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## Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence

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# POLARIZED VOTING AND THE POLITICAL PROCESS: THE TRANSFORMATION OF VOTING RIGHTS JURISPRUDENCE

*Samuel Issacharoff\**

INTRODUCTION .....	1833
I. THE EMERGENCE OF THE RACIALLY POLARIZED VOTING INQUIRY .....	1838
A. <i>Minority Vote Dilution</i> .....	1838
B. <i>The 1982 Amendments to the Voting Rights Act and     the Emergence of the Racial Bloc Voting Inquiry</i> ....	1845
C. <i>Thornburg v. Gingles</i> .....	1850
II. POLICING THE LEGITIMACY OF THE POLITICAL PROCESS .....	1854
A. <i>The Right to Vote as a Group-Based Claim</i> .....	1856
B. <i>Judicial Oversight of the Political Process</i> .....	1859
C. <i>Vote Dilution Under a Conservative Judiciary</i> .....	1862
D. <i>Voting Rights and Process Corrections</i> .....	1865
III. THE UNFORTUNATE REALITY OF RACIAL DIVISIONS ...	1891
A. <i>Racial Identities, the Republican Consensus, and     Individual Autonomy</i> .....	1873
B. <i>Preference and Prejudice</i> .....	1881
1. <i>The Arrow Impossibility Theorem</i> .....	1881
2. <i>Are the Discrete and Insular Disadvantaged?</i> ....	1884
CONCLUSION .....	1890

## INTRODUCTION

Why isn't voting rights litigation obsolete? A quarter century of federal policing of the electoral processes has markedly transformed

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the political landscape. Gone are the poll taxes,<sup>1</sup> the literacy tests,<sup>2</sup> and the other overt barriers to voter registration. Gone as well under the impact of one-person, one-vote is the artificial numerical inflation of the voting strength of one community at the expense of another.<sup>3</sup> Yet, despite these changes, voting rights claims continue to mount. For the past decade, changes in the substantive law governing voting rights claims have enhanced the efficacy of legal protections of the right to vote, clearing the way for greater judicial supervision of the electoral process.

The statutory standard for challenging at-large or multimember elections under section 2 of the Voting Rights Act<sup>4</sup> provides the clearest example of the increased protection of the franchise. In 1982, Congress swiftly reacted to the Supreme Court's imposition of a restrictive intent-based test for voting rights claims in *City of Mobile v. Bolden*.<sup>5</sup> In place of the onerous requirement that plaintiffs prove that challenged electoral practices had been adopted to further direct discriminatory purposes,<sup>6</sup> Congress recast the statutory voting rights doctrine to allow a broad-gauged inquiry into the "results"<sup>7</sup> that challenged practices have on the capacity of minorities to participate fully in the political process. Then, in 1986, the Supreme Court in *Thornburg v. Gingles*<sup>8</sup> affirmed the constitutionality of the 1982 amendments and went on to ease greatly the evidentiary requirements for making out a claim of minority vote dilution.<sup>9</sup> Instead of the multidimensional statutory "totality of the circumstances" inquiry, the Court adopted a simplified test to determine whether white voters as a group had frus-

1. See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) (striking down use of poll tax on federal constitutional grounds).

2. See *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (affirming power of Congress under § 4 of the Voting Rights Act to suspend use of literacy tests); *Katzenbach v. Morgan*, 384 U.S. 641 (1966) (holding New York literacy requirement unlawful to the extent it is inconsistent with the Voting Rights Act of 1965).

3. See *Baker v. Carr*, 369 U.S. 186 (1962) (finding unequal apportionment of Tennessee state legislature to be justiciable constitutional claim); *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying one-person, one-vote rule to state legislative apportionment).

4. 42 U.S.C. § 1973 (1988).

5. 446 U.S. 55 (1980) (plurality opinion) (requiring proof of racially discriminatory motivation to strike down at-large or multimember election systems under either the Constitution or § 2 of the Voting Rights Act).

6. 446 U.S. at 62-68.

7. 42 U.S.C. § 1973(a) (1982).

8. 478 U.S. 30 (1986).

9. The concept of "vote dilution" as applied to minority citizens began with the Supreme Court's recognition in *Allen v. State Board of Elections* that "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." 393 U.S. 544, 569 (1969). In the context of at-large or multimember elections, minority voters could face an electoral system that would "nullify their ability to elect the candidate of their choice just as would prohibiting some of them from voting." 393 U.S. at 569.

trated the electoral aspirations of a cohesive set of minority voters and, if so, whether an alteration of electoral practices could relieve the diminution of minority electoral opportunity.<sup>10</sup>

The invigoration of statutory protections under section 2 of the Voting Rights Act<sup>11</sup> accompanies the Supreme Court's generally expansive view of the extraordinary procedural provisions of section 5 of the Voting Rights Act. Section 5 requires certain jurisdictions, largely in the South, to submit for preclearance all proposed electoral or voting changes to the Department of Justice or a three-judge court in the District of Columbia.<sup>12</sup> Despite the increased prominence of federalist concerns in recent Supreme Court opinions,<sup>13</sup> two of the Court's most

10. *Thornburg v. Gingles*, 478 U.S. at 50-51. The Court's inquiry, designed in the context of a challenge to the impact of multimember election districts on minority electoral prospects, focused on three prerequisites to a successful voting rights claim. First, the minority group had to show that it could command a majority in a redrawn single-member district. Second, the minority community had to show that it was politically cohesive in its electoral preferences. Third, plaintiffs needed to demonstrate that their electoral choices were usually defeated as a result of the uniform voting patterns of the white majority community. 478 U.S. at 50-51; see *infra* notes 93-97 and accompanying text.

11. With its decisions last term in *Chisom v. Roemer*, 111 S. Ct. 2354 (1991), and *Houston Lawyers' Assn. v. Attorney Gen.*, 111 S. Ct. 2376 (1991), the Court extended the reach of § 2 of the Voting Rights Act to the one bastion of governmental power that had remained largely unaffected by the integrationist transformation of American politics: the elected state judiciaries. In holding for the first time that elected judges are fully within the reach of the Act, the Court reaffirmed that the Voting Rights Act "should be interpreted in a manner that provides 'the broadest possible scope' in combatting racial discrimination." *Chisom v. Roemer*, 111 S. Ct. at 2368 (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)). According to the Court, no elected institution stands immune from the antidiscrimination commands of the Voting Rights Act, not even one as removed from the customary meaning of the statutory term "representative" as the state judiciaries. Thus, the Court held, "[t]he reasons why Louisiana has chosen [to elect its judges rather than appoint them] are precisely the reasons why it is appropriate for . . . the Voting Rights Act to continue to apply to its judicial elections." 111 S. Ct. at 2367.

For evidence of the continuing inability of minorities to penetrate state judiciaries, see, for example, *League of United Latin Am. Citizens Council No. 4434 v. Clements*, 914 F.2d 620, 656 n.7 (5th Cir. 1990) (Johnson, J., dissenting) (preclearance of at-large judicial elections denied in Georgia, partially because of "a consistent lack of minority electoral success" in such elections); 914 F.2d at 665 n.25 ("[M]inorities in the challenged Texas districts are seldom ever — indeed, are only with great rarity — able to elect minority candidates to any of the at-large district court judge positions available . . ."), *revd. sub nom. Houston Lawyers' Assn. v. Attorney Gen.*, 111 S. Ct. 2376 (1991); *Chisom v. Edwards*, 839 F.2d 1056, 1058 (5th Cir. 1988) (finding that no black person had ever been elected to the Louisiana Supreme Court), *cert. denied sub nom. Roemer v. Chisom*, 488 U.S. 955 (1988); *Ewing v. Monroe County, Miss.*, 740 F. Supp. 417, 424 (N.D. Miss. 1990) (finding that no black had ever been elected to county judgeship in county with large black population); *Mallory v. Eyrich*, 707 F. Supp. 947, 954 (S.D. Ohio 1989) ("[D]uring the twenty-year period examined by the parties, no blacks have been elected to either the Hamilton County Municipal Court or the Hamilton County Common Pleas Court."). *But see Williams v. State Bd. of Elections*, 718 F. Supp. 1324, 1328-29 (N.D. Ill. 1989) (granting defendants' motion for summary judgment where several minority candidates had won judicial elections). See *generally* FUND FOR THE MODERN COURTS, INC., THE SUCCESS OF WOMEN AND MINORITIES IN ACHIEVING JUDICIAL OFFICE: THE SELECTION PROCESS 13 (1985) (reporting that as of 1985, only 3.8% of the state judges in the United States were black and 1.2% were Hispanic).

12. 42 U.S.C. § 1973c (1988). See *generally Allen v. State Bd. of Elections*, 393 U.S. 544, 566-70 (1969) (defining broad scope of preclearance requirement).

13. See, e.g., *Gregory v. Ashcroft*, 111 S. Ct. 2395, 2401 (1991) ("[T]he States retain substan-

recent cases under section 5 have dramatically enhanced federal power to regulate electoral processes.<sup>14</sup> In *City of Pleasant Grove v. United States*<sup>15</sup> and *Clark v. Roemer*,<sup>16</sup> the Court backed a broad interpretation of section 5's preclearance requirement, first to reach ill-motivated municipal annexation decisions even in the absence of any proved discriminatory impact<sup>17</sup> and then, unanimously, to reinvoke the injunctive reach of the Act.<sup>18</sup>

All of these substantive developments raise common questions: What is it that lends to voting rights claims a resilience, through the Reagan era and its Supreme Court, that is unmatched in any other area of civil rights law? And why the perceived need to expand the reach of the Act in light of the dramatic democratization of the political processes since the Court first set foot in the "political thicket" in the 1960s?

This article will address these issues by focusing on the transformation of voting rights litigation in the past decade. Accompanying the expansion of statutory remedies under the Act in the 1980s was a fundamental change in voting rights jurisprudence. In place of a meandering, inconclusive attempt to police the entirety of the political process through the mediating lens of the right to the franchise, the new jurisprudence focused court attention on the actual patterns of group voting in America. This inquiry, termed the test of racial bloc voting, gave voting rights claims a pluralistic perspective and provided both a powerful appeal to a conservative judiciary and a reason for probing beyond the issue of simple access to the polling booth.

The focus on racially polarized voting patterns forced the judiciary to confront the actual operation of challenged electoral systems in order to identify precisely the discriminatory mechanisms that frustrated minority political aspirations. By redirecting focus to the bloc voting

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tial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.").

14. *But see* *Presley v. Etowah County Commn.*, 112 S. Ct. 820 (1992) (refusing to apply § 5 to county commissioners' internal reallocation of authority in a manner that curtailed the powers of newly elected black commissioners). *See infra* note 29.

15. 479 U.S. 462 (1987).

16. 111 S. Ct. 2096 (1991).

17. In *Pleasant Grove*, the Court upheld the denial of preclearance to an all-white municipality for the annexation of an area inhabited by white families after the city had refused to annex an adjacent black neighborhood. Despite the fact that no minorities lived in Pleasant Grove, so there would be no discernible impact on preexisting minority political power, the Court nonetheless held that the indicia of discriminatory animus were sufficient to foreclose the proposed annexation. 479 U.S. at 471-72.

18. *Clark v. Roemer*, 111 S. Ct. 2096 (1991) (holding that district courts should enjoin elections if the pertinent voting statutes have not been precleared under § 5 of the Voting Rights Act, instead of allowing unprecleared electoral practices to be used on an interim basis).

practices of majority white communities and the resulting exclusion of minority-supported candidates from public office, the new voting rights jurisprudence identified two fundamental distortions in the electoral arena. First, electoral systems that fail to curb the deleterious consequences of racial bloc voting reward a racially defined majority faction with disproportionate political power and, consequently, with disproportionate access to the goods and services distributed through the legislative process. Second, the emergence of a racially defined majority faction compounds the potential for continued social and economic subordination of historically disadvantaged minorities.

The combination of a new voting rights doctrine focusing on actual electoral practices with the prevalence of such racially identifiable voting patterns in elections across the country made the new voting rights law a powerful weapon in the judicial transformation of local governments. Strangely, however, the new voting rights jurisprudence has not drawn significant attention from the legal academy. For the past quarter century, the commands of individual- and group-based equality in the political arena have significantly transformed the political institutions of this country.<sup>19</sup> Yet the jurisprudential transformation of the positive law remains surprisingly unexplored.

This article attempts to provide an analytic framework for the evolved voting rights law as it confronts the persistent effects of racial factionalism in the electoral arena. Insight into the corrosiveness of racially polarized voting and its frustration of minority electoral opportunity has organized and guided the new voting rights jurisprudence. This article will argue that the combination of process distortions from majority domination of electoral outcomes and substantive deprivation from minority exclusion defines this area of law and protects it against challenge from currently fashionable academic currents. The central insights gathered from the focus on polarized voting, I will argue, insulate voting rights law from the neoconservative charge that the Act is but a poorly veiled form of affirmative action and from the public-choice claim that solicitude for minority actors in the political marketplace is fundamentally misconceived.

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19. Professor Peter Schuck has described the transformation as follows: "Few contemporary legal developments are as striking, as unexpected, and as potentially far-reaching as the federal courts' redesign of the fundamental structures, institutions and incentives that frame and fuel political struggle at all levels of government. The courts have become principal regulators of politics." Peter H. Schuck, *The Thickest Thicket: Partisan Gerrymandering and Judicial Regulation of Politics*, 87 COLUM. L. REV. 1325, 1325 (1987) (footnote omitted).

## I. THE EMERGENCE OF THE RACIALLY POLARIZED VOTING INQUIRY

### A. *Minority Vote Dilution*

The Voting Rights Act of 1965 undertook to dismantle a simple yet overwhelming problem: the physical obstacles to blacks' getting to the ballot box and casting their votes.<sup>20</sup> The Act's substantive provisions were aimed primarily at restrictions on voter registration and on the actual casting of ballots — the inheritances of the Black Codes of the southern states — which in ways both subtle and overt had kept black citizens from exercising the franchise.<sup>21</sup> Like the other statutory centerpiece of the civil rights era, Title VII of the Civil Rights Act of 1964, the Voting Rights Act set its sights on the most visible barriers to black legal equality. These barriers were defined primarily as direct, formal discriminatory practices intended to exclude black participation in the central political and economic institutions of American life. Section 2 of the Act prohibited the use of any electoral practice or procedure which infringed the right to vote on the basis of race or color,<sup>22</sup> while section 4 ordered the suspension of literacy tests and similar devices in states where less than half the population was registered to vote or did vote.<sup>23</sup> The forces behind the Voting Rights Act assumed that curbing black disenfranchisement would lead inevitably to the right to full political equality, including the election of the representatives of choice of the black community.<sup>24</sup>

Achieving black political equality proved a more vexing problem than anticipated. The "first generation" of voting rights challenges forced the removal of the open barriers to black registration<sup>25</sup> and the

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20. The first federal voting rights statute, the Civil Rights Act of 1957, authorized the U.S. Attorney General to enjoin the intimidation of voters in federal elections. Pub. L. No. 85-315, § 131, 71 Stat. 634, 637 (1957) (superseded by 42 U.S.C.A. § 1975(c) (West Supp. 1992)).

21. See DAVID J. GARROW, *PROTEST AT SELMA* 19 (1978) (reporting 43.1% black voter registration rates in 11 southern states in 1964, but only 33.9% registration in the five Deep South states); *THE VOTING RIGHTS ACT TEN YEARS AFTER* 43 (1975) (estimating black voter registration rates in 1965 at 29.3% for five Deep South states plus North Carolina and South Carolina); Dianne M. Pinderhughes, *Legal Strategies for Voting Rights: Political Science and the Law*, 28 *How. L.J.* 515, 525 (1985) (reporting same 1965 figure of only 29% of southern voting-age blacks registered to vote).

22. 42 U.S.C. § 1973 (1988).

23. 42 U.S.C. § 1973b (1988); see *Oregon v. Mitchell*, 400 U.S. 112 (1970).

24. See 111 CONG. REC. H5059 (1965) (belief of President Johnson that the Voting Rights Act of 1965 would effectively give all citizens the right to choose their own leaders).

25. The Voting Rights Act, together with the Freedom Rides and the use of Federal Registrars, had an immediate effect on black voter registration rates. A rapid increase in black voter registration across the South tripled the number of registered black voters. See Bobby M. Rubarts, Comment, *The Crown Jewel of American Liberty: The Right to Vote, What Does it Mean Under the Amended Section 2 of the Voting Rights Act?*, 37 *BAYLOR L. REV.* 1015, 1020 (1985). Despite the improvements, barriers to voter registration persist in the form of time and place

casting of ballots. The successes of this first generation of legal challenge revealed a second set of obstacles that undermined the effectiveness of newly registered black citizens' emerging freedom to exercise the franchise. As blacks began to register and vote in increasing numbers, their electoral expectations were frustrated by political institutions that were well-insulated from challenge. The pattern was strikingly similar to the far better-known Supreme Court confrontation with continued exclusion of minorities from job opportunities even after formal discriminatory barriers were removed — what the Court in *Griggs v. Duke Power Co.*<sup>26</sup> called the “built-in headwinds” impeding minority advancement.<sup>27</sup> These second-tier problems in employment gave rise to the “disparate impact” inquiry into structural employment requirements, such as advanced educational degrees or success on standardized examinations, that effectively barred minority economic opportunity. In the voting rights case law, an equivalent inquiry emerged: the courts began to condemn “minority vote dilution” caused by the structural diminution of electoral opportunities, even where minorities could relatively freely register and vote.

The principal target of this “second-generation” challenge<sup>28</sup> to structural obstacles to minority political advancement was the use of at-large or multimember electoral districts. The widespread use of multimember electoral systems dates from the turn of the century, when an unusual alliance of northern Progressives and southern Redeemers endeavored to curtail the ability of community-based political machines, depicted pejoratively as ward heelers, to deliver the spoils of power to their local political bases.<sup>29</sup> By eliminating the local bases of voting power of, respectively, urban working-class ethnics and freed

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restrictions on voter registration. See Mississippi State Chapter, Operation PUSH v. Allain, 674 F. Supp. 1245, 1255 (N.D. Miss. 1987) (finding 25% gap between black and white registration rates in Mississippi), *affd.*, 932 F.2d 400 (5th Cir. 1991); Allan J. Lichtman & Samuel Is-sacharoff, *Black/White Voter Registration Disparities in Mississippi: Legal and Methodological Issues in Challenging Bureau of Census Data*, 7 J.L. & POL. 525 (1991) (reporting methodology used to determine continuing impact of restrictive voter registration laws).

26. 401 U.S. 424 (1971).

27. 401 U.S. at 432.

28. See Lani Guinier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1093 (1991) (tracing the shift from first-generation challenges to overt black disenfranchisement to second-generation concerns with meaningful political opportunity for enfranchised minorities).

29. A rich fact scenario for the real operation of locally based political machines in Etowah and Russell Counties, Alabama, recently confronted the Supreme Court. *Presley v. Etowah County Commn.*, 112 S. Ct. 820 (1992). Prior to a successful challenge under § 2 of the Voting Rights Act, Etowah County elected all of its commissioners at large, resulting in an all-white county commission. The county allowed each commissioner to let road contracts independently, a tremendous source of power and patronage in rural southern communities. When the county was forced to adopt a single-member district plan under court order, four incumbent commissioners voted to give themselves joint, exclusive authority over roads and to relegate two newly



slaves,<sup>30</sup> the turn-of-the-century reformers hoped to centralize political power through the use of at-large and multimember election devices. These election schemes allow for serial voting that, in the context of a majority voting bloc, will reward a cohesive majority with superordinate representation:

The "winner-take-all" character of the typical election scheme creates the possibility that a specific majority will elect all the representatives from a multimember district whereas the outvoted minority might have been able to elect some representatives if the multimember district had been broken down into several single member districts.<sup>31</sup>

The Court first confronted the group-based nature of vote dilution claims in *Whitcomb v. Chavis*,<sup>32</sup> a challenge to the impact of Indiana's multimember state legislative districts on black inner-city residents of Indianapolis. Although *Whitcomb* rejected plaintiffs' plea for the creation of single-member districts, which would have allowed for enhanced black representation,<sup>33</sup> the Court wavered uneasily between individual- and group-based inquiries in addressing the vote dilution claim. The Court acknowledged that the relevant inquiry was whether the affected black plaintiffs *as a group* had less opportunity than other similarly situated voters "to participate in the political process and to elect legislators of their choice."<sup>34</sup> The Court's characterization of the

elected commissioners (one of whom was black) to overseeing courthouse maintenance and engineering.

Justice Kennedy, writing for a six-justice majority, held that the commissioners' resolution affected "only the allocation of power among governmental officials"; it was not subject to the Act's preclearance requirements under § 5 because the resolution lacked any "direct relation to voting itself." 112 S. Ct. at 832.

30. See SAMUEL P. HAYS, *AMERICAN POLITICAL HISTORY AS SOCIAL ANALYSIS* 215-16 (1980) (The turn to at-large elections was "an attempt by upper-class, advanced professional, and large-business groups to take formal political power from the previously dominant lower- and middle-class elements so that they might advance their own conceptions of desirable public policy."); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH* 257-61 (1974); JAMES WEINSTEIN, *THE CORPORATE IDEAL IN THE LIBERAL STATE: 1900-1918*, at 109-10 (1968) ("[T]he heart of the [at-large commission] plan, that of electing only a few men on a citywide vote, made election of minority or labor candidates more difficult . . ."); J. Morgan Kousser, *The Undermining of the First Reconstruction: Lessons for the Second*, in *MINORITY VOTE DILUTION* 27, 30-37 (Chandler Davidson ed., 1984).

31. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-8, at 750 (1st ed. 1978).

32. 403 U.S. 124 (1971).

33. The Court stated:

We see nothing in the findings of the District Court indicating recurring poor performance by Marion County's delegation with respect to Center Township ghetto, nothing to show what the ghetto's interests were in particular legislative situations and nothing to indicate that the outcome would have been any different if the 23 assemblymen had been chosen from single-member districts.

403 U.S. at 155.

34. 403 U.S. at 149. This same inquiry is expressed in *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986), as whether a challenged at-large electoral scheme "operates to minimize or cancel out [minority citizens'] ability to elect their preferred candidates."

inquiry, however, was immediately coupled with a highly individual-oriented factual conclusion:

We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen.<sup>35</sup>

Consequently,

The mere fact that one interest group or another concerned with the outcome of Marion County elections has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where, as here, there is no indication that this segment of the population is being denied access to the political system.<sup>36</sup>

The voting rights case law found its analog to *Griggs* in *White v. Regester*,<sup>37</sup> the Supreme Court's 1973 opinion on the constitutionality<sup>38</sup> of multimember districts for election to the Texas state legislature. In *White*, the Court for the first time struck down the use of multimember electoral districts because of its finding, under a new "totality of the circumstances" test,<sup>39</sup> that such districts "enhanced the opportunity for racial discrimination."<sup>40</sup> In the aftermath of *White*, multimember districts — and particularly at-large elections — became the target of voting rights plaintiffs.

35. *Whitcomb*, 403 U.S. at 149.

36. 403 U.S. at 154-55.

37. 412 U.S. 755 (1973).

38. Because of the presence of state action in the creation and maintenance of all electoral systems, the early voting rights case law did not develop any distinction between statutory claims and claims brought under the Fourteenth or Fifteenth Amendment. The Voting Rights Act was originally intended to enforce the commands of the Fifteenth Amendment. See Pub. L. No. 89-110, 79 Stat. 437 (1965). According to the Court, "it is apparent that the language of § 2 [of the Act] no more than elaborates upon that of the Fifteenth Amendment, and the sparse legislative history of § 2 makes clear that it was intended to have an effect no different from that of the Fifteenth Amendment itself." *City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (plurality opinion). Only after the imposition of an intent standard for constitutional voting rights claims in *City of Mobile* and *Rogers v. Lodge*, 458 U.S. 613 (1982), did passage of the 1982 amendments to the Act draw a line of demarcation. See *infra* notes 61-67 and accompanying text.

39. *White* followed by two years the Supreme Court's ruling in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), that the use of at-large legislative elections in Marion County, Indiana (site of Indianapolis) was not unconstitutional. In *Whitcomb*, the Court framed the inquiry as requiring proof that "ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice." 403 U.S. at 149. Absent showings that blacks suffered obstacles in either registration or casting ballots or that slating processes precluded blacks' participation in the county's political parties, the Court declined to strike down the multimember electoral system on the basis of election outcomes alone:

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

40. 412 U.S. at 153.

40. 412 U.S. at 766.

The shift in focus to multimember and at-large election systems created a critical juncture in the transformation of voting rights jurisprudence. Unlike the first generation of voting rights challenges, which targeted the formal exclusion of blacks from the franchise and where the precise harms were easy to identify, no such easy targets anchored the second generation of voting rights law in cases like *White*.<sup>41</sup> The Court's ruling in *White* rested on a compendium of factors that included the history of de jure discrimination against black voters in Texas,<sup>42</sup> the depressed socioeconomic status of Mexican-Americans,<sup>43</sup> the existence of closed-door meetings by the Anglo political establishment to slate candidates for office,<sup>44</sup> depressed voter participation and registration levels of minorities,<sup>45</sup> and the paucity of minorities in elective office.<sup>46</sup>

In protecting the claims of group exclusion from the rewards of political participation in *White*, the Court decisively shifted away from the primary focus on individual access to the polling place that characterized the Act's initial concern.<sup>47</sup> *White* struck down multimember election practices because of an effective abridgment of a newly recognized group-based right,<sup>48</sup> defined as the right of racial and ethnic minorities meaningfully to participate in the political process,<sup>49</sup> which in turn the Court defined specifically to include the election of represent-

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41. Justice Harlan's concurring opinion in *Hunter v. Erickson*, 393 U.S. 385 (1969), anticipated the conceptual difficulty in addressing group disadvantaging legislation. Justice Harlan distinguished statutes that purposefully made it more difficult or impossible for individual minorities to participate from those that allowed the majority community to consistently frustrate the political aspirations of the minority community. 393 U.S. at 393-94 (Harlan, J., concurring).

42. *White*, 412 U.S. at 766.

43. 412 U.S. at 768.

44. 412 U.S. at 766-67.

45. 412 U.S. at 768.

46. 412 U.S. at 768-69.

47. See Guinier, *supra* note 28, at 1093; Joan F. Hartman, *Racial Vote Dilution and Separation of Powers: An Exploration of the Conflict Between the Judicial "Intent" and the Legislative "Results" Standards*, 50 GEO. WASH. L. REV. 689, 690 (1982) (early voting rights case law aimed at equalizing the weight of each citizen's vote); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation*, 24 HARV. C.R.-C.L. L. REV. 173, 184 (1989) ("Congress' optimism that ensuring the right to register and cast a ballot would provide black citizens with effective political power soon proved ill-founded. . . . The courts and the executive branch were soon called upon to address the question of racial vote dilution.").

The focus on individual rights was also a hallmark of the Court's initial abandonment of the political question doctrine. Thus, in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court struck down the malapportioned state legislative districts of Alabama because such malapportionment violated each voter's essential right "to vote freely for the candidate of one's choice," which could be "denied by a debasement or dilution of the weight of a citizen's vote." 377 U.S. at 555.

48. *White*, 412 U.S. at 766.

49. 412 U.S. at 767.

atives of choice.<sup>50</sup> The result was a shift from the focus on the treatment of individuals in the electoral marketplace, the voting rights equivalent to disparate treatment claims under Title VII, to a new concern with the rights of group-based representation. In *White v. Regester*, therefore, the Court found the electoral parallel to the disparate impact cause of action introduced by *Griggs v. Duke Power Co.*

The group-based focus of *White v. Regester* also set the stage for reevaluating judicial oversight of the decennial state legislative and congressional redistricting under the constitutional commands of one-person, one-vote. If minorities are distributed among potential single-member legislative or congressional districts in a more or less even manner, then, despite the single-member characteristic of each individual office, a districting system may be drawn to subordinate minorities mathematically within each of the electoral districts and deny minorities any opportunity for representation. The same processes of majority overrepresentation could be reproduced across even single-member districts in a large jurisdiction if the districting process resulted in a proportion of minorities in any given district lacking a critical mass for electoral influence.

The Court in *White*, however, failed to articulate the basis for its invalidation of the Texas legislative electoral system. The Court noted de jure discrimination against blacks, but not against Hispanics. Candidate slating, one of the practices singled out for condemnation, adversely affected blacks in Dallas County, but no mention was made of the existence (or nonexistence) of slating organizations in Bexar County, the site of the Mexican-American challenge.<sup>51</sup> Hispanics were found to suffer from low levels of voter registration, in part because of cultural and linguistic barriers, but no comparable finding was made concerning blacks.<sup>52</sup> The Court's opaque reasoning "gave no hint of the priority it attached to any of these facts; instead, it approved the district court's conclusion of unconstitutionality based on the 'totality of the circumstances.'" <sup>53</sup> Under the press of repeated challenges to the use of at-large elections in the Deep South, the Fifth Circuit in *Zimmer v. McKeithen*<sup>54</sup> sought to salvage some order from

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50. 412 U.S. at 769.

51. 412 U.S. at 766-69.

52. 412 U.S. at 766-69.

53. James Blacksher & Larry Menefee, *At-Large Elections and One Person, One Vote: The Search for the Meaning of Racial Vote Dilution*, in *MINORITY VOTE DILUTION*, *supra* note 30, at 203, 216 (quoting *White*, 412 U.S. at 769).

54. 485 F.2d 1297 (5th Cir. 1973) (en banc), *affd. sub nom.* East Carroll Parish Sch. Bd. v. Marshall, 424 U.S. 636 (1976).

*White*.<sup>55</sup> Despite uncertainty over the precise application of a “totality of the circumstances” analysis to any particular case, the reconstituted *White/Zimmer* evidentiary standard did provide a litigation arsenal for claims of minority vote dilution that held sway until the Supreme Court unceremoniously rejected it in 1980 in *City of Mobile v. Bolden*.<sup>56</sup>

Two critical points emerge from the relatively short lifespan of the *White/Zimmer* standard for vote dilution claims. The first is the absence of an overriding conception of the precise constitutional harm the courts were seeking to remedy. What was meant by “minority vote dilution”? Clearly the courts were concerned with the paucity of minority elected officials. But this concern was not reflected in any doctrinal requirement that there be a complete frustration of minority electoral aspirations as an indispensable component of a vote dilution claim under *White/Zimmer*. While many of the cases addressed a pattern of complete exclusion of blacks from elected office since the end of Reconstruction, some, including *White* itself, evidenced limited minority electoral success. Similarly, while the *White/Zimmer* standard developed in the context of multimember or at-large elections, the use of such election systems was not itself evidence of vote dilution; the Supreme Court cautioned that at-large elections were not per se unconstitutional.<sup>57</sup> Thus, while the vote dilution theory emerged out of the frustration of minority electoral prospects in multimember election systems, *White* was unable to specify which functional components of such elections were objectionable — a critical failure in a case marking such an important doctrinal breakthrough. On this score, *Zimmer* could only counsel that “[c]learly, it is not enough to prove a mere disparity between the number of minority residents and the number of minority representatives.”<sup>58</sup>

Second, neither *White* nor *Zimmer* could identify the operational mechanism for the unconstitutional dilution of minority voting strength. Neither opinion examined actual voting patterns to deter-

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55. The Fifth Circuit recast *White* as follows:

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

485 F.2d at 1305 (footnotes omitted).

56. 446 U.S. 55 (1980).

57. See *Fortson v. Dorsey*, 379 U.S. 433, 438-39 (1965).

58. 485 F.2d at 1305.

mine either minority preferences or whether the majority community was engaging in any impermissible electoral behavior. The *White/Zimmer* test ended up looking both backward from the electoral process, to examine the historical circumstances leading to its establishment, and forward to determine the outcomes of policy decisions by legislative bodies elected under such electoral arrangements. But this test conspicuously failed to provide an analytic tool for examining electoral behavior itself. The *White/Zimmer* "totality of the circumstances" test was static; its aim was to uncover the dynamic workings of electoral systems, but it had no way to measure the operational features of challenged electoral practices. Instead, the *White/Zimmer* case law searched for a prosaic formula, such as "one person, one vote,"<sup>59</sup> that could provide a ready definition of lack of equal political participation. Even on that score, the best that *White/Zimmer* could muster was the need to examine the "totality of the circumstances," an inquiry as empty as the resigned "I know it when I see it" approach to obscenity under the First Amendment.<sup>60</sup>

#### B. *The 1982 Amendments to the Voting Rights Act and the Emergence of the Racial Bloc Voting Inquiry*

The Supreme Court's 1980 decision in *City of Mobile v. Bolden*<sup>61</sup> decisively repudiated the *White/Zimmer* view of minority vote dilution. The Court recast voting rights claims in the mold of *Washington v. Davis*,<sup>62</sup> a watershed decision under the Equal Protection Clause of the Fourteenth Amendment, and required proof of invidious purpose in the maintenance and adoption of at-large electoral systems. Absent direct evidence of invidious purpose, no multimember electoral sys-

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59. With the emergence of the one-person, one-vote standard for apportionment cases in *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court created a relatively manageable norm against which claims of numerical malapportionment could be measured. For criticisms of the Court's fashioning of the one-person, one-vote standard, see RAOUL BERGER, *GOVERNMENT BY JUDICIARY* 8 (1977) ("[T]he 'one man, one vote' cases represent an awesome exercise of power, a [ ] 180-degree revision, taking from the States a power that unmistakably was left to them."); ALEXANDER M. BICKEL, *THE SUPREME COURT AND THE IDEA OF PROGRESS* 169 n.\* (1970) ("[T]he Warren Court chose to assume . . . that legislative policy is really made in elections, in which all groups have an equal chance, guaranteed by the one-man, one-vote rule, to coalesce with other ones in the formation of governing majorities. But this assumption is hardly realistic."); Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 18 (1971) ("The principle of one man, one vote was not neutrally derived: it runs counter to the text of the fourteenth amendment, the history surrounding its adoption and ratification and the political practice of Americans from colonial times up to the day the Court invented the new formula."); ROBERT H. BORK, *THE TEMPTING OF AMERICA* 85 (1990) (reiterating this view).

60. This, of course, is Justice Stewart's famous phrase, born of the Supreme Court's frustration in assigning any precise meaning to the concept of unprotected pornography. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

61. 446 U.S. 55 (1980).

62. 426 U.S. 229 (1976).

tems could be challenged under either the Constitution<sup>63</sup> or the Voting Rights Act.<sup>64</sup> Each of the *White/Zimmer* evidentiary factors was deemed to be of limited utility in establishing the ultimate issue of direct invidious motive.<sup>65</sup> Although the Supreme Court backed off from the most restrictive interpretation of the evidentiary weight of the *White/Zimmer* factors two years later in *Rogers v. Lodge*,<sup>66</sup> the Court's constricting interpretation of vote dilution in *Bolden* forced a reexamination of the accumulated grab bag of evidentiary factors inherited from the earliest challenges to at-large or multimember elections.

*Bolden* itself turned out to be a short-lived interruption in the development of voting rights jurisprudence. As has been well chronicled, Congress in 1982 amended the Voting Rights Act expressly to repudiate *Bolden* and to outlaw electoral practices that "result in" the denial of equal political opportunity to minority groups.<sup>67</sup> Less fully

63. The actual requirement of proving invidious intent received the support of only a plurality of the Court in *Bolden*. 446 U.S. at 58 (opinion of Justice Powell for four members of the Court). Justice Blackmun concurred in the result, 446 U.S. at 80, and Justice Stevens concurred in the judgment, 446 U.S. at 83.

64. Justice Stewart arrived at this statutory rule by concluding that § 2 of the Act did nothing more than elaborate on the Fifteenth Amendment, 446 U.S. at 60-61, and by then concluding that the Fifteenth Amendment, like the Equal Protection Clause of the Fourteenth Amendment, could only prohibit purposeful discrimination, 446 U.S. at 61-66.

65. The fact that minority candidates have been defeated "alone does not work a constitutional deprivation." 446 U.S. at 73 (plurality opinion of Stewart, J.). Discrimination against minority citizens in the provision of municipal services "is relevant only as the most tenuous and circumstantial evidence of the constitutional invalidity of the electoral system under which they attained their offices." 446 U.S. at 74. "[P]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." 446 U.S. at 74. Finally, the "mechanics of the at-large electoral system" are "far from proof that the at-large electoral scheme represents purposeful discrimination against Negro voters." 446 U.S. at 74.

66. 458 U.S. 613 (1982). In *Rogers*, the Court directly held that claims of diminution of minority voting power had to satisfy an intent-based standard of liability. However, the Court allowed the *White/Zimmer* test to stand as a proxy for invidious intent, a position diametrically opposite to the Court's ruling in *Bolden*. See Note, *Making the Violation Fit the Remedy: The Intent Standard and Equal Protection Law*, 92 YALE L.J. 328, 348-49 & n.120 (1982) (comparing *Bolden* and *Rogers* standards of proof of liability).

67. See Pub. L. 97-205, 96 Stat. 134 (codified at 42 U.S.C. § 1973(a) (1982)); S. REP. NO. 417, 97th Cong., 2d Sess. 2, reprinted in 1982 U.S.C.C.A.N. 177, 179 (reporting express legislative purpose of overruling *Bolden* for statutory voting rights claims). See generally MICHAEL PERTSCHUK, *GIANT KILLERS* 151-52 (1986) (rejection of intent-based standard was part of lobbyists' agenda for the 1982 amendments); Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449, 458-60 (1988); James F. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose vs. Results Approach from the Voting Rights Act*, 69 VA. L. REV. 633, 649-58 (1983); Thomas M. Boyd & Stephen J. Markman, *The 1982 Amendments to the Voting Rights Act: A Legislative History*, 40 WASH. & LEE L. REV. 1347, 1399-400 (1983); Armand Derfner, *Vote Dilution and the Voting Rights Act of 1982*, in MINORITY VOTE DILUTION, *supra* note 30, at 145, 159-61; Roy A. McKenzie & Ronald A. Krauss, *Section 2 of the Voting Rights Act: An Analysis of the 1982 Amendment*, 19 HARV. C.R.-C.L. L. REV. 155, 163-71 (1984); Frank R. Parker, *The "Results" Test of Section 2 of the Voting Rights Act: Abandoning the Intent Standard*, 69 VA. L. REV. 715, 747-50 (1983).

explored is the flip side of the repudiation of *Bolden* — that is, what standard Congress was affirmatively enacting. Despite repeated claims in the legislative history that the 1982 amendments simply restored the preexisting *White/Zimmer* measure of vote dilution,<sup>68</sup> the story is more complicated.

As developed above, one of the striking features of the *White/Zimmer* test was its curious silence about how voting actually transpired. Without an account of how the process of diluting voting strength operated, the *White/Zimmer* test had left courts describing both the context in which minority vote dilution was likely to occur (e.g., against a backdrop of historic discrimination and depressed socioeconomic status of minorities) and the likely outcome of diminished minority political influence (e.g., nonresponsiveness by governmental institutions), but without a core definition of what the dilutive mechanism was. By contrast, for social scientists, minority vote dilution was undefinable without reference to the actual workings of the election system: “[D]ilution is a process whereby election laws or practices, either singly or in concert, combine with systematic bloc voting among an identifiable group to diminish the voting strength of at least one other group.”<sup>69</sup>

While central to the social science definition of vote dilution, the concept of bloc voting patterns had appeared in passing in only two Supreme Court voting rights cases prior to *Bolden*, both arising under the preclearance requirements of section 5 of the Act.<sup>70</sup> In *Beer v. United States*,<sup>71</sup> the Supreme Court reviewed a district court holding that the proposed redistricting of the New Orleans city council was statutorily infirm because of the combination of the proposed districting lines and the history of polarized voting patterns in New Orleans. Because the case forced the Court to confront the effect that alternative districting plans would have on electoral outcomes, the racial bloc voting inquiry was squarely joined. While the majority reversed the district court on the narrow ground that section 5 covered only retrogressive changes in election practices, both Justices Marshall and White embraced the polarized voting analysis in dissents. According to Justice White, the author of *White v. Regester*,

Bloc racial voting is an unfortunate phenomenon, but we are repeat-

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68. A typical example is the floor statement of Rep. James Sensenbrenner: “Let there be no question then. We are writing into law our understanding of the test in *White* against *Regester*.” 128 CONG. REC. 14,934 (1982).

69. Chandler Davidson, *Minority Vote Dilution*, in MINORITY VOTE DILUTION, *supra* note 30, at 1, 4.

70. 42 U.S.C. § 1973c (1988).

71. 425 U.S. 130 (1976).



edly faced with the findings of knowledgeable district courts that it is a fact of life. . . . As I see it, Congress has the power to minimize the effects of racial voting, particularly where it occurs in the context of other electoral rules operating to muffle the political potential of the minority.<sup>72</sup>

The following year the Court again confronted a claim that racially polarized voting, combined with unfavorably drawn district lines, diminished group electoral prospects. In *United Jewish Organizations v. Carey*,<sup>73</sup> the Court acknowledged a claim by Hasidic Jews that the creation of a heavily black district in which they were the minority, combined with racial bloc voting, defeated their opportunity to elect candidates of their choice. The Court nonetheless refused to allow a showing of polarized voting patterns itself to prove the statutory or constitutional infirmity of an electoral system.<sup>74</sup> The Court found no support for the "proposition that the candidates who are found racially unacceptable by the majority, and the minority voters supporting those candidates, have had their Fourteenth or Fifteenth Amendment rights infringed by this process."<sup>75</sup> Instead, the Court minimized the consequences, "[h]owever disagreeable," by including them within the norms of political life: the position of the Hasidic Jewish minority "is similar to that of the Democratic or Republican minority that is submerged year after year by the adherents to the majority party who tend to vote a straight party line."<sup>76</sup>

The legislative history of the 1982 amendments introduces the formal recognition of racially polarized voting patterns as a crucial ingredient of a vote dilution claim. The inclusion of the polarized voting inquiry as the second of the reconstituted list of *White/Zimmer* factors marks a major shift in voting rights law.<sup>77</sup> That addition for the first time pointed to an emerging doctrinal coherence for claims of

72. 425 U.S. at 144 (White, J., dissenting).

73. 430 U.S. 144 (1977).

74. In a plurality opinion, Justice White, joined by Justices Stevens and Rehnquist, found two reasons why the defeat of electoral aspirations as a result of polarized voting patterns did not offend the Constitution. The first was based on the nature of the group in question, in this case Jews for whom the districting plan, according to Justice White, "represented no racial slur or stigma." 430 U.S. at 165. Alternatively, Justice White backed off his implied position in *Beer* to make clear that the Court was not prepared to have its voting rights jurisprudence hinge on the polarized voting insight into actual electoral behavior:

Where it occurs, voting for or against a candidate because of his race is an unfortunate practice. But it is not rare; and in any district where it regularly happens, it is unlikely that any candidate will be elected who is a member of the race that is in the minority in that district.

430 U.S. at 166-67 (opinion of White, J., joined by Stevens and Rehnquist, JJ.).

75. 430 U.S. at 167.

76. 430 U.S. at 167.

77. These factors are combined in the legislative history as part of the evidentiary factors to be considered in challenges to at-large election systems. The factors are:

1. the extent of any history of official discrimination in the state or political subdivision that

minority vote dilution. When stripped to its essentials, the paradigmatic claim of minority vote dilution under the amended Voting Rights Act would now incorporate three basic features: (1) structural obstacles to the electoral success of minorities, such as at-large elections; (2) behavioral patterns that interact with the structural obstacles to exaggerate the political power of the majority — i.e., racially polarized voting; and (3) a resulting underrepresentation or even complete lack of representation of the minority community relative to its proportion of the population.

Congress accomplished two things by formally introducing the polarized voting inquiry into the accepted pantheon of vote-dilution evidentiary factors, although neither is explicated in the legislative history. First, it began to give an operational meaning to vote dilution claims, following the lead of some lower federal courts prior to *Bolden*.<sup>78</sup> Second, the new statutory standard provided federal courts with a mechanism to inquire openly into the outcomes of actual voting practices while circumventing what Professor Levinson terms the “brooding omnipresence” of proportional representation.<sup>79</sup> The statutory language of section 2 contains a proviso<sup>80</sup> disclaiming the politi-

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touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Two additional factors of lesser evidentiary significance are mentioned:

whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and] whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

S. REP. NO. 417, *supra* note 67, at 28-29, *reprinted in* 1982 U.S.C.C.A.N. at 206-07 (footnotes omitted).

78. *See, e.g.,* Nevett v. Sides, 571 F.2d 209, 223 n.16 (5th Cir. 1978) (“[I]n the absence of [racially] polarized voting, black candidates could not be denied office because they were black, and a case of . . . dilution could not be made.”), *cert. denied*, 446 U.S. 951 (1980).

79. *See* Sanford Levinson, *Gerrymandering and the Brooding Omnipresence of Proportional Representation: Why Won’t It Go Away?*, 33 UCLA L. REV. 257 (1985) (arguing that pressures toward proportional representation are the inevitable byproduct of modern voting rights jurisprudence).

80. 42 U.S.C. § 1973(b) (1988) (“[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”).

cally thorny problem of any right to proportional representation.<sup>81</sup> At the same time, the "functional" application of the Senate Report evidentiary factors would direct the inquiry back to the actual success rates of minority-supported candidates compared to rates that would have occurred if "undiluted" minority voting strength had held sway.<sup>82</sup> As Chief Justice Rehnquist has written, the very concept of vote dilution "itself suggests a norm with respect to which the fact of dilution may be ascertained."<sup>83</sup> While declining to base that norm on proportional representation per se,<sup>84</sup> the inquiry into voting practices brought about a comparable result by establishing the voting practices of the majority and minority communities as the evidentiary benchmarks of amended section 2 vote dilution claims.<sup>85</sup>

### C. Thornburg v. Gingles

With the passage of the statutory voting rights amendments in 1982, lower federal courts lost no time in recasting case law to focus on an evidentiary inquiry into actual voting patterns. The Eleventh Circuit laid the groundwork in a trio of cases decided in 1984.<sup>86</sup> While allowing for the possibility that a vote dilution claim could be made

81. Congressional debates on the 1982 amendments demonstrated widespread opposition to any requirement of proportional representation. See PERTSCHUK, *supra* note 67, at 177-78 (noting that last-minute amendment incorporating the anti-proportional representation proviso "gave reassurance to legislators who had genuine reservations but believed in voting rights"); ABIGAIL THERNSTROM, *WHOSE VOTES COUNT?* 128 (1987) ("Frankly embracing proportional representation as a minority right was politically out of the question.").

82. *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring).

83. *Mississippi Republican Executive Comm. v. Brooks*, 469 U.S. 1002, 1012 (1984) (Rehnquist, J., dissenting from summary affirmation). As Justice Scalia colorfully queried from the bench during argument in *Chisom v. Roemer*, 111 S. Ct. 2354 (1991), "You don't know what watered beer is unless you know what beer is, right?" Lyle Denniston, *Split Argument Pays Off in Voting Rights Case*, AM. LAW., Sept. 1991, at 103 (quoting Scalia, J.). One assumes that any play on the leading case defining retrogression in minority voting strength, *Beer v. United States*, 425 U.S. 130 (1976), was unintentional.

84. *But cf.* *TRIBE*, *supra* note 31, at 1080 ("When those bringing such claims [of a right to proportional representation] are members of minority races, not only the Voting Rights Act, but also our history and Constitution suggest that this cost is well worth bearing."); John R. Low-Beer, Note, *The Constitutional Imperative of Proportional Representation*, 94 YALE L.J. 163 (1984) (arguing that reliance on proportional representation is ultimately the only way to balance minority representation and majority rule).

85. In reviewing the scope of § 2, Justice O'Connor wrote, "[A]ny theory of vote dilution must necessarily rely to some extent on a measure of minority voting strength that makes some reference to the proportion between the minority group and the electorate at large." *Gingles*, 478 U.S. at 84. Despite her reservations, Justice O'Connor concurred in finding that § 2 prohibited just such a dilution of voting strength.

86. See *Lee County Branch of NAACP v. City of Opelika*, 748 F.2d 1473 (11th Cir. 1984) (remanding for application of post-1982 voting rights statutory standard); *United States v. Dallas County Commn.*, 739 F.2d 1529 (11th Cir. 1984) (same); *United States v. Marengo County Commn.*, 731 F.2d 1546 (11th Cir. 1984) (striking down at-large election of county commissioners in Alabama), *cert. denied*, 469 U.S. 976 (1984).

out even in the absence of racially polarized voting, the Eleventh Circuit stressed that "this factor will ordinarily be the keystone of a dilution case."<sup>87</sup> The "keystone" view of polarized voting quickly became the dominant interpretation of the amended Voting Rights Act in the lower federal courts.<sup>88</sup>

The Supreme Court did not squarely address polarized voting until 1986. In *Thornburg v. Gingles*,<sup>89</sup> the Court for the first time attempted to define the mechanism by which multimember elections compromised the effectiveness of the minority franchise. Following the lead of the lower federal courts, the Court fastened on the polarized voting inquiry as the heart of a vote dilution claim. Without proof of polarized voting patterns, the Court held, "it cannot be said that the selection of a multimember electoral structure thwarts distinctive minority group interests."<sup>90</sup>

But *Gingles* did not merely ratify the statutory standards of amended section 2. Rather, the Court decisively recast the evidentiary factors from the legislative record of the 1982 amendments to the Act. Instead of the enhanced multipart inquiry into the "totality of the circumstances" inherited from *White* and *Zimmer*, the *Gingles* Court focused on the statutory mandate to create a "functional" approach to the problem of electoral inequality.<sup>91</sup> *Gingles* brought the racially polarized voting inquiry into the undisputed and unchallenged center of the Voting Rights Act: "The purpose of inquiring into the existence of racially polarized voting is twofold: to ascertain whether minority group members constitute a politically cohesive unit and to determine whether whites vote sufficiently as a bloc usually to defeat the minority's preferred candidates."<sup>92</sup> The nonelectoral evidentiary elements inherited from the *White/Zimmer* line of cases were discounted as "supportive of, but *not essential to*, a minority voter's claim."<sup>93</sup> Vote dilution was to be measured by the actual electoral practices of the

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87. *Marengo County*, 731 F.2d at 1566. Although the Eleventh Circuit claimed that the primary role of polarized voting was mandated by the legislative history of the 1982 amendments, 731 F.2d at 1566-67, the authoritative Senate committee report refers to polarized voting only twice, once in adding it to the *White/Zimmer* factors and once in defending the new statutory results test against criticism that § 2 would assume " 'that race is the predominant determinant of political preference' " rather than requiring that this be proved. S. REP. NO. 417, *supra* note 67, at 33, *reprinted in* 1982 U.S.C.C.A.N. at 211 (quoting criticism from the Subcommittee Report).

88. See *McMillan v. Escambia County*, 748 F.2d 1037, 1041-43 (5th Cir. 1984).

89. 478 U.S. 30 (1986).

90. 478 U.S. at 51.

91. 478 U.S. at 45 (quoting S. REP. NO. 417, *supra* note 67, at 30 n.120, *reprinted in* 1982 U.S.C.C.A.N. at 208 n.120).

92. 478 U.S. at 56.

93. 478 U.S. at 49 n.15.

day, and the polarized voting inquiry was to be its evidentiary centerpiece.

The result was a three-part test that signaled the emergence of polarized voting as the real measure of vote dilution. First, minority plaintiffs must prove that they are sufficiently numerous and geographically compact to constitute a minority-dominated single-member district.<sup>94</sup> Second, the minority community must be "politically cohesive," i.e., must express common electoral aspirations.<sup>95</sup> Third, plaintiffs must show that a corresponding pattern of bloc voting by the majority community has, over time, generally led to the defeat of minority-supported candidates.<sup>96</sup> As one district court summarized the *Gingles* standard:

Without establishing the first condition, the minority group cannot show that it has even the potential to elect the candidate of its choice in the absence of the alleged discriminatory practice. The final two requirements comprise the foundation for a finding that racial vote polarization exists. Establishment of these two conditions demonstrates that the black minority usually votes for one candidate, and the white majority votes for *and elects* a different candidate. If this racial vote polarization exists, then the minority voters have shown that "submergence in a white multi-member district impedes its ability to elect its chosen

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94. 478 U.S. at 50-51. The focus on minority population concentration as a precondition for a remedy places voting rights law somewhat apart from the normal integrationist thrust of civil rights reform. For criticisms of the view that geographic concentration should be a prerequisite to a successful vote dilution claim, see Richard L. Engstrom et al., *Cumulative Voting as a Remedy for Minority Vote Dilution: The Case of Alamogordo, New Mexico*, 5 J.L. & POL. 469, 472 (1989) (showing that alternative voting remedies can provide electoral opportunity even to dispersed minority voters); Karlan, *supra* note 47 (criticizing unduly narrow restrictions of requiring concentration in majority-dominated single-member districts); Dana R. Carstaphson, Note, *The Single Transferable Vote: Achieving the Goals of Section 2 Without Sacrificing the Integration Ideal*, 9 YALE L. & POLY. REV. 405 (1991) (by making residential segregation a prerequisite for vote dilution remedies, *Gingles* created a direct conflict between voting rights claims and the integration ideal; Court should consequently eliminate the geographic compactness requirement).

95. 478 U.S. at 50-51. The term *politically cohesive*, which had no precedent in existing case law, was drawn from commentators James U. Blacksher & Larry T. Menefee, *From Reynolds v. Sims to City of Mobile v. Bolden: Have the White Suburbs Commandeered the Fifteenth Amendment?*, 34 HASTINGS L.J. 1, 51-55, 58-60 & n.344 (1982); Walter L. Carpeneti, *Legislative Apportionment: Multimember Districts and Fair Representation*, 120 U. PA. L. REV. 666, 696-97 (1972); and Davidson, *supra* note 69, at 4.

Some courts initially treated the "cohesiveness" factor as requiring an extraordinary level of uniformity in the socioeconomic status and cultural activities of the minority community. See, e.g., *Gomez v. City of Watsonville*, 863 F.2d 1407, 1414-16 (9th Cir. 1988) (discussing district court's reliance on expert testimony of socioeconomic differences among Hispanic voters to conclude that the Hispanic community was too apathetic to be politically cohesive). Over time, however, the courts have treated this second *Gingles* factor as be a proxy for racial bloc voting by the minority community. See *Sanchez v. Bond*, 875 F.2d 1488, 1493 (10th Cir. 1989) (racially polarized voting indicates political cohesion); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988) ("[A] minority group is politically cohesive if it votes together."); *Collins v. City of Norfolk*, 816 F.2d 932, 935 (4th Cir. 1987) ("[T]he existence of *racially polarized voting* . . . establishes . . . cohesiveness of the minority group . . .").

96. 478 U.S. at 50-51.

representatives."<sup>97</sup>

With *Gingles*, the Court effectively rejected even Congress' modified *White/Zimmer* standard and, in the name of upholding the amended Act, rewrote the statutory inquiry.<sup>98</sup> As Justice O'Connor commented in her concurring opinion, under *Gingles*, "the basic contours of a vote dilution claim require no reference to most of the [*White/Zimmer* factors] . . . which were highlighted in the Senate Report. . . . [E]lectorate success has now emerged, under the Court's standard, as the linchpin of vote dilution claims . . . ." <sup>99</sup>

Following *Gingles*, voting rights litigation considers almost exclusively actual voting patterns to determine the validity of at-large election systems under the Voting Rights Act.<sup>100</sup> This brings us to the second issue: why the focus on polarized voting as the cornerstone of the Court's voting rights jurisprudence?

97. *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill. 1987) (quoting *Gingles*, 478 U.S. at 51) (citations omitted).

98. This article does not consider the detailed and highly technical controversies over the statistical methods by which racially polarized voting is established. Prior to *Gingles*, some courts had criticized statistical methods that focused exclusively on the outcomes of voting practices and failed to explain why white and black voting patterns might diverge. See, e.g., *Jones v. City of Lubbock*, 730 F.2d 233, 233-36 (5th Cir. 1984) (Higginbotham, J., specially concurring). Under this view, more sophisticated tools such as multivariate analyses, presumably capable of disaggregating racial from nonracial reasons for voting patterns, would be required as part of plaintiffs' proof. This trend in the law was curtailed by *Gingles*, which equated such an inquiry into the reason for divergent voting patterns with a return to the *Bolden* intent standard. See *Gingles*, 478 U.S. at 52-74 (opinion of Brennan, J.) (upholding use of bivariate regression analysis and homogeneous precinct analysis as preferred analytic tools to measure voting patterns).

Since *Gingles*, the courtroom battles in voting rights cases have involved ever more complex methods of statistical modeling: defendants have attempted to show the shortcomings in regression analyses, while plaintiffs have attempted to shore up the basic methodology utilized by plaintiffs' expert Bernard Grofman in the *Gingles* litigation. See Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. REV. 77 (1985) (setting forth basic methodology). These issues broke out into open warfare in the recent successful challenge to the districting lines for county supervisor in Los Angeles County. See *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), cert. denied, 111 S. Ct. 681 (1991) (war of experts in which defendants brought two chairmen of statistics departments and a theoretical physicist to attack plaintiffs' methodology; plaintiffs countered with political scientist Professor Grofman of the *Gingles* case and two highly regarded quantitative historians and experienced expert witnesses, Allan Lichtman and J. Morgan Kousser). The Los Angeles litigation has now spilled over into the academic journals with a fierce battle on methods. See David A. Freedman et al., *Ecological Regression and Voting Rights*, 15 EVALUATION REV. 673 (1991) (defendants' experts); Bernard Grofman, *Statistics Without Substance: A Critique of Freedman et al. and Clark and Morrison*, 15 EVALUATION REV. 746 (1991); Allan J. Lichtman, *Passing the Test: Ecological Regression Analysis in the Los Angeles County Case and Beyond*, 15 EVALUATION REV. 770 (1991).

99. 478 U.S. at 92-93 (O'Connor, J., concurring).

100. See, e.g., *Collins v. City of Norfolk*, 816 F.2d 932, 935-38 (4th Cir. 1987); *Buckanaga v. Sisseton Indep. Sch. Dist.*, 804 F.2d 469, 471-73 (8th Cir. 1986); *Martin v. Allain*, 658 F. Supp. 1183, 1202 (S.D. Miss. 1987); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1019 (C.D. Ill. 1987).

## II. POLICING THE LEGITIMACY OF THE POLITICAL PROCESS

Racial bloc voting is a prominent feature of American politics. The contours of racially identifiable voting patterns are readily evident in the national campaigns of Jesse Jackson in 1984 and 1988,<sup>101</sup> in David Duke's unsuccessful race for governor of Louisiana,<sup>102</sup> in the consolidation of white support behind the Republican party,<sup>103</sup> and in the use of more-or-less veiled racial imagery, as with the Willie Horton ads,<sup>104</sup> to secure the support of white voters. Even the notable breakthrough successes of black candidates in the 1980s evidence the nagging persistence of racial voting patterns. The pioneering elections of a black Mississippi congressman, a black governor in Virginia, and a black mayor in New York City were notable not only for the electoral emergence of a new generation of minority politicians, but for the paucity of white support garnered by each of the winning candidates. The levels of white support for Congressman Mike Espy (12%),<sup>105</sup> Gover-

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101. In the 1984 campaign, Jackson never received more than nine percent of white votes in any state for which exit polls were available. BOB FAW & NANCY SKELTON, *THUNDER IN AMERICA* 219 (1986). In 1988, Jackson won only 10% of the white vote. GARRY WILLS, *UNDER GOD: RELIGION AND AMERICAN POLITICS* 266 (1990). "For all of Jesse Jackson's hoopla about a 'rainbow' coalition, it proved an illusion, with black the dominant color and all but a total break with other racial and ethnic groups." Philip Perlmutter, *Black Activism Can't Afford to Go It Alone*, *CHRISTIAN SCI. MONITOR*, Oct. 3, 1985, at 18.

102. Duke, the Republican candidate and former Grand Wizard of the Ku Klux Klan, received 55% of the white vote but only 4% of the black vote. *Little Comfort in Mr. Duke's Loss*, *N.Y. TIMES*, Nov. 18, 1991, at A14 (editorial). Among an exclusively white electorate, Duke would today be governor of Louisiana.

103. A recent major work argues that racial issues were decisive in the coalescing of Republican Party dominance in presidential elections. See THOMAS B. EDSALL & MARY D. EDSALL, *CHAIN REACTION* (1991). The Edsalls report, for example, that a 1980 survey of voters concluded that 68.8% of voters believed the Democratic Party was likely to aid minorities, as opposed to 11.9% who believed it was not. By contrast, only 11.4% believed the Republicans would aid minorities, while 65.8% thought they would not. *Id.* at 150. By 1986, "fully 56 percent of blacks saw Reagan as racist." *Id.* at 139. The Edsalls argue that racial attitudes after the 1960s "became a central characteristic of both ideology and party identification, integral to voters' choices between Democrats and Republicans, and integral to choices between policy positions on a range of non-racial issues traditionally identified with liberalism and conservatism." *Id.* at 151; see also CHANDLER DAVIDSON, *RACE AND CLASS IN TEXAS POLITICS* 234-39 (1990) (describing emergence of Republican party in Texas as largely based on white reaction to civil rights claims).

This trend was anticipated by Republican strategist Kevin Phillips, the architect of the successful "Southern strategy" employed by President Nixon in his 1968 campaign. KEVIN P. PHILLIPS, *THE EMERGING REPUBLICAN MAJORITY* (1969). According to Phillips, the semiveiled racial themes surrounding busing remedies in the maverick 1968 presidential campaign of George Wallace provided a "way station" for Southern and ethnic whites to abandon the Democratic Party and enter the ranks of the Republicans. "The principal force which broke up the Democratic (New Deal) coalition is the Negro socioeconomic revolution and liberal Democratic ideological inability to cope with it." *Id.* at 37.

104. See EDSALL & EDSALL, *supra* note 103, at 19, 114 (describing role of Horton ads in creating a racially charged electoral context).

105. In 1986 Espy became the first black congressman from Mississippi since Reconstruction. Gloria Borger, *Crossing the Color Line*, *U.S. NEWS & WORLD REP.*, Nov. 6, 1989, at 22,

nor Douglas Wilder (41%),<sup>106</sup> and Mayor David Dinkins (27%),<sup>107</sup> amounted to roughly the same or less than the total votes for such recent landslide presidential losers as Barry Goldwater (38%), George McGovern (38%), and Walter Mondale (41%).<sup>108</sup> Even the most successful black politicians would be routine landslide losers at the hands of the white electorate.

So persistent are racial voting patterns that if one wished to predict the election of minority officeholders, particularly black elected officials, the racial composition of the jurisdiction would be the one indispensable piece of evidence. There is but one black governor in the United States and no black senators; only three of twenty-four black representatives were elected from majority-white congressional districts.<sup>109</sup> Similarly, there are no Hispanic senators, and no Hispanic representatives from majority-Anglo districts.<sup>110</sup> As the case law throughout the 1980s established with dismaying regularity, racial bloc voting is the single most salient feature of contemporary political life in this country.<sup>111</sup> Minorities may have scored impressive gains in

23. However, he gathered only 12% of the white vote. *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987).

106. Wilder became the first black governor of Virginia in 1989 with 41% of the white vote. Michael K. Frisby, *The New Black Politics*, BOSTON GLOBE, July 14, 1991 (Magazine), at 14.

107. In 1989, 27% of the white voters in New York City voted for Dinkins, the city's first black mayor. *Id.* This pattern was even more pronounced in the 1991 election of Willie Herenton as the first black mayor of Memphis, Tennessee. Mayor Herenton received between 10% and 15% of the white vote. Bill Nichols, *Upset Win in Memphis Marks "New Beginning."* USA TODAY, Oct. 7, 1991, at 2A.

108. Republican Barry Goldwater won 38.47% of the popular vote in the 1964 presidential election. CONGRESSIONAL QUARTERLY'S GUIDE TO U.S. ELECTIONS 297 (Robert A. Diamond ed., 1975). Democrat George McGovern won 37.53% of the popular vote in 1972. *Id.* at 299. Democrat Walter Mondale won 41% of the popular vote in 1984. THE STATESMAN'S YEAR-BOOK 1985-1986, at 1374 (John Paxton ed., 122d ed. 1985).

109. The three are Democrats Ronald Dellums of California and Alan Wheat of Missouri and Connecticut's Gary Franks, who in 1990 became the first black Republican to be elected to the House in 56 years. CONGRESSIONAL QUARTERLY'S POLITICS IN AMERICA 1992: THE 102ND CONGRESS 124-25, 853-54, 270-71 (Phil Duncan ed., 1991).

110. *See id.*

111. The finding of racially polarized voting patterns is so routine in voting rights cases that this inquiry is most noteworthy when it is not present. Post-*Gingles* cases finding persistent patterns of racially polarized voting include *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987) (upholding district court's finding of racial bloc voting in municipal elections), *cert. denied*, 492 U.S. 905 (1989); *Ewing v. Monroe County*, 740 F. Supp. 417, 421 (N.D. Miss. 1990) (adopting expert's finding of "severe and persistent racial polarization" in Monroe County); *Clark v. Edwards*, 725 F. Supp. 285, 298-99, 302 (M.D. La. 1988) ("pronounced and persistent" statewide pattern of racially polarized voting in Louisiana), *vacated sub nom. Clark v. Roemer*, 750 F. Supp. 200 (M.D. La. 1990), *vacated and remanded*, 111 S. Ct. 2881 (1991); *McDaniels v. Mehfoou*, 702 F. Supp. 588, 593-94 (E.D. Va. 1988) (ecological regression analysis and testimony of black community leaders establish continuing patterns of racially polarized voting); *Martin v. Allain*, 658 F. Supp. 1183, 1193-94 (S.D. Miss. 1987) (same); *McNeil v. City of Springfield*, 658 F. Supp. 1015, 1028 (C.D. Ill. 1987) ("[E]xtended analysis of voting in local elections in Springfield demonstrates that in races where there is a black candidate, most blacks vote for the black. White voters overwhelmingly prefer white candidates under



achieving elective office,<sup>112</sup> but with only a handful of exceptions,<sup>113</sup> these gains did not correspond to a notable breakdown in racial lines of voting.<sup>114</sup> Rather, the increased number of minority elected officials is most directly attributable to the successes of redistricting and reapportionment litigation and the resulting creation of more minority-dominated electoral districts.

Thus, the transformation of voting rights law through the focus on actual voting patterns gave to voting rights claims a resilience unmatched in any other area of civil rights law in the 1980s. That Ronald Reagan should have been elected to office in 1980, the nadir of the substantive voting rights law under the rule of *City of Mobile v. Bolden*, is ironic. By the time President Reagan left office, eight years and three Supreme Court appointments later, the governing law had not only repaired the damage of *Bolden* but had provided a far more beneficial regime for plaintiffs' claims than even under *White* and *Zimmer*. No other area of civil rights law came close to matching this history in the 1980s.

#### A. *The Right To Vote as a Group-Based Claim*

Ever since the Court's entry into the "political thicket"<sup>115</sup> with the

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the same circumstances. This is racially polarized voting.") (quoting and adopting a finding from one of plaintiffs' exhibits); *Jackson v. Edgfield County*, S.C. Sch. Dist., 650 F. Supp. 1176, 1198 (D.S.C. 1986) (noting that persistent and severe racial bloc voting "indicates that race still is a predominant influence over the electorate's preferences").

The author served as counsel to plaintiffs in several of the above-listed cases.

112. Since the passage of the Voting Rights Act, the number of black elected officials has increased from roughly 500 in 1965 to approximately 7200 in 1989. FRANK R. PARKER, *BLACK VOTES COUNT 1* (1990). The dramatic expansion of black electoral opportunity is best seen in Mississippi, as chronicled by Frank Parker. Before 1965, there were but six black elected officials in a state that was roughly 40% black; by 1989 that number had jumped to 646, the highest of any state in the country. *Id.* at 2. The progression was anything but smooth and orderly. After the passage of the Voting Rights Act of 1965 and the tremendous surge of black voter registration, the state responded by creating multimember legislative and local election units for the purpose of, and with the effect of, denying electoral opportunity to newly registered black voters. *Id.* at 34-77. Only after the elimination of at-large and multimember districts through years of litigation did black electoral success begin to take hold. *Id.* at 130-66.

113. Among the notable exceptions are black mayors of major U.S. cities in which whites are the majority population, such as Wellington E. Webb of Denver and Norman Rice of Seattle. Jonathan Tilove, *Political Integration*, MONTREAL GAZETTE, Sept. 3, 1991, at B3.

114. See, e.g., Bernard Grofman & Lisa Handley, *The Impact of the Voting Rights Act on Black Representation in Southern State Legislatures*, 16 LEGIS. STUD. Q. 111 (1991) (no decrease in polarized voting in the South over time). Professors Grofman and Handley's study found that, in 1989, only one percent of the 1534 southern state legislators from majority-white districts were black. In majority black districts, on the other hand, 139 of 233 elected legislators were black. *Id.* at 114. In another study, the same authors found that, in 1990, only six out of 142 southern congressmen were black in a region that is 18% black. Bernard Grofman & Lisa Handley, *Preconditions for Black and Hispanic Congressional Success*, in THE ELECTION OF WOMEN AND MINORITIES (Wilma Rule & Joseph Zimmerman eds., forthcoming 1992). See generally Guinier, *supra* note 28, at 1112-13 (documenting persistence of polarized voting patterns).

115. The term originates with Justice Frankfurter's stern warning in *Colegrove v. Green*, 328

one-person, one-vote reapportionment cases,<sup>116</sup> the specter of unbridled judicial oversight of the political process has weighed heavily on the Court. As the Court recognized early on in reviewing the per se legality of at-large elections, each election contest necessarily features winners and losers.<sup>117</sup> The Court's jurisprudence in the electoral arena has amounted to an attempt, admittedly imprecise, to determine at what point the presumed legitimacy of the political process breaks down so as to transform the customary frustration of the vanquished into a compelling legal claim. Absent such a defined presumption in favor of the legitimacy of the process, there is no doctrinal stopping point short of a judicial assessment of the fairness of each election's outcome.<sup>118</sup>

The fundamental issue in the electoral case law turns on the apparently countermajoritarian nature of judicial intervention into the electoral choices of the majority of voters. The early case law avoided the difficulties inherent in judicial review of actual election outcomes by focusing on individual rights in the political process. In the breakthrough cases of *Baker v. Carr*<sup>119</sup> and *Wesberry v. Sanders*,<sup>120</sup> the Court rooted its oversight of the electoral process by declaring that

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U.S. 549, 556 (1946), that principled judicial oversight of the political process was impossible. For later criticisms of the nonjusticiability of election issues, see BORK, *supra* note 59, at 89-90 (the Supreme Court's reapportionment cases were a "deformation of the Constitution [that] probably succumbed to the law of unintended consequences. . . . [T]he one man, one vote doctrine was not only illegitimate constitutional law but a political failure as well.").

116. The abandonment of the political question doctrine came with *Baker v. Carr*, 369 U.S. 186 (1962), which in reversing the district court held that a challenge to the numerically malapportioned Tennessee legislature was a justiciable constitutional cause of action under the Equal Protection Clause. Two years later, the Court announced the one-person, one-vote rule for reapportionment in *Reynolds v. Sims*, 377 U.S. 533 (1964). The actual application of the one-person, one-vote rule to state apportionment plans, in practice, has allowed considerable latitude for the exercise of state discretion. Compare *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (16.4% deviation from ideal state apportionment acceptable, although approaching "tolerable limits") with *Karcher v. Daggett*, 462 U.S. 725 (1983) (striking down congressional redistricting plan from New Jersey following 1980 census because of a population imbalance of less than one percent where the imbalance resulted from bad-faith reapportionment policies).

117. See *Whitcomb v. Chavis*, 403 U.S. 124, 153 (1971) ("As our system has it, one candidate wins, the others lose."). This discussion assumes head-to-head contests in which the highest votegetter is elected to office. Under various proportional representation systems, losing parties able to muster significant percentages of the popular vote could be afforded representation. For an overview of the uses of nonmajoritarian voting systems, see Karlan, *supra* note 47.

118. Indeed, with the recognition of claims based on fairness to the major political parties, *Davis v. Bandemer*, 478 U.S. 109 (1986), the Court does seem to have opened the door to just that possibility.

119. 369 U.S. 186 (1962).

120. 376 U.S. 1 (1964). Although *Wesberry* construed the application of article I, § 2 of the Constitution to the election of the Georgia congressional delegation, the holding that "one man's vote . . . is to be worth as much as another's," 376 U.S. at 8, parallels the Court's jurisprudence under the Fourteenth Amendment. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 13-2 (2d ed. 1988).

each individual had the right to be part of an electoral district with equally weighted representation.<sup>121</sup> Thus, for example, the Court held that the complaint in *Baker* adequately stated a claim for relief where the voting power of a single voter in one county of Tennessee was worth nineteen times the voting power of a similarly situated voter in another part of the state.<sup>122</sup> In announcing the formal one-person, one-vote rule in *Reynolds v. Sims*,<sup>123</sup> the Court unambiguously expressed the right to the franchise in terms of individual entitlements: “[A]n individual’s right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.”<sup>124</sup> Similarly, in striking down the exclusion of citizens who did not own or lease taxable real property or have children in the local public schools from local school board elections, the Court concentrated on the right of each citizen to “have an effective voice in school affairs.”<sup>125</sup>

While the population-based apportionment cases eased the Court’s path into the political thicket, they did little to adumbrate principles applicable to group-based exclusion. The critical, isolating feature of the pure vote dilution claim is the equality of apportionment across all citizens and the absence of any overt mechanism to prevent minorities from registering and voting. In the typical challenge to at-large elections, for example, each individual’s vote is counted and weighed in the same manner and each individual is presumptively equal to the next in being able to register to vote and actually cast her ballot. The issue, as Justice Scalia skeptically phrased it, is not “equality of individual votes” but “equality of minority blocs of votes.”<sup>126</sup>

As previously discussed, between *Whitcomb* and *White* the Court

121. Although the standard of justiciable individual rights was set out in *Baker v. Carr*, 369 U.S. 186 (1962), the Court articulated no substantive standard to guide future judicial inquiries. See Michael Klarman, *An Interpretive History of Equal Protection*, 90 MICH. L. REV. 213, 257-60 (1991). Only with *Wesberry* and *Reynolds v. Sims*, 377 U.S. 533 (1964), did the Court articulate the substantive one-person, one-vote standard.

122. 369 U.S. at 245 (Douglas, J., concurring).

123. 377 U.S. 533 (1964). The use of the term *one person, one vote* appears to have originated with Justice Douglas: “The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing — one person, one vote.” *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

124. 377 U.S. at 568. See generally TRIBE, *supra* note 31, at 1065-68 (describing difficulties in application of the one-person, one-vote rule); Samuel Issacharoff & Allan J. Lichtman, *The Census Undercount and Minority Representation: The Constitutional Obligation of the States to Guarantee Equal Representation*, NATL. BLACK L.J. (forthcoming 1992) (describing ambiguous commands of *Reynolds* and the one-person, one-vote principle).

125. *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621, 627 n.7 (1969).

126. *Chisom v. Roemer*, 111 S. Ct. 2354, 2374 (1991) (Scalia, J., dissenting).

shakily set the foundation for examining electoral outcomes to determine the fairness of the political process. Once the theme of electoral outcomes is introduced, the contrast with the early apportionment cases begins to emerge clearly. Under the one-person, one-vote standard, the Court weighed each individual's capacity to participate equally in the political process as she approached the ballot box. So long as access to the polls was assured and all voters stood in numerical equality prior to the actual voting processes, the apportionment inquiry was satisfied. What actually occurred in the election was not at issue. In order to find vote dilution, however, the Court of necessity began looking to the outcomes of the political process. This required turning away from the individual voter to determine how cognizable groups of voters fared in order to assess the fundamental fairness of the process. Outcome fairness can only be measured in the aggregate; a reviewing court "must have an idea in mind of how hard it 'should' be for minority voters to elect their preferred candidates under an acceptable system."<sup>127</sup> This group-based inquiry stands at the heart of representative politics. As Justice Powell has written, "[t]he concept of 'representation' necessarily applies to groups: groups of voters elect representatives, individual voters do not."<sup>128</sup> This investigation into group rights inevitably led the Court away from the focus on access to the balloting process and forced it to turn its sights to a greater and greater extent to the actual voting practices of jurisdictions under challenge.

The evolution of the Court's jurisprudence from *Whitcomb* and *White* to *Gingles* is therefore best understood as an attempt to consolidate the evidentiary criteria necessary for a group claim of vote dilution. The emergence of polarized voting patterns as the critical evidentiary issue in vote dilution claims corresponds to the shift from individual- to group-based perspectives in defining impediments to the full exercise of the franchise. As with *Griggs* under Title VII, the emergence of an expressly group-based inquiry under the Voting Rights Act, together with the evidentiary focus on polarized voting, invigorated the substantive law and dramatically increased the reach of statutory and constitutional protections of the right to vote.

### B. *Judicial Oversight of the Political Process*

The group-based nature of the emerging minority vote dilution claims raises troubling questions concerning both the manageability of

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127. *Thornburg v. Gingles*, 478 U.S. 30, 88 (1986) (O'Connor, J., concurring).

128. *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part).

the new standard and the reason for its existence. Although these are distinct issues, they arise from a common concern with the fundamental issue of judicial oversight of the political process. The focus on polarized voting patterns in these cases addresses the central underlying concern of political legitimacy and may lend a coherence to the Court's voting rights jurisprudence that helps explain the Court's solicitude for these claims over the past decade.

Behind each judicial determination that a particular voting system frustrates the electoral aspirations of minority voters stands an indictment of majoritarian processes.<sup>129</sup> The racially polarized voting inquiry gives the Court a healthy basis for skepticism concerning the majoritarian premise implicit in respect for the outcomes of elections. In the context of persistent racially polarized voting, the problem is not simply that some win and some lose. Rather, there is a predictability to who wins and loses, and that predictability falls along racial lines. This is reflected in the threshold for legal intervention set forth in *Gingles*. Simple electoral defeat does not trigger the Voting Rights Act because only "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting."<sup>130</sup>

The existence of this racially defined majority voting faction raises concerns as old as the republic. Madison in *The Federalist* cautioned of the venomous role of factions in political life.<sup>131</sup> But his particular concern was with majority factions that would be unrestrainable through the operation of the franchise: "If a majority be united by a common interest, the rights of the minority will be insecure."<sup>132</sup> Political institutions must provide safeguards to "guard one part of the society against the injustice of the other part."<sup>133</sup> Madison affirmatively assigned to government the role of protecting against the tyranny bred

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129. At least two separate factors cause this countermajoritarian dilemma. Compare RONALD DWORIN, *LAW'S EMPIRE* 178-80 (1986) (instinctive preferences for winner-take-all schemes) with ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 16-17 (1962) (court intervention "thwarts the will of representatives of the actual people of the here and now; it exercises control, not in behalf of the prevailing majority, but against it").

130. *Gingles*, 478 U.S. at 56.

131. *THE FEDERALIST* NO. 10 (James Madison).

132. *THE FEDERALIST* NO. 51 (James Madison), at 161 (Roy P. Fairfield ed., 1981); see also GLEN O. ROBINSON, *AMERICAN BUREAUCRACY* 36 & n.102 (1991); Julian N. Eule, *Judicial Review of Direct Democracy*, 99 *YALE L.J.* 1503, 1522-28 (1990) (depicting the Federalist caution about majority factions); Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 *SOC. PHIL. & POLY.* 196, 216 (1991) (observing that the challenge to the Madisonian conception of the republic was "to devise a means to retain the beneficial feature of popular government — the propensity of popular governments to prevent abuse by the rulers — while minimizing the danger of faction").

133. *THE FEDERALIST*, *supra* note 132, at 161.

of the ruling passions or interests<sup>134</sup> and to the judiciary the independent power to effectuate that protection.<sup>135</sup>

Persistent polarized voting is the courtroom proof of the existence of not only a permanent faction, but a majority faction. There are innumerable majority factions in American life, ranging from anti-Naziism to a near-universal rejection of the theory that the earth is flat. Majority factionalism does not in itself provide a legitimating trigger for judicial intervention. Rather, courts must look to the defining features of the majority and minority factions to justify countermajoritarian review. The polarized voting inquiry provides this justification by identifying a particular form of majority factionalism, one based on a repudiation of the political choices of historically disadvantaged minorities.

Once polarized voting specifies the nature of the voting factions, the inquiry in the at-large election challenges is not directed so much to the permissibility of such factional behavior as to its consequences. Voting rights jurisprudence does not reach into the individual act of casting a ballot, regardless of whether the individual voter is motivated by racial, partisan, or any other concerns. The target of voting rights claims is not individual behavior, or even the creation of a racially defined majority faction;<sup>136</sup> it is the creation or maintenance of electoral systems that reward that faction with superordinate representation. By allowing serial voting, at-large elections permit a cohesive, well-financed majority community to reward itself with enhanced represen-

134. THE FEDERALIST NO. 10 (James Madison); see also ROBINSON, *supra* note 132, at 47 (arguing that the point of constitutional order is to impose constraints on majorities: "The true Hobbesian 'state of nature' is not primitive society but unconstrained majoritarian politics"); GARRY WILLS, EXPLAINING AMERICA 205 (1981) ("The whole point of representation is to 'refine and enlarge the public views' by choosing men 'whose wisdom may best discern the true interest of their country.' These men turn their gaze from the partial and private interest to the public and common one . . .") (quoting THE FEDERALIST, *supra* note 132, No. 10 (Madison), at 21) (emphasis added by Wills).

135. In introducing the Bill of Rights, Madison commented:

If they [the Bill of Rights] are incorporated into the constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the legislative or executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the constitution by the declaration of rights.

1 CONG. DEB. 457 (Joseph Gales & William W. Seaton eds., 1834).

136. Voting rights jurisprudence is unique within the constellation of civil rights claims in that the case law accepts the fact of racially divided voting patterns, once proved, and then seeks to create a remedial scheme that assumes the continuance of those voting patterns. As Professor Guinier notes:

Rather than insisting that such separateness and difference be eradicated, as in the school desegregation context, or that poor blacks, isolated from and stigmatized by an unresponsive government, be afforded equal government services, as in equalization of municipal services litigation, the Voting Rights Act model of racial justice recognized racial difference.

Guinier, *supra* note 28, at 1099 (footnote omitted).

tation, if not outright monopoly of representation. In the context of legislative elections, such "disproportionate majority power is, in itself, so wrong that it delegitimizes majority rule."<sup>137</sup> Combined with the greater wealth, education, and resources of the majority white community, white bloc voting robs representative systems of any presumed entitlement to deference.

Judicial intervention, therefore, serves two distinct purposes, despite the fact that it is not directed at the actual voting preferences that give rise to claims of minority vote dilution in the first place. First, it controls the potentially deleterious impact on the political process whenever stable majority factions emerge. Second, it protects a particularly vulnerable minority faction, one comprised of historically subjugated racial and ethnic minorities, from the electoral perils of untrammelled majority factionalism. Under this view, where electoral structures are "unable to guarantee a hearing for a variety of voices or to prevent factional domination, courts must pick up the slack and ensure that the majority governs in the interests of the *whole* people."<sup>138</sup>

### C. *Vote Dilution Under a Conservative Judiciary*

To identify the sources legitimating judicial oversight of the electoral process is not to explain why voting rights claims should have fared so differently from other civil rights actions. In the same period when the Supreme Court was erecting nearly insuperable barriers to employment discrimination claims,<sup>139</sup> the Court strengthened the statutory protections of voting rights in *Gingles* and then extended the scope of those statutory protections to encompass elected state judiciaries.<sup>140</sup> Why has judicial oversight of the electoral process generally

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137. Lani Guinier, *No Two Seats: The Elusive Quest for Political Equality*, 77 VA. L. REV. 1413, 1478 (1991); see also ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 240 (Henry Reeve trans., spec. ed. 1835) ("[T]he power to do everything, which I should refuse to one of my equals, I will never grant to any number of them.").

138. Eule, *supra* note 132, at 1559.

139. The 1988 term of the Supreme Court, for example, fundamentally transformed the law of employment discrimination. The Court recast the burdens of proof upon civil rights plaintiffs, *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); the scope of statutory protections against racial harassment, *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989); the procedural hurdles to the vindication of civil rights claims, *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989); and, most notably, the permissible limits of local governmental efforts to benefit minority opportunity, *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

140. See *Chisom v. Roemer*, 111 S. Ct. 2354 (1991); *Houston Lawyers' Assn. v. Attorney Gen.*, 111 S. Ct. 2376 (1991). The Court also strengthened the remedial powers of § 5 by directing lower courts to enjoin the operation of unprecleared changes instead of allowing challenged elections to go forward on an interim basis. *Clark v. Roemer*, 111 S. Ct. 2096 (1991).

become more exacting under an increasingly conservative federal bench?

To address this paradox, it is necessary to disaggregate voting rights from the general rubric of civil rights claims. Because statutory and constitutional voting rights claims are typically brought in the name of minority citizens, there is a tendency to lump them into an undifferentiated pool of antidiscrimination law. Justice Marshall clearly identified this pattern in his *Bolden* dissent<sup>141</sup> when he tried to restrain the expansion of the *Washington v. Davis*<sup>142</sup> intent standard from reaching the fundamental rights line of equal protection cases.<sup>143</sup> According to Justice Marshall, voting rights cases involve “a substantive constitutional right to participate on an equal basis in the electoral process that cannot be denied or diminished for any reason, racial or otherwise, lacking quite substantial justification.”<sup>144</sup>

Justice Marshall mildly overstated this proposition by relying heavily on *Reynolds v. Sims* and its progeny to set out the nonclassification-based nature of voting rights claims.<sup>145</sup> As developed above, there had been a decisive shift from the individual-rooted claims of the early apportionment cases to the group-based nature of the vote dilution claims. Nonetheless, Marshall was right to redirect the Court’s attention to the distinction between typical civil rights claims and claims of interference with the fair operation of the electoral process. The standard claims to equality of opportunity in employment, housing, or education turn primarily on an individual’s entitlement to protection from the hostility of the majority community. The voting rights claims involve both an element of individual rights to participate equally and, more centrally, a protection from fundamental process distortions in the political arena. The latter insight is key for social scientists in defining the harms caused by at-large election mechanisms: “When voting patterns are polarized along racial lines . . . electoral competition can be structured in a manner that impedes a

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141. *City of Mobile v. Bolden*, 446 U.S. 55, 103-41 (1980) (Marshall, J., dissenting).

142. 426 U.S. 229 (1976) (requiring proof of invidious purpose or motive for equal protection challenge to state action having disproportionate impact on a suspect classification of the population).

143. Equal protection analysis prior to *Bolden* turned on whether the right at stake was fundamental or whether the challenged state action affected a discrete group of the population. Examples of fundamental rights cases include *Bullock v. Carter*, 405 U.S. 134 (1972) (right to vote); *Shapiro v. Thompson*, 394 U.S. 618 (1969) (right of interstate travel); *Williams v. Rhodes*, 393 U.S. 23 (1968) (rights guaranteed by First Amendment); *Douglas v. California*, 372 U.S. 353 (1963) (right to an adequate criminal defense); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (right to procreate).

144. *Bolden*, 446 U.S. at 120 (Marshall, J., dissenting).

145. 446 U.S. at 116.



minority — even a sizable minority — from converting its voting strength into the election of minority candidates.”<sup>146</sup>

The potential for exclusion inherent in at-large or multimember elections forces a confrontation with the heart of representative politics. Representative electoral systems can be looked at in terms of a hierarchy of outcomes. Ideally, politics should be a deliberative process in which cross-cutting alliances will be formed on an issue-by-issue basis<sup>147</sup> and in which race will not serve as the overriding cue for voting behavior. A secondary solution is to acknowledge the reality of racial bloc voting but to structure the electoral processes so as to distribute representational opportunity across all social groups. The undesirable third option is to have a political system that is characterized by racial voting patterns and that rewards the majority community with superordinate control of the outcomes.

This hierarchy corresponds to the bottom-line insight of James Madison that “[t]here are two methods of curing the mischiefs of faction: the one, by removing its causes; the other, by controlling its effects.”<sup>148</sup> Unfortunately, little evidence exists that the breakdown of at-large election systems has cured the problem of factions or moved American politics closer to any race-blind norm. In Madison’s pessimistic terms, it may then be that “the *causes* of faction cannot be removed, and that relief is only to be sought in the means of controlling its *effects*.”<sup>149</sup> This is where voting rights law has had substantial success, as reflected in the evidence that the effects of polarized voting have been significantly tempered. Voting rights litigation of the past two decades has dramatically altered the inequitable distribution of representation that emerges from the combination of polarized voting and at-large elections.<sup>150</sup>

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146. Richard L. Engstrom & Michael D. McDonald, *The Election of Blacks to Southern City Councils: The Dominant Impact of Electoral Arrangements*, in *BLACKS IN SOUTHERN POLITICS* 245, 245 (Laurence W. Moreland et al. eds., 1987).

147. See MAURICE DUVERGER, *POLITICAL PARTIES* (Barbara North & Robert North trans., 2d ed. 1959) (setting out relationship between structures of political systems and development of voting blocs); Guinier, *supra* note 137, at 1490 (arguing that breaking down voting systems that reward majority bloc voting will promote political stability by promoting nonpermanent, issue-based alliances).

148. *THE FEDERALIST*, *supra* note 132, No. 10 (Madison), at 17.

149. *Id.* at 19.

150. The most comprehensive study of the effect of voting rights litigation on the electoral success of candidates of choice of minority communities was undertaken by sociologist Chandler Davidson and political scientist Bernard Grofman. See CHANDLER DAVIDSON & BERNARD GROFMAN, *CONTROVERSIES IN MINORITY VOTING: A TWENTY-FIVE YEAR PERSPECTIVE ON THE VOTING RIGHTS ACT OF 1965* (forthcoming 1992); see also Chandler Davidson & George Korb, *At-Large Elections and Minority Group Representation: A Reexamination of Historical and Contemporary Evidence*, in *MINORITY VOTE DILUTION*, *supra* note 30, at 65, 71-74 (12 studies tend to confirm hypothesis that single-member districts afford blacks better chances for

The particular solicitude for voting rights claims under an increasingly conservative federal judiciary can be partially explained by the uniqueness of voting rights claims amid the constellation of civil rights causes of action. Voting rights law can be defined by its strong element of process correction applied on behalf of minorities who have been either shut out of or handicapped in entering the political sphere. That element of process correction separates voting rights claims from the purely outcome-driven civil rights claims against the distribution of goods and opportunities in this society. That same element of process correction, however, introduces a decided limitation on the post-*Brown v. Board of Education* commitment to constitutional protection of minority rights in this country.

#### D. Voting Rights and Process Corrections

Understanding the distinct treatment of vote dilution claims during the 1980s requires returning to the unique features of voting rights law. The voting rights cases stand apart from typical antidiscrimination claims when viewed from the vantage point of restraining the process distortions introduced by majority bloc voting in the context of at-large elections. Where the focus is on the coalescing of a majority faction, judicial intervention into the political arena should be seen not simply as a vindication of the rights of discrete and insular minorities but as the application of exacting judicial scrutiny to legislation which restricts the functioning of the political processes. The group-based nature of the vote dilution claim approximates the general panoply of civil rights actions in combatting "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities," as formulated by the famous paragraph three of the *Carolene Products* footnote.<sup>151</sup> But the strong element of process distortion in the electoral arena also implicates a special constitutional solicitude for challenges to a law that "restricts those political processes which

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representation); Bernard Grofman, *Alternatives to Single-Member Plurality Districts: Legal and Empirical Issues*, in BERNARD GROFMAN ET AL., REPRESENTATION AND REDISTRICTING ISSUES 107, 114-16 (1982) (collecting sources); Theodore P. Robinson & Thomas R. Dye, *Reformism and Black Representation on City Councils*, 59 Soc. Sci. Q. 133 (1978) (finding black representation significantly increased in cities with districts rather than at-large elections); Delbert Taebel, *Minority Representation on City Councils: The Impact of Structure on Blacks and Hispanics*, 59 Soc. Sci. Q. 142 (1978) (finding relationship between districting and increased council representation both for blacks and Latinos).

There is also some evidence that the prospect of minority electoral success through the elimination of at-large elections contributes to increased minority political participation, including actual turnout on election day. See Lani Guinier, *Keeping the Faith: Black Voters in the Post-Reagan Era*, 24 HARV. C.R.-C.L. L. REV. 393, 420 (1989).

151. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

can ordinarily be expected to bring about repeal of undesirable legislation," as formulated by paragraph two of the *Carolene Products* footnote.<sup>152</sup>

For process-based constitutional theorists, cases implicating the closing of the political process stand at the core of legitimate, but narrow, judicial review.<sup>153</sup> As one defender of process-based theory would have it, "[i]t is difficult to imagine a more compelling case for judicial intervention on political process grounds than *Baker v. Carr*; Tennessee legislators had proven fiercely resistant to reapportioning themselves out of a job, and even a 'civically militant electorate' was not about to budge them."<sup>154</sup> The persistent exclusion of minority representatives as a result of majority bloc voting in at-large elections embodies the central argument of the process-based defense of the apportionment cases: "when a numerical majority chooses a[n electoral] plan that shuts out a numerical minority, that plan is not in fact 'democratic.'"<sup>155</sup> Because of the rewards to be reaped by the majority community if the at-large system is preserved, it is impossible to look to the voting process to legitimate electoral outcomes.<sup>156</sup> Nor can there be reliance on the political process to protect or restore minority voting rights. Thus seen, judicial reaction against at-large election systems contaminated by majority bloc voting has the allure of restoring legitimacy to the basic functioning of the electoral process.

The inquiry into racial bloc voting is critical to the application of process theory to vote dilution claims. Without a focus on actual electoral practices, process theory provides no consistent guidance for answering the question that has plagued the Supreme Court: how to

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152. 304 U.S. at 152 n.4.

153. The undisputedly leading work in this field is JOHN H. ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980). Dean Ely attempts to define a limited, non-normative theory of judicial review based upon the process-distortion theory of paragraph two of *Carolene Products*. Under such a theory, the apportionment cases loom large as a focal point for judicial intervention into the political process. See *id.* at 117. Ely, however, also tries to fit the more complex vote dilution cases, which do not readily present catch phrases like *one person, one vote* to guide judicial review, within the framework of process theory as well. For Ely, the definition of a suspect class is its systematic exclusion from effective participation in the political process. *Id.* at 151-53. For extensive criticisms of Ely, see *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991). Even defenders of Ely criticize the attempted incorporation of the suspect classification strain of equal protection within his process-based theories. See Michael J. Klarman, *The Puzzling Resistance to Political Process Theory*, 77 VA. L. REV. 747, 773 (1991).

154. Klarman, *supra* note 153, at 757-58 (quoting *Baker v. Carr*, 369 U.S. 186, 270 (1962) (Frankfurter, J., dissenting)) (footnotes omitted).

155. Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 14 (1991).

156. See Note, *supra* note 66, at 346 (arguing that deference to majoritarian legislative decisions in vote dilution cases "is absurd on its face; the vindication of voting rights can hardly be trusted to the very representatives whose election is the result of the alleged vote dilution").

distinguish the simple act of electoral loss from broader systemic failures of the electoral process. Standing alone, pure process theory could not draw the "distinction between cases in which a group . . . loses on a particular issue or series of issues and cases in which a group is permanently excluded from effective political participation by the refusal of other groups to deal with it."<sup>157</sup> Nor could process theory without an operational component rebut the even more extreme claim that "whichever group happens to lose the political struggle or fails to command the attention of the legislature . . . is — by that fact alone — a discrete and insular minority."<sup>158</sup>

As formulated by Dean Guido Calabresi:

When an identifiable social group has been consistently and significantly underrepresented or in other ways excluded from the legislative process, traditional political processes cannot be relied upon to protect that group. The courts must therefore step in to guard the group from unjustified selective treatment, that is, discrimination. The group must not be just a temporary political loser. It must have experienced a history of discrimination or must face a real danger of long-run exclusion.<sup>159</sup>

The polarized voting analysis, therefore, energizes and concretizes a process-based approach to judicial oversight of the electoral arena. But that is only half the story. In addition to lending doctrinal coherence, process-based reforms hold a separate allure for a conservative judiciary. Together with allowing courts to claim an exclusive process focus on "how politics should work"<sup>160</sup> stands the strong tendency of such an approach to evade the problematic questions of outcome fairness. As Professor Brilmayer contends, "[i]f process were *Carolene's* true focus, then it would not matter whether a particular legislative outcome is good or bad. From a process viewpoint, an individual or a group should be allowed to participate in political decisionmaking regardless of whether it will make any difference to the result."<sup>161</sup>

The limitations inherent in process-based theories are apparent in

157. Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEXAS L. REV. 343, 380-81 (1981) (book review).

158. Owen M. Fiss, *The Supreme Court, 1978 Term — Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 8 (1979) (criticizing the apparent attraction of process-based theories of judicial review).

159. Guido Calabresi, *The Supreme Court, 1990 Term — Foreword: Antidiscrimination and Constitutional Accountability (What the Bork-Brennan Debate Ignores)*, 105 HARV. L. REV. 80, 91 (1991) (referring favorably to this standard of review as "Type II" judicial enforcement of the antidiscrimination principle).

160. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1063 (1980).

161. Lea Brilmayer, *Carolene, Conflicts, and the Fate of the "Insider-Outsider,"* 134 U. PA. L. REV. 1291, 1313 (1986); see also ELY, *supra* note 153, at 102 n.\* (admitting worries over what full process-based theory would mean for civil liberties claims); Tribe, *supra* note 160, at 1079-80 (speculating on likely impact of process-based theories on constitutional decisionmaking).

the second major consequence of the polarized voting inquiry in vote dilution cases: the elimination of prior case law requiring intrusive court review of the *outcomes* of the political process.<sup>162</sup> In the case law prior to the 1982 amendments to the Voting Rights Act, the issue of “nonresponsiveness” of elected bodies to the needs and interests of the minority community was a central focus of litigation.<sup>163</sup> The inquiry into a “significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group” was carried forward as part, albeit a subordinate part, of the statutory standard of amended section 2 of the Act<sup>164</sup> until *Gingles* effectively discarded it.

By looking to process failure in the capture of superordinate representation by a majority voting bloc, the polarized voting inquiry spared the courts the need to review each item of legislative decision-making and, if need be, to strike it down as racially invidious.<sup>165</sup> This process-oriented inquiry into voting patterns is attractive to the courts as a proxy for the broader issue of the distributional consequences of political decisionmaking. In an important recent article, Professor Guinier challenges the limitations inherent in focusing on electoral outcomes and using simple access to representation as a proxy for the broader remedial aims that the franchise was thought to offer the civil rights movement.<sup>166</sup> She argues that the focus on voting patterns

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162. This theme has been sounded consistently through the case law reviewing all aspects of the political process. For example, in an interview conducted just before his retirement, Chief Justice Earl Warren explained that apportionment

is perhaps the most important issue we have had before the Supreme Court. If everyone in this country has an opportunity to participate in his government on equal terms with everyone else and can share in electing representatives who will be truly representative of the entire community and not some special interest, then most of these problems that we are now confronted with would be solved through the political process rather than through the courts.

*Excerpts From Interview With Warren on His Court's Decisions*, N.Y. TIMES, June 27, 1969, at 17.

163. See, e.g., *Lodge v. Buxton*, 639 F.2d 1358, 1375 (5th Cir. 1981), *affid. sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982); *Kirksey v. Board of Supervisors*, 554 F.2d 139, 146 (5th Cir.), *cert. denied*, 434 U.S. 968 (1977); *Zimmer v. McKeithen*, 485 F.2d 1297, 1305 (5th Cir. 1973) (en banc), *affid. sub nom. East Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976).

164. See S. REP. NO. 417, *supra* note 67, at 29 n.116, *reprinted in* 1982 U.S.C.C.A.N. at 207 n.116 (unresponsiveness a relevant inquiry to the extent plaintiffs introduce evidence on this point).

165. See Guinier, *supra* note 137, at 1510-13 (proposing procedural protections of defeated minority interests to spare courts from overly intrusive item-by-item review of local legislative decisions).

166. Guinier, *supra* note 28, at 1096-101. Professor Guinier argues that the 1982 amendments to the Voting Rights Act cemented a limited version of black electoral opportunity that focused overwhelmingly, if not exclusively, on the numbers of black elected officials. The effect of this view of electoral opportunity, she argues, was threefold:

[F]irst, it provided a successful litigation approach to challenge the failure of the election to produce elected black officials; second, it gave courts a justiciable standard to determine the

emerged primarily because a limited inquiry fit the needs of the institutional voting rights plaintiffs' bar for whom the "responsiveness" inquiry was too burdensome and too unpredictable and that it consequently sheltered the courts from the more exacting and often-times unmanageable inquiry into the results of the exercise of political power.<sup>167</sup>

The lesson of the past decade is that voting rights claims gather force to the extent that process-based claims can relieve a conservative judiciary of any obligation to police the substantive distributional outcomes of the policy decisions of elected political bodies. The one recent Supreme Court decision curtailing the breadth of voting rights protections brought this limitation into sharper relief. In *Presley v. Etowah County Commission*,<sup>168</sup> the Court restricted the scope of the preclearance requirement of section 5 of the Voting Rights Act to matters that have a "direct relation to, or impact on, voting" and, accordingly, refused to extend the coverage of section 5 to the actual duties of elected county commissioners once in office.<sup>169</sup> The Court, while leaving the substantive reach of the Act to the electoral process unrestricted, candidly declared that, at its core, the "Voting Rights Act is not an all-purpose antidiscrimination statute."<sup>170</sup>

In fairness, it must be recognized that there are tremendous difficulties in extending the struggle for equality of political opportunity to a normative vision of what the yields of a substantively fair political process should be. An initial difficulty stems from the unbounded nature of the inquiry. A typical vote dilution case focusing on the unresponsiveness of elected representatives may require courts to weigh the quality and funding levels of local schools; the hiring practices of local public agencies; the appointment processes to administrative boards, committees, and judicial offices; and the allocation of municipal services such as road construction and repair.<sup>171</sup> In the guise of challeng-

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problems and progress that were closely related to the ultimate limits of the voting rights inquiry; and third . . . it "inescapably closed the door" on the real goal of the civil rights movement, which was to alter the material condition of the lives of America's subjugated minorities.

*Id.* at 1101.

167. *Id.* at 1096 & n.88.

168. 112 S. Ct. 820 (1992) (refusing to apply § 5 to county commissioners' internal reallocation of authority in a manner that curtailed the powers of newly elected black commissioners).

169. 112 S. Ct. at 830.

170. 112 S. Ct. at 832.

171. All of these factors were present in the record in *Lodge v. Buxton*, 639 F.2d 1358 (5th Cir. 1981), *affid. sub nom. Rogers v. Lodge*, 458 U.S. 613 (1982). See 639 F.2d at 1376-77. This elaborate factual record is by no means atypical. See Blacksher & Menefee, *supra* note 95, at 43 n.283 (arguing that inquiry into unresponsiveness is so open-ended that it becomes completely unmanageable in the courts).

ing a structural distortion in the election process, voting rights litigation became the forum for challenges to every conceivable facet of local decisionmaking.

The responsiveness inquiry served as the political equivalent of antitrust.<sup>172</sup> The electoral arena was viewed as a political marketplace in which competing social factions acquire legislative goods through the representative process. An overconcentration of goods in the hands of one faction is an evil akin to monopoly pricing. By identifying the outcome distortion in the distribution of legislative goods, the responsiveness inquiry detected political market failure in the same manner as would be indicated by monopoly pricing schemes.

In turn, the polarized voting inquiry went one step further in simplifying this assumption. Political market failure could be identified not by the distributional outcomes of the legislative process but by the electoral practices that selected the representatives. Where electoral practices revealed a persistent pattern of racial exclusion, the polarized voting inquiry allowed the courts to presume the maldistribution of legislative goods that would result. The necessary corollary, however, was a presumption of legitimacy in the distribution of legislative goods where the courts could identify no adverse effect on minority political participation as a result of structural barriers such as at-large elections combined with a pattern of polarized voting practices.

Part of the problem of identifying properly functioning political systems, however, extends beyond simple administrability. The normative outcomes of full political equality have been uncertain since the founding strokes of the modern civil rights movement. With Dr. Martin Luther King, Jr., for example, one finds strikingly different chords emerging from the demand for the franchise:

Give us the ballot, and we will no longer have to worry the federal government about our basic rights . . . . Give us the ballot and we will fill our legislative halls with men of good will . . . . Give us the ballot and we will help bring this nation to a new society based on justice and dedicated to peace.<sup>173</sup>

In one speech, Dr. King equates the franchise with a guarantee of the integrity of the political process, a substantive vision of electoral outcomes in a nondiscriminatory electoral setting, and a normative vision of the policy determinations of a polity freed from the blinders of in-

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172. Cf. WILLS, *supra* note 134, at 201-02 (comparing the pluralist ideal of "the free interplay of competing interests" with the Madisonian scheme, which "does not so much act against monopolies in the name of intellectual free trade as impose a general and prior restraint on trade" by insisting that legislators concern themselves only with the public good).

173. Quoted in Guinier, *supra* note 28, at 1082 n.14.

justice and discrimination.<sup>174</sup> Whatever difficulties the ambiguous role of the franchise held for the civil rights movement could only be compounded when translated to the substantive law of voting rights.

To a large extent, the *White/Zimmer* standards for proof of vote dilution reflected the uncertainty over the exact objective of voting rights claims. Prior to *Gingles*, courts were called upon to scrutinize process fairness in the physical acts of registering and voting, outcome fairness in specific electoral contests, and the ultimate normative fairness of the allocation of societal resources and opportunities through the legislative process. As against such a broad-gauged challenge to the totality of the political process, the focus on voting patterns and electoral outcomes to determine process fairness corresponds to a limited but real view of the first-order problems in discriminatory electoral systems. The focus on voting patterns offers fairly dependable evidence of electoral process failures through the political exclusion of minorities while relieving the courts of the need to police the outcomes of what can then be certified as fairly constituted political bodies. Therein lies both the power and the limitation of voting rights jurisprudence over the past decade.

### III. THE UNFORTUNATE REALITY OF RACIAL DIVISIONS

The polarized voting analysis assumes two theories of political participation to justify judicial intervention against the outcome of majoritarian selection. The first theory is process-based, arguing that a disproportionate capture of political power by an electoral majority is a potentially harmful development in any representative democracy, since the normal electoral processes will be helpless in removing an entrenched and stable majority from its position of dominance. In the specific context of at-large or multimember elections, this theory further incorporates empirical evidence that such entrenched majority factions will be able to reward themselves with a superordinate share of representative positions and may accordingly be immune from the give and take of parliamentary horsetrading.<sup>175</sup> The result is not just a

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174. The multipurpose quality of the franchise is reflected in the legislative debates accompanying the Voting Rights Act of 1965. A statement by Republican House members in support of the Act, for example, speaks repeatedly of the purpose of access to the franchise as restoring the responsiveness of political institutions to all citizens, and concludes that "in the political process of free and responsive operation of local government lies the final goal of equality in all civil rights." H.R. REP. NO. 439, 89th Cong., 1st Sess. 37 (1965), reprinted in 1965 U.S.C.C.A.N. 2437, 2466 (Republican views of William M. McCulloch, Richard H. Poff, William C. Cramer, Arch A. Moore, Jr., Clark MacGregor, Carleton J. King, Edward Hutchinson, and Robert McClory).

175. See Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 Q.J. ECON. 371, 393 (1983) (arguing that majorities should normally be unable to main-



maldistribution of elective office, but a distorted allocation of legislative goods through the political processes.

The second theory is historically and sociologically specific. When the disadvantaged groups under such unchecked majoritarianism are historically subordinated groups, most clearly in the case of black Americans, the process distortions take on a greater urgency. The creation of stable patterns of political exclusion through the combination of racial voting practices and institutional devices such as at-large elections has a specific connotation for groups that emerged from formal and complete exclusion from the political process only a generation ago. These electoral process distortions work a kind of de facto disenfranchisement, the results of which bear an unfortunate and uncanny resemblance to the older regime of formal exclusion of historically disadvantaged groups from the political process.

The view of American electoral practices that emerges from the voting rights jurisprudence is that of a pluralism that has failed to overcome a paralyzing attachment to racially and ethnically defined group identities. Case after case supports the conclusion that the electoral arena remains charged with group-based battles in which the simple cuing device of race or ethnicity serves as the mobilizing force for legions of voters. The integrative hopes of the American melting pot fail at the political frontiers of race and ethnicity. This view of failed pluralism does not a handsome portrait make.<sup>176</sup>

The pessimistic view of the politics of race that undergirds the new voting rights jurisprudence is not without its detractors. The view of more-or-less permanent, racially defined factions locked in electoral battle over the spoils of the political system runs contrary to a number of currently fashionable theories of politics. I will therefore use the final section of this article as a defense, in part anticipatory, of the new voting rights jurisprudence based upon the twin pillars of process distortion and substantive exclusion. These foundations of the new voting rights jurisprudence, grounded in the polarized voting analysis, are central in defending this area of law from two very different forms of criticism.

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tain complete control over political outcomes if minority factions "are free to bid for votes, form majority coalitions, and win the political games").

176. As expressed by Richard Epstein, "[a]t its best, the pluralist sees politics as an extension of market behavior into the political realm. At its worst, the pluralist recognizes that politics is an endless series of pathological special interest deals whose sole validation derives from the electoral and the legislative process that generated them." Richard A. Epstein, *Modern Republicanism — Or The Flight From Substance*, 97 *YALE L.J.* 1633, 1637 (1988). Epstein challenges republicanism from the right, defending private market-based rights for all but the production of public goods, which is the narrow sphere that he delegates to the government.

The first body of criticism is aimed at the premise of group-based identities in the political sphere. This critique sees the focus on group-based voting patterns as an unfortunate departure from the coalition-based, integrative thrust of American politics. Two different arguments are involved here. The right-wing form of the critique sees judicial intervention into the political arena in defense of group rights as a departure from the fundamental right of each individual voter to join in electoral alignments of choice. The left-wing form considers a jurisprudence based on hardened community antagonisms at odds with the republicanist vision of the transformative role of politics.

The second set of attacks is grounded in public choice theory. It too has two forms, the first of which is a critique of any theory of politics that assumes that voter preferences can be accurately gauged by the outcomes of elections. The second, more direct criticism is that solicitude for minorities in the political process is misdirected because it misperceives the disproportionate power minorities can command in the political process by virtue of the greater intensity of their preferences and their superior ability to marshal their supporters.

#### A. *Racial Identities, the Republican Consensus, and Individual Autonomy*

Voting rights jurisprudence runs contrary to communitarian views of the political process as an arena for dialogue and integration rather than the hardening of historic lines of division. This gives rise to an argument, currently presented as the new republicanism, that looks to the transformative role of politics in promoting dialogue<sup>177</sup> and creating new preferences.<sup>178</sup> Under this view, the capacity to achieve new collective grounds for the polity yields political legitimacy.<sup>179</sup>

The hallmark of contemporary republicanism, its animating principle according to its proponents, is the concept of civic virtue. Civic virtue is "the willingness of citizens to subordinate their private inter-

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177. See Frank I. Michelman, *The Supreme Court, 1985 Term — Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 31-33 (1986).

178. See Cass R. Sunstein, *Preferences and Politics*, 20 PHIL. & PUB. AFF. 3, 10 (1991) (arguing that existing preferences are characterized as "shifting and endogenous," a function of "current information, consumption patterns, legal rules, and general social pressures").

179. For discussions of the "cognizable common good" to be revealed through the dialogic processes, see Michelman, *supra* note 177, at 40. See also Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31-32 (1985) (arguing that this view animates the entire republican view of the structure of constitutional government inherited from the Framers). For discussion of the overlap between the concept of a cognizable common good and the Rousseauian notion of the "general will," see David M. Estlund, *Democracy Without Preference*, 99 PHIL. REV. 397, 416-23 (1990).

ests to the general good.”<sup>180</sup> This in turn requires subordination of individual or group self-interest in favor of political engagement to select “values that ought to control public and private life.”<sup>181</sup> Through the discourse born of public debate, the proponents of republicanism contend, politics will yield a social consensus.<sup>182</sup> The underlying core of republicanism is the aspiration for that politics of consensus.<sup>183</sup>

The republicanist image of politics stands quite apart from the group-based interests which underlie contemporary voting rights jurisprudence.<sup>184</sup> The polarized voting inquiry searches for distinctly group-based identities, as reflected in voting practices, to yield a rudimentary definition of fairness in the political process. The pluralist vision of distinct political interests among what Professor Kathleen Sullivan terms “involuntary intermediate groups”<sup>185</sup> is a source of great consternation for the proponents of republicanism. Professor Michelman sets out this fundamental conflict of political impulses quite clearly: “Republicanism contests with a so-called pluralist vision, which regards the political system as, ideally, designed to serve the self-defined private interests of individuals or groups, fairly represented in political forums, where they compete under fair rules for fair shares of the outputs of public policy.”<sup>186</sup> The heart of republicanism is, therefore, to reject the primacy of any preexisting group identities that threaten to derail the collective or communitarian goals of citizenship.<sup>187</sup> As summarized by Professor Michelman,

[R]epublicanism affirms . . . the notion of a statewide, substantive common interest or good. Accordingly, the special mark of republican constitutional thought is affirmation of “an autonomous public interest independent of the sum of individual interests,” a common interest existent and determinable not just within the confines of a particular social

180. GEOFFREY R. STONE ET AL., *CONSTITUTIONAL LAW* 5 (2d ed. 1986).

181. *Id.*

182. Michelman, *supra* note 177, at 23.

183. See Cass R. Sunstein, *Beyond the Republican Revival*, 97 *YALE L.J.* 1539, 1554 (1988). As defined by Professor Sunstein, “the republican view assumes that ‘practical reason’ can be used to settle social issues.” Sunstein, *supra* note 179, at 32.

184. For those who focus on the distinct historical treatment of blacks in the United States, the communitarian faith of the new civic republicans is extremely troubling. See, e.g., Derrick Bell & Preeti Bansal, *The Republican Revival and Racial Politics*, 97 *YALE L.J.* 1609, 1611 (1988) (“[T]he ‘shared values’ in which the antifederalists laid faith included a historically constant and (for whites) a unifying belief in the inferior and subordinated position of black Americans.”); *id.* at 1614 (noting conceptual obstacles to inclusion in the republican vision of community for those persons who “‘could not count themselves heirs to traditions whose meanings did at those times involve the exclusion or subordination of just those persons’”) (quoting Frank I. Michelman, *Law’s Republic*, 97 *YALE L.J.* 1493, 1496 (1988)).

185. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 *YALE L.J.* 1713, 1716-18 (1988).

186. Michelman, *supra* note 177, at 21.

187. *Id.* at 27.

group . . . .<sup>188</sup>

Contemporary voting rights jurisprudence has been subjected to at least one direct attack from republicanist quarters for its focus on policing group-based rewards in the political process. The critical problem, according to Professor Kathryn Abrams, is the fixation of voting rights law on preexisting divisions to define the entire political process:

The problem with an aggregation device such as an election is that it presents a picture of the winning and losing voters as homogeneous masses, without reference to the distinct judgments that formed the basis of their votes. It suggests that elections are won by nondescript "majorities" rather than by shifting combinations of smaller groups, who support a candidate for different reasons, but whose votes combine to produce a victory. Because this concept of aggregation obscures the reasons for people's votes, it produces the problems of translation that are the final drawback to the preference aggregation model.<sup>189</sup>

As expressed by the new civic republicans, preference aggregation "directs attention to a single event — the general election — thereby neglecting a series of other events that often determine electoral outcomes and help translate election results into substantive policy."<sup>190</sup>

Paradoxically, the challenge to preference aggregation proves to be a unifying theme of both the left-wing republicanist critique and a right-wing individual autonomy challenge. From the right, the critique is grounded in a fundamental focus on individual rights in the political arena. For this view, the focus on polarized political preferences threatens to create permanent "ethnic boundaries" that "ultimately smother[] democratic choice and threaten[] democratic institutions."<sup>191</sup> As a result, the voting rights jurisprudence is accused of "cut[ting] back on the individualistic premises of the reapportionment cases — one person, one vote — and [inching] us along toward a corporate concept of electoral democracy."<sup>192</sup>

To take an example from Abigail Thernstrom, the leading neoconservative critic of voting rights law, a genuine problem of political legitimacy stems from persistently racially polarized elections

in which white voters consistently voted as a bloc against candidates (white or black) preferred by blacks. Elections would then amount to a

188. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 445 (1989) (quoting Morton J. Horowitz, *Republicanism and Liberalism in American Constitutional Thought*, 29 WM. & MARY L. REV. 57, 67 (1987)) (footnote omitted).

189. Abrams, *supra* note 67, at 487 (footnote omitted).

190. *Id.* at 488.

191. *Bills to Amend the Voting Rights Act of 1965: Hearings on S. 53, S. 1761, S. 1975, S. 1992, and H.R. 3112 Before the Subcomm. on the Constitution of the Senate Comm. on the Judiciary*, 97th Cong., 2d Sess. 1310 (1982) (testimony of Professor Donald L. Horowitz).

192. *Id.*

racial census, with the result that blacks in a majority-white jurisdiction would have nothing to lose by remaining home on election day. The breakdown of registrants by race would determine the outcome.<sup>193</sup>

She immediately contends, however, that "such white solidarity in the face of black enfranchisement is seldom permanent; blacks become a powerful swing vote when white candidates begin to compete."<sup>194</sup>

This critique based on individual autonomy runs strikingly parallel to the republicanist criticism of the new voting rights jurisprudence. According to Professor Abrams,

[w]here a minority group is of sufficient size that it cannot be ignored without risking electoral outcomes, white voters will be more inclined to coalesce with that group. Redrawing district lines to create groups of minority voters with such potential influence can help break the cycle of mutual avoidance that has characterized polarized politics.<sup>195</sup>

As noteworthy as the doctrinal overlap in the critiques from left and right is the lack of empirical evidence from the broad trends of American voting practices offered to substantiate these claims.<sup>196</sup> It is striking that theories purporting to promote more effective minority electoral participation proffer no empirical support for the claim that white voters will indeed be more likely to coalesce with minority voters in the absence of judicial intervention. To her credit, Thernstrom does make concessions on this score, even if they are not at all integrated into her final thesis:

There is no doubt that where "racial politics . . . dominates the electoral process" and public office is largely reserved for whites, the method of voting should be restructured to promote minority officeholding. Safe black or Hispanic single-member districts hold white racism in check, limiting its influence. And where whites — and often blacks — regard skin color as a qualification for office (in part because no experience suggests otherwise), the election of blacks helps to break both white and black patterns of behavior.<sup>197</sup>

This leads to the second problem with these critiques. They appear to hold the peculiar belief that basing a theory of judicial intervention upon the consequences of polarized voting patterns might somehow *create* those patterns rather than vice versa. The critics get to this point by disregarding the importance of the empirical findings required of a court in a vote dilution case. Under *Gingles*, an indispen-

193. THERNSTROM, *supra* note 81, at 23.

194. *Id.*

195. Abrams, *supra* note 67, at 504.

196. For a critique of Thernstrom on this score, see Pamela S. Karlan & Peyton McCrary, *Without Fear and Without Research: Abigail Thernstrom on the Voting Rights Act*, 4 J.L. & POL. 751, 760-61 (1988).

197. THERNSTROM, *supra* note 81, at 238-39.

sable prerequisite for a plaintiff's judgment is proof that polarized voting does actually exist as a long-term trend prior to the commencement of litigation in any jurisdiction whose electoral system is under challenge. If white voters had a propensity to form coalitions with black voters in nondistricted election units, then there would be no basis for a claim of minority vote dilution.<sup>198</sup> The voting rights remedy does not spring into being whenever a minority group can lay claim to sufficient numbers to form a majority in a single-member district. Rather, the minority group must show that this remedy is necessary to defeat the consequences of a persistent pattern of frustration of its determined political choices at the hands of a majority voting bloc.<sup>199</sup> The Thernstrom/Abrams critique is misdirected both as a matter of positive law — the presumed capacity of blacks and whites to form coalitions would defeat a voting rights claim — and on its empirical assumptions that such patterns of effective minority participation are indeed the norm.

Both the right and left critiques circumvent a more troubling question: why *shouldn't* there be racial voting patterns? Behind the repeated empirical observations of racially polarized voting lie fundamental differences in the socioeconomic positions of white and black Americans. This fact has critical importance, not only in recognizing the fact of racial divergence in the political process but in explaining the persistence of these differences.

Let us take but one example, the issue of government expenditures on social programs and other regulatory activities. Roughly 30% to 40% of black Americans live at or below the federal poverty line and are dependent on government entitlement programs for some or all of their basic needs.<sup>200</sup> Some 22.5% of working blacks are employed in the public sector, and a stunning 53.5% of all blacks in professional or managerial positions are employed by government.<sup>201</sup> Cuts in social

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198. In fact, many vote dilution claims have been defeated because of plaintiffs' failure to prove cohesive voting patterns. See, e.g., *Concerned Citizens v. Hardee County Bd. of Commrs.*, 906 F.2d 524 (11th Cir. 1990); *Monroe v. City of Woodville*, 897 F.2d 763 (5th Cir. 1990), cert. denied, 111 S. Ct. 71 (1990); *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989); *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989); *Sanchez v. Bond*, 875 F.2d 1488 (10th Cir. 1989), cert. denied, 111 S. Ct. 340 (1990); *Overton v. City of Austin*, 871 F.2d 529 (5th Cir. 1989).

199. Professor Abrams' next claim compounds the failure to confront the fact of repeated court findings of racially polarized voting: "If we concede the polarization hypothesis, we risk not only oversimplification, but also reliance on a remedy that is not sufficient, in and of itself, to make minorities effective political participants." Abrams, *supra* note 67, at 504. *Contra* Guinier, *supra* note 28, at 1127 & n.247 (criticizing Abrams on this score).

200. EDSALL & EDSALL, *supra* note 103, at 231.

201. *Id.* at 162. By contrast, 15.3% of working whites are employed by government, and only 27.5% of white managerial and professional employees are employed in the public sector. *Id.*

service programs have a disproportionate impact on racial and ethnic minorities,<sup>202</sup> as does any diminution in the level of government employment.<sup>203</sup> Is it any wonder that blacks and whites have hugely different views on the critical political issue of government responsibility to guarantee employment and/or decent standards of living?<sup>204</sup> Or that polls indicated that blacks and public employees were the only groups to oppose the budget-slashing Proposition 13 in California?<sup>205</sup>

Having discussed the overlap between the two critiques, let me now turn to the divergence between left and right on this score. The left critique, primarily through Abrams, is an optimistic exhortation that the political process be allowed to play the curative role assigned to it in the republican view. Whatever the lack of empirical basis for this claim, at least it is directed to the same fact of second-class minority status in the political process as is the Voting Rights Act and its case law. For the right, on the other hand, the communitarian analysis is more of a shill for unchecked majoritarianism. The singular focus on individual access to the polls, when raised in the face of persistent claims of electoral exclusion, amounts to a defense of the status quo. Thus Thernstrom angrily frames her central inquiry not by recognizing the historically aggrieved position of blacks in the American political process but by asking "how much special protection from white competition are black candidates entitled to?"<sup>206</sup>

202. Only two of every 100 white households would be adversely affected by a cut in welfare payments, compared to 15 of every 100 black households and 10 of every 100 Hispanic households. Similarly, food stamps are utilized by nine of every 100 white households, compared to 26% of black households and 15% of Hispanic households. *Id.*

203. See GARY ORFIELD & CAROLE ASHKINAZE, *THE CLOSING DOOR: CONSERVATIVE POLICY AND BLACK OPPORTUNITY* xv, 20-21, 174-204, 231 (1991) (arguing that a reduction in the federal commitment to hiring minorities has curbed black employment prospects); Don Terry, *Cuts in Public Jobs May Hurt Blacks Most*, N.Y. TIMES, Dec. 10, 1991, at A1 (reporting particular vulnerability of blacks to reductions in public sector employment).

204. The Edsalls report that a 1984 survey showed a 58 percentage point spread between black support for this proposition and white support for it. EDSALL & EDSALL, *supra* note 103, at 183 (citing WARREN E. MILLER & SANTA A. TRAUOGOTT, *AMERICAN NATIONAL ELECTIONS STUDIES DATA SOURCEBOOK* 181 (1989)). As the late Texas congressman Mickey Leland colorfully observed in 1982, "'Blacks supporting the Republican Party is like a bunch of chickens getting together to support Col. Sanders.'" DAVIDSON, *supra* note 103, at 235 (quoting Leland).

205. EDSALL & EDSALL, *supra* note 103, at 130.

206. THERNSTROM, *supra* note 81, at 5. Thernstrom's argument begins from the unfortunate premise of the presumptive legitimacy of the status quo. This view from the top is the subject of a great deal of criticism in the critical feminist and critical race literature, where scholars point to a pervasive tendency to see whites as the neutral race and males as the neutral gender, making nonwhites and females deviants from those "norms." See Kimberlé W. Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1379 (1988) ("The white norm . . . continues in an unspoken form as a statement of the positive social norm, legitimating the continuing domination of those who do not meet it."); Christine A. Littleton, *Reconstructing Sexual Equality*, 75 CAL. L. REV. 1279, 1310 (1987) ("[T]he phallogocentric fallacy . . . consistently leads courts (and even legal reformers) to choose the (biological or social) male as the norm and to locate difference in the female.")

Polarized voting is not just a result of historic antipathy or enforced ethnic divides, nor is it a construct of a misdirected voting rights case law seeking to enforce group-based identities and entitlements at the expense of either individual autonomy or broader communitarian values. Rather, much of this unfortunate voting pattern is the product of fundamentally different societal interests resulting from the basic differences in the socioeconomic means of blacks and whites. Under such circumstances, it would be extraordinary if there were not divergent voting patterns. The persistence and extremity of the polarized voting practices in community after community, despite substantial numbers of middle-class blacks and poor whites indicates that, beyond the divergent socioeconomic interests, there must also be a more fundamental racial antipathy at work as well.<sup>207</sup>

The attempt to cast the specter of illegitimate preferences over voting rights claims fails, at a fundamental level, because remedying the racial impact of voting systems is not subject to the same criticisms as affirmative action programs in employment, for example. Voting is not an area in which preexisting individual white expectations have been formed. Even Thernstrom acknowledges that there is no countervailing entitlement claim that whites could raise in opposition to minority claims for enhanced electoral opportunity: "Whites denied medical school admission as a consequence of minority preference

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(footnote omitted); Martha Minow, *Justice Engendered*, 101 HARV. L. REV. 10, 39-43 (1987) (arguing that the Supreme Court's pregnancy discrimination decisions, by allowing employers to ignore the difference of pregnancy, have perpetuated the assumption that equal treatment is measured by a male norm); Ann C. Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1378 (1986) (Males are the "picture of humanity," while "women are but male subjectivity glorified, objectified, elevated to the status of reality."); Patricia J. Williams, *Metro Broadcasting, Inc. v. FCC: Regrouping in Singular Times*, 104 HARV. L. REV. 525, 530 (1990) (whites are treated as the "neutral" race, while blacks are the "other").

Critical observers have similarly spoken of policymakers' general inability to put themselves in the position of the "other." See *Lynch v. Donnelly*, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring) (observing, while discussing whether the Establishment Clause prohibits a municipality from displaying a nativity creche at Christmas, that "[i]f the audience is large, as it always is when government 'speaks' by word or deed, some portion of the audience will inevitably receive a message determined by the 'objective' content of the statement, and some portion will inevitably receive the intended message"); Charles R. Lawrence III, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that pervasive, unconscious racism requires that allegedly discriminatory governmental acts be evaluated in terms of their cultural meanings rather than the government actors' intentions); Mari J. Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, 22 HARV. C.R.-C.L. L. REV. 323 (1987) (arguing that the Critical Legal Studies (CLS) movement has suffered from CLS scholars' failure to integrate the experiences of minorities into their work); Minow, *supra*, at 51 (Supreme Court Justices tend to "reject[] as irrelevant or relatively unimportant the experience of 'different' people and have denied their own partiality, often by using stereotypes as though they were real.") (footnotes omitted).

207. For a view of voting rights developments focusing on the extent of persistent racial antagonisms, see T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 355-64 (1992).



have been arguably denied a right; those disadvantaged by a change in the electoral rules cannot make that claim."<sup>208</sup> Remedies flowing from voting rights claims must be judged against process-based accounts of republican government and a substantive evaluation of which groups suffer the brunt of electoral exclusion. Unlike employment claims, for example, voting rights challenges do not implicate preexisting expectations of the continued spoils born of majority overrepresentation to which independent, legally vested interests have attached.<sup>209</sup>

Moreover, to the extent that one aspires to break down racially defined political allegiances, it is quite possible that facilitating minority representation may promote that end, even if the means chosen reward minority bloc voting. The election of minorities in the face of white bloc voting does not necessarily translate into complete exclusion at the legislative level. This view "fails to recognize that voting and coalition-building among representatives differ significantly from voting and coalition-building among the citizenry as a whole."<sup>210</sup> There are at least three potential reasons for this: first, representative bodies are collegial groups whose members need to work with each other on a daily basis; second, repeat voting is more likely to give rise to coalition building than the limited participation of the citizenry at large would allow; and, third, legislative voting occurs in an institutional setting that formalizes debate and deliberation.<sup>211</sup> While the history of minority participation on elected bodies has not necessarily fulfilled the promises of such participation,<sup>212</sup> allowing for elected representation under racially polarized voting conditions may well facilitate the breaking down of some racial and ethnic barriers.

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208. THERNSTROM, *supra* note 81, at 242.

209. See Samuel Issacharoff, *When Substance Mandates Procedure: Martin v. Wilks and the Rights of Vested Incumbents in Civil Rights Consent Decrees*, 77 CORNELL L. REV. 189, 204-18 (1992) (analyzing Supreme Court employment discrimination doctrines from vantage point of burden placed upon dispreferred groups or individuals).

210. Karlan, *supra* note 47, at 216.

211. *Id.* at 216-18; WILLIAM H. RIKER, *THE THEORY OF POLITICAL COALITIONS* 51 (1962) (coalition formation more likely among small groups than broad diffuse masses).

212. A particularly disturbing example is the election of the first Mexican-American member to a small rural school district in Texas. Immediately upon her election, the board changed its internal procedures to require a second before any item could be placed on the voting agenda, a requirement that had not been in effect while the board was entirely Anglo. See *Rojas v. Victoria Indep. Sch. Dist.*, Civ. A. No. V-87-16, 1988 U.S. Dist. LEXIS 11049 (S.D. Tex. Mar. 29, 1988), *aff'd.*, 490 U.S. 1001 (1989); see also *supra* note 29 (discussing similar alteration of decisionmaking rules to frustrate first-time minority elected officials in *Presley v. Etowah County Commn.*, 112 S. Ct. 820 (1992)).

## B. Preference and Prejudice

Contemporary voting rights doctrine, relying as it does on the finding of racially polarized voting, makes two key assumptions. The first is that there are indeed discernible, racially defined voting patterns, and the second is that such voting patterns place the minority at a disadvantage in the electoral marketplace. Each of these assumptions is subject to criticism from social choice or public choice scholars. The first critique, which I shall consider the soft form of social choice theory, concerns the ability to discern meaningful social preferences through the examination of voting patterns. This critique does not refer to the methodological steps taken actually to measure the extent to which blacks and whites vote as blocs,<sup>213</sup> but rather to whether there are actually meaningful preferences established through the voting processes that can justify judicial intervention. The second form of the social choice critique, the harder form, is whether the propensity for group-based bloc voting is a disadvantage or an advantage in the political process.

### 1. The Arrow Impossibility Theorem

The first critique begins with the famous Impossibility Theorem developed by Kenneth Arrow.<sup>214</sup> The Arrow Theorem expresses grave skepticism about whether the product of any decisionmaking process can be thought to represent a true ordering of preferences untainted by the constraints of the selection process. Within each ranking of preferences is the "cycling" problem of divergent preferences' being forged into a majority vote by the constraints of the selection process, or of other equally unacceptable constraints upon democratic choice.<sup>215</sup> Following Arrow, it is difficult to see any electoral outcome as reflecting the preferences of the majority or to see the majority pref-

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213. See *supra* note 98 for a discussion of the methodological disputes surrounding the actual measurement of voting patterns. See also *Thornburg v. Gingles*, 478 U.S. 30, 52-54 (1986) (discussing the use of bivariate ecological regression and homogeneous precinct analysis to establish polarized voting patterns).

214. See KENNETH J. ARROW, *SOCIAL CHOICE AND INDIVIDUAL VALUES* (2d ed. 1963).

215. The key insight is derived from an application of the "voter's paradox," initially developed by the French political theorist Condorcet in the eighteenth century. See Richard H. Pildes & Elizabeth S. Anderson, *Slings Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2129-35 (1990) (setting forth Condorcet's voter's paradox and the Arrow Impossibility Theorem). Condorcet demonstrated that for any set of voting choices, alternative outcomes would emerge depending on how the choices were presented to the voters. Arrow generalized this finding to be a fundamental problem of all collective decisionmaking: "In theoretically searching for democratic procedures that would aggregate the given preferences of individuals into a single collective outcome, Arrow discovered that the paradox turns out to be an inescapable feature of any decision-making process likely to be considered even minimally fair." *Id.* at 2131.

erences as legitimating the ensuing policy outcomes. Not only may the manner of choice presentation to the voters influence the outcome, but preferences may be unstable over time and distorted by the frozen snapshot of the electoral process. One of the implications of Arrow is the difficulty of even discerning majority preferences, let alone constructing a democratic theory based on the presumed inviolability of such preferences as revealed through elections. As summarized by Professor Sunstein:

[A]ccurate preference-aggregation through politics is unlikely to be accomplished in the light of the conundrums in developing a social welfare function. Public choice theory has shown that cycling problems, strategic and manipulative behavior, sheer chance and other factors make majoritarianism highly unlikely to provide an accurate aggregation of preferences.<sup>216</sup>

In part, the insights derived from the Arrow Impossibility Theorem should lend credence to the demands of minorities that electoral systems that frustrate their political aspirations be denied the presumptive legitimacy accorded to majoritarian outcomes. However, a key part of Arrow translates into skepticism about whether any true majority preference may exist. The impact of voting procedures on substantive outcomes, together with the problem of cycling of voter choices, yields an inability to interpret any electoral outcome "as *uniquely representing the popular will*."<sup>217</sup> This argument could be applied both to the outcomes of individual elections and to the view that elected legislatures cannot be presumed to "reflect the views of a majority in society."<sup>218</sup> Because of the difficulty of aggregating genuine preferences, the Arrow Impossibility Theorem is thought to demonstrate "that the notion of a *popular will* is incoherent, or that the popular will is itself incoherent, whichever you prefer."<sup>219</sup>

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216. Cass R. Sunstein, *Constitutions and Democracies: An Epilogue, in CONSTITUTIONALISM AND DEMOCRACY* 327, 335 (Jon Elster & Rune Slagstad eds., 1988) (citations omitted).

217. JULES L. COLEMAN, *MARKETS, MORALS AND THE LAW* 298 (1988).

218. Erwin Chemerinsky, *The Supreme Court, 1988 Term — Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 79 (1989); see also Michael A. Fitts, *The Vices of Virtue: A Political Party Perspective on Civic Virtue Reforms of the Legislative Process*, 136 U. PA. L. REV. 1567, 1616 (1988). For application of the Arrow Impossibility Theorem to legislative decision-making, see Harold H. Bruff, *Legislative Formality, Administrative Rationality*, 63 TEXAS L. REV. 207, 226-27 (1984) (difficulty of courts' deciphering legislative intent); Frank H. Easterbrook, *Statutes' Domains*, 50 U. CHI. L. REV. 533, 547-48 (1983) (applying public choice theory to posit the impossibility of discerning legislative intent). See also WILLIAM N. ESKRIDGE, JR. & PHILLIP P. FRICKEY, *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 597-613 (1988) (summarizing the public choice scholarship on statutory interpretation). This view of statutory interpretation has also come to dominate the jurisprudence of Justice Antonin Scalia. See DANIEL A. FARBER & PHILLIP P. FRICKEY, *LAW AND PUBLIC CHOICE* 89 n.3 (1991) (compiling opinions by Justice Scalia that address the issue of statutory interpretation).

219. JON ELSTER, *NUTS AND BOLTS FOR THE SOCIAL SCIENCES* 155 (1989) (emphasis ad-

I am not aware of any direct application of the insights of the Arrow Theorem to voting rights law. Nonetheless, there is a stark disjuncture between a legal doctrine founded on the electoral preferences of racial and ethnic communities and an analytic school which disputes the ability to draw any conclusions about aggregate preferences from electoral results. To a limited extent, the Arrow Theorem might appear to justify a more rigorous examination of the causal connection between race or ethnicity and voting patterns. As played out in voting rights litigation, this has turned into a methodological dispute between the use of bivariate regression analyses to establish simple correlations between the racial composition of communities and the *resulting* electoral behavior and the use of more sophisticated multivariate models to try to isolate the role of race or ethnicity in *causing* the polarized voting outcomes.<sup>220</sup>

Nothing in the voting rights literature defending the evidentiary methodologies currently in use can match the sophistication of the Arrow cycling problem. Two defenses of the voting rights case law are available, however, even in the face of the inability to define a perfectly coherent majority preference. The first is to take the polarized voting analysis as empirical evidence of the persistence of electoral defeats of candidates who would have been elected to office had the election been confined to a minority-dominated electoral subdistrict rather than an at-large jurisdiction. This finding pervades the case law and social science literature and persists across time and geographic jurisdiction. Even if we are not willing to assign a fixed affirmative preference to the voting majorities in these jurisdictions, we can identify a negative preference based on the actions taken: that, as innumerable studies have shown, across time and region, irrespective of their individual motivations, white voters are unwilling to vote for minority candidates.<sup>221</sup>

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ded). See generally WILLIAM H. RIKER, *LIBERALISM AGAINST POPULISM* (1982) (applying impossibility theorem to political decisionmaking); Jerry L. Mashaw, *The Economics of Politics and the Understanding of Public Law*, 65 CHI.-KENT L. REV. 123, 126-27 (1989) ("The most basic finding of the Arrowian branch of public choice theory might be characterized as indicating that collective action must be either objectionable or uninterpretable."); Pildes & Anderson, *supra* note 215, at 2124-28 (providing the best overview of the application of the Arrow Theorem to political decisionmaking and constitutional law).

220. The statutory language of amended § 2 of the Act opts for the first, "results"-based outcome. 42 U.S.C. § 1973(a) (1988). The strongest argument for the use of a complex, multivariate analysis was put forward by Judge Higginbotham of the Fifth Circuit in *Jones v. City of Lubbock*, 730 F.2d 233, 234-35 (5th Cir. 1984) (Higginbotham, J., specially concurring). That standard of proof was rejected by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 61-63 (1986).

221. See Guinier, *supra* note 28, at 1112 (concluding that "[a]s a general rule whites do not vote for blacks"); *id.* at 1113 nn.167-68 (accumulating survey and social science evidence of white antipathy toward black candidates). This corresponds to what Justice Rehnquist called "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the

Moreover, because of the persistence of this pattern, we may be willing to assume that the observed patterns are the result of something more than a question of cycling — that is, of the manner in which the choices are put to the voters — and may indeed reflect genuine racial antipathy.

The more fundamental defense of voting rights law, however, turns not on the interpretation of aggregate preferences but on the resulting distribution of legislative opportunity. Recall that the polarized voting inquiry emerged in large part as an evidentiary proxy for the cumbersome examination of the responsiveness of governmental institutions to the needs of all citizens. Nonresponsiveness was never intended to be a measure of a legislative refusal or inability to meet the distributional preferences of the majority of voters. Instead, nonresponsiveness was defined as the failure to allocate goods and services fairly among all the constituents of the community.<sup>222</sup>

Ultimately, this body of law is not so concerned with whether electoral outcomes fully represent the actual preferences of voters. The capture of legislative opportunity by a racially defined majority faction is as objectionable if an all-white city council is the real and verifiable preference of a majority of voters or if the selection process has suffered distortion under some second best theory. The result is the same: an all-white city council will be called upon to decide the distribution of legislative goods for that community. At bottom, voting rights law posits access to representative office as a social good that an entrenched and racially defined majority community cannot monopolize, regardless of the fidelity of the electoral outcome to the true preferences of a majority of voters.

## 2. *Are the Discrete and Insular Disadvantaged?*

The more troubling application of public choice theory to political life is not the indeterminacy of the Arrow cycling problem but the

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critical question of discrimination." *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978). Given the particular history of race in shaping the modern political agenda, it seems wise to join Justice Rehnquist's conclusion from the employment discrimination setting that "we know from our experience that more often than not people do not act in a totally arbitrary manner . . ." 438 U.S. at 577.

222. See, e.g., *Cross v. Baxter*, 604 F.2d 875, 882-84 (5th Cir. 1979) (comparing provision of governmental services and distribution of government jobs to overall black and white communities to satisfy responsiveness inquiry); see also *Nevett v. Sides*, 571 F.2d 209 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980):

Showings of unresponsiveness and lack of access make a strong dilution case. The capacity of a governing body to respond to the needs of its constituency is, in large measure, what makes that body representative. Ideally, electoral processes are designed to provide an institutional and periodic method of guaranteeing governmental responsiveness. 571 F.2d at 223 n.19 (citation omitted).

fundamental corruption introduced by the influence of "special interest groups" in the electorate. In its academic form, what I will term the hard form of social choice theory draws its inspiration from the work of Nobel laureate James Buchanan.<sup>223</sup> This theory holds the legislative arena to be the site of rent-seeking behavior by specially organized subgroups of the population. Under this view, both the selection of legislators and the outcomes of the legislative process are corrupted by the ability of those setting the voting agenda to control the outcome of the electoral and political processes.<sup>224</sup>

The next step in this argument is to examine which groups are likely to be able to benefit through the capture of the political process. These observers conclude that because of free-rider problems, transaction costs, and other obstacles to acquiring information about the political process, small, well-defined groups with high-intensity preferences will dominate the legislative scene.<sup>225</sup> These groups may be able to secure rent-seeking legislation that, for example, may limit competitive entry into a regulated market or directly subsidize some group at the public's expense.<sup>226</sup> A simple example may illustrate the problem. Surveys routinely show that a majority of Americans favors some form of gun control.<sup>227</sup> Nonetheless, that broad majority is unable to

223. See, e.g., JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962).

224. See, e.g., William H. Riker & Barry R. Weingast, *Constitutional Regulation of Legislative Choice: The Political Consequences of Judicial Deference to Legislatures*, 74 VA. L. REV. 373, 396 (1988) (characterizing the legislator as "a placeholder opportunistically building up an ad hoc majority for the next election"); *id.* at 393 (arguing that because of cycling problems, the "absence of an equilibrium implies that the person in control of the agenda (e.g., a committee leader) can bias legislative choice in favor of his or her most preferred alternative. Thus, there is a fundamental arbitrariness to social choice under majority rule.") (footnotes omitted).

225. Although this area of social choice theory is still quite young, an extensive literature on the subject has been well summarized in *Symposium on the Theory of Public Choice*, 74 VA. L. REV. 167 (1988). For overviews of this theory of the legislative process, see Becker, *supra* note 175, at 380 (1983) (focusing on the ability to discipline potential free riders as the key to political effectiveness); Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471 (1988).

226. See ROBERT E. McCORMICK & ROBERT D. TOLLISON, *POLITICIANS, LEGISLATION, AND THE ECONOMY: AN INQUIRY INTO THE INTEREST-GROUP THEORY OF GOVERNMENT* 49 (1981) (describing benefits to members of regulated professions by limitations of entry into those professions, and noting that "such legislation typically results from lobbying pressure by practitioners in the occupation"); Frank H. Easterbrook, *The Supreme Court, 1983 Term — Foreword: The Court and the Economic System*, 98 HARV. L. REV. 4, 17 (1984) (providing examples of rent-seeking behavior); Geoffrey P. Miller, *Public Choice at the Dawn of the Special Interest State: The Story of Butter and Margarine*, 77 CAL. L. REV. 83 (1989) (describing dairy industry capture of regulatory power to prohibit yellow coloration of margarine in name of consumer protection).

227. See, e.g., Frances Ann Burns, *Poll: New Jersey Residents Favor Tougher Gun Control*, UPI, July 6, 1991, available in LEXIS, Nexis Library, UPI File (stating that 58% of New Jersey residents "strongly support" ban on assault weapons); Helen Dewar, *NRA Begins Drive to Stall Crime Bill*, WASH. POST, July 10, 1991, at A13 (discussing political use of Senate filibuster to frustrate popularly supported gun control).

organize itself and is unable to deliver votes on the basis of intensity of preference on the issue of gun control alone. Politicians may vote against gun control yet secure the support of gun-control backers on other issues. By contrast, opponents of gun control, organized in a well-disciplined group through the National Rifle Association, will be informed of the position of any candidate on the gun control question and will vote against pro-gun control candidates on that issue alone. As a result, candidates can be assured of few guaranteed votes based on a pro-gun control plank but will assuredly lose a significant number of votes because of such a position. Thus, despite majority sentiment in favor of regulation, the smaller, well-organized gun lobby is able to exert disproportionate influence in the political process and thwart attempts at regulation.

Under the public choice rationale, the well-defined minority groups in society are not at a competitive disadvantage in politics. Rather, the broad, diffuse majorities who are unable to discipline their followers into collective action are most at risk. Thus, we now hear Professor Bruce Ackerman proclaim:

*Carolene* is utterly wrongheaded in its diagnosis. Other things being equal, "discreteness and insularity" will normally be a source of enormous bargaining advantage, not disadvantage, for a group engaged in pluralist American politics. Except for special cases, the concerns that underlie *Carolene* should lead judges to protect groups that possess the opposite characteristics from the ones *Carolene* emphasizes — groups that are "anonymous and diffuse" rather than "discrete and insular." It is these groups that both political science and American history indicate are systematically disadvantaged in a pluralist democracy.<sup>228</sup>

Public choice scholarship would suggest that the presumption of minority disadvantage that underlies voting rights law is at best questionable<sup>229</sup> and that the special solicitude of the voting rights case law for minorities in the political process is not justified. The voting rights case law rests on the empirical observation that polarized voting practices essentially leave racial and ethnic minorities as discrete and insular groups in the political process *and* that their discrete and insular status is a political disadvantage. But the Buchanan view posits that the discrete identity of minorities may give them, like the National Rifle Association, disproportionate strength rather than weakness in the political process. Cohesive minority actors in the political marketplace should enjoy advantages stemming from their intense, shared preferences and their ability to deliver more concentrated benefits to

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228. Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 723-24 (1985).

229. See FARBER & FRICKEY, *supra* note 218, at 29-37 (reviewing scholarly literature).

their constituents.<sup>230</sup>

This is by no means a trivial issue. Minorities have scored impressive political gains on the national stage, just as public choice would have predicted.<sup>231</sup> But, before rushing to discard protection for discrete and insular groups in the political process, we should explore some mediating concerns. The public choice scholarship has been subject to extensive criticism for its reliance on economic self-interest as the exclusive causal agent in politics and for its failure to acknowledge the role of ideology in the political process.<sup>232</sup> Repeated social science studies have shown simple ideological alignments, such as liberal or conservative, to be highly predictive of legislator behavior and, by implication, to account for a significant portion of voter behavior.<sup>233</sup>

Moreover, the public choice scholarship does not establish the impossibility of organizing broad and diffuse majorities, but merely the difficulty of doing so. In this sense, Ackerman generalizes beyond what public choice can support. While the organization of broad majority groups is difficult for precisely the reasons that public choice theory tells us — preferences may be diffuse, making it decidedly difficult to overcome free-rider problems and to marshal support — that does not mean it is impossible. Ackerman himself allows for one possible exception to the benefits that well-defined minorities are assumed to enjoy in the political process: the question of prejudice.<sup>234</sup> Although Ackerman disputes whether there is any longer a “pariah” effect for minorities in the political process, the evidence of polarized voting shows that majority refusal to incorporate racial minorities persists, particularly at the local level.<sup>235</sup> Racial lines of division play the

230. See Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 *YALE L.J.* 31, 49 (1991) (identifying features of special interest groups that give them advantages in political process, but arguing that absent a normative baseline there is no basis for claiming this distorts political process).

231. Even during the Reagan/Bush years, for example, when minority interests have generally been thought to be at their recent political nadir, the legislative record is by no means unidimensional. For example, minorities have had notable success in overturning adverse Supreme Court decisions through legislation, as with the 1982 Voting Rights Act amendments, Pub. L. No. 97-205, 96 Stat. 131 (codified at 42 U.S.C. § 1973 (1988)) (overturning *City of Mobile v. Bolden*, 446 U.S. 55 (1980)), the Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, 102 Stat. 28 (1988) (codified at 42 U.S.C. § 2000d-4a (1988)) (overturning *Grove City College v. Bell*, 465 U.S. 555 (1984)), and the Civil Rights Act of 1991, Pub. L. No. 102-166 (overturning in whole or in part eight adverse Supreme Court employment discrimination decisions).

232. See FARBER & FRICKEY, *supra* note 218, at 23-24.

233. See *id.* at 27-33 (reviewing social science evidence).

234. Ackerman, *supra* note 228, at 732-37.

235. This fact prompted Justice Scalia to comment,

What the record shows . . . is that racial discrimination against any group finds a more ready expression at the state and local than at the federal level. To the children of the Founding Fathers, this should come as no surprise. An acute awareness of the heightened danger of



same role in organizing broad majority voting practices as ideology does in ordering political behavior. As Professors Farber and Frickey rightfully note, "Ackerman explicitly addresses himself to the future when full minority political participation is commonplace and our 'grim history' has been overcome. If Ackerman errs, it is in underestimating the tenacious hold of that history."<sup>236</sup>

The true insight of public choice theory concerns the advantage a well-organized, discrete, and insular minority will hold when faced with opposition of less intensity by a diffuse and amorphous majority. Being discrete and insular is an advantage only if the majority is unorganized; so long as the majority retains its diffuse and amorphous character, a well-disciplined minority should hold a relative advantage in the political arena.<sup>237</sup> Here again, the polarized voting inquiry is key. Unlike the situation of blacks, members of the National Rifle Association are not subject to consistent polarized voting by the amorphous majority that prefers some form of gun control. The NRA holds a relative edge. Black voters, on the other hand, face a majority voting bloc that is not diffuse. The polarized voting evidence demonstrates that racial divides continue to dominate the electoral arena.

Public choice theory offers genuine insights about the *difficulty*, although not the *impossibility*, of sustaining broad group action in the political arena. To overcome the collective action problems associated with any group effort, simple cues must direct conduct along well-established paths.<sup>238</sup> In group decisionmaking, such as voting, the "consequences are aggregate but the decisions are exceedingly individ-

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oppression from political factions in small, rather than large, political units dates to the very beginning of our national history.

City of Richmond v. J.A. Croson Co., 488 U.S. 469, 523 (1989) (Scalia, J., concurring); see also Akhil R. Amar, *The Bill of Rights As a Constitution*, 100 YALE L.J. 1131, 1148 (1991) (attributing Madison's concern over majority oppression at local level to, e.g., the fact that "state legislative representation was so much less attenuated than congressional representation, making state legislative majorities far more likely to reflect the unrefined sentiments of popular majorities").

236. Daniel A. Farber & Phillip P. Frickey, *Is Carolene Products Dead? Reflections on Affirmative Action and the Dynamics of Civil Rights Legislation*, 79 CAL. L. REV. 685, 708 (1991) (footnote omitted).

237. See Calabresi, *supra* note 159, at 96 (suggesting that solicitude for discrete and insular minorities should be limited to "those who have a long record of social marginalization and relative powerlessness in the legislative process").

238. For example, the primary determinant of voter behavior in American politics traditionally has been party preference. See Philip L. Dubois, *Voting Cues in Nonpartisan Trial Court Elections: A Multivariate Assessment*, 18 LAW & SOC. REV. 395, 397 (1984) (voter participation is greater in partisan than in nonpartisan judicial races because "the party label [provides] voters with a familiar voting cue, one which touches upon the psychological identification most voters to some degree have with one of the major parties. When the party label is not present, a larger portion of voters find themselves with no meaningful guide to voting and thus fail to participate.") (quoting Philip L. Dubois, *Public Participation in Trial Court Elections*, 2 LAW & POLY. Q. 133, 135 (1980)). When party information is unavailable, voters substitute other cues such as incumbency, name familiarity, religious-ethnic cues apparent from candidate surnames, sex, oc-

ual.”<sup>239</sup> For masses of white voters to consistently reject minority candidates in successive elections and jurisdictions, a simple and direct behavioral cue must be at work.<sup>240</sup>

Given the centrality of the racial divide in American history, from slavery forward, the race card is the perfect mechanism to overcome the collective action problem in moving broad masses to act in a disciplined fashion. Race is the perfect cue: it is a simple call<sup>241</sup> and it elicits intensely held beliefs and values.<sup>242</sup> Race serves more than perhaps any other single issue in contemporary American life as a defining ideological bellwether.<sup>243</sup>

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cupation, geography, or even relative position on the ballot. Philip L. Dubois, *Significance of Voting Cues in State Supreme-Court Elections*, 13 LAW & SOC. REV. 757 (1979).

239. THOMAS C. SCHELLING, MICROMOTIVES AND MACROBEHAVIOR 145 (1978).

240. For a discussion of the collective action problems in organizing mass behavior, see DENNIS CHONG, COLLECTIVE ACTION AND THE CIVIL RIGHTS MOVEMENT 103-40 (1991) (discussing the assurance game aspect of organizing collective action around civil rights issues).

241. The voting rights case law has understood this point relatively well, as reflected in the inquiry into the use of racial appeals in election campaigns as Factor 6 of the enumerated Senate Report factors accompanying the 1982 amendments to the Voting Rights Act. See S. REP. NO. 417, *supra* note 67, at 28-29, reprinted in 1982 U.S.C.A.N. at 206-07. This is perhaps most striking in electoral campaigns in which white candidates publish pictures of themselves next to their black opponents in their own campaign literature. See, e.g., *McDaniels v. Mehfoud*, 702 F. Supp. 588, 595 (E.D. Va. 1988). See generally *Williams v. City of Dallas*, 734 F. Supp. 1317, 1360 n.119 (N.D. Tex. 1990) (quoting Bernard Grofman et al., *The "Totality of Circumstances Test" in Section 2 of the 1982 Extension of the Voting Rights Act: A Social Science Perspective*, 7 LAW & POLY. 199, 214 (1985)); *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, No. CIV.A 89-239 LON., 1991 WL 274840, at \*18 (D. Del. Dec. 27, 1991); *Gingles v. Edmisten*, 590 F. Supp. 345, 364 (E.D.N.C. 1984), *affd. in part and revd. in part sub nom. Thornburg v. Gingles*, 478 U.S. 30 (1986); see also GEORGE E. SIMPSON & J. MILTON YINGER, RACIAL AND CULTURAL MINORITIES: AN ANALYSIS OF PREJUDICE AND DISCRIMINATION 105-11 (4th ed. 1972) (arguing that racial difference provides a convenient, permanent reference point for the ethnocentrism, common to all societies, that provides a rationale and an impetus for maintaining the in-group's privileges).

242. I will not attempt to reproduce the vast literature dealing with the centrality of race and racial identities in the everyday life of America. I commend to the reader, among other sources, Aleinikoff, *supra* note 207; Lawrence, *supra* note 206.

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That voters will support the candidate with whom they share skin color is hardly surprising. In addition to racists, some voters will turn to race as a cue if they find the competitors' policy stands equally attractive. . . .

The race of the candidate should be more powerful than other personal characteristics since it is more closely associated with a number of policy options than are club memberships or university affiliations. A voter would usually be correct in assuming that a black candidate is more liberal than an opposing white. Moreover, race — but not religion or alma mater — is readily discernible by a glance at a campaign poster, brochure, or television ad. Voting for a candidate of one's own race may be a product of racism, or it may be the result of reliance on a simple, readily available cue, much as a candidate's last name prompts some ethnically oriented voters to forsake party identification and support a fellow ethnic. Charles S. Bullock III, *Racial Crossover Voting and the Election of Black Officials*, 46 J. POL. 238, 239-40 (1984) (citations omitted). Even where partisan attachments are relatively strong, race may be an even stronger determinant of voting behavior. James M. Vanderleeuw, *A City in Transition: The Impact of Changing Racial Composition on Voting Behavior*, 71 SOC. SCI. Q. 326, 326 (1990); see also ANGUS CAMPBELL, WHITE ATTITUDES TOWARD BLACK PEOPLE 158 (1971) (“[I]n the absence of inhibitions associated with religious or educational experience grievances against the community are displaced into hostility against black people.”); MILTON D.

Polarized voting analysis is the evidence that race is playing just such a role. Although the causal link between racial divides and divergent voting patterns has not been established scientifically, two hypotheses suggest why that link exists. First, race is increasingly recognized as a central feature of the most obvious political division in American life: Democrats versus Republicans. In the period since the passage of the Voting Rights Act, race has increasingly emerged "from a regional concern into a national issue, from partisan obscurity to a fundamental division between the parties, from being unconnected to mass political beliefs to being at the core of mass ideology."<sup>244</sup> Second, the socioeconomic status of minorities is centrally implicated in so many controversial domestic policy issues — including schools, transfer payments, housing policy, mass transit, the use of tax policy to underwrite social welfare programs, indeed, virtually all but abortion<sup>245</sup> — as to give a predictable racial axis to the policy debates surrounding these issues.

Because of the centrality of the racial dimensions to the dominant debates of contemporary political life, the race card can be played with minimal organization and maximum effectiveness. The prevalence of racially polarized voting patterns indicates that racial factionalism is alive and well, and that even majority factions are able to discipline their troops effectively. So long as this remains the case, discreteness and insularity will continue to serve as sources of political vulnerability fully meriting special legal solicitude.

### CONCLUSION

Modern voting rights law rests on the foundations of a failed pluralism in the political process and the distortions of public policy that follow from that failure. During the past two decades, the concept of

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MORRIS, *THE POLITICS OF BLACK AMERICA* 121 (1975) ("[R]ace forms the basis of one fundamental cleavage in the society which is reflected in virtually every area of political life."); H. Andrew Sagar & Janet W. Schofield, *Racial and Behavioral Cues in Black and White Children's Perceptions of Ambiguously Aggressive Acts*, 39 *J. PERSONALITY & SOC. PSYCHOL.* 590 (1980) (black actors performing ambiguously aggressive acts elicit more threatened responses in children than white actors performing the same acts); Tommy E. Whittler & Joan DiMeo, *Viewers' Reactions to Racial Cues in Advertising Stimuli*, 31 *J. ADVERTISING RES.* 37, 43 (1991) ("[R]egardless of their attitudes toward blacks, whites were less likely to purchase the products and had less favorable attitudes toward the products . . . when the advertisements featured black rather than white actors.").

244. EDWARD G. CARMINES & JAMES A. STIMSON, *ISSUE EVOLUTION: RACE AND THE TRANSFORMATION OF AMERICAN POLITICS* 185 (1989); see also DAVIDSON, *supra* note 103, at 240-59; EDSALL & EDSALL, *supra* note 103, at 137-53.

245. While restrictions on access to abortion may have greater effects on the poor, who are disproportionately minority, the abortion debate draws centrally on deeply held values independent of racial or ethnic considerations.

minority vote dilution has emerged from a multifaceted inquiry into every component of the political and economic workings of a jurisdiction into a shorthand calculus for process failure and substantive exclusion. That shorthand is the inquiry into the exclusion of minority-preferred candidates from office in the course of racially polarized elections.

The racially polarized voting inquiry has greatly facilitated the curtailment of at-large and multimember election practices and the dramatic increase in numbers of minority elected officials. The new focus on actual voting practices for the first time has lent a coherence to court intervention in local electoral practices and defined workable boundaries for judicial review of election outcomes. To the extent that the modern doctrines have been successful at these tasks, this article is designed to provide a conceptual defense for this area of law.

Whether the new voting rights law has failed at the broader transformative goals of the civil rights movement is an inquiry beyond the scope of this article. It is difficult to argue with critics who would focus on the increasingly desperate plight of the black underclass in urban areas that have been increasingly committed to black local governance. Neither the distressed socioeconomic standing of the underclass nor the political advances of those blacks elected to office can be denied.

Yet there can be no doubt that the new voting rights law has changed and invigorated minority participation in American politics. Nor can there be any doubt that it has done so at some cost to pluralist aspirations for a race-neutral politics by exposing the continued disabilities attaching to race in the political arena. On balance, this is, I maintain, a limited but real step forward. It is, in Madison's words, "a republican remedy for the diseases most incident to republican government."<sup>246</sup>

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246. THE FEDERALIST, *supra* note 132, No. 10 (Madison), at 23.