of federal examiners to supervise registration for state elections.

266. South Carolina v. Katzenbach, 383 U.S. 301, 324 (1966). The Court relied upon the basic test of *McCulloch*, *see supra* note 264. South Carolina v. Katzenbach, 383 U.S. 301, 326 (1966) (quoting *McCulloch*).

267. 22 U.S. (9 Wheat.) 1 (1824).

268. South Carolina v. Katzenbach, 383 U.S. 301, 327 (1966) (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 86 (1824)).

ting and ingenious defiance"[269] of South Carolina, that congressional authority could certainly withstand judicial review. Although the states have broad powers to determine the conditions under which the right to vote may be exercised, the fifteenth amendment supercedes contrary assertions of state power. A more difficult question, however, was presented when the claim was made that compliance with the Voting Rights Act violated the constitutional rights of whites.

The opinions in *United Jewish Organizations v. Carey*,[270] reflect this difficulty. No consensus emerged when the question presented was whether a state may use race as a criterion in complying with the requirements of section 5 of the Voting Rights Act to draw districts that did not abridge or deny the voting rights of Black and Puerto Rican citizens of Kings County, New York. The relevant focus of disagreement among the Justices was whether the challenged action would be constitutional *without* the statutory compulsion of the Voting Rights Act.

Justices White, Stevens, and Rehnquist were prepared to hold that the safe districting adopted by the state of New York was akin to the decision by the state to adopt single-member districts in order to increase minority representation where minorities had previously been unable to elect representatives in a multi-member system.[271] They concluded that this intentional reduction of white voting power would be constitutionally permissible. Given Justice Rehnquist's later vigorous dissent in *Mississippi Republican Executive Committee v. Brooks*,[272] we can only conclude that he joined Justices White and Stevens in the view that race conscious measures to protect minority voting were constitutional because of Justice Rehnquist's view that voting qualifications and political representation are matters of *states rights*. Thus, Justices Blackmun and Brennan's view that drawing district lines to enhance minority representation was constitutional *only* because compelled by the Voting Rights Act,[273] assumes greater importance. Though the case provides little in precedential authority, it does, however, give us important insights into the various analytical approaches within the Court. A plurality was prepared to *reject* the following propositions: first, in the voting context racial criteria may never be used to accomplish districting and apportionment; second, that the use of a " 'racial quota' in redistricting is never acceptable."[274]

269. *Id.* at 309.
270. 430 U.S. 144 (1977).
271. *Id.* at 166.
272. 105 S. Ct. 416, 418 (1984).
273. United Jewish Organizations v. Carey, 430 U.S. 144, 148-44 (1977).
274. *Id.* at 156. These views were criticized by Dixon, *Bakke, A Constitutional Analysis*, 67 CALIF. L. REV. 69, 81 (1979). Dixon had earlier been quite a forceful advocate of the group representation theory, which he criticized the Court for failing to emphasize in the aftermath of Reynolds v. Sims. *See, e.g.*, R. DIXON, *supra*

What conclusions can be drawn from the analysis thus far? As noted at the outset of this Article, the Court has ventured indecisively toward recognition of the constitutional value of special measures to preserve or enhance the political effectivenss of racial minorities. But, alas, we are left with only a series of outcomes in search of a rationale. Here, the fifteenth amendment can supply what has been lacking.

2. The Fifteenth Amendment Rationale for Safe Districting and Proportional Representation

If we turn to the fifteenth amendment we find support for the following propositions. First, the voting rights of Blacks, and later by statutory definition language minorities, have been specially protected by the Constitution against denials and abridgements.[275] Second, the spirit of the fifteenth amendment is surely not confined to the crude implements of discrimination found in the early access to the ballot cases discussed in Section I above.[276] Although the racial vote dilution cases have been justified on the basis of the fourteenth amendment more often than on the fifteenth amendment, this is surely wrong. One need only consider that the right to be protected from unconstitutional dilution of the right to have one's vote count equally with other voters, is a right that had to be created in *Reynolds v. Sims* by implication and analogy from the fourteenth amendment. Thus, it is a strange misconception to reason that the constitutional status of the racial dilution cases is derived from the one-person, one-vote line of authority.

Unlike the fourteenth amendment, which does not refer specifically to the right to vote,[277] the fifteenth amendment refers specifi-

note 92; Dixon, *The Court, The People, and "One Man, One Vote,"* in POLSBY, *supra* note 61, at 7.

275. The protection of the amendment extends to both state action and private conduct. *Ex parte* Yarbrough, 110 U.S. 651 (1884). *See generally* Note, *The Strange Career of "State Action" Under the Fifteenth Amendment*, 74 YALE L.J. 1148 (1965).

276. There is ample support for this view in Rogers v. Lodge, 458 U.S. 613 (1982) (decided on fourteenth amendment grounds; the Court did not reach the fifteenth amendment claim); White v. Regester, 412 U.S. 755, (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971).

277. I do not imply by this that I subscribe to the view of Justice Harlan that the fourteenth amendment should not be extended to voter qualification and malapportionment cases, as stated in his dissents in Reynolds v. Sims, 377 U.S. 533, 595-602 (1964) (Harlan, J., dissenting); and Oregon v. Mitchell, 400 U.S. 112, 154-200 (1970) (Harlan, J., concurring in part and dissenting in part). Dean Ely is surely right when he suggests that "[t]he lack of any specific expectation that the fourteenth amendment would be applied to voting seems unusually irrelevant in light of ratification of the fifteenth amendment two years later." Although Ely is willing to concede at least that it is more likely than not that the framers of the fourteenth amendment did not specifically anticipate that its first section would apply to voting rights, he concludes that: "[u]njustified discriminations in the dis-

cally to that right and protects against denials *and* abridgements on the basis of race, color, or previous condition of servitude. What can this mean other than what it says? Certainly as to vote dilutions based on race, the fifteenth amendment is the primary repository of the constitutional value of preserving the political access and participation of Blacks and other racial minorities.

Matters become more problematic, however, when we take up the question of affirmative action, that is, measures intended to correct the present effects of prior racial discrimination. Recent commentators have argued that such measures as the creation of safe districts violate the Constitution.[278] They note:

> Safe districting intentionally manipulates voting rules to increase the likelihood of black proportional representation. This forces certain jurisdictions to give blacks a different kind of opportunity to compete in the electoral process. Creating such an opportunity of unequal participation for some voters and not others violates the Constitution's political equality norm.[279]

This analysis can only be persuasive if we consider the source of the value, the right to be free of racial discrimination affecting political participation, as the fourteenth amendment. I reject, however, the model of free competition for political power that is the unspoken premise of the Howards' objection to safe districting and the direct affirmative action measures in the voting rights context. True equality of political participation can best be achieved by preserving meaningful access for racial and ethnic minorities. In fact, one group of political scientists has recognized that the political incorporation of minorities will be achieved if:

> excluded groups achieve three goals:
> 1. they must get elected.
> 2. they must become part of a coalition.
> 3. the coalition must be dominant.[280]

Thus, it would seem that minorities who are free to compete for

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tribution of the franchise fit comfortably within the language of and just as obviously violate the ideal expressed by—the Equal Protection clause." J. ELY, DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW 116-19 (1980). But Dean Ely, too, leaves us hanging. What then is the independent objective of the fifteenth amendment? One can agree with his observation that voting was intended to be protected by the fourteenth amendment, without undercutting the premise of this paper, which is that the fifteenth and not the fourteenth amendment is the primary repository of those values, with regard to racial minorities.

278. Howard & Howard, *The Dilemma of the Voting Rights Act-Recognizing the Emerging Political Equality Norm*, 83 COLUM. L. REV. 1615 (1983). *See also* Note, *Proportional Representation by Race: The Constitutionality of Benign Racial Redistricting*, 74 MICH. L. REV. 820 (1976) [hereinafter cited as Note, *Proportional Representation*]; Note, *Getting Results Under Section 5 of the Voting Rights Act*, 94 YALE L.J. 139 (1984).

279. Howard & Howard, *supra* note 278, at 1654.

280. R. BROWNING, D. MARSHALL & D. TABB, PROTEST IS NOT ENOUGH: THE STRUGGLE OF BLACKS AND HISPANICS FOR EQUALITY IN URBAN POLITICS 241 (1984).

political power will always lose, if the coefficients of success are not made more accesible than sheer numbers would dictate.[281] It is successful participation that enhances the likelihood that minorities, who will always lose based on the numbers, will continue to desire to participate. An argument can be made that measures that enhance such participation are more compatible with the frankly political objectives of the fifteenth amendment.[282]

Finally, I propose that the fifteenth amendment would permit explicit consideration of race if the following factors are present: first, a history or prior discrimination affecting the right of voting; second, a history of racial bloc voting; and third, the presence of geographical patterns that make it unlikely that a minority will ever emerge to be represented in proportion to their voting population percentages.

These criteria have been proposed because they reflect a recognition that the political reaction of whites to anything other than a carefully tailored remedy will ultimately undercut the effectiveness of any measures designed to correct the history of prior discrimination affecting the right of voting. The use of remedial measures such as safe districting and even proportional representation can be justified in the context of voting even for those who have difficulty accepting affirmative action in access to employment and educational opportunities. Voting is different because it is the core of our democracy. We must insure that those who are discrete and insular minorities have a stake in the success and survival of our democracy by clearing the channels of participation.[283] I conclude by noting that the fifteenth amendment can be used to this end. Support for the intent requirement has weakened.[284] Thus, if the Constitutional authority of the fifteenth amendment is restored, the options for both the courts and Congress to

281. The millennium assumed by Professor Ackerman in his recent essay, *see* Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985), has not yet arrived. The political powerlessness that the footnote 4 rationale in *Carolene Products* is designed to correct is in fact the dominant state of affairs today.

282. Several commentators have made this point. *See, e.g.*, Note, *Geometry and Geography: Racial Gerrymandering and the Voting Rights Act*, 94 YALE L.J. 189 (1984); Note, *United Jewish Organizations v. Carey and the Need to Recognize Aggregate Voting Rights*, 87 YALE L.J. 571 (1978). But see Note, *Proportional Representation*, *supra* note 278, at 822 (making the argument that benign measures are not "a constitutionally permissible remedy for the effects of prior dilution of minority voting power"). See also Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163, 168 (1984) (rejecting the fifteenth amendment justification for proportional representation).

283. I make a similar argument with regard to minority participation as intervenors in affirmative action litigation. *See* Jones, *Problems and Prospects of Participation in Affirmative Action Litigation: A Role for Intervenors*, 13 U.C. D. L. REV. 221 (1980); Jones, *Litigation Without Representation: The Need for Intervention to Affirm Affirmative Action*, 14 HARV. C.R.—C.L. L. REV. 31 (1979).

284. *See* Rogers v. Lodge, 458 U.S. 613 (1983).

hasten the day when such measures will no longer be needed are substantial.

VI. CONCLUSION

The power and significance of the right to vote in our democracy is recognized in the national consensus that voting is a seminal right that is entitled to special deference and protection. The divergence of opinion within the Supreme Court concerning the rationale for racial dilution cases can be ameliorated if we take up once again the fifteenth amendment. The conceptual challenges of the problems of racial discrimination affecting the right of voting and political participation are best approached from the vantage point of that amendment. I hope to advance the discussion by insisting that the years of political impotence suffered by racial minorities may end sooner if we take up the fifteenth amendment and once again take voting rights seriously.