

MANIPULATED DOCTRINES, IMPROPER DISTINCTIONS, AND THE LAW OF RACIAL VOTE DILUTION

AVI FREY*

“It is time to realize that manipulating doctrines and drawing improper distinctions under the Fourteenth and Fifteenth Amendments, as well as under Congress’ remedial legislation enforcing those Amendments, make this Court an accessory to the perpetuation of racial discrimination.”¹

Justice Thurgood Marshall

INTRODUCTION

This Note is about racial vote dilution, a justiciable harm as defined by both a constitutional and a statutory right to a racially undiluted vote. Racial vote dilution occurs when a racial minority group is denied access to the political process on the basis of race. This happens when members of racial minority groups are unable to aggregate their votes for the chance to achieve a numerical majority. In such circumstances, racial minority groups may fail to gain electoral results because the votes of their members have no currency in the political marketplace.² The issue of race makes voters of different races disinclined to form political coalitions. As a result, the numerical minority status of racial minorities results in

* Law Clerk, Hon. John T. Nixon, Federal District Court Judge, United States District Court for the Middle District of Tennessee, 2008–2009; J.D., New York University School of Law, 2008; Symposium Editor, *New York University Annual Survey of American Law*, 2007–2008. I would like to thank Professor Paulette Caldwell for her generous and provocative guidance in the writing of this Note, as well as Professors Richard Pildes and Samuel Issacharoff for sharing their voting-rights expertise. My appreciation also to *Annual Survey of American Law* editor Stephanie Herbert, whose diligence brought this work to publication. Love to my parents and sister, even if they never read what follows.

1. *City of Mobile v. Bolden*, 446 U.S. 55, 141 (1980) (Marshall, J., dissenting), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

2. The financial market metaphor for the effective use of the franchise comes from Professor Issacharoff’s comparison of elements of racial vote dilution law to antitrust. Samuel Issacharoff, *Polarized Voting and the Political Process: The Transformation of Voting Rights Jurisprudence*, 90 MICH. L. REV. 1833, 1870 (1992) [hereinafter Issacharoff, *Polarized Voting*].

the denial of any effective representation at all. This is the harm of racial vote dilution.

To remedy this harm, states are required to take race into account in the process of redistricting. States must draw majority-minority, or “safe” minority, districts in which an excluded racial minority group is the numerical majority and is therefore guaranteed the ability to elect its candidate of choice.³ The theory here is that if racial discrimination bars entrance of certain groups to the political market, then a special market must be brought to such groups.

There is an open question in the law, however, as to exactly what racial vote dilution *is*. This confusion, I argue, centers on two questions. The first asks whether a racial minority population must be geographically, politically, or culturally compact to suffer racial vote dilution.⁴ The second asks whether racial vote dilution must entail intentional racial discrimination by state actors in the process of redistricting. These questions are of great legal significance because the Constitution places various limitations on the extent to which states may take account of race in *any* legislative policy.⁵ Because the proper remedy for racial vote dilution is a function of the right to a racially undiluted vote, the legal conception of racial vote dilution defines the extent to which states may take race into account in redistricting in the face of constitutional limitations. These questions are also of great normative significance: if racial vote dilution is defined in such a way as to permit claims only by a limited class of racial minority populations, and only where intentional state discrimination can be shown, the number of viable claims is drastically reduced. This means fewer majority-minority districts, and thus, where the political preferences of racial minorities are denied value across racial lines, the end result is racial minority underrepresentation. Therefore, in this Note I argue that the class of racial minority populations entitled to bring suit must be defined expansively, and that a requirement of proof of intentional state discrimination must be rejected.

3. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986) (“Minority voters . . . must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates.”).

4. I use the terms “politically compact” and “politically cohesive” interchangeably. The notion of cultural compactness is explained below. See *infra* pp. 353–54.

5. See *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

In Part I of this Note, I begin by tracing the law of racial vote dilution from its origin in *Reynolds v. Sims*,⁶ which announced the right to an effective vote. I then discuss two of the first cases to set the parameters of the law of racial vote dilution, *Whitcomb v. Chavis*⁷ and *White v. Regester*.⁸ I argue that, while these cases provide some insight into how to define racial vote dilution, they leave two critical questions unanswered. First, what racial minority populations may suffer racial vote dilution? And second, does racial vote dilution entail intentional discrimination by state legislators in the process of redistricting, or is political exclusion of racial minorities as a result of private discrimination in the voting public sufficient?

In Part II, I turn to the answers that the Supreme Court has provided to these questions. Analyzing Court doctrine in the cases of *Shaw v. Reno*,⁹ *Shaw v. Hunt (Shaw II)*,¹⁰ and *League of United Latin American Citizens v. Perry (LULAC)*,¹¹ I conclude that the Court has adopted what I will call a “natural district population requirement,” which is a requirement that geographical, political, and cultural compactness are necessary for a racial minority population to claim racial vote dilution. Moreover, while the doctrine on the question of state intent is somewhat muddled, I argue that *LULAC* represents a move towards a state intent requirement by suggesting that a natural district population is necessary as evidence of discriminatory state intent. I conclude Part II by arguing that the Court’s decisions on these two questions are likely to result in underrepresentation of racial minorities suffering racial animus in the general voting public.

In Part III, I mount a constitutional attack on the Court’s decisions. I begin by arguing that a state intent requirement is improper in the law of racial vote dilution because the context of the right to vote is different from other equal protection contexts in which the *Washington v. Davis*¹² requirement of proof of discriminatory state intent applies. This difference is based on two lines of argument. The first stems from the logic of *United States v. Carolene Products*,¹³ which stated that the Court must be more active in policing the machinery of democracy. The second is rooted in the fact that the

6. 377 U.S. 533 (1964).

7. 403 U.S. 124 (1971).

8. 412 U.S. 755 (1973).

9. 509 U.S. 630 (1993).

10. 517 U.S. 899 (1996).

11. 548 U.S. 399 (2006).

12. 426 U.S. 229 (1976).

13. 304 U.S. 144 (1938).

right to an effective vote comes out of the fundamental-rights strand of the Equal Protection Clause, as opposed to the suspect-classification strand, to which *Davis* applies. In the second portion of Part III, I examine possible justifications for a natural district population requirement other than as evidence of state intent. Here I conclude that the traditional arguments for invalidation of so-called “benign” racial classifications fail to uphold a natural district population requirement, because the natural district population requirement cannot be linked to prevention of cognizable harms. As a result, I conclude that both natural district population and discriminatory state intent requirements are improper as applied to the law of racial vote dilution.

It is beyond the scope of this Note to flesh out and defend a definition of racial vote dilution alternative to the one adopted by the Court. My purpose here is merely to argue that the choices made by the Court in defining racial vote dilution—choices which are likely to cut against racial minority representation where racial animus exists in the voting public—are constitutionally unfounded.

I.

EMERGENCE OF THE RIGHT TO A RACIALLY UNDILUTED VOTE

A. *The Right to an Effective Vote*

The right to a racially undiluted vote grows out of the right to an “effective” vote, which emerged in the Warren Court during the 1960s.¹⁴ Before that time, the Supreme Court had only heard what may be called “first generation” voting-rights claims.¹⁵ These were claims that a state had impeded the rights of individuals to register and cast a ballot, generally through the use of such devices as poll taxes,¹⁶ literacy tests,¹⁷ or grandfather clauses.¹⁸ It is important to

14. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964).

15. Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001); *see, e.g.*, *Minor v. Happersett*, 88 U.S. 162 (1875) (denying that women have a right to vote under the Fourteenth Amendment Privileges and Immunities Clause).

16. *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding the use of a poll tax as a prerequisite to voter registration unconstitutional under the Fourteenth Amendment).

17. *Lassiter v. Northampton County Bd. of Elections*, 360 U.S. 45 (1959) (upholding the constitutionality of a facially non-discriminatory literacy test as a prerequisite to voter registration), *superseded by statute*, Voting Rights Act of 1965, 42 U.S.C. § 1973b (2000).

18. *Giles v. Harris*, 189 U.S. 475 (1903) (denying equitable enforcement of political right to vote in the face of Alabama Constitution, which made passage of

emphasize that first-generation claims concerned individual rights; when the Court ultimately recognized the right to vote as fundamental under the rights strand of the Equal Protection Clause, it thereby protected the right of an individual to register and cast a ballot.¹⁹

The right to an effective vote was born of a “second generation” voting rights claim, a claim which will be referred to in this Note as “vote dilution proper.”²⁰ By challenging the ways in which votes are grouped and counted, second-generation claims differ from first-generation ones and go beyond the right to register and cast a ballot; second-generation claims challenge the ways in which votes are grouped and counted. Thus, second-generation claims are primarily leveled against state redistricting apportionments because apportionments are the legislative acts that group voters into territorial clusters to be tallied together.²¹

racially biased tests a prerequisite to registration for all voters not registered as of 1903).

19. *Harper*, 383 U.S. at 670 (“[W]here fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined. . . . Those principles apply here. . . . [T]he right to vote is too precious, too fundamental to be so burdened or conditioned.” (citations omitted)).

20. Gerken, *supra* note 15, at 1671.

21. Since 1842, state and congressional legislators have been elected by districts. The use of districts is not constitutionally required. Congress established a districting electoral structure by statute in 1842 under its Article I, Section 4 powers. This measure was political and did not reflect a general belief that geographic regions should be represented in districts because of the influence of location on political preferences. Instead, the districting requirement was urged by small states fearful of being overwhelmed by the bloc voting power of large states if at-large elections were allowed. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1156–58 (rev. 2d. ed. 2002). Districts are internal to states and are drawn by state legislators in apportionments, which are maps of state districting arrangements passed by legislative act. Districts may be single-member, meaning that one legislator is elected by a given district, or multi-member, meaning that several legislators are elected within the district in at-large, majority-rule elections. The combination of single- and multi-member districts within a given apportionment is not unconstitutional. *Id.* at 687 (citing *Fortson v. Dorsey*, 379 U.S. 433 (1965)). Second-generation claims were unknown outside the districting context until *Bush v. Gore*, 531 U.S. 98 (2000). In that case, a majority of seven Justices agreed that disparate recount policies across groups of voters within the State of Florida presented an equal protection problem under the Court’s understanding of second-generation voting rights. *Id.*

R

Reynolds v. Sims represents the first clear enunciation of second-generation voting rights.²² In *Reynolds*, the Court considered an apportionment for the state legislature of Alabama in which urban districts were vastly more populated than rural ones, though all such districts elected the same number of legislators.²³ This was vote dilution: the votes of urban voters were simply worth less than their rural counterparts. The Court responded by establishing the one-person/one-vote rule, or equipopulation rule, to strike down the apportionment.²⁴ The one-person/one-vote rule effectively means that, in the process of redistricting, states must create districts of equal population to the extent practicable.²⁵ In asserting the rationale for this rule, Chief Justice Warren announced the right to an effective vote: “[E]ach and every citizen has an inalienable right to full and effective participation in the political process[] . . . [which] requires . . . that each citizen have an equally effective voice in the election of members of his . . . legislature.”²⁶

22. 377 U.S. 533 (1964). The Court had recognized an equal protection right against apportionments of a certain type in *Baker v. Carr*, 369 U.S. 186 (1962). However, famously, and over vigorous dissent, in holding the subject of redistricting *not* a non-justiciable political question, the Court failed to provide both a standard for determining a violation of this right and a judicial remedy. *See, e.g., id.* at 267 (Frankfurter, J., dissenting) (“A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence.”).

23. *Reynolds*, 377 U.S. at 540–41. In the years which followed the national census of 1901, the increased urbanization of American life resulted in a significant population shift from rural to urban settings. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 147. This meant swelling of urban electoral districts, such that urban single-member districts contained populations many times that of their rural counterparts. *See, e.g.,* *Colegrove v. Green*, 328 U.S. 549, 566 (1946) (Black, J., dissenting) (referencing Illinois congressional districts ranging in population from 112,116 to 914,000). In spite of the constitutional mandate that representatives be apportioned “according to their . . . [n]umbers,” states did not reapportion to maintain approximately proportional population-to-representative ratios. U.S. CONST. art. I, § 2, cl. 3. This was no accident. State incumbent officials—even those representing the harmed urban electorate—did not want to redistrict and risk destabilizing their support base. Because their constituents benefited from overrepresentation, incumbent officials in rural regions had an additional reason to oppose reapportionment. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 147. The result was underrepresentation of urban voters and overrepresentation of rural ones.

24. *Reynolds*, 377 U.S. at 559.

25. *Id.* at 568–69. *Reynolds* announced the rule of equipopulation for state legislative districts; *Wesberry v. Sanders* extends the requirement to congressional districts. 376 U.S. 1, 2 (1964).

26. *Reynolds*, 377 U.S. at 565.

R

R

It is clear from the factual context of *Reynolds* that recognition of the right to an effective vote was motivated by the democratic principle of majority rule.²⁷ Majority rule requires that numerical majorities be honored at the polls with election of their candidates of choice. This principle is therefore violated where state action frustrates the electoral success of numerical majorities. *Reynolds* thus presents a straightforward violation of the principle of majority rule, insofar as urban voters, the numerical majority, were denied greater political representation than their numerically inferior rural counterparts.

By bringing the principle of majority rule within the ambit of the Equal Protection Clause, the Court recognized that the right to an effective vote is first and foremost a group right.²⁸ Logically, this must be so because numerical majorities are groups, and it is numerical majorities, like the urban voters of *Reynolds*, which have claims against apportionments that frustrate their group voting strength.²⁹ To the extent that individuals have any claim against such apportionments, then, it is because they are members of numerical majorities. In this sense, the individual right to an effective vote is derivative of the group right.³⁰ This understanding makes sense in light of the intuitive fact that what allows singular votes to be effective is the potential to forge them together through coalitions which might ultimately achieve numerical majority status. In this manner, the derivative individual right to an effective vote may be understood as “a meaningful chance of effective aggregation with those [votes] of like-minded voters to claim a just share of electoral results.”³¹

27. Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. COLO. L. REV. 749, 753–54 (1994).

28. Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883 (1995) [hereinafter Issacharoff, *Groups and the Right to Vote*].

29. This is what Justice Powell meant when he said, “[t]he concept of ‘representation’ necessarily applies to groups: groups of voters elect representatives, individual voters do not.” *Davis v. Bandemer*, 478 U.S. 109, 167 (1986) (Powell, J., concurring in part and dissenting in part).

30. This understanding of the right to an effective vote is just one example of the way in which Professor Fiss famously characterized rights under the Equal Protection Clause generally. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Professor Fiss contended that the Equal Protection Clause embodies an anti-subordination principle as opposed to an anti-discrimination principle, and so must endow groups with rights in the first instance. *Id.* at 150–51.

31. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 883.

B. *Whitcomb v. Chavis and White v. Register*

One of the first cases to raise a claim of racial vote dilution was *Whitcomb v. Chavis*.³² In *Whitcomb*, a geographically compact, politically cohesive black population living in the Center Township Ghetto (the “Ghetto”) of Marion County, Indiana, brought suit against the State of Indiana, claiming racial vote dilution on account of the population’s submergence within the majority white multi-member district of Marion County.³³ The Ghetto Blacks aligned behind political issues and candidates that were rejected by Marion County Whites. This phenomenon of the propensity for certain racial groups to categorically deny support to candidates across racial lines is called “racially polarized voting.”³⁴ The *Whitcomb* plaintiffs claimed that, in combination with racially polarized voting, their placement in a majority white multi-member district denied them the right to an effective vote because the Ghetto black population was sufficiently large and compact to make up the majority in a single-member district, in which they would have been free to elect their candidates of choice.³⁵ Within the multi-member district, however, they were an entrenched minority, unable to aggregate their votes to gain representation in election after election. In the abstract, the *Whitcomb* claim was straightforward: the Marion County multi-member district diluted the black vote.

The *Whitcomb* Court denied relief to the Ghetto Blacks for two reasons. First, the Court held that multi-member districts are not per se unconstitutional.³⁶ Second, the facts of *Whitcomb* did not permit an inference that the Ghetto Blacks had suffered electoral

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

33. *Id.* at 128–29.

34. *Thornburg v. Gingles*, 478 U.S. 30, 52–58 (1986). The *Gingles* Court decided that racially polarized voting may be evidenced via simple bivariate analysis of election returns, the two variables being the race of the candidate and the race of the voter. Where data suggests a strong positive correlation between these two variables, the Court held that racially polarized voting may be inferred. *See id.* Much is open for debate in the theory of racially polarized voting. For example, *how* strong an indicator of voting race must be and *how* little political overlap there must be between racial groups are both open questions. In addition, the Court has been criticized for its allowance of bivariate analysis instead of requiring multiple regression analysis, which might filter out hostile voting patterns across racial groups for reasons of politics rather than race. *See, e.g., Issacharoff, Polarized Voting, supra* note 2, at 1853 n.98. However, these concerns are largely outside the scope of this Note.

35. *Whitcomb*, 403 U.S. at 128–29.

36. *Id.* at 142–43.

frustration for reasons of race.³⁷ Because of the close overlap of race and politics, the mere fact of repeated electoral defeat of a racial group might have been for political reasons; the *Whitcomb* plaintiffs presented no evidence to tip the scales towards race. This inability to distinguish race from politics was fatal to their claim because political minorities are *supposed* to lose at the polls under the principle of majority rule.³⁸ The Court thus held that racial minority groups, like all interest groups, are required to engage in the political process—what the Court would later call the “pull, haul, and trade”³⁹ of coalition building—in order to achieve electoral results. Racial minority groups have no *per se* entitlement to proportionate representation and no claim for relief resulting from mere political failure.⁴⁰ *Whitcomb* is thus instructive because it identifies what racial vote dilution is *not*: the evidentiary elements of a multi-member district, racially polarized voting, and a population that is politically and geographically compact and sufficiently large to form the majority in a single-member district are, in and of themselves, insufficient to support a claim.

The first case to uphold a constitutional claim of racial vote dilution was *White v. Regester*.⁴¹ In *Regester*, the Court was faced with a challenge to two multi-member districts under the 1970 Texas apportionment for the State House of Representatives.⁴² These multi-member districts corresponded to Dallas and Bexar Counties, in which it was claimed that blacks and Latinos, respectively, suffered racial vote dilution as a result of the use of multi-member districts.⁴³ As a starting point, plaintiffs from both Dallas and Bexar County presented the evidentiary elements of the *Whitcomb* claim: the respective groups of blacks and Latinos both represented geographically and politically compact populations of sufficient size, and racially polarized voting was evidenced for both multi-member districts.⁴⁴ However, in *Regester*, the Court upheld the lower court’s

37. *Id.* at 153 (“On the record before us plaintiffs’ position comes to this: . . . the ghetto, along with all other Democrats, suffers the disaster of losing too many elections.”).

38. *Id.* at 149–55.

39. *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994).

40. *Id.* at 1020, 1024.

41. 412 U.S. 755 (1973).

42. *Id.* at 756.

43. *Id.* at 766–69.

44. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 878 (noting that, prior to *Gingles*, all racial vote dilution claims entailed evidence of the existence of geographically and politically compact racial minority populations, as well as evidence of racially polarized voting).

finding of racial vote dilution in both Dallas and Bexar Counties. The remedy ordered was invalidation of the multi-member districts and subsequent creation of single-member, majority-minority districts.⁴⁵

In arriving at this result, the Court distinguished *Whitcomb* on the grounds that the *Regester* plaintiffs were able to show something more than *Whitcomb* evidence.⁴⁶ This was evidence under what have come to be called the “*Regester* factors,” a non-exhaustive list of types of evidence which might permit a court to find an instance of racial vote dilution under the “totality of the circumstances.”⁴⁷ The factors which the Court identified were as follows:

1. A history of racial discrimination in the given jurisdiction, particularly in the electoral context
2. The presence of election rules which frustrate minority group voting strength⁴⁸
3. Historic underrepresentation of the racial minority group in the given legislative body
4. The irrelevance of the racial minority group to the election of representatives

45. Majority-minority districts are districts in which a racial minority group constitutes the numerical majority.

46. See *Regester*, 412 U.S. at 766–69 (“The District Court apparently paid due heed to *Whitcomb v. Chavis* . . . but did, from its own special vantage point, conclude that the multimember district, as designed and operated in Bexar County, invidiously excluded Mexican-Americans from effective participation in political life, specifically in the election of representatives to the Texas House of Representatives. On the record before us, we are not inclined to overturn these findings, representing as they do a blend of history and an intensely local appraisal of the design and impact of the Bexar County multimember district in the light of past and present reality, political and otherwise.”).

47. *Id.* at 766–69.

48. For example, in *Regester*, one Dallas County election rule which proved relevant under this factor was a majority-vote requirement in the election primary—candidates could only advance beyond the primary with greater than 50% of the total vote. *Id.* at 766. This rule may frustrate minority voting strength in the following way: Consider a primary election in which 40% of the electorate is black and 60% white, with the blacks uniting behind Candidate 1 while the whites are split between Candidates 2 and 3. Where a majority requirement is in place, the blacks will not prevail in advancing their candidate of choice beyond the primary stage, though the initial primary vote comes out, for example, 40% for Candidate 1, 35% for Candidate 2, and 25% for Candidate 3. In most structures in which a majority requirement is in place, Candidate 3, as the least popular, would be dropped from the ticket after the first round of voting, and Candidates 1 and 2 would then face off in a second primary round. Where racially polarized voting is present, it is safe to assume whites would then unite behind Candidate 2 to defeat Candidate 1, the black candidate of choice. Less subtle rules, such as poll taxes and literacy tests, would also have been evidentiary under this prong.

5. The absence of good-faith concern of elected officials for the concerns of members of the racial minority group
6. The use of racial campaign tactics to defeat the candidates of choice of the racial minority group in recent elections
7. The existence of a cultural and language barrier obstructing the participation of the racial minority in the political process⁴⁹

According to Justice White, the *Regester* factors enable plaintiffs to meet their burden of proof, which consists of

produc[ing] evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.⁵⁰

Regester therefore suggests that the combination of the evidentiary elements of *Whitcomb* and evidence under the *Regester* factors is sufficient to support a claim of racial vote dilution. Racial vote dilution may be loosely defined, then, as an apportionment which renders the political process closed to a given racial minority group because of its racial minority status.

C. Two Questions Left Open

While *Regester* gives some content to the constitutional harm of racial vote dilution—namely, political exclusion of a given racial group on the basis of race—it leaves open two questions as to precisely how the harm is to be defined.

The first question left open in *Regester* is which, if any, of the elements of *Whitcomb* are necessary to a claim of racial vote dilution?⁵¹ Presumably, the requirements that white bloc voting opposes the racial minority group, and that the electoral structure thereby permits the racial minority votes to be drowned out, are essential. But must the racial minority population be as politically

49. *Id.* at 766–69. The *Regester* factors as I list them have been abstracted from the context-specific formulation of the Court’s holding.

50. *Id.* at 766.

51. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 877–88. Professor Issacharoff discusses this question more concretely by asking whether or not the *Gingles* test, which requires evidence of a geographically and politically compact racial minority population and of racially polarized voting, ought properly to be a necessary and/or sufficient condition for a claim of racial vote dilution against a state apportionment, as opposed to a multi-member district. *See id.*; *Thornburg v. Gingles*, 478 U.S. 30, 48–51 (1986).

cohesive as the Ghetto Blacks of Marion County, for instance? Also, presumably, the racial minority population must be sufficiently large to form the majority in a single-member district if the principle of majority rule is to be triggered. Without this requirement, racial minority groups could claim no harm as a result of a particular state apportionment. But must a sufficiently large racial minority population be geographically compact? Putting these questions together, we can ask simply: What degree of geographical and political compactness is required?

The second question left open in *Regester* is what is the evidence under the *Regester* factors supposed to prove?⁵² We know from the difference between *Whitcomb* and *Regester* that plaintiffs must demonstrate that political exclusion is on the basis of race, meaning that racial minorities are being excluded because they are racial minorities. So *Regester* factor evidence suggests racial subordination arising out of racial animus. But whose animus must be proven? Two answers to this question are possible. First, it might be that the harm of racial vote dilution in *Regester* was that the blacks and Latinos of Dallas and Bexar Counties, respectively, were politically excluded by the racial animus of whites in their multi-member districts.⁵³ Under this interpretation, whites opposed the candidates and issues supported by blacks and Latinos for the simple reason that they were hostile to blacks and Latinos, and as a result of their numerical majority status, whites were able to deny racial minority representation by voting in bloc to oppose racial minority electoral results. So the *Regester* factors might suggest—and thus the harm of racial vote dilution might be premised on—private discrimination in the voting public.

A second possible interpretation of the *Regester* factors is that they provide evidence of racial animus on the part of state legislators in the process of redistricting.⁵⁴ Under this interpretation, it is

52. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 691 (asking whether *Regester* recognizes discriminatory purpose or effects as giving rise to a claim of unconstitutional racial vote dilution). R

53. This interpretation, like its alternative, finds support in some of the language of both *Whitcomb* and *Regester*. See *Regester*, 412 U.S. at 766 (“The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election *were not equally open . . .*” (emphasis added)); *Whitcomb v. Chavis*, 403 U.S. 124, 144 (1971) (“[W]e have insisted that the challenger carry the burden of proving that multi-member districts *operate* to dilute or cancel the voting strength of racial . . . elements.” (emphasis added)).

54. As mentioned *supra* note 53, this position may also be supported by language from *Whitcomb* and *Regester*. See *Regester*, 412 U.S. at 756 (phrasing the question before the Court as “whether the multimember districts provided for Bexar R

irrelevant whether racially polarized voting is for reasons of political opposition or racial animus in the general public; the harm of racial vote dilution occurs when state legislators capitalize on racially polarized voting in the general voting public to craft an apportionment in which racial minority preferences are certain to be drowned out. This is a view of racial vote dilution as requiring proof of discriminatory state intent.

II.

SUPREME COURT DOCTRINE ON THE *REGESTER* QUESTIONS AND ITS CONSEQUENCES

A. *Court Doctrine on the First Question Left Open in Regester*

In *Shaw*, *Shaw II*, and *LULAC*, the Court was faced with challenges to state apportionments which had the following critical similarity: in each apportionment, a sufficiently large, geographically and politically compact racial minority population was denied the creation of a majority-minority district for the purpose of protecting the seat of an incumbent in the region.⁵⁵ Section 2 of the Voting Rights Act (“VRA”)—the statutory prohibition of racial vote dilution enacted in 1982⁵⁶—was interpreted in *Thornburg v. Gingles* to require creation of a majority-minority district wherever a sufficiently sized, geographically and politically compact racial minority population was denied the ability to elect its candidates of choice because of racially polarized voting.⁵⁷ As a result, fearing Section 2 liability in light of statewide racially polarized voting, each of the

and Dallas Counties were properly found to have been *invidiously* discriminatory” (emphasis added); *Whitcomb*, 403 U.S. at 149 (“[T]here is no suggestion here that Marion County’s multi-member district, or similar districts throughout the State, were [sic] conceived or operated as *purposeful* devices” (emphasis added)).

55. League of United Latin Am. Citizens v. Perry (*LULAC*), 548 U.S. 399, 423–24 (2006); *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899 (1996); *Shaw v. Reno*, 509 U.S. 630, 673 n.10 (1993) (White, J., dissenting).

56. 42 U.S.C. § 1973 (1982).

57. 509 U.S. 30, 48–51 (1986). In this respect, *Gingles* effectively overruled *Whitcomb*. It might seem that *Gingles* thus provides an answer to the first question left open in *Regester* in that it holds that geographical and political compactness are both necessary and sufficient to racial vote dilution claims under Section 2. This is not the case. *Gingles* represents a doctrine whose logic was predicated on racial vote dilution through the use of multi-member districts; in the context of single-member districting, *Gingles* does not provide an adequate answer to the question of what conditions are either necessary or sufficient for a racial vote dilution claim. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 878–81. For instance, the Court reintroduced the *Regester* factors as necessary in *Johnson v. De Grandy*, 512 U.S. 997 (1994). More importantly for present purposes, *Shaw*, *Shaw II*, and *LULAC* provide a subtly different and more concrete answer to the question of what

states in *Shaw*, *Shaw II*, and *LULAC* created a majority-minority district to substitute for the district *not* drawn for reasons of incumbent protection. In deciding whether these substitutions were constitutional, the Court grappled with two theoretical issues. First, could the substitute districts be conceived of as remedying racial vote dilution for their own racial minority populations, or were they merely stand-ins for the majority-minority districts not drawn? Second, if the substitute districts were merely stand-ins, under what circumstances, if any, was the substitution proper? To resolve these issues, the Court was forced to identify the sort of racial minority populations which might suffer racial vote dilution, and for this reason, these three cases provide an answer to the first question left open in *Regester*.

1. *Shaw*

The Court began to shed light on an answer to the first *Regester* question in *Shaw v. Reno*.⁵⁸ In the *Shaw* case, the State of North Carolina, a covered jurisdiction under Section 4 of the Voting Rights Act of 1965,⁵⁹ submitted its post-1990-census redistricting plan to the Attorney General for preclearance.⁶⁰ The Attorney

characteristics are necessary for a racial minority population to suffer racial vote dilution and so succeed on a claim.

58. 509 U.S. 630 (1993).

59. 42 U.S.C. § 1973b. A brief word on the Voting Rights Act as originally enacted may be informative here as background. Prior to 1965, a number of states, particularly in the South, employed a myriad of adaptive strategies to effectively deny the franchise to blacks. The Department of Justice, along with private civil rights organizations, worked to tackle these insurgencies one at a time by filing suit against the states in federal courts. This strategy was expensive, time consuming, and ineffective: by the time an individual suit was resolved, not only had the franchise been denied to blacks in other states for a period of years, but the challenged state had repealed its prior practice to enact a new one, equally discriminatory. Congress responded with the Voting Rights Act of 1965, which essentially flipped the burden onto the offending states to justify their election practices. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 546–48. This was achieved in two parts. First, Section 4 of the Act contains an ingenious “triggering formula,” which is a test designed to ensnare the various regions which had most recently and aggressively demonstrated hostility to black voting in the era before passage of the Act. 42 U.S.C. § 1973b. Second, jurisdictions which fall within the category defined by Section 4—declared “covered”—are subject to Section 5, which requires “preclearance” before enactment of any new election policy. *Id.* § 1973c. Preclearance can be attained either through approval of the Attorney General or by a three member panel of the United States District Court for the District of Columbia, with the governing standard being that the new policy cannot be “retrogressive” with respect to the voting power of racial minorities. *Id.*

60. *Shaw*, 509 U.S. at 633.

General rejected the plan as first proposed, believing it required an additional majority-minority district to comply with the VRA.⁶¹ As a result, the Attorney General advised that a second majority-minority district could be drawn in the south-central to southeastern region of the state, in which the black population was sufficiently large and geographically and politically compact.⁶² North Carolina declined to draw a majority-minority district in this region because such a district would have destabilized the seat of an incumbent.⁶³ Instead, the State drew substitute majority-minority District 12 in the north-central region of the state.⁶⁴ The black population in this region was not geographically compact, and so to encircle an effective black majority within a district consistent with the *Reynolds* one-person/one-vote rule, state legislators had to draw a district which was “160 miles long and, for much of its length, no wider than the I-85 corridor.”⁶⁵ In physical appearance, District 12 was “bizarrely” shaped.⁶⁶

In response to District 12, the *Shaw* Court recognized a new kind of equal protection claim against a district “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.”⁶⁷ To defend against such a claim, a state would need to pass the strict scrutiny review applied elsewhere in equal protection law by demonstrating that the redistricting was narrowly tailored to a compelling government interest.⁶⁸

The *Shaw* claim was new in three respects. First, it brought so-called “benign” race consciousness in redistricting within the ambit of strict scrutiny review. Maligned race consciousness in redistricting—the use of race in redistricting to achieve racial subordination—had been outlawed since the time of *Gomillion v. Lightfoot* over thirty years prior.⁶⁹ In *Gomillion*, the State of Alabama had redefined the boundaries of the City of Tuskegee—transforming what was a geographical square into a twenty-eight-sided figure—for the purpose of drawing the majority of black residents of Tus-

61. *Id.* at 635.

62. *Id.*

63. *Id.* at 674 n.10 (White, J., dissenting).

64. *Id.* at 635 (majority opinion).

65. *Id.*

66. *Id.* at 644.

67. *Id.* at 642.

68. *See, e.g.,* *Adarand Constructors v. Peña*, 515 U.S. 200, 235 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

69. 364 U.S. 339 (1960).

kegee out of the city for municipal voting purposes.⁷⁰ The Court held that a constitutional claim existed against a redistricting arrangement “solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.”⁷¹ In *Shaw*, on the other hand, racial considerations in redistricting were designed to *increase* black voting strength in the State of North Carolina. In this sense, *Shaw* is congruent with a move made by the Court in other equal protection areas,⁷² applying heightened scrutiny to so-called “benign,” as well as maligned, legislative uses of race in the redistricting context.

Second, *Shaw* conferred standing on any voter within the state, whether within the challenged district or not, and without regard to race.⁷³ This represented a departure from prior districting challenges, which had required that a plaintiff suffer the denial of an effective vote to bring suit against an apportionment on the basis that his own district was unconstitutional.⁷⁴ This also represented a change from challenges to remedial race-conscious legislation, where standing was reserved for members of the racial group *not* benefited, namely, whites.⁷⁵

70. *Id.* at 340.

71. *Id.* at 341. The majority in *Gomillion* recognized a claim under the Fifteenth Amendment: the redistricting was alleged to deny black Tuskegee residents the right to vote in municipal elections. *Id.* at 342. Justice White noted this distinction in his *Shaw* dissent. *Shaw*, 509 U.S. at 668–69 (White, J., dissenting). In response to this argument, the *Shaw* majority cited to Justice Whittaker’s concurring opinion in *Gomillion*, which rooted the constitutional harm of *Gomillion* in the Fourteenth Amendment’s prohibition against segregation. *Id.* at 645 (majority opinion). There is reason to think this reliance is improper: Justice Frankfurter, the author of the majority opinion in *Gomillion*, was vehemently opposed to equal protection review of state apportionments. See *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (“Courts ought not to enter this political thicket.”); *Baker v. Carr*, 369 U.S. 186, 325–30 (1962) (Frankfurter, J. dissenting). Frankfurter’s opinion regarding the non-justiciability of challenges to State redistricting had yet to be overturned by *Baker* at the time of *Gomillion*, which suggests that, regardless of the relative merit of Justice Whittaker’s reasoning, his source of law might not have carried a majority of the Court to reach the *Gomillion* outcome in the absence of a Fifteenth Amendment alternative. However, the source of law question from *Gomillion* is not central to my analysis of the critical distinction between *Gomillion* and *Shaw*, and so the *Shaw* majority position may be accepted *arguendo*.

72. See, e.g., *Adarand Constructors*, 515 U.S. at 227; *J. A. Croson*, 488 U.S. 469.

73. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 514–15 (1993).

74. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 31 (1986) (“Minority voters . . . must prove that the use of a multimember electoral structure operates to minimize or cancel out their ability to elect their preferred candidates.”).

75. Pildes & Niemi, *supra* note 73, at 514–15.

Third, the *Shaw* claim was new in the sense that it drew a constitutional distinction between majority-minority districts on the basis of their appearance.⁷⁶ Following the Court's reasoning, only districts which are bizarrely shaped give rise to an inference that race was the predominant factor in redistricting, and so trigger strict scrutiny review.⁷⁷

From this third novel feature of the *Shaw* claim, a partial answer may be tentatively suggested to the *Regester* question of which elements of *Whitcomb* are necessary to a claim of racial vote dilution: *Shaw* implies that a racial minority population must be geographically compact to suffer racial vote dilution. This may be inferred because a racial minority population which is not geographically compact could only be captured in a majority-minority district which was bizarrely shaped. Any such district, after *Shaw*, would be vulnerable to equal protection attack. However, the fact that *Shaw* did not actually apply strict scrutiny review to District 12 but instead remanded for that purpose⁷⁸ suggests reason to note that an interpretation suggesting a geographical compactness requirement on the basis of *Shaw* alone can only be tentative. This is because it remained a theoretical possibility after *Shaw* that District 12 would be upheld under strict scrutiny review because it was narrowly tailored to the compelling government interest of compliance with Section 2, and so geographical compactness might not be required after all. Moreover, it is important to note that *Shaw*'s answer to the first *Regester* question is only partial for the same reason that it is tentative: because the Court did not apply strict scrutiny review to District 12, the Court did not have to address the question of whether District 12 was a proper remedy for some harm of racial vote dilution to the population in the north-central region of the state, and so did not fully identify the characteristics of a racial minority population which are necessary for it to suffer racial vote dilution.

2. *Shaw II*

The next piece of the *Regester* puzzle was revealed in *Shaw v. Hunt (Shaw II)*.⁷⁹ In *Shaw II*, the Court returned to North Carolina District 12 to apply the strict scrutiny review which the Court had deemed proper in *Shaw*. The facts of both cases were thus identical, save only for the fact that in the interim, the district court hear-

76. See *Shaw*, 509 U.S. at 647.

77. See *id.*

78. *Id.* at 658.

79. 517 U.S. 899 (1996).

ing the case on remand had concluded that District 12 did not violate the Constitution because it was narrowly tailored to the compelling government interest of compliance with the VRA.⁸⁰ In *Shaw II*, the Supreme Court reversed the district court.⁸¹ The Court presumed, *arguendo*, that compliance with Section 2 of the VRA⁸² was a compelling government interest for the use of race in redistricting,⁸³ but found that District 12 was not narrowly tailored to that end. This was because District 12 did not remedy the racial vote dilution of the population in the south-central to southeastern region of the state, where the Attorney General had suggested creation of a majority-minority district.⁸⁴ To argue otherwise—that strengthening the votes of blacks of one region of the state could stand in for dilution in another region—would be to essentialize on the basis of race, i.e., to presume that the votes of blacks are fungible because all blacks vote the same.⁸⁵ Such an overgeneralization is in violation of the Equal Protection Clause.⁸⁶

The *Shaw II* Court was forced to address the constitutionality of substitution of majority-minority districts. In so doing, the Court answered, in two distinct and important ways, the question of what elements of *Whitcomb* are necessary to racial vote dilution claims. First, the tentative answer of *Shaw*, that geographical compactness is required, may be confirmed. This is because the Court examined District 12 to see whether it was narrowly tailored to the remedy of racial vote dilution of blacks in the south-central to southeastern region of the state. The Court thus implicitly dismissed the possibility that District 12 might remedy racial vote dilution of blacks in the region which was actually encompassed by District 12.⁸⁷ It may thus be inferred that the Court considers populations such as the blacks of District 12, which are *not* geographically compact, to be incapable of suffering racial vote dilution.

80. *Id.* at 901–02.

81. *Id.* at 902.

82. Voting Rights Act of 1965, 42 U.S.C. 1973 (1982).

83. *Shaw II*, 517 U.S. at 915.

84. *Id.* at 915–17.

85. Gerken, *supra* note 15, at 1693–94. Indeed, there is language in *Shaw* which suggests this concern was lurking even there, though it was not explicitly held to invalidate District 12. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (“[Bizarre districts] reinforce [] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.”).

86. See *Shaw*, 509 U.S. at 647.

87. *Shaw II*, 517 U.S. at 916 (“District 12 could not remedy *any* potential § 2 violation.” (emphasis added)).

Second, *Shaw II* suggests that substitution is unconstitutional where the substitute district is not clearly a political substitute for the geographically compact population deprived of a majority-minority district. This understanding comes out of the Court's reliance on the anti-essentialism principle to invalidate District 12. This principle is only properly invoked if it is claimed that, under Section 2, District 12 must be a *political* substitute for a majority-minority district in the south-central to southeastern part of the state. If Section 2 permits District 12 to be merely a race-based substitute, meaning that one black majority-minority district is swapped out for another, then the anti-essentialism principle is improperly invoked because there is no harm in the generalization that all blacks are black.⁸⁸ The use of the anti-essentialism principle thus manifests a heightened political cohesion requirement for a racial minority group to suffer racial vote dilution. It only makes sense to require the substitute district to be politically cohesive with the deprived population if the deprived population is itself internally politically cohesive.

I refer to this political cohesion requirement as "heightened" because some threshold degree of racial minority political cohesion is necessary to the existence of racially polarized voting. If, for instance, a black population was in no way politically cohesive, it would be impossible for a white population to systematically and simultaneously oppose the black population's political preferences. The requirement of *Shaw II* is "heightened" because, if racially polarized voting existed at the state level in North Carolina, which it did,⁸⁹ the blacks across the entire state were presumptively politically cohesive in the minimal sense that their preferences permitted systematic and simultaneous white opposition. If only this threshold degree of political cohesion were required, then application of the anti-essentialism principle would have been improper given statewide racially polarized voting. As a result, use of the anti-essentialism principle in *Shaw II* must be understood to signal a requirement of some heightened degree of political cohesion among racial minority populations in order to suffer racial vote dilution.

88. This claim might be challenged if different conceptions of "black" are taken into account between the first and second instance of the word "black" in the phrase "all blacks are black." I do not consider such complexities here because the law of racial vote dilution does not examine issues of race at this level of nuance.

89. Frank R. Parker, *The Damaging Consequences of the Rehnquist Court's Commitment to Color-Blindness Versus Racial Justice*, 45 AM. U. L. REV. 763, 771 (1996).

3. *LULAC*

In *League of United Latin American Citizens v. Perry (LULAC)*,⁹⁰ the Court provided the most recent piece of the *Regester* puzzle. In *LULAC*, the Court was faced with a challenge to a Texas reapportionment plan that dismantled one safe Latino district, District 23, for the purpose of protecting an incumbent in the region.⁹¹ The Texas State legislature simultaneously created a new safe Latino district, District 25, as a substitute to comply with Section 2.⁹² In terms of Latino geographical compactness, former District 23 and new District 25 were substantially similar: both spanned several hundred miles between Latino communities at the bookends of the districts.⁹³ However, neither former District 23 nor new District 25 was bizarrely shaped—both represented what have been called “bacon-strip districts,” which were considered “inevitable, given the geography and demography of that area of the State.”⁹⁴ As a result, the case did not implicate *Shaw* claims and so was not primarily concerned with geographical compactness.

The Court’s focus, as evidenced in Justice Kennedy’s opinion for the majority, was trained instead on the socioeconomic and ethnic characteristics of the relevant racial minority populations. New District 25 was divided between two discrete Latino populations which were socioeconomically and ethnically disparate,⁹⁵ while former District 23 had captured a fairly socioeconomically and ethnically homogenous Latino population.⁹⁶ New District 25 thus lacked what has been termed “cultural compactness,”⁹⁷ whereas former District 23 had not been so lacking. It was largely for this reason that the Court struck down new District 23: new District 25, because lacking in cultural compactness, could not be a constitutional sub-

90. 548 U.S. 399 (2006).

91. *Id.* at 400.

92. Richard H. Pildes, *The Decline of Legally Mandated Minority Representation*, 68 OHIO ST. L.J. 1139, 1140, 1143 (2007).

93. *LULAC*, 548 U.S. at 501 (Roberts, J., dissenting).

94. *Id.* at 497 (Roberts, J., dissenting) (citation omitted).

95. *Id.* at 432 (“The Latinos in the Rio Grand Valley and those in Central Texas . . . are ‘disparate communities of interest,’ with ‘differences in socio-economic status, education, employment, health, and other characteristics.’” (citation omitted)).

96. *Id.* at 435 (“[T]here has been no contention that different pockets of the Latino population in old District 23 have divergent needs and interests, and it is clear that, as set out below, the Latino population of District 23 was split apart particularly because it was becoming so cohesive.”).

97. Pildes, *supra* note 92, at 1145.

stitute for former District 23.⁹⁸ As Justice Kennedy stated, “We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities [of new District 25], coupled with *the disparate needs and interests of these populations*—not either factor alone—that renders District 25 noncompact for Section 2 purposes.”⁹⁹ As mentioned above, because former District 23 posed much the same degree of geographical non-compactness as new District 25, the fact of cultural non-compactness must be understood as driving Justice Kennedy’s opinion.

Having determined new District 25 to be culturally non-compact, the fact that Justice Kennedy declined to invalidate District 25 is perplexing. In fact, Justice Kennedy’s rebuke of District 25 was so strong that Justices Souter and Ginsburg, the critical votes in giving Justice Kennedy a majority, mistakenly believed that District 25 had, in fact, been struck down.¹⁰⁰ However, Justice Kennedy’s invalidation of new District 23 instead of new District 25 should not be taken to detract from the core addition of *LULAC* to the law of racial vote dilution. As Professor Pildes notes,

[F]rom a legal perspective, the least Justice Kennedy’s approach might mean . . . is that the Act is not violated [meaning there is no racial vote dilution] even when there is racially polarized voting unless an election district can be created in which minority voters are not just a numerical majority, but in which the district is also geographically and culturally compact.¹⁰¹

Justice Kennedy imputes a cultural compactness requirement just as certainly by invalidating new District 23 as he might have done by invalidating new District 25: the reason for both actions would have been the same, that new District 25 could not substitute for former District 23 because it was lacking cultural compactness. If the Latinos of new District 25 were not culturally compact, then new District 25 could not be culturally compact with the Latinos of former District 23, and because the substitution of majority-minority districts was therefore invalid, new District 23 represented an instance of racial vote dilution.

The logic of the Court’s reasoning in *LULAC* was motivated by the same principle underlying *Shaw II*. That is, in the absence of

98. *Id.* at 1143 (“Justice Kennedy’s concerns about *this* district [District 25] . . . appear to have driven his invalidation of District 23, rather than the other way around.”).

99. *LULAC*, 548 U.S. at 435 (emphasis added).

100. Pildes, *supra* note 92, at 1146.

101. *Id.* at 1146.

cultural compactness, the assumption that one racial minority population could serve as a political stand-in for another would entail the essentialist position that all members of racial minority groups, regardless of differences which are often closely related to political preferences—geography in *Shaw II*, ethnicity and socioeconomic status in *LULAC*—are likely to vote the same. As a result, following *LULAC*, the answer to the first question left open in *Regester* seems clear: racial vote dilution may only be suffered by racial minority populations which are geographically, culturally, and politically compact. I will refer to populations which are geographically, culturally, and politically compact as “natural district populations,” and so the requirement coming out of *Shaw*, *Shaw II*, and *LULAC* may be called a natural district population requirement.

B. Court Doctrine on the Second Question Left Open in Regester

The Court has not yet decisively resolved what the *Regester* factors are in fact supposed to prove: discriminatory intent by the State or racial animus by voters. However, the Court’s holding in *LULAC* suggests that the law of racial vote dilution is moving towards a state intent requirement. In this Subpart, I will begin by discussing the case law prior to *LULAC*, in which the doctrine was very much undecided. I turn then to discuss the implications of *LULAC* on this question.

1. Doctrinal Indeterminacy Prior to *LULAC* on the Question of State Intent

In the 1980 case of *City of Mobile v. Bolden*,¹⁰² the Court turned racial vote dilution law on its head by incorporating the formal state intent requirement, which *Washington v. Davis*¹⁰³ announced for equal protection claims in 1976, into the racial vote dilution context. The factual backdrop of *Mobile* was substantially similar to those of *Whitcomb* and *Regester*: black plaintiffs in Mobile, Alabama, sued the city, claiming that the electoral structure of its city commission, which elected three members at large, unconstitutionally diluted the black vote.¹⁰⁴ The *Mobile* plaintiffs represented a natural district population and presented evidence under the *Regester* factors that “no Negro had ever been elected to the City Commission . . . [and] that city officials had not been as responsive to the

102. 446 U.S. 55 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

103. 426 U.S. 229 (1976).

104. *Mobile*, 446 U.S. at 58.

interests of Negroes as to those of white persons.”¹⁰⁵ Furthermore, it must be noted that Alabama has a lengthy and nefarious history of racial discrimination against blacks in the voting context,¹⁰⁶ which qualifies as evidence under the *Regester* factors. Nonetheless, the Court denied relief.

The *Mobile* holding worked a significant disruption of racial vote dilution law because the Court not only imputed a state intent requirement into the law of racial vote dilution, but it also held that *Regester* factor evidence was insufficient to support an inference of discriminatory state intent. As a formal matter, the *Mobile* Court claimed fidelity to *Regester* and nowhere explicitly overruled it.¹⁰⁷ However, in reversing the lower courts’ findings of racial vote dilution, the *Mobile* Court held that the lower courts’ reliance on *Zimmer v. McKeithen*¹⁰⁸ represented legal error.¹⁰⁹ This must be seen as an attack on *Regester*, because *Zimmer* and *Regester* stand for the same thing. Consider that “[i]n the lower court effort to apply the *Whitcomb/Regester* principles . . . [*Zimmer* represented] the most important touchstone.”¹¹⁰ *Zimmer* elucidated the *Regester* factors and presented a more comprehensive list of types of evidence which might give rise to an inference of political exclusion on the basis of race.¹¹¹ As a result, the Court’s attempt to uphold *Regester* while rejecting *Zimmer* is nonsensical. *Regester* was, for all intents and purposes, overturned.

However, *Mobile* was not the final word on the intent/effects question. The *Mobile* holding sparked considerable public outcry, notably from civil rights groups, and in 1982, such groups were successful in lobbying for congressional remedy.¹¹² Congress responded by amending Section 2 of the VRA under its Fourteenth Amendment Section 5 powers. As amended, Section 2 reinstated

105. *Id.* at 71.

106. See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (striking down a 1957 enactment by the Alabama State legislature which redefined the City of Tuskegee so as to exclude blacks from residence and, so, political participation in city government); *Giles v. Harris*, 189 U.S. 475 (1903) (concerning the Alabama Constitution of 1901 which grandfathered in white voter registration and made black voter registration contingent on meeting numerous invidious obstacles).

107. See *Mobile*, 446 U.S. at 69 (“*White v. Regester* is thus consistent with ‘the basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose.’” (quoting *Davis*, 426 U.S. at 240)).

108. 485 F.2d 1297 (5th Cir. 1973) (en banc).

109. *Mobile*, 446 U.S. at 73.

110. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 689.

111. *Id.*

112. *Id.* at 713–14.

Regester's totality of the circumstances test¹¹³ and listed the *Regester* factors as the determinative evidence in the Senate Judiciary Committee Report which accompanied the amendment.¹¹⁴ The elements of a Section 2 claim of racial vote dilution remain unchanged: plaintiffs do not need the sort of evidence that would be required by either *Mobile* or *Davis* standards to make out a claim of vote dilution under Section 2. Whether *Regester* factor evidence is understood to give rise to an inference of racial animus on the part of the State or the voting public remains an open question in Section 2 claims,¹¹⁵ but it is clear that some combination of the evidentiary elements of *Whitcomb* and *Regester* is sufficient to succeed on a claim of racial vote dilution.

However, the state intent question was significantly complicated by *City of Boerne v. Flores*,¹¹⁶ which postdates the 1982 amendment to Section 2. The context of *Boerne* was as follows: In *Employment Division v. Smith*,¹¹⁷ the Court held that a showing of discriminatory state intent is required to assert a First Amendment challenge to state action that interferes with the free exercise of religion. Congress responded with the Religious Freedom Restoration Act ("RFRA"),¹¹⁸ which, notably, was modeled on amended Section 2 of the VRA (itself a response to *Mobile*) both in its substantive content and procedural enactment.¹¹⁹ In *Boerne*, the Court struck down the RFRA as in excess of Congress's Fourteenth Amendment Section 5 powers. This was justified by the separation of powers principle, dating to *Marbury v. Madison*,¹²⁰ that the Court is the final arbiter of questions of constitutional interpretation.¹²¹ *Boerne* required that any congressional enactment under Section 5 of the Fourteenth Amendment be marked by "congruence and proportionality" to the relevant Fourteenth Amendment doctrine.¹²²

113. Voting Rights Act of 1965, 42 U.S.C. § 1973c (1982).

114. S. REP. NO. 97-417, at 27-29 (1982), as reprinted in 1982 U.S.C.C.A.N. 177, 205-07.

115. Legislative history suggests that Congress itself was uncertain of what *Regester* factor evidence was supposed to prove, whether discriminatory state intent or not. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 720-21 (citing Subcommittee on the Constitution hearings on the meaning of the totality of the circumstances test).

116. 521 U.S. 507 (1997).

117. 494 U.S. 872 (1990).

118. 42 U.S.C. § 2000bb (Supp. V 1993).

119. Douglas Laycock, *Conceptual Gulfs in City of Boerne v. Flores*, 39 WM. & MARY L. REV. 743, 749-50 (1998).

120. 5 U.S. (1 Cranch) 137 (1803).

121. *Boerne*, 521 U.S. at 536.

122. *Id.* at 519-20.

This requirement of congruence and proportionality means that Congress must produce a substantial record when legislating under its Section 5 powers to show not only that Congress is employing the same conception of constitutional harm as the Court, but also that the legislative remedy being enacted is proportional to the Court's understanding of the gravity of the harm.¹²³

The constitutionality of Section 2 has not been challenged under *Boerne*, but the claim against Section 2 is fairly obvious: the "totality of the circumstances" test of amended Section 2 is not congruent and proportional to the requirement of discriminatory intent in racial vote dilution which the Court adopted in *Mobile*. To defend against this challenge, Congress would likely have to argue that evidence under the *Regester* factors establishes a prima facie case for discriminatory state intent which is congruent and proportional to the *Mobile* holding. This argument is not directly foreclosed by *Mobile* because that decision did not explicitly overrule *Regester*, but rather chose to note the insufficiency of the practically identical *Zimmer* factors. If *Boerne* were applied straightforwardly to Section 2, the constitutionality of Section 2 would thus turn on whether Congress could produce sufficient findings to suggest that *Regester* factor evidence is highly correlated with discriminatory state intent in the process of redistricting. It is not my purpose here to assess the strength or plausibility of this argument; instead, I merely wish to highlight the complexity in the doctrine preceding *LULAC* surrounding the issue of whose racial animus must be proven to succeed on a claim of racial vote dilution. If only private discrimination in the voting public must be proven, then one of two things must happen under *Boerne*: either *Mobile* must be overturned, or racial vote dilution must be exempted from the *Boerne* congruence and proportionality requirement. If, on the other hand, discriminatory state intent must be proven, then either *Regester* must be shown to be congruent and proportional to *Mobile* (which postdates *Regester*) or, again, racial vote dilution must be excepted from the *Boerne* requirement.

2. *LULAC* on the Question of State Intent

In a recent article, Professor Pildes suggests that *LULAC* provides a new wrinkle on the question of state intent in the law of racial vote dilution:

123. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 861 (discussing the reason the Court determined the RFRA to fail the congruence and proportionality test).

[T]he Court is groping for what seems to be a way to confine the concept of minority vote dilution to cases the Court views as ones of truly intentional state discrimination. The touchstone appears to be the concept of a “naturally arising” minority district, one that exists or would exist due to the geographic concentration of minority voters whose proximity also reflects common socioeconomic and other interests.¹²⁴

According to Professor Pildes, the geographical, political, and cultural compactness requirements of *LULAC* are necessary because of an emerging state intent requirement for Section 2 claims. The theory here seems to be that only such racial minority populations suggest “natural” locations for majority-minority districts to legislators in the process of redistricting. It is only when states fail to draw such “natural” districts that a presumption of discrimination arises; seemingly, it would be unnecessary to stifle racial minority populations which lack any geographical, political, or cultural compactness because such populations possess no obvious potential bloc voting strength in an ordinary apportionment. It is only geographically, politically, and culturally compact racial minority populations which suggest a political threat, and so only failure to draw a district around such populations gives rise to a presumption of discriminatory intent.

*C. The Likely Consequence of Court Doctrine on the
Regerter Questions*

The Court’s apparent adoption of natural district population and state intent requirements is likely to result in underrepresentation of racial minorities. In this Subpart, I will first discuss the implications for the natural district population requirement. I will then examine those for the requirement of state intent.

1. The Consequences of the Natural District Population Requirement

To begin, I will define a concept that I call “remedial proportionality.” Remedial proportionality is the creation of majority-minority districts that allow a given racial minority group to elect candidates of choice in a number proportional to the group’s percentage of the state population as a whole. So, for example, in a state of population 1000 with a black population of 100, remedial proportionality would require one safe black district for every ten districts statewide. Turning now to the repercussions of the Court’s doctrine, a natural district population requirement signals that

124. Pildes, *supra* note 92, at 1159.

where racial animus, whether in the state legislature or the voting public, functions to exclude racial minorities from the political process, remedial proportionality will not be guaranteed, but will place a cap on the creation of majority-minority districts. In this sense, proportionality under the Court's definition of racial vote dilution is a ceiling but not a floor.

That remedial proportionality is not a floor follows directly from the natural district population requirement. The natural district population requirement means that only natural district populations may be drawn majority-minority districts—all other majority-minority districts will be subject to strict scrutiny under equal protection review, under which they are likely to be struck down as in violation of the anti-essentialism principle. This means that if a given racial minority group's population is not clustered in natural district populations of a number which permits remedial proportionality, remedial proportionality would be held unconstitutional. Taken to the logical extreme, if a given racial minority group's population is politically and culturally disjointed and scattered across a state, the Court's doctrine may well forbid the drawing of even a single majority-minority district. Because *Regester* factor evidence might still suggest the political exclusion of a racial minority group on the basis of race in such a scenario, the natural district population requirement thus permits racial animus to effect underrepresentation of racial minorities approaching the vanishing point.

It might be thought that the natural district population requirement could equally allow for overrepresentation of racial minority groups. For instance, if racial minority groups were clustered in natural district populations of sufficient size and number to permit the creation of majority-minority districts which exceeded the racial minority group's population relative to the population of the state as a whole, remedial proportionality could be exceeded. However, this possibility is foreclosed. Remedial proportionality represents a ceiling on racial minority representation in light of the doctrine of *Johnson v. De Grandy*.¹²⁵ In *De Grandy*, the Court considered a Section 2 racial vote dilution claim of Cuban-American plaintiffs who represented a natural district population. These plaintiffs had already been allotted a number of majority-minority districts proportional to their population, but claimed that their size permitted the drawing of an additional majority-minority dis-

125. 512 U.S. 997 (1994).

trict.¹²⁶ This “maximization”¹²⁷ claim was rejected by the Court, which held that “[o]ne may suspect vote dilution from political famine, but one is not entitled to suspect (much less infer) dilution from mere failure to guarantee a political feast.”¹²⁸

The problems with maximization are twofold. First, because of the zero-sum game nature of racial politics,¹²⁹ a state could not exceed remedial proportionality for one racial group without depriving another racial group of its share in violation of the principle of majority rule. In other words, maximization for one group entails racial vote dilution for other groups. In *De Grandy*, the racial group threatened by maximization was black,¹³⁰ though the Court has held that the same principle also protects whites against maximization.¹³¹ Second, the remedy of maximization is excessive with respect to the harm of racial vote dilution. In the language of the Court, the remedy of majority-minority districts is “the politics of second best,”¹³² which is shorthand for the idea that majority-minority districts stand in for the democratic ideal in which racial animus would not frustrate cross-racial aggregation, and racial minority groups would attain representation in proportion to their numbers.¹³³ Because any claim that racial minorities would achieve representation beyond their bloc voting strength would be speculative, racial vote dilution does not create a right to maximization, even where the size of a natural district population would permit it.

It is in this sense that remedial proportionality is a ceiling but not a floor given the natural district population requirement; majority-minority districts may be drawn only around natural district populations, but not in a number which represents maximization.

126. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 873–75.

127. *Id.* at 874.

128. *De Grandy*, 512 U.S. at 1017.

129. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 904 (“Once the principle of group representation is pushed beyond the initial question of the complete exclusion of black representation in at-large elections, the voting rights analysis of who should be afforded representation in single member districts quickly borders on the impossible.”).

130. *De Grandy*, 512 U.S. at 1024 (“[T]he [district] court did not . . . think it was possible to create both another Hispanic district and another black district on the same map . . .”).

131. *United Jewish Orgs. of Williamsburgh v. Carey (UJO)*, 430 U.S. 144, 165–66 (1977).

132. *De Grandy*, 512 U.S. at 1020 (internal quotation marks omitted).

133. *See id.* at 1017 (“However prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75 percent above its numerical strength indicates a denial of equal participation in the political process.”).

R

R

As a result, where evidence under the *Regester* factors suggests political exclusion on the basis of race, except where natural district populations exist in a manner which fortuitously permits the achievement of remedial proportionality, underrepresentation of subordinated racial minorities is to be expected under the court's prevailing definition of racial vote dilution.

2. The Consequences of the State Intent Requirement

The requirement of a showing of discriminatory state intent is a notoriously difficult burden for plaintiffs to meet in equal protection claims.¹³⁴ However, at first glance, it might seem that the difference between a requirement of state intent and the allowance of claims premised on private discrimination is merely academic. This is because, in either event, racial vote dilution may be proven under the Court's current doctrine with some combination of the evidentiary elements of *Whitcomb* and *Regester*; the more demanding requirement of proving state intent under *Davis* and *Personnel Administrator of Massachusetts v. Feeney*¹³⁵ adopted in *Mobile* has seemingly been abandoned.¹³⁶ But such an understanding of a state intent requirement would be mistaken for two reasons. First, if state intent is indeed to be proven through a combination of the *Regester* factors and evidence of a natural district population as *LULAC* suggests, then the sort of underrepresentation which attaches to a natural district population requirement, described above, must follow. If a natural district population requirement is justified on this ground alone, because a natural district population cannot otherwise be justified under the Constitution, then a state intent requirement would make a real difference by denying a guarantee of remedial proportionality where appropriate.

Second, under *Boerne*, a state intent requirement would be susceptible to the challenge that permitting racial vote dilution claims premised on *Regester* factor evidence and evidence of a natural dis-

134. See, e.g., *City of Mobile v. Bolden*, 446 U.S. 55, 104 (1980) (Marshall, J., dissenting), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

135. 442 U.S. 256 (1979).

136. Under *Davis* and *Feeney*, plaintiffs are required to produce evidence to show that a given state action was taken "because of," not merely "in spite of" a discriminatory outcome. *Feeney*, 442 U.S. at 279. This creates a much more stringent burden on plaintiffs because it denies relief to plaintiffs who would be able to prove under the *Regester* factors that "the combination of an electoral structure and historical and social factors" rendered the quashing of the racial minority vote foreseeable in the case of a given apportionment. *Mobile*, 446 U.S. at 111 n.7 (Marshall, J., dissenting).

strict population is not congruent and proportional to the Court's holding in *Mobile*. This means that the constitutionality of Section 2 would turn on whether Congress could produce sufficient findings to suggest that failure to draw a majority-minority district around a natural district population presenting *Regester* factor evidence is highly correlated with discriminatory state intent in the process of redistricting. The problem is that no such findings have ever been systematically amassed.¹³⁷ In 1982, Congress did not seem to know *what* the *Regester* factors were supposed to prove. The motive for Section 2 was not nuanced in this regard, but was instead a blunt one: to sidestep *Mobile* and return the law of racial vote dilution to the *Regester* totality of the circumstances test.¹³⁸ Moreover, in 2006, when Congress renewed the VRA, no comprehensive findings were recorded to suggest a correlation between a combination of evidence of a natural district population and the *Regester* factors, on the one hand, and discriminatory state intent on the other.¹³⁹

I do not suggest that Section 2 would be struck down under *Boerne*; I intend only to show that Section 2 is vulnerable to a challenge under *Boerne*, and that the continuing vitality of Section 2 would therefore depend on the ability to either deny the applicability of *Boerne* or to meet congruence and proportionality requirements, both of which suggest real complications. If Section 2 were to fall, then the law of racial vote dilution would revert to *Mobile*, as that opinion has not been touched by the Court. This would mean that even a natural district population presenting *Regester* factor evidence would not be entitled to an inference of discriminatory state intent. Instead, plaintiffs would face the more daunting task of proving racial vote dilution under the standards of *Feeney*, which

137. Professor Karlan argues to the contrary that ample evidence of intentional state discrimination prompted amendment of the VRA in 1982, and that Congress needed to cast a wide net via federal law to ensnare all cases of such invidious discrimination. Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 WM. & MARY L. REV. 725, 733 (1998). My contention in response is that such findings were not systematically documented, and that, in fact, evidence suggests Congress was not specifically concerned with remedying State discrimination so much as reversing *Mobile* in 1982. See *supra* note 112 and accompanying text. Nonetheless, my argument for the vulnerability of Section 2 does not hinge on the necessity of finding Section 2 unconstitutional, but only on the risk. That Professor Karlan presents a strong argument for Section 2's constitutionality does not undermine this risk.

138. See *supra* note 113 and accompanying text.

139. E-mail from Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law, to Avram D. Frey, Student, New York University School of Law (April 9, 2007, 10:05 EST) (on file with author).

would significantly stunt the viability of such claims, resulting in less racial minority representation. This is not a problem faced by the opposing view—that only private racial discrimination must be proven—because such a view might preempt *Boerne* applicability by arguing that *Mobile* was wrongly decided.

III.
CONSTITUTIONAL ATTACK ON COURT DOCTRINE
ANSWERING THE QUESTIONS LEFT OPEN
IN *REGESTER*

In this Part, I provide constitutional arguments for rejecting the Court's answers to the questions left open in *Regester*. The Constitution does not require the underrepresentation of racial minorities, but just the opposite.

A. *Constitutional Arguments Against the Requirement of State Intent*

In this Subpart, I defend a position which rejects the Court's holding in *Mobile*, essentially arguing that the *Davis* state intent requirement is improperly applied to the context of racial vote dilution. This argument is premised on two constitutional hooks. The first comes out of an interpretation of the Court's opinion in *United States v. Carolene Products Co.*¹⁴⁰ The second stems from the position taken by Justice Marshall in his *Mobile* dissent: that the state intent requirement is properly applied to the suspect classification strand of equal protection law, not the fundamental rights strand, which covers racial vote dilution. I then discuss a group of voting cases called *The White Primary Cases* as exemplary of the Court's own recognition of the uniqueness of the voting context with regard to a state intent requirement.

1. *Carolene Products*

In *United States v. Carolene Products Co.*,¹⁴¹ the Court departed from the *Lochner*-era view of the Court as super-legislature to adopt the current practice of broad legislative deference.¹⁴² The Court's decision reflects respect for democratic principles, giving voice to the idea that the will of the majority should be given priority over the beliefs and values of unelected judges.¹⁴³ This holding

140. 304 U.S. 144 (1938).

141. *Id.*

142. See Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 713–15 (1985).

143. See *id.*

manifests the rule of legal ideology that the best prevention against substantive harms is procedural: the political process provides a better means of achieving substantive fairness in the law than the case-by-case review of substantive policies by courts.¹⁴⁴ However, in Footnote 4 of the Court's opinion, Justice Stone recognized three circumstances in which deference to the legislative branch would be improper: protection of enumerated rights, correction of political process failures, and protection of "discrete and insular minorities."¹⁴⁵ These circumstances represent instances in which the political process cannot be trusted to make substantively fair law. In such circumstances of process failure, the Court must play a more active role in policing substantive outcomes.¹⁴⁶

In this manner, the philosophy of *Carolene Products* suggests rejection of a state intent requirement in the voting rights context. Racial vote dilution, as Professor Issacharoff has noted, touches on two of the Footnote 4 triggers for heightened judicial involvement: election law and discrimination against discrete and insular minorities.¹⁴⁷ The logic of requiring judicial involvement regardless of discriminatory state intent is straightforward: if the political process is the preferred protection of substantive fairness, then fairness must be secured *ex ante* in the substantive law of election structures, particularly where fairness concerns touch upon discrete and insular minorities. As Professor Issacharoff notes, "there [can] be [no] reliance on the political process to protect or restore minority voting rights."¹⁴⁸ If the Court were to take a passive role in the law of democracy, then the protection provided by the vote would be "an empty form."¹⁴⁹

The *Davis* model is an outgrowth of *Carolene Products*: it suggests trust in substantive outcomes which emerge from a legislative body free of the taint of discriminatory intent.¹⁵⁰ However, just as *Carolene Products* does not suggest deference without exception, *Da-*

144. Issacharoff, *Polarized Voting*, *supra* note 2, at 1866–68 (citing JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980)).

145. *Carolene Prods.*, 304 U.S. at 153 n.4.

146. Ackerman, *supra* note 142, at 715 ("Whereas the Old Court had protected property owners who enjoyed ample opportunity to safeguard their own interests through the political process, the New Court would accord special protection to those who had been deprived of their fair share of political influence.").

147. Samuel Issacharoff, *Supreme Court Destabilization of Single-Member Districts*, 1995 U. CHI. LEGAL F. 205, 216–17.

148. Issacharoff, *Polarized Voting*, *supra* note 2, at 1866.

149. *Giles v. Harris*, 189 U.S. 475, 488 (1903).

150. Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 284 (1991).

R

R

R

vis's presumption of fairness must not be understood to hold across the board. Instead, following *Carolene Products*, an exception must be carved out for the political process. In this sense, far from *Davis* requiring proof of discriminatory intent in the context of election law, the logic of *Davis* would seem to require election law claims regardless of state intent in order to ensure an equally effective vote across racial lines. Only if all races have an equally effective vote can there be any merit to legislative deference on issues which have a racially disparate impact in non-voting contexts. This logic was powerfully voiced by Dr. Martin Luther King, Jr.:

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.¹⁵¹

Carolene Products thus provides a forceful argument for denying a requirement of state intent. Where state redistricting allows racial animus in the general populace to shut racial minorities out of the political process, racial minorities may be rendered politically powerless and therefore have no procedural defense against unfairness in any body of substantive law. This is precisely the sort of result which requires constitutional intervention by the judiciary, and, therefore, the right to a racially undiluted vote should properly be construed as an affirmative right of protection against such a prospect.

2. Justice Marshall's *Mobile* Dissent

In *Mobile*, Justice Marshall rooted his dissent in the argument that the state intent requirement of *Davis* is properly applied in claims which fall under the strict scrutiny strand of the Equal Protection Clause. Racial vote dilution claims fall under the fundamental rights strand of the Equal Protection Clause, and thus application of the *Davis* standard is improper.¹⁵² The suspect classification equal protection doctrine comes out of *Bolling v. Sharpe*,¹⁵³

151. Martin Luther King, Jr., Give Us the Ballot, Address at the Prayer Pilgrimage for Freedom (May 17, 1957), quoted in Lani Gunier, *The Triumph of Tokenism: The Voting Rights Act and the Theory of Black Electoral Success*, 89 MICH. L. REV. 1077, 1082 n.14 (1991).

152. *City of Mobile v. Bolden*, 446 U.S. 55, 113 (1980) (Marshall, J., dissenting), superseded by statute, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131.

153. 347 U.S. 497, 499 (1954).

Korematsu v. United States,¹⁵⁴ and *Loving v. Virginia*.¹⁵⁵ These cases all concerned legislative policies which made racial classifications. The line of doctrine spawned by their holdings requires that legislation which invokes suspect classifications, of which race is one, be subjected to strict scrutiny review.¹⁵⁶ *Davis* is a case concerned with suspect classification doctrine: it holds that strict scrutiny review is only triggered where a legislative policy which has a disparate impact on a suspect class can also be shown to have been motivated by a discriminatory purpose.¹⁵⁷

But racial vote dilution claims fall under the fundamental rights strand of equal protection law.¹⁵⁸ This strand of the Equal Protection Clause protects against infringements upon rights which the Court has deemed fundamental over the years, such as the right to travel,¹⁵⁹ the right to equal access to criminal procedure,¹⁶⁰ and the right to vote.¹⁶¹ Under the fundamental rights strand of the Equal Protection Clause, there is no state intent requirement. Instead, strict scrutiny review is triggered wherever a legislative policy has the effect of impinging upon a fundamental right.¹⁶²

The distinction between the suspect classification and fundamental rights strands of the Equal Protection Clause is not merely formal; there is a principled reason why *Davis* might be sensibly applied to the former but not the latter. As Justice Marshall noted, the impetus for the *Davis* state intent requirement was fear that disparate impact claims would interfere with the government's determination of how to dole out constitutional benefits.¹⁶³ In *Davis* itself, the Court was faced with discrimination in public employment, a benefit to which no citizen enjoys a constitutional right.¹⁶⁴ But in the case of fundamental rights, the alleged state impingement is upon enjoyment of a constitutional entitlement. For purposes of a state intent requirement, this makes all the difference. A constitutional entitlement to a thing means that denial of that thing for any purpose suggests a remediable harm. Justice Marshall's *Mobile* dissent quotes Professor Ely for a powerful statement of this

154. 323 U.S. 214, 216 (1944).

155. 388 U.S. 1, 9, 11 (1967).

156. See, e.g., *Adarand Constructors v. Peña*, 515 U.S. 200, 227 (1995).

157. *Mobile*, 446 U.S. at 113 (Marshall, J., dissenting).

158. *Id.* at 118.

159. *Shapiro v. Thompson*, 394 U.S. 618, 630, 638 (1969).

160. *Griffin v. Illinois*, 351 U.S. 12, 19 (1956).

161. *Harper v. Va. Bd. of Elections*, 383 U.S. 663 (1966).

162. *Mobile*, 446 U.S. at 113–14 (Marshall, J., dissenting).

163. *Id.* at 133.

164. *Id.* at 114 n.11.

point: "It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as much unless it was intentional."¹⁶⁵ In this manner, legal authority for racial vote dilution claims argues that a state intent requirement is not only improper as applied to such claims, but also represents confusion¹⁶⁶ as to the constitutional significance of what is being protected.

3. *The White Primary Cases*

The special position of the vote with respect to state intent requirements has been given effect in voting rights jurisprudence. The most prominent examples are *The White Primary Cases*.¹⁶⁷

The White Primary Cases arose out of the context of the historically one-party-dominated South. In Texas, the Democratic Party was dominant for the first half of the twentieth century: the Democratic Primary unfailingly determined the results of the general election. Both Texas and the Democratic Party sought to exclude blacks from the primary and subsequently deny them any role in the political process.¹⁶⁸ In *The White Primary Cases*, the Court struggled against this trend to give meaning to the Fifteenth Amendment. The difficulty in these cases was in distinguishing between discriminatory state action, which is unconstitutional under the Fourteenth and Fifteenth Amendments, and Democratic Party membership discrimination, which is constitutionally *protected* under the First Amendment right to associate. The challenge for the Court lay in finding the state action necessary to provide constitutional remedies, particularly as exclusion moved farther and farther into the domain of purely private discrimination.

At first, in *Nixon v. Herndon*, the Court dealt with a State of Texas mandate that blacks were to be excluded from the Demo-

165. *Id.* at 121 n.21 (quoting John Hart Ely, *The Centrality and Limits of Motivation Analysis*, 15 SAN DIEGO L. REV. 1155, 1160-61 (1965)).

166. Justice Marshall, finding no apparent justification for the unique applicability of a state intent requirement to racial vote dilution claims among all fundamental rights claims, suggests that the Court may have so decided "because the plaintiffs in the present cases are Negro." *Id.* at 113.

167. *Terry v. Adams*, 345 U.S. 461 (1953); *Smith v. Allwright*, 321 U.S. 649 (1944); *Nixon v. Condon*, 286 U.S. 73 (1932); *Nixon v. Herndon*, 273 U.S. 536 (1927).

168. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 117 (suggesting that exclusion of blacks was necessary to maintain stability among an otherwise sharply divided State Democratic Party).

cratic Party's primary.¹⁶⁹ This was the easy case: state action had clearly discriminated on the basis of race, and the exclusionary act was struck down. In *Nixon v. Condon*,¹⁷⁰ the Court faced a slightly more difficult set of facts. The State of Texas enacted a law which permitted the Democratic Party Executive Committee to determine eligibility for participation in the primary, and the Executive Committee subsequently denied eligibility to blacks.¹⁷¹ The Court struck down the state delegation of authority to the Executive Committee. They held that, given the one-party nature of Texas politics, the distinction between the Executive Committee and state legislators was too formal to deny state action.¹⁷² In *Smith v. Allwright*, the Court was forced to go a step further; the Democratic Party nominating convention voted to exclude blacks from the primary, and, therefore, the act of discrimination was clearly internal to private actors divorced from the state.¹⁷³ The Court responded by fusing the primary election into the general election, holding that the significance of the primary made the two elections "a single instrumentality for choice of officers."¹⁷⁴ Because the general election was a function of state law, this fusion brought the Democratic Primary within the purview of state action.

The final step came in *Terry v. Adams*.¹⁷⁵ The Texas Jaybird Association was the effective nerve center of the Texas Democratic Party. For years, the Jaybirds had slated the candidates who were ultimately elected.¹⁷⁶ *Terry v. Adams* concerned the exclusion of blacks by the Jaybirds from their primary, a process once-removed from the Democratic Primary.¹⁷⁷ The Court could not agree on a principle which could push this private discrimination within the realm of state action. Nevertheless, the Court struck down the exclusion and required the access of blacks to the Jaybird nominating procedures.¹⁷⁸

In this manner, *The White Primary Cases* manifest the constitutional weight of the right to vote as recognized by the Court.

169. 273 U.S. at 539–40.

170. 286 U.S. 73.

171. *Id.* at 81–82.

172. *Id.* at 88–89.

173. 321 U.S. 649, 656–57 (1944).

174. *Id.* at 659–60 (citing *United States v. Classic*, 313 U.S. 299 (1941), for the proposition that the primary may be fused into the general election).

175. 345 U.S. 461 (1953).

176. *Id.* at 484 (Clark, J., concurring) ("Over the years . . . [the Texas Jaybirds'] balloting has emerged as the locus of effective political choice.").

177. *Id.* at 462 (majority opinion).

178. *Id.* at 469–70.

Though First Amendment law protected white discrimination which shut blacks out of the political process, the special importance of the right to vote inspired the Court to bend the law of state intent to ensure black access to meaningful political participation. Although the Court could no longer agree on a doctrinal footing by the time of *Terry v. Adams*, the majority of the Court recognized the urgency of protecting racial minority voting, even in the face of existing doctrine requiring proof of discriminatory intent.¹⁷⁹ As discussed above, two doctrinal sources have emerged since the time of *The White Primary Cases* to provide a constitutional hook for the Court's intuition in *The White Primary Cases*. It is on the basis of these hooks and the Court's own intuition that I contend that the *Mobile* state intent requirement for claims of racial vote dilution should properly be rejected.

B. Constitutional Arguments Against the Requirement of a Natural District Population

Shaw, *Shaw II*, and *LULAC* collectively hold that sufficiently large racial minority populations must be geographically, politically, and culturally compact to suffer racial vote dilution.¹⁸⁰ In the preceding Subpart, I attempted to argue that this cannot be justified by appeal to a state intent requirement—that is, a natural district population requirement should not be maintained as necessary to evidence state intent, because a state intent requirement is improper. I turn now to examine whether any other justifi-

179. It should be noted that *The White Primary Cases* were presented by the appellees in *Mobile* in opposition to the Court's adoption of an intent requirement in the law of racial vote dilution. The *Mobile* Court distinguished *The White Primary Cases* from the racial vote dilution context on the grounds that *The White Primary Cases* concerned first-generation voting rights claims under the Fifteenth Amendment, as opposed to the second-generation voting rights claims under the Fourteenth Amendment at issue in the law of racial vote dilution. *City of Mobile v. Bolden*, 446 U.S. 55, 64–65 (1980), *superseded by statute*, Voting Rights Act Amendments of 1982, Pub. L. No. 97-205, 96 Stat. 131. This is a distinction without a difference. The whole point of the second-generation voting rights movement is recognition that the right to vote, without more, means nothing in terms of access to the political process. In this sense, if *The White Primary Cases* embody the principle that state intent doctrine must be bent to accommodate equal access to political participation across racial lines, then that principle must be extended to the law of racial vote dilution.

180. See *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 435 (2006); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 899–900, 914 (1996); *Shaw v. Reno*, 509 U.S. 630, 655 (1993) (collectively holding that neither geography nor disparate needs and interests were sufficient on their own to render a district non-compact).

cation for a natural district population requirement is constitutionally sustainable. I wish to proceed here systematically, so I will begin by trying to identify the several types of justifications that might exist for a natural district population requirement. I will then address each potential justification individually, and ultimately conclude that none can withstand close examination.

To begin with, there is no such thing as a “natural” district: neither constitutional nor prudential principles suggest that districts must be drawn in a certain way or in certain locations.¹⁸¹ The “traditional” principles of districting, namely, contiguity, compactness, respect for political subdivisions,¹⁸² and incumbency protection, are neither constitutionally required nor do they suggest any one apportionment scheme.¹⁸³ Indeed, even strict adherence to these principles permits near-infinite permutations in the creation of districts across a state.¹⁸⁴ As a result, any reason for a natural district requirement must be relative to the naked use of race in redistricting.

In this vein, the natural district population requirement which originated in *Shaw* brings strict scrutiny review to so-called benign racial classifications. The use of race in redistricting to create majority-minority districts may seemingly be subjected to heightened scrutiny wherever race is known to be the predominant factor in the creation of a given district, and insofar as the contested district does not capture a natural district population, the district will be held unconstitutional. The natural district population requirement thus brings the law of racial vote dilution within the jurisprudence of “color-blindness.”¹⁸⁵ Any argument that racial vote dilution is not a function of geographical, political, and cultural compactness places the fact of race at the forefront in the definition of racial minority numerical majorities, and subsequently permits the crea-

181. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 880–81.

182. For purpose of clarification, it should be noted that “respect for the integrity of political subdivisions” does not mean respect for cognizable interest group pockets. “Political subdivisions” here refers to geographical locations with a distinct local government structure, such as a city or a town. The traditional principle of districting entails that such locally governed entities not be split where practicable.

183. See *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004) (overturning *Davis v. Bandemer*, 478 U.S. 109 (1986), to hold that partisan gerrymandering claims are non-justiciable because no standard exists to determine the proper way to redistrict).

184. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 881.

185. *Adarand Constructors v. Pena*, 515 U.S. 200, 225–27 (1995); *Richmond v. J. A. Croson Co.*, 488 U.S. 469 (1989).

R

R

tion of districts with the same racial prioritization.¹⁸⁶ According to the theory of a color-blind Constitution, the naked use of race is to be distrusted because, however seemingly benign, racial classifications may result in cognizable harms. Strict scrutiny review is proper, according to this view, to snuff out the harms which may lurk within seemingly benign legislation. Accordingly, if strict scrutiny review is proper to find and invalidate the creation of majority-minority districts which do not satisfy the natural district population requirement, then it must be possible to link majority-minority districts which do *not* comply with this requirement to constitutional harm.

In his concurring opinion in *United Jewish Organizations of Williamsburgh v. Carey (UJO)*,¹⁸⁷ Justice Brennan outlined a list of possible harms from the specific context of race-conscious redistricting for creation of majority-minority districts. Justice Brennan identified three harms which might underlie the allegedly benign use of race in legislative action:

First, a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of the plan's supposed beneficiaries. . . . *Second*, even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society's latent race consciousness, suggesting the utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual's worth or needs. . . . *Third* . . . we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most "discrete and insular" of whites often will be called upon to bear the immediate, direct costs of benign discrimination.¹⁸⁸

What this means for the natural district population requirement is that it might be sustained by appeal to any of the three harms which Justice Brennan identifies. In other words, the predominance of race in redistricting—manifested by deviation from the natural district population requirement—may justifiably be held unconstitutional if it results in either harm to the intended

186. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (noting "the appearance of political apartheid" in the face of majority-minority districts which disregard natural district population characteristics).

187. 430 U.S. 144 (1977).

188. *Id.* at 172-74 (Brennan, J., concurring) (citations omitted).

beneficiary racial minority group, harm to whites, particularly underrepresented whites, or the societal harm of heightened race-consciousness.

1. Harm to Racial Minorities: The Court's Anti-Essentialism Principle

In *Shaw II* and *LULAC*, the Court adopts the view that the natural district population requirement is informed by the first of Justice Brennan's identifiable harms, harm to racial minorities.¹⁸⁹ In these cases, this harm is identified as the practice of essentialism inherent in the presumption that geographically and/or culturally disparate racial minority populations are politically cohesive in a heightened sense. When the state presumes that geographically and culturally disparate members of a racial minority group may serve as political substitutes for one another, it presumes unconstitutionally that all members of that racial group vote the same. Essentialism is a constitutional harm under the Equal Protection Clause because it represents an over-generalization which does not respect individuality, and instead defines individuals on a racial basis.

However, the reasoning of *Shaw II* and *LULAC* is logically flawed because when a state draws a majority-minority district around a non-natural district population, essentialism need never enter the picture.¹⁹⁰ To see this point, consider the following counterfactual premised on the facts of *Shaw II*. First, suppose the State of North Carolina perceived the existence of evidence under the *Regester* factors suggesting political exclusion of blacks across the state on the basis of race. Next, to protect against this harm, suppose the state sought to provide remedial proportionality for blacks, which was achieved by the drawing of District 12. At what point in these two steps would the state have practiced essentialism? The state need not have presumed that the blacks of District 12 all vote the same on the basis of race, nor need it have presumed that District 12 blacks vote the same as the blacks of the natural district population in the south-central to southeastern region of the state. Instead, the state would necessarily have presumed only the commonality of race—which is ascertained through self-identification in census data—and the weak form of political cohesion manifested by racially polarized voting.¹⁹¹ Essentialism would only be involved

189. *League of United Latin Am. Citizens v. Perry (LULAC)*, 548 U.S. 399, 427 (2006); *Shaw v. Hunt (Shaw II)*, 517 U.S. 899, 914 (1996).

190. Gerken, *supra* note 15, at 1731–33.

191. *Id.* Professor Gerken takes the view that my argument here oversimplifies the nature of racial politics by presuming two polar opposites for racial minori-

if it were the case that only racial minority populations of heightened political cohesion may suffer racial vote dilution; only then would the suggestion that District 12 suggests a remedy for racial vote dilution of either the District 12 population or the south-central to southeastern natural district population betray a belief that all blacks vote the same. But this requirement of heightened political cohesion, an element of the natural district population requirement, is itself unsubstantiated. So the anti-essentialism principle is question begging: why must a community be politically cohesive in a heightened sense to suffer racial vote dilution? If the harm of racial vote dilution, as *Regester* suggests, is political exclusion on the basis of race, then it would seem to follow that only the weak form of political cohesion manifested in racially polarized voting would be required.

But the case against an anti-essentialism principle as justifying a natural district population requirement is even stronger in light of the Court's holding in *United Jewish Organizations of Williamsburgh v. Carey (UJO)*.¹⁹² In that case, the Court was presented with a claim of racial vote dilution brought by Hasidic Jews in a majority black district.¹⁹³ Relying on the perhaps contentious view that the Hasidim were racially white, the Court denied relief, holding that

ties in the political process: inclusion and exclusion. Because, instead, there is a gradient along the axis of exclusion of racial minorities, Professor Gerken contends that racial vote dilution should properly respond with sensitivity to the level of exclusion of different racial minority populations. This assessment requires giving voice to specific communities as defined by heightened political cohesion, and as evidenced by geographical and cultural compactness; it thus requires a degree of essentialism in the creation of majority-minority districts which disregards the natural district population requirement. *Id.* at 1731–32. This is a strong challenge, but I think it can be met, if only briefly here. There are, indeed, differences in the degree of exclusion of populations within a single racial minority group, and constitutional remedies should be sensitive to the differences along this spectrum. However, it is my contention that wherever *Regester* factor evidence suggests a threshold level of exclusion on the basis of race across a jurisdiction, the creation of majority-minority districts to achieve remedial proportionality across the jurisdiction is constitutionally required and entails no essentialism. However, within the framework of remedial proportionality, states should take account of differences across racial minority populations within the same group in terms of both degrees of exclusion and numerical size, the latter in accordance with the principle of majority rule. Therefore, out of respect for both anti-essentialism and the principle of majority rule, states may be required to give preference to natural district populations as the proper place to begin in meeting remedial proportionality.

192. 430 U.S. 144 (1977).

193. *Id.* at 152–53.

white filler people¹⁹⁴ have no claim under the Constitution where they are permitted to register and vote.¹⁹⁵ This is because not every voter is entitled to electoral results in his/her given district, and white voters in a given district can claim no racial vote dilution where remedial proportionality is maintained because the votes of whites in other districts are an acceptable substitute.¹⁹⁶ Under this holding, if heightened political cohesion is required of racial groups to be considered numerical majorities, then the Court practiced essentialism by treating all white votes as fungible, regardless of geographical and cultural non-compactness. This might have meant that the Court rejected a requirement of heightened political cohesion, in which case the anti-essentialism principle could not be applied to the creation of majority-minority districts at all. But since the Court has applied the anti-essentialism principle in *Shaw II* and *LULAC*, *UJO* suggests that heightened political cohesion is a requirement which applies only to racial minorities if they are to claim racial vote dilution. This special burden on racial minorities renders the Court's position of anti-essentialism untenable.¹⁹⁷ For

194. T. Alexander Aleinkoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 631 (1993).

195. *UJO*, 430 U.S. at 165–66.

196. *Id.* at 166 (“[E]ven if voting in the [challenged district] occurred strictly according to race, whites would not be underrepresented relative to their share of the population. . . . [Therefore] the individual voter in the district with a nonwhite majority has no constitutional complaint . . . [because] [s]ome candidate, along with his supporters, always loses.”).

197. Professor Gerken suggests that the Court endorses the anti-essentialist position largely as a result of confusion regarding the aggregate nature of voting rights. Gerken, *supra* note 15, at 1718. According to Professor Gerken, since the Court has misapplied the individual rights conception of the Equal Protection Clause favored by the Rehnquist Court to the voting context, the result is that the right of individuals within a racial minority group suffering racial vote dilution seemingly cannot be said to be protected by creation of majority-minority districts elsewhere without essentialism. *Id.* at 1665–66, 1691. This preference for an individual rights conception of the Equal Protection Clause, Professor Gerken argues, is itself motivated by discomfort with essentialism, because the notion of group rights relies on a notion of sameness across a given group. *Id.* at 1718. However, in the context of racial vote dilution, as noted in the text accompanying this note, there is no essentialism in the definition of relevant racial minority groups: the weak political cohesion required is satisfied not by unconstitutional presumption, but by a showing of racially polarized voting coupled with *Regester* factor evidence.

Professor Issacharoff suggests a different causal explanation for the Court's adoption of the natural district population requirement: fixation on the factual context of multi-member districts. Issacharoff, *Groups and the Right to Vote*, *supra* note 28, at 880–88. I read Professor Issacharoff as lending support to the following argument: In the era of multi-member districts, the jurisdictional denominator was sufficiently small that political exclusion was almost by necessity of natural dis-

R

R

this reason, I conclude that the justification for the natural district population requirement is not rooted in Justice Brennan's first identifiable harm of injury to the intended beneficiary racial minority groups.

2. Harm to Whites

It might be argued that the natural district population requirement is a principle which protects the interests of whites. This argument would proceed roughly as follows: When States draw majority-minority districts around non-natural district populations, they must make certain to fill the district with a substantial numerical minority of individuals of a different racial group from the group composing the majority.¹⁹⁸ This is because a majority-minority district which was, for instance, 100% black would itself represent unconstitutional racial vote dilution: blacks in such a district would be "packed."¹⁹⁹ The Court has determined that a district need only be 65% composed of a given racial minority group for the district to be safe for that group.²⁰⁰ A district significantly in excess of 65% is unconstitutionally packed because it "wastes" the votes of the surplus, which might be more effective in another district.²⁰¹ This prohibition of packing thus necessitates the presence of other racial groups in the majority-minority district called "filler people,"²⁰² whose function is that of "electoral fodder," placed within the minority-safe district for the express purpose of losing while taking up space.²⁰³ It is known in advance that filler people are likely to lose because of racially polarized voting: the state will be aware, for instance, that blacks and whites vote in opposition to each other, so when it fills a 65% black district with 35% whites, the whites can reasonably be expected to lose, unless they cross over. Because filler people will often be whites, Justice Brennan's identifiable harm of injury to whites may be manifested in the requirement of filler people in the creation of majority-mi-

trict populations. In the expanded denominator of redistricting, the Court failed to adjust and evaluate the logic of the natural district population requirement as divorced from the question of political exclusion on the basis of race. *Id.*

I mention these as potential historical explanations for the Court's adherence to the natural district population requirement, but it is important to note that neither explanation offers a constitutional justification for this view.

198. Aleinkoff & Issacharoff, *supra* note 194, at 630–31.

199. *Id.*

200. ISSACHAROFF, KARLAN & PILDES, *supra* note 21, at 890.

201. *Id.*

202. Aleinkoff & Issacharoff, *supra* note 194, at 630–31.

203. *Id.* at 633.

R

R

R

nority districts: majority-minority districts require the purposeful invalidation of white votes *because* they are *white* votes.

This argument immediately runs into the following problem: *all* majority-minority districts are governed by the same prohibition against packing, and so entail the same requirement of filler people. The filler people argument is supposed to be a narrow attack on majority-minority districts which are not in compliance with the natural district population requirement. As a result, the filler people argument needs to urge one of the following views to justify the natural district population requirement: either there is something qualitatively different about the harm suffered by white filler people in majority-minority districts which do not capture natural district populations, or there is something quantitatively different about the amount of harm which divergence from the natural district population requirement would allow.

The first contention, that there is a qualitative difference, is clearly question begging: the qualitative difference between natural and non-natural district populations is exactly what a justification for the natural district population requirement must prove.

The second possible contention, of a quantitative difference, is initially more compelling. As noted in Part II, the natural district population requirement is likely to cap the number of majority-minority districts which may be drawn at a number below remedial proportionality. In the absence of this requirement, a greater number of majority-minority districts would likely be drawn, and so a greater number of filler people would be required. This avenue is also a dead-end, however, in light of the Court's holding in *UJO*. In that case, the Court denied relief to the Hasidim because whites enjoyed rough proportionality of representation in the challenged apportionment.²⁰⁴ *UJO* thus stands for the proposition that the rights of racial groups to an effective vote protect the diminution of their group voting power below proportionality, but not against impingement on surplusage.²⁰⁵ But because of *De Grandy*, it can never be the case that the creation of majority-minority districts will diminish the voting strength of other racial groups below proportionality. The harm which *UJO* recognizes, diminution below proportionality, is effectively safe-guarded by *De Grandy's* prohibition of maximization. As a result, since no theory of racial vote dilution permits the creation of majority-minority districts above

204. *United Jewish Orgs. of Williamsburgh v. Carey (UJO)*, 430 U.S. 144, 166 (1977).

205. *Id.*

the ceiling of proportionality, there can thus be no argument that injury to whites informs the natural district population requirement.

3. The Harm of Raised Racial Consciousness

In their article, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, Professors Pildes and Niemi make the case that the bizarre district at issue in *Shaw* gave rise to a constitutional claim because it resulted in an "expressive," as opposed to material, harm.²⁰⁶ Expressive harms, according to Professors Pildes and Niemi, are administered when government action offends the deeper norms of our society by manifesting "value reductionism."²⁰⁷ Value reductionism happens when state action prioritizes one consideration above all others.²⁰⁸ This is offensive to the extent that we expect our government to weigh all the relevant factors in legislative decision making and not privilege one improperly. This is particularly true of an issue such as race to which the notion of a color-blind Constitution suggests we ought to attribute value only in the limited circumstances where policy is narrowly tailored to a compelling state interest.

Professors Pildes and Niemi thus flesh out an argument which parallels Justice Brennan's discussion of the identifiable harm of raised racial consciousness in the public. Interpolating from the argument of Professors Pildes and Niemi, the justification for a natural district population requirement might be prohibition of value reductionism, an idea that requires geographical, cultural, and political compactness to subordinate the prominence of race in the redistricting process.

In response to this argument, this Note contends that the constitutional doctrine outside of *Shaw* does not recognize any such thing as a purely expressive harm in the use of race, and that instead, prohibition of value reductionism has been implicated only where linked to material harms. Professors Pildes and Niemi argue against this challenge that *Shaw* reflects the Court's war on value reductionism in other areas of equal protection law, particularly in the so-called affirmative action context, where the Court has held that equal protection norms will not permit that race be the pre-

206. Pildes & Niemi, *supra* note 73.

207. *Id.* at 500.

208. *Id.*

dominant factor.²⁰⁹ If this is so, then there is a cognizable jurisprudence of expressive harms which may support the natural district population requirement. However, the doctrine to which Professors Pildes and Niemi refer outside of racial vote dilution must be distinguished. In education and employment, the traditional contexts of affirmative action law, the use of race in admissions, hiring, and contracting results in material harms: white people are denied seats in universities²¹⁰ and law schools,²¹¹ construction contracts,²¹² and teaching positions.²¹³ In fact, in order to have standing to challenge the use of race in these contexts—unlike in *Shaw* where seemingly any person in the state has standing to challenge a bizarre district—a plaintiff must have suffered a material harm.²¹⁴ As a result, the more traditional affirmative action doctrine does not suggest a precedent for the recognition of expressive harms proper because in that doctrine, it is likely that material harms were doing all the work.

Professors Pildes and Niemi suggest another instance of expressive harms outside the context of race in the doctrine which has emerged for the “endorsement test” under the Establishment Clause.²¹⁵ In short, the endorsement test holds that government endorsement of religion is an expressive harm.²¹⁶ In response, this Note contends that, for three reasons, the endorsement test is a poor paradigm for the law of racial vote dilution. First, the endorsement test is premised on a logic which is lacking in the context of racial vote dilution. When the government endorses any particular religion, or even religion generally over “no religion,” the government is expressing partiality towards a particular class of citizens. The expression itself violates the norm of a divided church and state which is supposed to be essential to impartial government; thus, the very expression threatens inequality. But when the government acts on the basis of race, nothing can necessarily be determined about the values behind such action. In fact, promotion of equality may provide the impetus for such an action.

209. See *id.* at 503 (“Justice O’Connor’s opinion in *Shaw* resonates with Justice Powell’s opinion in *Regents of the University of California v. Bakke*.”).

210. See *Grutter v. Bollinger*, 539 U.S. 306 (2003).

211. See *Gratz v. Bollinger*, 539 U.S. 244 (2003).

212. See *Adarand Constructors v. Peña*, 515 U.S. 200, 210–11 (1995).

213. See *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986).

214. Pildes & Niemi, *supra* note 73, at 514–15.

215. *Id.* at 511–12 (citing Justice O’Connor’s concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984), as the founding endorsement test case, maintained and developed in subsequent cases like *Edwards v. Aguillard*, 482 U.S. 578).

216. *Id.* at 512.

Second, the idea that pure value reductionism existed in *Shaw* is unsound. In *Shaw*, race was decidedly *not* the central consideration in the state's challenged redistricting plan—incumbency protection was. If race had been North Carolina's first priority, the state would likely have drawn an additional majority-minority district in the south-central to southeastern region because the Attorney General suggested it. By examining District 12 in isolation to note that *that* district was created solely on the basis of race, the Court ironically suggests that it would prefer that North Carolina *had* made race the first concern in the statewide redistricting so as to avoid the outcome of bizarre districts which bring the use of race to the public's attention. Therefore, I argue that the Court's objection cannot be rooted in true value reductionism, but rather stems from discomfort with "apparent" value reductionism.

Third, the Court seems to have abandoned the notion of value reductionism as the harm underlying the natural district population requirement.²¹⁷ As Professor Gerken notes, in the years since *Shaw*, "[o]nly those opinions written by Justice O'Connor consistently identify *Shaw* as addressing expressive harms . . . and only her first such opinion [*Shaw*] garnered a majority of the Court."²¹⁸ Professor Gerken's assessment was written before the Court's opinion in *LULAC*, but her prognosis was further reinforced by that opinion. The Court seems to have made a decisive move away from the notion of expressive harms towards anti-essentialism as the dominant justification for the natural district population requirement.²¹⁹ This shift may be interpreted as the Court's recognition that purely expressive harms are a poor fit for the context of the use of race in redistricting.

For these reasons, this Note denies that there is a sustainable argument that race-conscious redistricting which does not adhere to the natural district population requirement creates a constitutional harm by raising awareness of race. As a result, each of Justice Brennan's three identifiable harms of race-conscious legislative action fail to justify the natural district population requirement. In light of my arguments in the preceding Subpart that the natural district population requirement should not be justified on the grounds that it is evidentiary of discriminatory state intent, I now conclude that no justification for the natural district population requirement is sustainable.

217. Gerken, *supra* note 15, at 1692–93.

218. *Id.* at 1693.

219. *Id.* at 1693–94.

CONCLUSION

This Note attempts to untie some of the troublesome knots in racial vote dilution doctrine, leaving open an interpretation of racial vote dilution that will allow for remedial proportionality of racial minority representation where racial animus would otherwise exclude racial minorities from the political process. I do not propose and defend an alternative view: undoubtedly, any such view must face complications and arouse controversies given the stakes, as well as the close overlap of factors such as race, class, and politics. Nevertheless, where doctrine emerges which is fairly certain to result in judicial complacency in the face of racial minority underrepresentation, that doctrine must be scoured, challenged, and, where flawed, expunged. Judicial complacency can only magnify the inequalities that exist as fallout from a history of discrimination in both public and private sectors; what is at stake is the ability of racial minorities to gain representation in the political process, and so begin to undo the damage of that troubling history.