TRACKING THE COURT THROUGH A POLITICAL THICKET: AT-LARGE ELECTION SYSTEMS AND MINORITY VOTE DILUTION

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I. INTRODUCTION

The Supreme Court's holding in *Baker v. Carr*[1] ushered the judiciary into the "political thicket."[2] The Court held that voters[3] challenging malapportioned legislative districts in federal courts state a justiciable claim[4] under the equal protection clause of the fourteenth amendment.[5] Two years later, *Reynolds v. Sims*[6] established the con-

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1. 369 U.S. 186 (1962).

2. Justice Frankfurter first used the phrase in Colegrove v. Green, 328 U.S. 549, 556 (1946). The Court found a challenge to a malapportioned state legislature (brought under the guarantee clause of Art. IV, § 4 of the Constitution) to present a non-justiciable political question. The guarantee clause is discussed more fully in notes 31 and 37-43 *infra*.

Prior to the apportionment cases, the Court had indirectly entered the political thicket by recognizing a fundamental right to vote. Cases discussing the Court's invalidation of artificial and unjustifiable barriers to free exercise of the franchise are collected in notes 55-60 and accompanying text *infra*.

3. The Court established that voters have standing to challenge malapportioned districts. 369 U.S. at 204-08.

4. *Id.* at 208-37.

5. *Id.* at 198-204.

6. 377 U.S. 533 (1964). Between *Baker* and *Reynolds*, the Court decided two districting cases without reaching the fourteenth amendment question. *See* Wesberry v. Sanders, 376 U.S. 1 (1964) (striking down Georgia's congressional districting statute

stitutional guidelines for Courts to consider when passing on the validity of election systems. The Court reasoned that "[f]ull and effective participation by all citizens in state government requires . . . that each citizen have an equally effective voice in the election of members of the state legislature."[7] Since *Reynolds*, the judicial trek through the thicket at times has been confused. The Supreme Court has been less than a coherent guide.

Litigation in the voting rights area presents a common theme—the litigant wishes to increase the representation of his partisans in the legislative body so that legislative outcomes are more favorable to himself and those who share his beliefs.[8] In the initial cases in this area, the Court avoided dealing with such group representational rights by concentrating on quantitative problems of population deviations[9] among districts.[10] Under the one person, one vote standard[11]

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and construing U.S. Const., art. I, § 2, to require "that as nearly as practicable one man's vote in a congressional election . . . be worth as much as another's"); Gray v. Sanders, 372 U.S. 368 (1963) (invalidating Georgia's county unit system of primary elections).

7. 377 U.S. at 565.

8. *See* Dixon, *The Court, the People, and "One Man, One Vote,"* in REAPPORTIONMENT IN THE 1970S 7, 32 (N. Polsby ed. 1971) [hereinafter cited as Dixon]. Dixon notes that the plaintiffs in all districting cases "are concerned about political representation in a personal, partisan sense." Their goal is to compel "a reshaping of legislative districts so that they and their fellow partisans will have a better opportunity of electing like-minded legislators." *Id.*

9. The typical apportionment vote dilution case is raised under circumstances of numerous state legislative districts; each with a different population and each electing the same number of state officials. Voters in the larger districts allege that their votes are of less weight than those of voters in the smaller districts. The issue focuses on whether population deviations from the average district are impermissibly large. For an in depth discussion of the Court's mathematical quagmire see R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968) [hereinafter cited as R. DIXON]. *See also* cases collected at note 12 *infra*.

10. Most forms of unequal political districting are subject to constitutional attack. Prior to *Reynolds*, Wesberry v. Sanders, 376 U.S. 1 (1964) established that congressional districting was subject to scrutiny. *Reynolds* and its companion cases involved unequal state legislative districts. *Reynolds* held that *both* houses of a bicameral state legislature must be apportioned on a population basis, reasoning that analogy to the federal legislative branch was not proper. 377 U.S. at 568. *See also* Lucas v. Colorado Gen. Assembly, 377 U.S. 713 (1964) (reasoning that the equal population requirement cannot be avoided by voter referendum approving apportionment of one house of a bicameral legislature in a manner other than population).

Four years after *Reynolds*, the Court applied the apportionment standard to local government units. *See e.g.* Avery v. Midland County, 390 U.S. 474 (1968) (holding the Constitution allows no substantial deviation from equal population in mapping districts "for units of local government having general governmental powers over the

the Court mandated districts of near equal population.[12] Realizing, though, that quantitative answers do not necessarily lead to qualitative group representation,[13] litigants pushed the federal judiciary to consider questions of proportional representation.

Challenges to state and local use of multi-member[14] and at-large[15]

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entire geographic area served by the body." *Id.* at 485). *See also* Hadley v. Junior College Dist., 397 U.S. 50 (1970) (school board election districts must have equal population). For evaluations of the application of population equality principles to local government, *see generally* Dixon, *Local Representation: Constitutional Mandates and Apportionment Options*, 36 GEO. WASH. L. REV. 693 (1968); Jewell, *Local Systems of Representation: Political Consequences and Judicial Choices*, 36 GEO. WASH. L. REV. 790 (1968) [hereinafter cited as Jewell]; Sentell, Avery v. Midland County: *Reapportionment and Local Government Revisited*, 3 GA. L. REV. 110 (1968); Sentell, *Reapportionment and Local Government*, 1 GA. L. REV. 596 (1967).

11. The Court first used the term in Gray v. Sanders, 372 U.S. 368, 381 (1963), announcing that since the time of the nation's founding "[t]he conception of political equality . . . can mean only one thing—one person, one vote." *Id.*

12. The *Reynolds* standard provides that deviations from strict population equality are tolerable only if "based on legitimate considerations incident to the effectuation of a rational state policy. . . ." 377 U.S. at 579. In subsequent cases the Court sought to precisely define the area of allowable deviations. In Kirkpatrick v. Preisler, 394 U.S. 526 (1969), the Court overturned Missouri's congressional districting plan where district populations varied 2.8% below and 3.1% above the ideal plan. In White v. Weiser, 412 U.S. 783 (1973), the court overturned Texas' congressional redistricting which deviated 2.43% above and 1.7% below the ideal.

The Court treats state legislature and local unit districting with greater leniency. *See* Mahan v. Howell, 410 U.S. 315 (1973) (16.4% population deviation in districting of the lower house of the Virginia legislature adequately supported by state's policy of "maintaining the integrity of political subdivision lines"); Abate v. Mundt, 403 U.S. 182 (1971) (districting of a county board upheld despite an 11.9% deviation from population equality because the deviation was supported by legitimate state consideration in fostering cooperation between the county and its constituent towns). In other decisions the Court indicated that deviations not in excess of 10% are "minor" and do not require justification. *See* White v. Regester, 412 U.S. 755 (1973) (a maximum variance of 9.9% and an average variance of less than 2% are minor, and do not establish a prima facie case of unconstitutionality); Gaffney v. Cummings, 412 U.S. 735 (1973) (deviation of 8% too minor to make out a prima facie case of invidious discrimination).

13. *See* discussion at notes 82-92 and accompanying text *infra*.

14. In a multi-member district all voters within the district vote for and elect more than one legislator to represent the district as a whole. In other words, the constituency of each of the legislators elected in a multi-member district is composed of the entire district and not some subdistrict. By way of contrast, in a single member district, voters elect one legislator who is their representative.

Single member districts comply with the one person, one vote standard where all districts within the political unit are of near equal population. A multi-member district complies with one person, one vote standard where the number of legislators elected by the multi-member district corresponds with the population of that district

election systems constitute a major portion of political participation litigation.[16] More than sixty percent of the nation's cities use the at-large system to elect municipal governments.[17] At-large elections weigh heavily against inner city racial minorities.[18] These elections tend to give disproportionate weight to the votes of the majority political group and, in turn, dilute votes of the community's racial and political minorities.[19]

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relative to the population of other districts. For example, if district A elects five legislators, district B elects two, and all other districts within the unit elect one legislator, then district A's population must be five times greater than the population of the single member districts, and B's population must be twice that of the other districts. *See* Burns v. Richardson, 384 U.S. 73 (1966).

15. The at-large system is a special type of multi-member district. In an at-large district more than one legislator is elected by the voters and represents the entire district. In contrast to the multi-member district, however, the at-large district encompasses the entire political unit. Multi-member and at-large districts may be considered identical for many purposes. Legal significance, however, should attach to the facts that the at-large district is a district of the whole unit and the multi-member district is one of many districts making up the political whole. *See* Jewell, *supra* note 10, at 799-800.

The at-large system is often used for the election of a city council. All city voters vote for and elect the entire number of councilmen. The ward system is a competing municipal election system where the city is divided into districts or wards with each ward electing a single council member. For descriptions of the leading forms of municipal government see D. GRANT & H. NIXON, STATE AND LOCAL GOVERNMENT IN AMERICA 429-53 (2d ed. 1968); C. SNIDER, AMERICAN STATE AND LOCAL GOVERNMENT (2d ed. 1965); H. TURNER, AMERICAN DEMOCRACY: STATE AND LOCAL GOVERNMENT (1968). Not all municipal at-large systems operate in the same manner; variations are discussed at note 103 and accompanying text *infra*.

16. The bulk of the litigation involving at-large districting has been in the Fifth Circuit. *See* cases cited in Bonapfel, *Minority Challenges to At-Large Elections: The Dilution Problem*, 10 GA. L. REV. 353, 357 n.29 (1976). *See also* Note, *At-Large Voting Dilution Claims: The Fifth Circuit Requires Racially Motivated Discrimination*, 9 CUM. L. REV. 443 (1978).

17. MUNICIPAL YEAR BOOK (1979). A study of municipal government reports that the at-large system is in use in 63.7% of all cities reporting. Small cities especially use the at-large system. Sixty-seven percent of cities with populations between 25,000 and 50,000 persons elect city governments at-large. The ward/district system is preferred only in cities with populations greater than 500,000. *Id.*

A city's propensity to elect officials at-large follows geographic lines. The study notes that the most frequent users of the system are in the Pacific States (86.2%), the Solid South (75.6%), and the Border States (67.6%). New England least favors the at-large system (40.4%). *Id.* (The geographic terms are defined, *id.* at 97). *See also* notes 115-17 and accompanying text, *infra*, for authorities detailing the reasons for the wide use of at-large election systems.

18. *See* discussion at notes 105, 109 and accompanying text *infra*.

19. Multi-member and at-large districts are conducive to dilution of interest

The Court's leading decisions, *Whitcomb v. Chavis*[20] and *White v. Regester*,[21] left the lower federal courts with little guidance in dealing with these claims. The Court has failed to adequately articulate the scope of political participation rights recognized in the apportionment cases. The Court has also failed to state how multi-member and at-large suits fit into the constitutional framework developed in *Reynolds*. The recent decision of *City of Mobile v. Bolden*[22] illustrates the Court's struggle with these problems. In *Bolden* the Court addressed for the first time the circumstances under which the at-large election of a city council would unconstitutionally dilute minority votes. On the facts presented, the Court found no fourteenth or fifteenth Amendment violation but it was badly divided in its reasoning.[23]

This Note urges the Court to make a straightforward appraisal of group voting rights—recognizing on one hand the value to republicanism of minority representation in legislative bodies, and on the other hand, the federalist value of giving states and their political subdivisions the maximum constitutional power to establish their own forms of government. Thus, at issue is the very nature of representative government.[24] In passing on the issue, the Court must concern itself with the proper role of the judiciary and the need for

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group voting power. The interest group must be able to marshall a greater number of voters sharing common interests to elect representatives than would be necessary under a single-member system. This result is particularly distressing to racial minorities residing in large numbers in compact areas capable of supporting one or more single-member districts. For examples of how multi-member and at-large districts dilute minority voting strength, *see, e.g.*, Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard after* Washington v. Davis, 76 MICH. L. REV. 694, 695 (1978); Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577, 1587-88 (1970).

20. 403 U.S. 124 (1971).

21. 412 U.S. 755 (1973).

22. 446 U.S. 55 (1980).

23. *Id.* Justice Stewart issued the judgment of the Court and was joined by Chief Justice Burger and Justices Powell and Rehnquist. Justice Stevens concurred in the judgment but disagreed with the plurality's reasoning. Justice Blackmun concurred in the result, siding with the dissenters on the substantive issues but finding the lower court's remedy inappropriate. Justices Brennan, White, and Marshall dissented. *Id.*

As this Note went to press, the Supreme Court decided another at-large case. In Rogers v. Lodge, 50 U.S.L.W. 5041 (July 1, 1982) (No. 80-2100), the Court held invalid the at-large system for electing members to the Burke County, Georgia Board of Commissioners. For a further discussion of the decision, see note 191 *infra*.

24. *See* issues discussed at notes 27 and 31-33 and accompanying text *infra*.

manageable standards.[25]

Section II of this Note discusses the importance of political participation and the participation rights recognized in the apportionment decisions. Section III presents the problems associated with at-large voting and lays the groundwork for Section IV's evaluation of the treatment given vote dilution claims in the federal courts. Section V analyzes the Court's decision in *Bolden* and suggests ways in which the Court might more profitably deal with similar issues in the future.

II. POLITICAL PARTICIPATION RIGHTS

A. *Political Theory and Participation*

The ability of citizens to participate effectively in the political process is a value rooted in the Anglo-American political tradition.[26] Representative democracy, the touchstone of this tradition, is based on the recognition of the coercive power of government.[27] A government so intimately affects the well-being of its citizens that an effective check on its power is required in the form of popular control. The citizens practice popular control through the medium of legislative bodies. The people elect the members of the legislative bodies to represent their interests. The outcomes of the legislative process reflect compromises struck by the various interests represented.[28] Representation is effective only if elected officials are accountable and attuned to the needs of the electorate.[29]

Representative democracy thus involves two basic concepts. First,

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25. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (The judiciary should intervene only when the Court can formulate and apply manageable standards).

26. *See, e.g.*, G. BAKER, THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT 14-22 (1966) (Baker provides a concise review of the development of the equal representation in England and in America from the colonial period forward).

27. *See, e.g.*, THE FEDERALIST No. 51, 397, 398-99 (Lippincott ed. 1864) (A. Hamilton). In a familiar passage, Hamilton wrote

> If men were angels, no government would be necessary. If angels were to govern men, neither external or internal controls on government would be necessary. In framing a government, which is to be administered by men over men, the great difficulty lies in this: You must first enable the government to control the governed; and in the next place, oblige it to control itself. A dependence on the people is, no doubt, the primary control on the government; but experience has taught mankind the necessity of auxiliary precautions.

Id.

28. *See* Bonapfel, *supra* note 16, at 358.

29. Note, *Challenges to At-Large Election Plans: Modern Local Government on*

a majority of the citizens should elect a majority of the representatives. Second, a minority of the voters should elect a minority of the legislators.[30] As James Madison once stated, this constitutional guarantee of a republican form of government reflects both principles.[31] Madison, writing at the time of the Constitution's adoption, argued that broad participation was essential to republicanism.[32] The more interests that gained representation in governing bodies, he wrote, the less chance majorities would develop to fence other interests out of the political process.[33] Minority representation not only protects minority rights from majority abuse,[34] but also preserves vocal opposi-

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Trial, 47 U. CIN. L. REV. 64, 76 (1978). *See also* A. DE TOQUEVILLE, DEMOCRACY IN AMERICA, ch. 1 (R.D. Hefner ed. 1956).

30. John Stuart Mill stated,

> In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives; but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people would rule over the rest: there is a part whose fair and equal share of influence in the representation is withheld from them; contrary to all in just government, but above all, contrary to the principle of democracy, which professes equality as its very root and foundation.

J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 141-42 (Gateway ed. 1962).

31. Madison's comments on the nature of republican government are found in THE FEDERALIST No. 39, 301, 302 (Lippincott ed. 1884) (J. Madison). *See also* THE FEDERALIST No. 10, 104, 109-12 (Lipincott ed. 1884) (J. Madison discussing how a republic would control factionalism). In the guarantee clause, the Constitution provides: "The United States shall guarantee every State in this Union a Republican Form of Government. . . ." U.S. CONST. art. IV, § 4, cl. 1.

32. THE FEDERALIST No. 10, 111 (Lippincott ed. 1884) (J. Madison).

33. *Id. See also* THE FEDERALIST No. 39, 301, 302 (Lippincott ed. 1884) (J. Madison) (arguing that it is essential to republican government "that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class"). Thomas Jefferson expressed the same idea. In 1816 he wrote that "a government is republican in proportion as every member composing it has his equal voice in the direction of its concerns . . . by representatives chosen by himself. . . ." Reynolds v. Sims 377 U.S. 533, 573 n.53 (1964) (quoting Jefferson, Letter to Samuel Kercheval, 10 WRITINGS OF THOMAS JEFFERSON (Ford ed. 1899)). Three years later Jefferson stated, "Equal representation is so fundamental a principle in a true republic that no prejudice can justify its violation because the prejudices themselves cannot be justified." *Id.* (quoting Jefferson, *Letter to William King*, JEFFERSON PAPERS, Library of Congress, Vol. 216, p. 38616).

34. *See, e.g.*, THE FEDERALIST No. 10 (J. Madison). As one commentator notes, however, minority representation will not always assure that republican government will adequately protect minorities. This failing is the reason constitutional provisions

tion to incumbent political interests.[35]

B. *Participation Rights Before the Supreme Court*

The Supreme Court recognizes that notions of republicanism and similar expressions of political theory do not amount to an invitation for judicial intervention on a grand scale into the political process. Rather, the Court acknowledges the limits of judicial power and deals with political participation claims only when they lend themselves to manageable standards.[36]

The Court established almost from the outset that claims under the guarantee clause,[37] which question the republican character of state government present nonjusticiable political questions.[38] In *Colegrove v. Green*[39] the Court declined to hear a challenge under the guarantee clause concerning malapportioned state legislative districts.[40] The Court reiterated this position in *Baker v. Carr*,[41] noting that the clause is "not a repository of judicially manageable standards" on which a court could rely to identify the lawfulness of state government.[42]

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insulate certain fundamental interests from the political process by placing them beyond the power of the majority to affect. Constitutionalism is rooted in the distrust of majorities. Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1164 (1977). For a discussion by Judge J. Skelly Wright of problems faced by minority groups in the political process see Wright, *Professor Bickel, The Scholarly Tradition, And The Supreme Court*, 84 HARV. L. REV. 769, 789 (1971).

35. Wilkinson, *The Supreme Court, The Equal Protection Clause And The Three Faces Of Constitutional Equality*, 61 VA. L. REV. 945, 962 (1975) (The author analogizes a proposed right to proportional representation to the recognized right of political dissent emanating from freedom of expression. *Id.*).

36. *See* Baker v. Carr 369 U.S. 186, 217 (1962). In *Baker* the Court recognized that even if intervention would enhance political equality, practical considerations may force the Court to stay its hand. The principal consideration is whether a constitutional idea can be formed into "judicially discoverable and manageable standards." *Id.* In other words, the standard announced must be one that the Supreme Court can communicate with precision to the lower courts and the political branches of government. See Wilkinson, *supra* note 35, at 968-69.

37. For the language of the guarantee clause see note 31 *supra*.

38. *See* Luther v. Borden, 48 U.S. (7 How.) 1 (1849) (held that Congress determines which of two "governments" claiming to represent the people of Rhode Island is the true government).

39. 328 U.S. 549 (1946).

40. *Id.* at 554.

41. 369 U.S. 186 (1962).

42. *Id.* at 223.

In *Baker*, however, the Court found apportionment claims justiciable under the equal protection clause of the fourteenth amendment.[43] Justice Brennan's majority opinion noted that placing political rights at issue does not make the issue a political question.[44] Refusing to reach the merits, Justice Brennan left open the question of whether a right to districting on the basis of population is a group right or an individual right.[45] *Reynolds v. Sims*[46] answered the question, however.[47] The Constitution protects an individual voter residing in a more populous district from dilution of his vote vis-a-vis the vote of an individual in a less populous district.[48] In so holding, Chief Justice Warren's opinion for the Court commented on the scope of political participation rights. The Chief Justice argued that representative government is essentially self-government and all citizens possess "an inalienable right to full and effective participation in the political process" of state legislative bodies.[49] Representative government thus requires that a majority of the citizens elect a majority of the state's legislators.[50] Minority control of the legislature is inconsistent

43. *Id.* at 237. The respective merits of the equal protection clause and the guarantee clause for handling apportionment issues is discussed in Bonfield, Baker v. Carr: *New Light On The Constitutional Guarantee of Republican Government*, 50 CALIF. L. REV. 245 (1962). *See also* Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study In Constitutional Desuetude*, 46 MINN. L. REV. 513 (1962).

44. 369 U.S. at 209-210.

45. Note, *Group Representation And Race-Conscious Apportionment: The Roles of States And The Federal Courts*, 91 HARV. L. REV. 1847, 1854 (1978).

46. 377 U.S. 533 (1964). For reactions to *Reynolds see generally* A. BICKEL, THE SUPREME COURT AND THE IDEA OF PROGRESS (1970); R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968); Casper, *Apportionment And The Right To Vote: Standards Of Judicial Scrutiny*, 1973 SUP. CT. REV. 1 (P. Kurland ed.); McKay, *Reapportionment: Success Story Of The Warren Court*, 67 MICH. L. REV. 223 (1968).

47. The Court stated, "Legislators represent people, not trees or acres. Legislators are elected by voters, not farms or cities or economic interests." 377 U.S. at 562. The Court thus adopted an individual emphasis which paved the way for an easily enforceable objective standard—one person, one vote. The cases involved in the Court's quest for near mathematical equality among districts are collected at notes 10-12, *supra*.

48. *See* 377 U.S. at 565. Equal protection, noted Chief Justice Warren, requires the "uniform treatment of persons standing in the same relation to the [challenged] governmental action . . . [and] all voters, as citizens of a State, stand in the same relation regardless of where they live." *Id.*

49. *Id.*

50. *Id.* Compare the passage by John Stuart Mill quoted at note 30 and accompanying text *supra*.

with this democratic ideal.[51] Because legislative actions affect all citizens, the Court argued, legislators must be "collectively responsive to the popular will."[52]

The rulings in *Baker* and *Reynolds* opened the Court to issues of district apportionment, but these decisions were preceded by a developing line of cases using the fourteenth and fifteenth Amendments to protect the right to vote.[53] Relying on the fifteenth amendment's prohibition of the "denial of abridgement" of the right to vote on racial grounds,[54] the Court found unconstitutional the refusal of municipal officials to count the ballots of black voters.[55] Similarly, the Court overturned other abridgements to voting rights such as the grandfather clause[56] and the white primary.[57] *Gomillion v. Lightfoot*[58] invalidated the redrawing of Tuskegee, Alabama's municipal boundaries so as to exclude almost all blacks but no white residents.[59] The Court concluded that the twenty-eight sided figure "despoiled" only black citizens and their previously enjoyed right to vote.[60]

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51. 377 U.S. at 565.

52. *Id.*

53. Voting was long considered a privilege, not a right. Neither the Constitution nor the Bill of Rights confers on citizens a right to vote. For a discussion of the development of a constitutional right to vote, primarily through the fourteenth and fifteenth amendments, see Goulder, *The Reconstructed Right To Vote: Neutral Principles And Minority Representation*, 9 CAP. U.L. REV. 31, 34-39 (1979) and authorities cited therein.

54. U.S. CONST. amend. XV, § 1. For histories on the development of the fifteenth amendment, *see generally* W. GILLETTE, THE RIGHT TO VOTE: POLITICS OF THE PASSAGE OF THE FIFTEENTH AMENDMENT (1965); J. MATHEWS, LEGISLATIVE AND JUDICIAL HISTORY OF THE FIFTEENTH AMENDMENT (1909); Lucus, *Dragon In The Thicket: A Perusal Of Gomillion v. Lightfoot*, 1961 SUP. CT. REV. 194 (P. Kurland ed.).

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

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

57. Terry v. Adams 345 U.S. 461 (1935) (using the fifteenth amendment to strike down a pre-primary nominating procedure operated by a "club" of white Democrats); Nixon v. Herndon, 273 U.S. 536 (1927) (using the fourteenth amendment to invalidate a state law excluding blacks from voting in party primaries).

58. 364 U.S. 339 (1960).

59. *Id.*

60. *Id.* at 347. For a discussion of the implications of *Gomillion* for group political participation rights *see* Chu, *Political Efficacy: The Problems of Money, Race, And Control In Schools*, 1977 WIS. L. REV. 989. *See also* Defner, *Racial Discrimination And The Right To Vote*, 26 VAND. L. REV. 523 (1973) (discussion of the history of racial discrimination in voting from Reconstruction to the Voting Rights Act).

Voting rights cases dominated the reapportionment era.[61] The Court found that unreasonable impediments to the exercise of the franchise violated a fundamental freedom.[62] The decision in *Reynolds* built upon this development. The Court noted that "the right of suffrage is a fundamental matter in a free and democratic society."[63] The Court's requirement of careful and meticulous scrutiny[64] stopped just short of the higher level of review required in fundamental rights cases, however.[65] The leading voting rights case in the era, *Harper v. Virginia Board of Elections*,[66] recognized the importance of the right to vote in preserving all other basic civil and political rights.[67]

The apportionment and voting rights cases demonstrate two central themes behind the Supreme Court's intervention into the political process. First, the franchise should be broadly based.[68] This includes not only the right of any citizen to participate in the selection of officials,[69] but also the right to participate in the selection of candidates[70] and the ability to campaign and seek office[71] on the same terms as other citizens. An impediment to free exercise of the

61. *See, e.g.*, Burns v. Fortson, 410 U.S. 686 (1973) (upholding 50 day residency requirement); Dunn v. Blumstein, 405 U.S. 330 (1972) (invalidating one year residency requirement as unduly restrictive); Kramer v. Union Free School District, 395 U.S. 621 (1969) (striking down a limitation on school board elections allowing only parents of students and owners of taxable real property to vote); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (finding unconstitutional state poll tax); Carrington v. Rash, 380 U.S. 89 (1965) (voiding voting limit based on military status).

62. The Court first held that voting involves a fundamental right in Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). *See also* San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33-34 (1973) (defining perimeter of fundamental rights protection as rights "explicitly or implicitly guaranteed by the Constitution").

63. 377 U.S. at 561-62.

64. *Id.* at 561-62.

65. Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 15 (P. Kurland ed).

66. 383 U.S. 663 (1966) (voiding Virginia's poll tax).

67. *Id.* at 667. The Court relied expressly on the language of Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). *See also* Dunn v. Blumstein, 405 U.S. 330, 336 (1972). In *Dunn*, the Court announced that "a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." *Id.*

68. *See* Wilkinson, *supra* note 35, at 958.

69. The Court refers to this as the right to "register and vote without hindrance." *See* City of Mobile v. Bolden, 446 U.S. 55, 65 (1980).

70. *See, e.g.*, Terry v. Adams, 345 U.S. 461 (1953).

71. *See, e.g.*, Williams v. Rhodes, 393 U.S. 23 (1968).

franchise is constitutional only if supported by a compelling state interest.[72] Second, given the right to unhampered voting, each vote should count equally.[73] The rule of one person-one vote provides a judicially manageable standard,[74] but only when translated into a rule requiring essential mathematical equality among districts.[75]

In adopting the equal weight value the Court made a decision on the nature of representative government.[76] The apportionment holdings preserve individual, rather than group, political participation rights.[77] Stated differently, equality of district population, not the quality of representation, controls the determination.[78]

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72. *See, e.g.*, Harper v. Virginia Bd. of Elections, 383 U.S. 663, 667 (1966).

73. *See* Wilkinson, *supra* note 35, at 959.

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

75. *See* cases collected at notes 10-12, *supra*.

76. *See* Walker, *One Man, One Vote: In Pursuit of an Elusive Ideal*, 3 HASTINGS CONST. L.Q. 453, 453 (1976). Walker argues that the Court's previous refusal to deal with apportionment issues under the political question doctrine resulted from its inability or refusal to adopt a justifying value which could serve as the basis for a manageable standard. *Id.*

77. *See* notes 45-48 and accompanying text *supra*.

78. *See*, Dixon, *supra* note 8, at 12. Effective representation is a political concept and cannot be divorced from the voting strength of groups of persons sharing common interests. *See also* Comment, *Effective Representation and Multimember Districts*, 68 MICH. L. REV. 1577, 1586 (1970).

The dissenters in *Reynolds* commented on the importance of interest groups in determining the weight of individual votes. Justice Harlan argued that "people are not ciphers and that legislators can represent their electors only by speaking for their interests." 377 U.S. at 623-24 (Harlan, J., dissenting). Justice Harlan feared the Court's individual vote language significantly encroached on the legislative determination of how interests should be balanced. Justice Stewart believed that as long as effective majority rule existed, courts should not be concerned with unequal populations. He thought that equal numbers involved only part of the question of fair districting. Lucas v. Colorado Gen. Assembly, 377 U.S. 713, 749 (Stewart, J., dissenting) (Justice Stewart's dissenting opinion replies to the majority opinion in *Reynolds* as well as *Lucas*)

> Representative government is a process of accommodating group interests through democratic institutional arrangements. Its function is to channel the numerous opinions, interests and abilities of the people of a State into the making of the State's public policy. Appropriate legislative apportionment, therefore, should ideally be designed to insure effective representation in the State's legislature, in cooperation with other organs of political power, of the various groups and interests making up the electorate. In practice, of course this idea is approximated in the particular apportionment system of any state by a realistic accommodation of the diverse and often conflicting political forces operating within the State.

Id. at 749 (Stewart, J., dissenting).

The common thread running through the holdings in voting right and apportionment cases is that the means of achieving effective representation should be open and available to all.[79] The claims, however, focus on the ends. Litigants, particularly in the apportionment setting, seek to increase the impact of a person who shares their interests at the pay-off level—legislative outcomes.[80] Recognizing this point in *Baker*, Justice Frankfurter argued in dissent that the issue was merely a guarantee clause claim masquerading under an equal protection label.[81]

The apportionment opinions run into problems when the Court indicates that the protection of the means leads directly to the realization of the ends.[82] Justice Black's opinion in *Wesberry v. Sanders*[83] first linked equal population districts with the equal representation concept.[84] He asserted "equal representation for equal numbers of people [is] the fundamental goal."[85] Chief Justice Warren adopted this language in *Reynolds*.[86] The decision in *Reynolds* turned in large part on the democratic ideals of equality and majority rule.[87] The Court reasoned that a majority of the legislators should represent the interest of the political majority.[88]

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79. For a similar reading of the voting rights and apportionment cases see Wilkinson, *supra* note 35, at 957.

80. *See* note 8 and accompanying text *supra*.

81. Baker v. Carr, 369 U.S. at 300 (Frankfurter, J., dissenting). Frankfurter stated, "What is actually asked of the Court . . . is to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy—in order to establish an appropriate form of government." *Id.*

82. *See* R. DIXON, *supra* note 9, at 267-71.

83. 376 U.S. 1 (1964).

84. *See* R. DIXON, *supra* note 9, at 270.

85. 376 U.S. at 18.

86. Reynolds v. Sims, 377 U.S. at 559-61. After a review of Wesberry v. Sanders, 376 U.S. 1 (1964) and Gray v. Sanders, 372 U.S. 368 (1963), the Court concluded that *Wesberry* established "the fundamental principle of representative government . . . [is] equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State." 377 U.S. at 560-61.

87. 377 U.S. at 566.

88. *Id.* at 565. The Court in *Reynolds* evidently translated the language from *Wesberry* into a protection of majoritarianism. The Court did not indicate whether near proportional representation for minority interests was also a hoped for goal. The Court mentioned in passing that protection of minority interests is an inadequate basis for minority legislature control. The Court reasoned minorities possess other means of protection in a constitutional system. *Id.* at 566.

See Bickel, *The Supreme Court and Reapportionment* in REAPPORTIONMENT IN THE

The Court's move from means to ends is untenable. The Court fails to recognize, in the words of one commentator, that one person, one vote "is a slogan not a political theory."[89] Numerical equality and proportional representation are not wholly consistent.[90] The former denotes a "verifiable objective concept," while the latter is "a highly subjective term connoting a hoped-for result."[91] The Court's equating of the two concepts is an archetypical example of moving from the objective to the subjective without noting the shift.[92]

The one person, one vote standard imposes a limit on state districting by mandating districts of equal population. Outside this limit, however, states retain essentially unbridled discretion in determining the relative electoral power of competing racial, ethnic, and economic groups.[93] Numerical equality stands as only one factor in the districting issue.[94] Professor Dixon identifies the following four factors which bear on interest group representation: first, where districts are located; second, what voting interests each district maximizes or minimizes; third, what external constraints affect districting discretion

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SEVENTIES 57 (N. Polsby ed. 1971) [hereinafter cited as Bickel]. Bickel criticized the Court for failing to take into account values other than majoritarianism. He noted Walter Lippman's distinction between majoritarianism and effective representation, arguing that political institutions rest not on majoritarianism but on accommodating various interests. *Id.* at 58 (paraphrasing W. LIPPMANN, THE GOOD SOCIETY (1943)). For government to best reflect the will of the people, power and influence should be more widely distributed than would be the case under a strict adherence to majoritarianism. Bickel at 59-60. Bickel noted that government in a pluralist society is essentially one of minority rule. There is no single majority but many minorities which band together for different purposes. *Id.* at 60 (discussing R. DAHL, A THEORY OF JUSTICE (1971)).

For excellent discussions of the pluralist nature of American politics *see generally* R. DAHL, A PREFACE TO DEMOCRATIC THEORY (145-46 (1956); A. DEGRAZIA, PUBLIC AND REPUBLIC: POLITICAL REPRESENTATION IN AMERICA (1951); Friedmann, The *Changing Content of Public Interest: Some Comments on Harold D. Lasswell*, in NOMOS V: THE PUBLIC INTEREST 84 (C. Friedrich ed. 1962).

89. Dixon, *supra* note 8, at 45.

90. *See id.*, at 12.

91. R. DIXON, *supra* note 9, at 269.

92. *Id.*

93. *See* Note, *Group Representation and Race-Conscious Apportionment: The Role of States and the Federal Courts*, 91 HARV. L. REV. 1847, 1854 (1978).

94. *See* Dixon, *supra* note 8, at 19. *See also* Dixon, *Reapportionment in the Supreme Court and Congress: Constitutional Struggle For Fair Representation*, 63 MICH. L. REV. 209 (1964). Dixon argued that because "apportionment involves the creation and control of political power, the group dynamics of American politics" are crucial to the issue of effective representation. *Id.* at 218.

and the impact of these constraints on effective voting; and fourth, given districting decisions throughout the political unit, how closely actual representation maps the relative numeric size of each interest group.[95]

III. Districting, Gerrymanders, and At-Large Districts

A. *The Districting Game*

Districting is a form of gerrymandering because it discriminates on the basis of residence.[96] Gerrymandering simply involves districting which by design or effect increases the political strength of one group and decreases that of another.[97] While gerrymandering is normally associated with oddly drawn districts, it need not involve distortions.[98]

Although a typical group-gerrymander claim involves the *Reynolds*-type situation where districts are drawn with grossly unequal populations, gerrymandering may take place in equal population districts.[99] The controversy shifts from how many persons reside in the district to how many persons of a specific identification live there.[100] A person is grouped in one district rather than another by the accident of his residence. The number of other district residents that share his interests determine the weight of his vote at the pay-off level—election results.[101] In other words, districts of equal population discriminate because people are not fungible.[102]

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95. *See* Dixon, *supra* note 8, at 19-20.

96. *See id.* Dixon notes that all districting discounts the votes of minority voters within a district.

97. *See id.* at 29-30. See also R. Dixon, *supra* note 9, at 459-63. For general presentations of gerrymandering problems and suggested judicial solutions *see generally* Clinton, *Further Explorations in the Political Thicket: The Gerrymander And The Constitution*, 59 Iowa L. Rev. 1 (1973); Edwards, *Gerrymandering And "One Man, One Vote,"* 46 N.Y.U. L. Rev. 879 (1971); Note, *Political Gerrymandering: A Statutory Compactness Standard As An Antidote For Judicial Impotence*, 41 U. Chi. L. Rev. 398 (1974).

98. *See* Dixon, *supra* note 8, at 29.

99. *See* Walker, *One Man, One Vote: In Pursuit Of An Elusive Ideal*, 3 Hastings Const. L.Q. 453, 467 (1976).

100. *See id.*

101. *See id.*

102. *See* R. Dixon, *supra* note 9, at 272. Dixon states,

> The distinctive thing about people, in contrast to trees or acres, is that people are not fungible . . . . Although legislators are elected "by voters," as Chief Justice

B. *At-Large Election Systems*

At-large districts[103] involve a subtle form of gerrymandering.[104] An at-large election system gives an advantage to any majority over any minority.[105] In theory, as a winner-take-all system the at-large method allows an organized majority to elect all candidates of its choice.[106] Minorities are powerless to elect any candidates.[107] The system is particularly distressing to large, coherent minorities,[108] such

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Warren said, they are elected by voters who have interests which lead them to organize for group political actions.

Id.

103. Although this section's focus is on at-large election systems, the impact of such systems is generally applicable to multi-member districts. At-large district is defined at note 15, *supra*. Multi-member district is defined at note 14, *supra*.

At-large districts do not all operate in the same way. Typically a majority vote is required for victory. For example, a black candidate receiving a plurality because of a split in the white vote may be defeated in the run-off election. An additional feature is the "anti-single shot" requirement which requires a voter to mark his ballot for as many candidates as there are positions. Thus voters may not vote only for a few strongly preferred candidates but must also give votes to candidates less favored. Some at-large systems divide the district into subdistricts and require candidates for each seat to be a resident of a designated subdistrict. Although this feature prevents voters from concentrating their votes behind several candidates in their subdistrict, it may result in a more racially or ethnically diverse legislative body. *See* Bonapfel, *supra* note 16, at 358-59.

104. *See* Dixon, *supra* note 8, at 54. Dixon describes the discrimination against minorities resulting from at-large districting as "institutional gerrymandering." The description is apt because the inequality of representation is built into the institutional set-up of government.

105. The minority may be racial, ethnic, or political. *See* Jewell, *supra* note 10, at 798-805. Jewell notes that research on the effects of multi-member districts in several states and at-large districts in several cities indicates that legislative bodies often will be composed entirely on one political party. *Id.* at 801-802. In addition at-large elections tend to result in a disproportionately high number of representatives coming from one ethnic group or socioeconomic group. *Id.* at 803.

106. *Id.* at 801.

107. *Id.* Voting power serves the important function of assuring a group of legislative responsiveness. In other words, group members have greater control over legislative behavior. Where an interest group lacks voting strength, it is an invitation for elected representatives to become unresponsive to the group's needs. Legislators concentrate their efforts on behalf of voters with greater electoral power.

108. Dilution depends on the assumption that all or many members of a particular racial, ethnic, or socioeconomic group will vote together on a variety of issues. Thus before group voting strength can be considered debased, group behavior must be subject to accurate prediction. *See* Walker, *One Man, One Vote: In Pursuit Of An Elusive Ideal*, 3 HASTINGS CONST. L.Q. 453, 483-84 (1976). *See also* United Jewish Organizations of Williamsburg v. Wilson, 510 F.2d 512 (2d Cir. 1975); Zimmer v. McKeithen, 485 F.2d 1297, 1309 (5th Cir. 1973) (Coleman, J., dissenting in part).

as blacks,[109] when they reside in compact geographic areas. Such minorities could expect to elect one or more candidates of their choosing had districting been along single-member lines.[110]

At-large elections do not necessarily exclude racial minorities from representation. Majority voters may ignore race in voting, or parties may prefer racially balanced tickets.[111] Even in such circumstances, an elected minority representative may be less effective in representing minority interests because of the need for majority support at the polls.[112] Only when voting is racially polarized and the political parties are unresponsive to minority interests is minority defeat absolute.[113]

Dilution also depends on whether the area in which members of a particular group reside is sufficiently compact to form a single-member, group controlled district.

109. In at-large jurisdictions blacks are generally not represented in legislative bodies in proportion to their number in district populations. Blacks, however, are overrepresented in some jurisdictions. Evidence indicates, though, that blacks tend to be underrepresented to a greater degree in at-large districts than in single-member districts. Disagreement is sharp within social science literature as to the extent at-large elections disadvantage blacks. For a sample of this literature *see* Berry & Dye, *The Discriminatory Effects of At-Large Elections*, 7 FLA. ST. U. L. REV. 85, 113-32 (1979); Jones, *The Impact of Local Election Systems On Black Political Representation*, 11 URB. AFF. Q. 345 (1976); Karnig, *Black Representation On City Councils: The Impact Of District Elections And Socioeconomic Factors*, 12 URB. AFF. Q. 223 (1976); Sloan, *Good Government And The Politics Of Race*, 17 SOC. PROB. 161 (1969).

Some commentators assert that the specter of racial gerrymandering may be overstated. Wilkinson argues that racial groups losing out in one district may constitute a majority in another. In addition black minority voting groups may result in an important swing constituency. *See*, Wilkinson, *supra* note 35, at 972 n.142. *See also* P. DAVID & R. EISENBERG, STATE LEGISLATIVE REDISTRICTING: MAJOR ISSUES IN THE WAKE OF JUDICIAL DECISION 22 (1962) (arguing that at-large or multi-member districting is not inherently evil).

110. Single-member districts may dilute the voting power of minority groups as well. Stated differently, single- as well as multi-member districts may be subject to gerrymandering. *See* Kirksey v. Board of Supervisors of Hinds County, 554 F.2d 139 (5th Cir. 1977) (en banc). *Kirksey* held that dividing a concentrated black community into five districts violated the equal protection clause. This division resulted in a lack of black registered voter majorities in any district, even though the districts were drawn without regard to race. The court reasoned that the single-member plan denied blacks access to the political process.

111. *See* Jewell, *supra* note 10, at 802.

112. *See* E. BANFIELD & J. WILSON, CITY POLITICS 307 (1963). The authors argue that blacks gaining office in an at-large jurisdiction "generally find it necessary to be politicians first and Negroes second." This necessitates downplaying the issues of greatest concern to blacks as blacks. *Id.*

113. *See* Jewell, *supra* note 10, at 802. Jewell states that blacks tend not to fare as

Racial or political motivations[114] may lead to the adoption of at-large systems, but the at-large election originally developed to serve the objectives of municipal reform. Reformers in the early 1900's urged cities to adopt council-major or council-manager governments to remedy machine politics and other abuses associated with ward government.[115] Reformers believed that a small city council elected at-large would remove city politics from parochial pressures and allow the council to deal with problems from a city-wide perspective.[116] Thus the council system by design renders municipal government less responsive to the interests of subsections of the community.[117] Despite the intentions of municipal reformers, the at-large election system renders the votes of substantial urban minorities less effective. Dilution itself, however, does not necessarily violate the equal protection clause.

IV. MULTI-MEMBER AND AT-LARGE DISTRICTS IN THE COURTS

A. *Supreme Court Precedents*

The Supreme Court addressed the constitutionality of multi-member districts in its initial legislative apportionment decisions. The Court commented in *Reynolds* that multi-member districts may give flexibility to districting as states struggle to meet one person, one

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well as other minorities "presumably because of their geographic concentration and because race is of greater concern to most voters than other ethnic distinctions." *Id.*

114. Dixon argues that no line can be drawn between racial or political gerrymanders. Rather, he asserts a racial gerrymander is a form of political gerrymandering because the primary concern is the political impact on the racial minority. *See* R. DIXON, *supra* note 9, at 464. *See also* Dixon, *supra* note 8, at 32.

115. *See* C. SNIDER, AMERICAN STATE AND LOCAL GOVERNMENT (2d ed. 1965) (describing the origin, advantages, and disadvantages of city council and ward governments and indicating a general preference for at-large elected city councils). *See also* M. SEASONGOOD, LOCAL GOVERNMENT (1933); L. STEFFENS, THE SHAME OF THE CITIES (1904).

116. *See* Jewell, *supra* note 10, at 804. Jewell describes the advantages and disadvantages of both the council and ward forms of government. *See also* Note, *Challenges To At-Large Election Plans: Modern Local Government On Trial*, 47 U. CIN. L. REV. 64, 76-77 (1978).

117. *See* Jewell, *supra* note 10, at 804-805. Jewell's research into communities recently shifting from single-member to at-large systems indicates that legislators believe that the shift produced significant changes in the way they conduct their representative functions. Many legislators respond that they became more responsive to the demands of the district's strongest political groups. *Id.*

vote.[118] But in a companion case, *Lucas v. Forty-Fourth General Assembly of Colorado*, the Court pointed to undesirable aspects of multi-member districting.[119]

A year later, *Fortson v. Dorsey*[120] presented the Court with its first opportunity to address the vote diluting effect of a multi-member system. Plaintiffs alleged that the state's use of both single and multi-member districts to elect the state senate unconstitutionally created two classes of voters. Voters in the single-member class select their own senator while voters in one sub-district of the multi-member class must band together with voters in other subdistricts to select a desired group of senators. Even then, the preferences of voters in other subdistricts may nullify one subdistrict's choice of a representative.[121] The Court rejected the challenge noting that so long as the state met the *Reynolds* test of substantial equality of population, it satisfied constitutional directives.[122]

Fortson qualified the Court's endorsement of multi-member districting. The Court stated multi-member districts may be found unconstitutional if "designedly or otherwise . . . [they] minimize or cancel out the voting strength of racial or political elements of the voting population."[123] Despite quoting this standard in *Gaffney v. Cummings*,[124] the Court validated districts drawn to coincide with

118. Reynolds v. Sims, 377 U.S. at 577. The Court argued that although both houses of a bicameral state legislature must be apportioned according to population, one method of distinguishing the two bodies is to have one house, at least in part, elected through multi-member districts.

119. Lucus v. Forty-Fourth Gen. Assembly of Colorado, 377 U.S. 713 (1964). The Court noted that multi-member districts characteristically produce long, cumbersome ballots and deny individual groups within the district a single representative responsible directly to them. *Id.* at 731 n.21.

120. 379 U.S. 433 (1965).

121. *Id.* at 437-38.

122. *Id.*

123. *Id.* at 439. The plaintiffs in *Fortson* had not alleged that they were members of a cognizable "racial or political element" but only that they were voters residing within a multi-member district. *Id.*

The language from *Fortson* was quoted with approval in Burns v. Richardson, 384 U.S. 73, 88 (1966). In *Burns* the Court sustained a plan to apportion Hawaii's state senate among multi-member districts. Commenting on the *Fortson* standard the Court stated that an invidious effect is more easily found where (1) districts are large in relation to the total number of legislators, (2) districts are not appropriately subdistricted to assure a broad distribution of legislators, and (3) multi-member districts are extensively used in both houses of a bicameral legislature. *Id.*

124. 412 U.S. 735 (1973).

the relative political strength of the two major political parties.[125] This validation occurred despite a bias favoring one party. The Court reasoned that equal protection cannot reach such political gerrymanders because "politics and political considerations are inseparable from districting."[126]

In *Whitcomb v. Chavis*[127] and *White v. Regester*,[128] the Court squarely faced the dilution effect of multi-member districts on racial minorities. Plaintiffs in *Whitcomb*, black ghetto residents, alleged that the socioeconomic characteristics of the ghetto[129] and the interests of its residents[130] differed markedly from the characteristics and interests of voters comprising the bulk of the multi-member district. The district court found that because ghetto residents shared strong interests in certain public policies, they were entitled to the ability to elect representatives in proportion to their numbers.[131]

The Supreme Court disagreed. The Court held that the *Fortson* standard was not met by the fact that the legislature did not represent ghetto residents proportionately.[132] The Court found the claim defective absent a showing that blacks were not allowed to register and vote, participate in political party affairs, and participate in the selection of candidates.[133] The Court discovered no support in the record for the assertion that the legislature ignored the black community.[134]

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125. *Id.* The claim in *Gaffney* did not involve multi-member districting but districting under a "political fairness" policy according to which districts were drawn so as to maintain the relative distribution of power between the Democratic and Republican parties.

126. 412 U.S. at 753.

127. 403 U.S. 124 (1971).

128. 412 U.S. 755 (1973).

129. The district court held that the ghetto was essentially a separate community. It differed in terms of housing conditions, income and education levels, and unemployment rates from the other metropolitan areas in the remainder of the multi-member district. Chavis v. Whitcomb, 305 F. Supp. 1364, 1373-80 (S.D. Ind. 1969), *rev'd* 403 U.S. 124 (1971).

130. The district court found ghetto residents possessed "compelling interests" in such legislative policies as urban housing, quality of schools and health care, employment training and opportunities, and welfare. *Id.* at 1380.

131. *Id.* at 1381-85. Although black ghetto residents comprised 17.8% of the district's population, over a period of eight years only 5.97% of the representatives and 4.75% of the senators were residents of the ghetto area. *Id.*

132. 403 U.S. at 143-44.

133. *Id.* at 149-50.

134. *Id.* at 155. The Court noted, in addition, that black residents were a crucial

The Court concluded that the ghetto's failure to achieve proportionate representation resulted from election defeats and not from an institutional bias.[135] The judiciary should intervene, the Court reasoned, only when an identifiable segment of the population is "denied access to the political system."[136]

Two years later in *White v. Regester*,[137] the Court found the requisite denial of access and sustained a challenge brought by black and Mexican-American voters to a multi-member plan. The Supreme Court largely adopted the factual findings of the district court.[138] The district court had determined that both minority groups had suffered from a history of official discrimination inhibiting their right to register and vote.[139] In addition, structural features of the multi-member system (a majority vote requirement and a rule requiring candidates to run for specific seats[140]) adversely affected the ability of minority votes to elect candidates of their own race.[141]

The Supreme Court first addressed the claim of black voters, finding that voters had elected only two blacks since Reconstruction.[142] The Court also found that the apparent lack of political power in the black community encouraged the legislature to be unsympathetic to the community's needs.[143] This underrepresentation, combined with the control of candidate slating by a predominantly white organization[144] and continuous racial campaign tactics,[145] led the Court to

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constituency of the Democratic Party and shared in the political party misfortunes at the polls. *Id.* at 150-51.

135. *Id.* at 153. the Court reasoned that "cancelling out" of voting strength is often "a mere euphemism for political defeat at the polls." More recently in United Jewish Organizations v. Carey, 430 U.S. 144, 167 (1977), the Court noted that "there is no authority for a proposition that the candidates who are found racially unacceptable to the majority, and the minority voters supporting those candidates, have their [constitutional] rights infringed."

136. 430 U.S. at 154-55.

137. 412 U.S. 755 (1973).

138. *Id.* at 769-70. The Court noted that it would look favorably upon factual findings reflecting "a blend of history and an intense local appraisal of the design and impact" of the districting system.

139. Graves v. Barnes, 343 F. Supp. 704, 724-27, 731 (W.D. Tex. 1972), *rev'd in part, aff'd in part sub nom.* White v. Regester, 412 U.S. 755 (1973).

140. These features are discussed in note 103 *supra*.

141. 343 F. Supp. at 725.

142. 412 U.S. at 766.

143. *Id.* at 767.

144. *Id.*

conclude blacks had been unable to enter the political process in a meaningful manner.[146]

The Court also found that Mexican-American voters[147] had recently suffered invidious discrimination in areas of health, education, housing, and employment.[148] Cultural and language barriers,[149] when viewed in conjunction with the recent removal of the poll tax and other restrictive voting practices,[150] contributed to low registration and electoral success among group members. The Court held that both black and Mexican-American plaintiffs had shown more than a failure to control "legislative seats in proportion to [their] voting potential[s]."[151] Rather, they demonstrated that their "members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice."[152]

B. *Dilution in the Fifth Circuit*

The Fifth Circuit has played a leading role in the development of vote dilution law.[153] *Zimmer v. McKeithen*,[154] decided immediately after *Regester*, allowed the Circuit to apply the Supreme Court's di-

145. *Id.*

146. *Id.*

147. The Court found that Mexican-Americans constitute an identifiable class within the district. The court noted that Mexican-Americans constituted 29% of the district's population and resided in a compact area in which they represented 78% of the population. *Id.* at 768.

148. *Id.*

149. *Id.* at 768-69. The Court observed that only five Mexican-Americans had been elected to the legislature since 1880.

150. *Id.*

151. *Id.* at 765-66.

152. *Id.*

153. For in depth discussions of the Fifth Circuit's role *see* Bonapfel, *supra* note 16, at 371-87; Note, *Discriminatory Effect of Elections At-Large: "The Totality of Circumstances" Doctrine*, 41 ALB. L. REV. 363 (1977); Note, *At-Large Voting Dilution Claims: The Fifth Circuit Requires Racially Motivated Discrimination*, 9 CUM. L. REV. 433 (1978).

154. 485 F.2d 1297 (5th Cir. 1973) (en banc), *aff'd per curiam on other grounds sub nom.* East Carroll Parish School Bd. v. Marshall, 424 U.S. 636 (1976). In *Zimmer* the court held unconstitutional a municipal at-large plan. Although black residents were a numerical majority of the parish they comprised only 46% of the district's registered voters. Crucial to the decision was the fact that black voter registration had only been allowed after 1962. *See, id.* at 1301. *See also*, Bonapfel, *supra* note 16, at 372-73.

rective. The test formulated in *Zimmer* consolidated the factors deemed relevant in *Regester*.[155] The court considered the following four factors primary: first, whether minorities lacked access to the nominating process; second, whether legislators were unresponsive to minority needs and aspirations; third, whether a tenuous state policy underlies the preference for multi-member districting; and fourth, the existence of past discrimination which has a continuing effect on minority participation in the election system.[156] Certain inhibiting features built into the multi-member scheme may enhance a showing under the criteria.[157] In subsequent cases the court held that not all of the criteria need be shown.[158] The trial court, however, must consider each factor and base its ruling on the totality of the circumstances.[159]

The Fifth Circuit in a recent four case consolidation[160] made a substantial attempt to redefine the constitutional standard applied in multi-member and at-large district challenges. The leading case of the foursome, *Nevett v. Sides*,[161] established that a showing of racially

155. The Supreme Court affirmed the Fifth Circuit's invalidation of the at-large plan but the affirmation was "without approval of the constitutional views expressed by the Court of Appeals." 424 U.S. at 636. In a recent decision, City of Mobile v. Bolden, 446 U.S. 54 (1980), a majority of the court expressly rejected the *Zimmer* test. *See* note 184 and accompanying text *infra*.

156. 485 F.2d at 1305.

157. *Id.* The "enhancing factors" include a majority vote requirement, anti-single shot voting provisions, and the lack of provision for at-large candidates running from specific geographic subdistricts. *See* note 103 *supra*.

158. *See* 485 F.2d at 1305. *See*, e.g., NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978); Black United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978) *rev'd* 446 U.S. 54 (1980); Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978); David v. Garrison, 553 F.2d 923 (5th Cir. 1977); Perry v. Opelousas, 515 F.2d 639 (5th Cir. 1975); Wallace v. House, 515 F.2d 619 (5th Cir. 1975), *vacated and remanded on other grounds*, 425 U.S. 947 (1976); Brandas v. Rapids Parish Policy Jury, 508 F.2d 1109 (5th Cir. 1975); Turner v. McKeithen, 490 F.2d 191 (5th Cir. 1973).

159. Nevett v. Sides, 571 F.2d at 226.

160. NAACP v. Thomas County, 571 F.2d 257 (5th Cir. 1978); Blacks United for Lasting Leadership, Inc. v. City of Shreveport, 571 F.2d 248 (5th Cir. 1978); Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978), *rev'd*, 446 U.S. 54 (1980); Nevett v. Sides, 571 F.2d 209 (5th Cir. 1978).

161. 571 F.2d 209. In *Nevett* black residents of Fairfield, Alabama, brought suit challenging the municipal at-large election system. Under this system, twelve councilmen are selected, two from each of six districts. The court upheld the system, finding the district court's conclusion that only one of the *Zimmer* criteria had been shown by the plaintiffs not clearly erroneous.

motivated discrimination is necessary to an equal protection or fifteenth amendment claim. The court reasoned that a showing of such intent was compelled by the Supreme Court's opinion[162] in *Washington v. Davis*.[163] The court viewed purposeful discrimination as a "universal" prerequisite to any racial discrimination claim. It found no basis to distinguish claims of racial discrimination in vote dilution setting.[164]

The court in *Nevett* turned next to requirements for satisfying intent. Plaintiffs need not show racial motivation in the adoption of the at-large system.[165] Rather a plan, racially neutral at its enactment, may later supplant other discriminatory devices or may be maintained for invidious purposes.[166] Circumstantial evidence also may serve as the basis of intent.[167] The court ruled that the *Zimmer* criteria provide a factual basis from which the necessary intent may be inferred.[168]

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162. *Id.* at 218.

163. 426 U.S. 229 (1976). The Court in *Washington* held that where official action is racially neutral on its face, courts must follow "the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must be ultimately traced to a racially discriminatory purpose." *Id.* at 240. *See also* Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977). For discussions of the development of the intent requirement *see* Brest, Palmer v. Thompson: *An Approach to the Problem of Unconstitutional Legislative Motive*, 1971 SUP. CT. REV. 95. Note, *Racial Vote Dilution in Multimember Districts: The Constitutional Standard After* Washington v. Davis. 76 MICH. L. REV. 694, 704-13 (1978).

164. Nevett v. Sides, 571 F.2d at 218. The Fifth Circuit noted that the Supreme Court in *Washington* relied on Wright v. Rockefeller, 376 U.S. 52 (1964). This case refused equal protection and fifteenth amendment relief to the plaintiff for an alleged racial gerrymander in New York's congressional apportionment. 571 F.2d at 218. *See also* Washington v. Davis, 426 U.S. 229, 240 (1976).

165. 571 F.2d at 221. The court in Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978) (en banc), *rev'd*, 446 U.S. 54 (1980), rejected the city's argument that a finding of discriminatory intent could not be found where blacks were effectively disenfranchised at adoption of the election system. Rather maintenance of a discriminatory system with the intent to disadvantage blacks, once blacks were allowed to vote, is enough. *See* Nevett v. Sides, 571 F.2d at 221.

166. 571 F.2d at 221.

167. *Id.* at 222.

168. *Id.* at 222-23. In Cross v. Baxter, 604 F.2d 875, 880-81 n.9 (5th Cir. 1979), the court stated that after *Nevett*, the *Zimmer* criteria are required to do double-duty. *Id.* "[T]hey must show that the effect of the multi-member system is to dilute minority voting power and they must show discriminatory intent in the institution or continuation of this electoral system." *Id.*

The court, after elaborating on the substance of the *Zimmer* factors,[169] addressed the method of review. The trial court must assess the evidence presented under each criterion and then view the findings in the aggregate.[170] The process is an intuitive assessment of the likelihood that the decision to adopt or maintain the challenged system was designed to further an unconstitutional objective.[171]

V. *CITY OF MOBILE* AND BEYOND

A. *The Supreme Court Rejects the Fifth Circuit's Approach*

In *City of Mobile v. Bolden*,[172] a badly divided Court[173] addressed a racial vote dilution claim under an at-large system for the first time. The district court[174] and the Fifth Circuit[175] had sustained the challenge which black residents had brought under the equal protection clause and fifteenth amendment.

The district court found that although no formal impediments prevented blacks from voting or seeking office, the local political process was not open to blacks on equal terms and white residents.[176] The court based its conclusion on racially polarized voting which contrib-

169. Nevett v. Sides, 571 F.2d at 222-24. The court concluded that evidence of racial bloc voting would henceforth be a key indicator of discriminatory intent. *See* United Jewish Organizations v. Carey, 430 U.S. 144, 166 & n.24 (1977) (the Supreme Court noted the pervasiveness of bloc voting and concluded that "if voting does not follow racial lines, the [white voter] has little reason to complain"). *See also* Beer v. United States 425 U.S. 130, 144 (1976) (White, J., dissenting). For criticism of reliance on bloc voting *see* Note, *Group Representation and Race-Conscious Apportionment: The Roles of States and the Federal Courts*, 91 HARV. L. REV. 1847, 1852-53 (1978).

170. Nevett v. Sides, 571 F.2d at 224. *See* Blacks United for Lasting Leadership, Inc. v. Shreveport, 571 F.2d 248 (5th cir. 1978) (en banc). In *Blacks United* the court overturned and remanded the district court's decision holding unconstitutional an at-large system. A majority of the Fifth Circuit found the findings of fact inadequate to support intent. Judge Wisdom, however, accurately pointed out in dissent that the findings were at least as specific as those accepted in *Nevett* and *Bolden*. *Id.* at 257 (Wisdom, J., dissenting).

171. Nevett v. Sides, 571 F.2d at 224 n.20. *See also* Brest, *supra* note 163, at 121-22.

172. 446 U.S. 54 (1980).

173. *See* note 23 *supra*.

174. Bolden v. City of Mobile, 423 F. Supp. 384 (S.D. Ala. 1976).

175. Bolden v. City of Mobile, 571 F.2d 238 (5th Cir. 1978) (en banc) (consolidated with Nevett v. Sides).

176. 423 F. Supp. at 387; 571 F.2d at 243.

uted to consistent defeats for blacks at the polls and the reluctance of blacks to run for office.[177] The district court also found that local officials were unresponsive to the needs of the city's racial minorities and discriminated in the provision of public services and employment.[178] The court concluded that Mobile's seventy year old at-large system invidiously disadvantaged black voters. The court therefore ordered the city to dismantle and replace the system with a ward government.[179] The Fifth Circuit affirmed. It found that although the system was not adopted with the purpose of inhibiting minority participation, it was "archetypical of the intentionally maintained plan . . . contemplated in *Nevett*."[180]

The Supreme Court reversed. Justice Stewart, speaking for a plurality of four,[181] agreed with the Fifth Circuit's conclusion that discriminatory intent formed the basis of a fifteenth amendment[182] or equal protection[183] violation. The plurality, unlike the Fifth Circuit in *Nevett*, determined that satisfaction of the *Zimmer* criteria provides an insufficient demonstration of purpose.[184]

The plurality gave little indication of what evidence would count toward a showing of discriminatory intent.[185] Justice Stewart con-

177. 423 F. Supp. at 389; 571 F.2d at 243.

178. 423 F. Supp. at 390-93; 571 F.2d at 244-45. The evidence included Mobile's failure to employ more than a token number of blacks for higher levels of public service. The district court found drainage systems, roads, and sidewalks in black neighborhood were allowed to continue in disrepair. In addition, the court cited unresponsiveness by the city's police department to racial violence.

179. 571 F.2d at 246-47.

180. *Id.* at 246.

181. Justice Stewart's opinion was joined by Chief Justice Burger and Justices Powell and Rehnquist. 446 U.S. at 58.

182. 446 U.S. at 62-65 (plurality opinion by Stewart, J.) The plurality after reviewing prior case law concluded the fifteenth amendment "prohibits only purposefully discriminatory denial or abridgment by government of the freedom to vote 'on account of race. . . .'" *Id.* at 65. *See* note 54 and accompanying text *supra*.

183. 446 U.S. at 65-70. The plurality did note, however, that dicta from the Court's prior opinions had indicated that disproportionate effect, without intent, was enough to establish an equal protection violation. *Id.* at 66. *See* note 123 and accompanying text *supra*.

184. 446 U.S. at 73. A majority of the Court agreed that *Zimmer* should be rejected. *See id.* at 90 (Stevens, J., concurring).

185. *Id.* at 90-91 (Stevens, J., concurring) (arguing that the plurality requires a showing of subjective intent). With the rejection of the *Zimmer* criteria and the failure of a majority of the justices to agree on an intent test, the Supreme Court provided little guidance to the lower courts. *See* Jones v. City of Lubbock, 640 F.2d 777,

centrated instead on the inadequacy of the district court's findings. He noted that the failure of blacks to achieve office is of little relevance so long as blacks are able to register and vote without hindrance, and there is no official obstacle to black candidacy.[186] In addition, evidence of unresponsiveness and discrimination by public officials lacks a close relation to the constitutionality of the system through which the officials reached office.[187]

The plurality next rejected the notion that intent could be drawn, in part, from a state's history of official race discrimination.[188] Justice Stewart concluded that the structural features of an at-large system, such as a majority vote requirement,[189] inherently disadvantages all political minorities. The structural features, however, do not indicate an intent to discriminate against black voters.[190]

By stripping the at-large dilution claim of its circumstantial support, the plurality apparently believed that a successful challenge

779 (5th Cir. 1981) (Goldberg, J., specially concurring) (arguing that the task of developing a coherent doctrine has fallen to the appellate and trial courts).

The Fifth Circuit has experienced much difficulty in attempting to give *Bolden* content. In McMillan v. Escambia County, 638 F.2d 1238 (5th Cir. 1981), Judge Kravitch's opinion interpreted *Bolden* as requiring a showing that the election system was purposefully designed or maintained to minimize a district class' voting power and that the election system had that effect. *Id.* at 1248. The judge asserted that *Bolden* specifically rejected consideration of whether whites campaigned for black support and whether elected officials were unresponsive to minority needs and interests.

But in Lodge v. Buxton, 639 F.2d 1358 (5th Cir. 1981), *aff'd*, 50 U.S.L.W. 5041 (July 1, 1982) (No. 80-2100), Judge Fay, after an exhaustive review of vote dilution law, held that *Bolden* requires a governmental unresponsiveness showing to state a prima facie case. *Id.* at 1373. In addition to unresponsiveness, the plaintiffs must present sufficient evidence to support the implication of discriminatory intent. The trial court must make a specific determination of purpose given the totality of the circumstances. In making this determination the court may consider many factors, including the *Zimmer* criteria, so long as satisfaction of *Zimmer* does not lead automatically to a finding of discriminatory intent. *Id.* at 1375. The implications of *Lodge* are spelled out further in its companion cases, Cross v. Baxter, 639 F.2d 1383 (5th Cir. 1981); and Thomasville Branch of NAACP v. Thomas County, 639 F.2d 1384 (5th Cir. 1981). *But see* Lodge v. Buxton, 639 F.2d at 1381-82. (Henderson, J., dissenting) (arguing that *Bolden* demands emphasis on "official state denial of equal participation" in candidate slating and the election process, and eschews heavy reliance on socio-economic data).

186. 446 U.S. at 73.

187. *Id.* at 73-74.

188. *Id.* at 74.

189. *See* note 103 *supra*.

190. 446 U.S. at 74.

must be premised on a subjective showing that the legislature intended to enact a discriminatory election system.[191] Justice Stevens

191. *Id.* at 90 (Stevens, J., concurring).

In a recently decided case, the Supreme Court appeared to abandon the approach taken by the plurality in *Bolden*. In Rogers v. Lodge, 50 U.S.L.W. 5041 (July 1, 1982) (No. 80-2100), the Court affirmed a district court's finding that the at-large system for electing County Commissioners in Burke County, Georgia, while "neutral in origin," was "being maintained for invidious purposes" in violation of the fourteenth amendment. *Id.* at 5043.

Justice White, speaking for six members of the Court, appeared to relax the quantum of evidence necessary to satisfy the discriminatory purpose requirement under Washington v. Davis, 426 U.S. 229 (1976). Contrary to the plurality's approach in *Bolden*, the *Rogers* Court was willing to infer an invidious purpose based on a subjective examination of local conditions and voting practices. The Court did not require proof that particular officials acted with an impermissible intent. Rather the Court ruled that "determining the existence of a discriminatory purpose 'demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available.'" 50 U.S.L.W. at 5042, *quoting* Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

The Court detailed the District Court's findings that justified the holding. 50 U.S.L.W. at 5044-45. The Court first noted the "overwhelming evidence of bloc voting along racial lines." Observing that bloc voting enabled elected officials to disregard black interests with political impunity and resulted in the defeat of black candidates at the polls (the majority of county's registered voters were white), the Court surmised that "[b]ecause it is sensible to expect that at least some blacks would have been elected in Burke County, the fact that none have ever been elected is important evidence of purposeful exclusion." *Id.* at 5044.

The majority also found that historical discrimination hampered the ability of blacks to participate effectively in county political processes. *Id.* In addition, the Court mentioned the District Court's finding that elected county officials "have been unresponsive and insensitive to the needs of the black community, which increases the likelihood that the political process was not equally open to blacks." *Id.* Finally, the Court noted that the size of the county and the requirements for being elected operated "to minimize the voting strength of racial minorities." *Id.* at 5045.

Justice Powell, joined by Justice Rehnquist, dissented. *Id.* He accused the majority of supporting its holding with "largely sociological evidence," a type of proof deemed insufficient in *Bolden*. *Id.* While Justice Powell agreed that the fourteenth amendment required a subjective inquiry into the intent of local officials, *id.* at 5046, he believed that the majority's ad hoc approach permitted federal courts to intrude "into an area of intensely local and political concern" with few constitutional guidelines. *Id.* at 5045.

Justice Stevens dissented on other grounds. *Id.* at 5046-52. Elaborating on the approach he outlined in *Bolden* (*see* notes 192-200 *infra*), Justice Stevens argued that the Court should base its determination of purposeful discrimination on an objective, rather than subjective, inquiry into the local circumstances surrounding the challenged electoral system. Under this approach, plaintiffs must demonstrate that features of the challenged system "have such an adverse impact on the minority's opportunity to participate in the political process that this type of government deprives the minority of equal protection of the law." *Id.* at 5048. Local officials must then justify the features. *Id.* Since the parties had not addressed these questions,

concurred in the judgment but disagreed with this approach. Justice Stevens drew a distinction between "state action that inhibits an individual's right to vote and state action that affects the political strength of various groups" engaged in competition for political power.[192] In the first category he grouped fundamental voting rights and apportionment claims.[193] In the second category, Justice Stevens placed actions involving political gerrymanders—suits calling "into question a political structure that treats all individuals as equals but adversely affects the political strength of a[n] . . . identifiable group."[194] At-large dilution claims fall within the latter class.[195]

Justice Stevens noted that there is no functional difference between racial gerrymanders and other political gerrymanders.[196] Both forms should face the same constitutional standard.[197] He presented a three part test based on the characteristics of gerrymanders condemned in *Gomillion v. Lightfoot*.[198] Politically discriminatory districting is unconstitutional if first, it is clearly not the result of a normal or traditional political decision; second, it lacks support by a "neutral justification"; and third, the districting decision is completely irrational or "entirely motivated" by a desire to limit the political power of a minority.[199] As an appendage to his test Justice Stevens commented that a political decision should not be upset merely because some irrational or invidious factors played some role in its passage or continuation.[200]

Justice Blackmun, concurring in the result, agreed with the dissent

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Justice Stevens believed that the record did not provide an "adequate basis for determining the validity of Burke County's governmental structure on the basis of traditional objective standards." *Id.*

192. 446 U.S. at 83-84 (Stevens, J., concurring).

193. *Id.*

194. *Id.*

195. *Id.*

196. Id at 87-88 (Stevens, J., concurring) (arguing, in the long run, no more certainty exists that members of racial groups are more apt to vote alike than members of other interest groups). Justice Stevens noted, in addition, "there is no national interest in creating an incentive to define political groups by racial characteristics." *Id.* at 88.

197. *Id.* at 89 (Stevens, J., concurring).

198. 364 U.S. 339 (1970). For discussions of the case, see notes 58-60 and accompanying text *supra*.

199. 446 U.S. at 90-91 (Stevens, J., concurring).

200. *Id.*

that the city's system unconstitutionally debased the voting strength of black citizens.[201] Justice Blackmun, however, found that the nature of the violation did not justify the scope of the trial court's remedy.[202] He reasoned that a restructuring short of a mandated mayor-ward government could have removed the constitutional infirmity and accommodated Mobile's preference for council government.[203]

Justice Marshall dissented,[204] arguing that the plurality erred in holding that at-large dilution comes within the equal protection standard established to deal with racial discrimination claims.[205] To the contrary, dilution actions are premised on a fundamental interest in voting[206] and therefore the intent requirement of *Washington v. Davis* does not affect the claims.[207] Justice Marshall reasoned that a showing of "invidious effect" meets the constitutional requirement.[208]

Justice Marshall found support for his fundamental-interest approach in *Reynolds v. Sims*. Language in *Reynolds* indicates that the right to vote is fundamental in a free and democratic society.[209] Marshall correctly characterized *Reynolds* as a vote dilution case[210] and concluded that subsequent dilution cases had firmly established "a substantive constitutional right to participate on an equal basis in the electoral process."[211] He further contended that his theory would not open the courts to every political group finding itself outvoted. Rather, the only groups to state a claim are those ignored by the controlling political factions due to their "electoral discreteness and insularity."[212]

B. *Narrowing the Issues of At-Large Dilution*

Since political majorities cannot be relied upon to respond ade-

201. *Id.* at 81-82 (Blackmun, J., concurring).
202. *Id.*
203. *Id.*
204. Justices Brennan and White filed separate dissents.
205. *Id.* at 104-05 (Marshall, J., dissenting).
206. *Id.*
207. *Id.*
208. *Id.* at 112-14 (Marshall, J., dissenting).
209. *Id.* at 115-16 (Marshall, J., dissenting).
210. *Id.*
211. *Id.*
212. *Id.* at 122 (Marshall, J., dissenting).

quately to minority interests,[213] the judiciary has consistently acted as a protector of minority rights. The courts, however, operate within the context of political realities and recognize their limited power to affect these realities.[214]

The at-large claim arises from the same set of political circumstances which motivated voters to bring suits in the *Reynolds v. Sims*-type apportionment case. Stated differently, in both at-large and traditional apportionment cases the litigants seek to reallocate the distribution of political power to the group interests with which they identify.[215] In both cases claimants essentially ask the judiciary to define what constitutes a republican form of government. The Court refused the challenge in *Baker v. Carr*.[216] It apparently believed that a standard based on the guarantee clause could not be limited to malapportioned districts but would involve the judiciary in a variety of suits questioning the representativeness of government. The Court found more convenient the individual-oriented standard of one person, one vote.[217]

The issue of what rights interest groups possess in republican government is not so easily avoided in the at-large dilution context. The claims are not susceptible to an individually based test. Essentially the questions raised are the same as those considered in *Baker*—whether the courts should intervene in the local political processes, and if so, under what circumstances and to what extent should they intervene.

Justice Marshall's fundamental-interest theory[218] is not helpful in resolving these questions. Basically the fundamental rights doctrine protects an individual from the deprivation of a constitutional right because of some personal characteristic, racial or otherwise.[219] Proponents of this approach argue that not only is the act of voting fundamental, but so is the act of casting a meaningful vote.[220] The argument forces its adherents into an extreme position. Dilution of

213. *See* notes 26-29 and accompanying text *supra*.

214. *See* note 36 and accompanying text *supra*.

215. *See* note 8 and accompanying text *supra*.

216. 369 U.S. 186 (1962). *See* notes 41-45 and accompanying text *supra*.

217. *Id.*

218. *See* notes 205-13 and accompanying text *supra*.

219. *See* notes 53-67 and accompanying text *supra*.

220. *See, e.g.*, Note, *Equal Protection: Analyzing The Dimensions Of A Fundamental Right—The Right To Vote*, 17 SANTA CLARA L. REV. 163 (1977).

voting strength is divorced from the racial claim and the suit stands as one alleging the debasement of the votes of any group finding itself in a political minority. In other words, the fundamental rights position does not conceptually allow the segregation of claims based on race from those based on other claims of minority status.

By definition, an at-large district treats all voters equally.[221] A voter's asserted membership in a group provides the basis for a dilution complaint.[222] At-large districting does not involve the individual deprivation characteristics of a fundamental rights violation. Rather the election system—neutral on its face—imposes a disproportionate impact on a particular class of person. Such a disproportionate impact forms the heart of *Washington v. Davis*.[223]

The plurality's approach in *City of Mobile* is equally unsatisfying. The plurality's belief that plaintiffs must show direct intent on the part of decisionmakers to discriminate against racial[224] minorities cuts against the Court's long standing recognition that subtle schemes of discrimination are no less repugnant to the Constitution than direct schemes.[225] By removing all bases for a circumstantial showing, the plurality left aggrieved racial minorities with an intolerable burden of proof.

VI. CONCLUSION: TOWARD A STEVENS-BLACKMUN RULE

Justice Stevens provided the most persuasive framework in *City of Mobile*. He stated that legislation preventing or inhibiting black citizens from voting falls into a different class from statutes which submerge black votes by the creation of at-large districts.[226] Clearly both classes can operate to fence blacks out of the political decisionmaking process. The point of distinction is in the remedy. In the first class of cases, the remedy is to overturn impediments which aim exclusively at blacks or other racial minorities. In the second class, the statute is race-neutral and adversely affects members of all political minorities. A remedy exclusively protecting blacks and other insular minorities would alter the distribution of political power to favor

221. *See* 446 U.S. at 87-88 (Stevens, J., concurring).

222. *See id.*

223. *See id.*

224. *See* note 185 and accompanying text *supra*.

225. *See* Lane v. Wilson, 307 U.S. 268, 275 (1939).

226. *See* notes 186-90 and accompanying text *supra*.

these groups but deny a like remedy to the community's other interest minorities.[227] As a result, the Sevens three-part test applies to all political gerrymanders.

The test may be more rigorous than desired if the claims could be exclusively limited to race. It is much less open-ended, however, than the fundamental-interest approach which grants relief on a mere showing of group submersion.[228] A literal reading of the requirement suggests that no at-large system could be defeated due to the strong interest which a municipality may have in commission government. The judiciary could read this factor as requiring a court to balance the respective political interests of the community and of its constituent groups. A judicial remedy is justified where the discriminatory effect on sizeable groups outweighs benefits adhering to the municipality from continuation of the at-large system.[229] The remedy, as Justice Blackmun noted in *City of Mobile*, should take into account the "compelling interest" of the city and its residents in at-large government.[230] The remedy could be to divide the community into a few multi-member districts, or to adopt a combined system of at-large and single-member districts.[231] The Stevens rule combined with the Blackmun remedy suggests a manageable course of action for the courts.

227. Justice Stevens reaches essentially the same conclusion. 446 U.S. at 83-88. *See* note 196 *supra*.

228. For the basic standard applied under the fundamental interest doctrine see *Developments in the Law—Equal Protection*, 82 HARV. L. REV. 1065, 1088, 1120 (1969).

229. *See* note 199 and accompanying text *supra*. *See also* McMillan v. Escambia County, 638 F.2d 1239, 1243 (5th Cir. 1981) (describing Justice Steven's opinion as requiring a very strict intent showing).

230. *See* notes 201-204 and accompanying text *supra*.

231. *See* notes 202 and accompanying text *supra*.

COMMENTS