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# Refocusing on Race

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# Refocusing on Race

Grant M. Hayden\*

## *Introduction*

The papers presented at this Symposium address some of the most challenging issues in the law of democracy. This panel on barriers to voting has examined many of the ballot access and integrity issues that arose in the 2004 elections. Other panels have considered the state of campaign finance in the wake of the Bipartisan Campaign Reform Act<sup>1</sup> and partisan gerrymandering in light of recent Supreme Court opinions on the subject. These legal developments played a significant role in the last round of elections, and they raise important issues that promise to bedevil legislatures, courts, and scholars in the coming years.

Largely missing from most of the panels, though, was much discussion of the continuing role of race in politics. With few exceptions, the issue of race came up only obliquely, if at all, in the discussion of other issues. And this is more than a bit unusual, for race has been a driving force in the development of much of the law of democracy over the last several decades. Even today, it continues to give rise to some of the more difficult, and controversial, legal problems.

Of course, there is more to politics than race. And there are good reasons why many of the panels focused on other issues. The 2000 presidential election fiasco in Florida, coupled with recent passage of the Help America Vote Act<sup>2</sup> and predictions (mostly correct, it turns out) of a close presidential election this time around, made us focus on ballot access and integrity in a way that we haven't since the passage of the Voting Rights Act.<sup>3</sup> Significant new legislation<sup>4</sup> and Supreme Court opinions<sup>5</sup> in the areas of campaign finance and partisan gerrymandering in the last couple of years made those issues especially relevant. And when it comes to the law of politics, we all recognize the need to strike while the iron is hot—and ballot access, campaign finance, and partisan gerrymandering are certainly the hot issues of the last election.

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<sup>1</sup> Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 81 (codified in scattered sections of 2 U.S.C.).

<sup>2</sup> Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified in scattered sections of 42 U.S.C.).

<sup>3</sup> Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (2000).

<sup>4</sup> See Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 116 Stat. 181 (codified in scattered sections of 2 U.S.C.).

<sup>5</sup> See *Vieth v. Jubelirer*, 541 U.S. 267, 305–06 (2004) (plurality opinion) (finding that no judicially manageable standards exist for adjudicating political gerrymandering claims); *McConnell v. FEC*, 540 U.S. 93, 224 (2003) (upholding the constitutionality of the major provisions of the Bipartisan Campaign Reform Act of 2002).

But the relative inattention to the role of race in politics may reflect more than the temporary rise of other issues. It may also reflect a broader belief that, when it comes to race, we've done about all we can, especially when it comes to the larger, structural issues. The thinking goes something like this. The problem of minority access to the polls was largely resolved in the 1960s through enforcement of the Voting Rights Act. To the extent such problems still crop up, they can be remedied within existing legal structures. The problem of minority vote dilution has proven more difficult, but the creation of majority-minority (or, more recently, coalition) districts under sections 2 and 5 of the Voting Rights Act has effectively remedied that issue. And, in any case, that remedy appears to have reached its limit, both because there are few places left to draw additional majority-minority districts and because the creation and maintenance of such districts may actually reduce minority influence in political affairs.

The belief that problems of minority political participation have been solved, or perhaps more accurately, that there is not that much more we can do about them within existing legal structures, comes at a critical time. Several portions of the Voting Rights Act come up for reauthorization in 2007.<sup>6</sup> The most significant of these is section 5, which requires the attorney general or the U.S. District Court for the District of Columbia to give advance approval to, or "preclear," any changes in election law in certain jurisdictions.<sup>7</sup> Allowing section 5 to expire without replacing it with something comparable will eliminate one of the most flexible legal tools for countering the constantly evolving methods of effectively reducing meaningful minority political participation.

The purpose of this Article is to refocus attention on the issue of race. Part of this project must involve making sure we continue to set new goals as the old ones are achieved. The great success of the Voting Rights Act was due in part to the fact that, even after going a long way to ensure minority access to the voting booth, the law was then used to make sure that those minority votes were combined in ways that made them meaningful. Another part of this project involves making sure that we recognize that some of the constraints that prevent minority groups from fully realizing their potential in a democratic society are of our own, or the Supreme Court's, making, and that what we have created, we can undo (or at least question). The strict application of the one person, one vote rule, which I'll discuss throughout the Article, may be one example of such a constraint. This Article, then, is a call to remain vigilant in policing the many intentional and unintentional ways in which the political rights of racial minorities may be infringed upon. And, more generally, it is an argument to think more broadly about the possibilities that may exist to improve minority participation.

## *I*

Even though there is much work to be done, it would be foolish to suggest that there has not been tremendous improvement in minority political

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<sup>6</sup> 42 U.S.C. § 1973b(a)(8).

<sup>7</sup> Voting Rights Act of 1965 § 5, 42 U.S.C. § 1973c.

participation over the last forty years.<sup>8</sup> The improvement has taken place on almost every legal front. It began where it had to, at the polls, where, despite ratification of the Fifteenth Amendment nearly a century before, most blacks in the early 1960s could not cast a ballot.<sup>9</sup> These prohibitions on minority voting came in a variety of forms, the most notorious of which were devices like literacy tests and poll taxes.<sup>10</sup>

The Voting Rights Act of 1965 removed many of these impediments. Section 2 of the Act tracked the language of the Fifteenth Amendment and prohibited voting qualifications or practices that "den[ie]d or abridge[d] the right of any citizen . . . to vote on account of race or color."<sup>11</sup> More importantly, however, the Act contained several provisions that prohibited the facially race-neutral devices used to keep minority voters from the polls. Section 4 used a formula to select certain jurisdictions for special treatment.<sup>12</sup> These "covered" jurisdictions, including most of the worst offenders in the South, were prohibited from using literacy tests, character tests, or other devices that had been used to discriminate against minority voters.<sup>13</sup> Moreover, section 5 of the Act required the covered jurisdictions to submit proposed changes in election procedures to the attorney general or to the U.S. District Court for the District of Columbia for "preclearance" before making the changes.<sup>14</sup>

The Voting Rights Act of 1965 was immediately successful in opening up the polls to minority voters. Within two years, the percentage of blacks who were registered rose from 29% to over 52%.<sup>15</sup> In 1966, the Supreme Court found poll taxes in state elections to be unconstitutional;<sup>16</sup> the Twenty-Fourth Amendment, ratified a couple of years earlier, had banned them in federal elections.<sup>17</sup> And in 1970, the Voting Rights Act was amended to extend the ban on literacy and character tests nationwide.<sup>18</sup> Over subsequent decades,

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8 For a good general discussion of the history of the right to vote in the United States, see ALEXANDER KEYSSAR, *THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES* 54–60, 263–73 (2000). For more focused histories with an emphasis on minority voting rights, see BERNARD GROFMAN ET AL., *MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY* 4–22 (1992); J. MORGAN KOUSSER, *THE SHAPING OF SOUTHERN POLITICS: SUFFRAGE RESTRICTION AND THE ESTABLISHMENT OF THE ONE-PARTY SOUTH, 1880–1910* (1974); STEVEN F. LAWSON, *BLACK BALLOTS: VOTING RIGHTS IN THE SOUTH, 1944–1969* (1976); *QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965–1990* (Chandler Davidson & Bernard Grofman eds., 1994).

9 See GROFMAN ET AL., *supra* note 8, at 15–16; LAWSON, *supra* note 8, at 22.

10 See GROFMAN ET AL., *supra* note 8, at 8–10; KEYSSAR, *supra* note 8, at 111–16; KOUSSER, *supra* note 8, at 55–63.

11 Voting Rights Act of 1965 § 2, 42 U.S.C. § 1973(a).

12 *Id.* § 4(b), 42 U.S.C. § 1973b(b).

13 *Id.* § 4(a), (c), 42 U.S.C. § 1973b(a)(1), (c).

14 *Id.* § 5, 42 U.S.C. § 1973c.

15 Grant M. Hayden, *Resolving the Dilemma of Minority Representation*, 92 CAL. L. REV. 1589, 1596 (2004); see GROFMAN ET AL., *supra* note 8, at 21–22.

16 *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666 (1966).

17 U.S. CONST. amend. XXIV, § 1.

18 Voting Rights Act Amendments of 1970, Pub. L. No. 91-285, § 6, 84 Stat. 314, 315 (codified as amended at 42 U.S.C. § 1971(a)(2)(c) (2000)).

the level of minority participation has continued the upward climb begun in the 1960s.<sup>19</sup>

That early success, however, does not mean that we can discuss problems of minority access only in the past tense. There remain significant obstacles, legal and otherwise, to full minority participation, some of which render millions of members of minority groups ineligible to register and vote in federal, state, and local elections. Felon disenfranchisement laws, originally created in many cases with the express purpose of limiting black political participation,<sup>20</sup> continue to fulfill their century-old design by prohibiting over 1.4 million black men (a disproportionate number) from casting a ballot.<sup>21</sup> Citizenship requirements play a similar role in excluding a disproportionate number of other ethnic minorities, namely Hispanics, from polling places.<sup>22</sup> And some obstacles to minority voting, which others on this panel discussed, are just beginning to emerge. Long lines, for example, affected many in the last presidential election, but those in minority neighborhoods often had longer waits than others.<sup>23</sup> And, when it came to minority participation, the new identification requirements of the Help America Vote Act may have hurt more than helped.<sup>24</sup>

But these remaining limitations on access seem less worrisome than other more structural barriers to full minority participation. For one thing, there does not appear to be any slowdown in the push for expanding opportunities for minority access. This may be because, in many cases, it is difficult for politicians to support an obvious contraction of the franchise, and so the right to cast a ballot often has a bit of a one-way ratchet built into it—or at least more of one than other more complicated aspects of the right to vote.<sup>25</sup> And this may be, in part, because improving access for all people usually, and straightforwardly, leads to relative improvements for racial minorities. When

19 Hayden, *supra* note 15, at 1596; see GROFMAN ET AL., *supra* note 8, at 22.

20 See JAMIE FELLNER & MARC MALLER, *LOSING THE VOTE: THE IMPACT OF FELONY DISENFRANCHISEMENT LAWS IN THE UNITED STATES*, § 2, para. 3 (1998), available at <http://www.hrw.org/reports98/vote>.

21 See Pamela S. Karlan, *Convictions and Doubts: Retribution, Representation, and the Debate over Felon Disenfranchisement*, 56 STAN. L. REV. 1147, 1157 (2004).

22 See Daniel J. Rearick, *Reaching Out to the Most Insular Minorities: A Proposal for Improving Latino Access to the American Legal System*, 39 HARV. C.R.-C.L. L. REV. 543, 548 (2004).

23 See Andrew Welsh-Huggins, *Election Boards Expect Recount Demand Today*, CINCINNATI POST, Dec. 7, 2004, at A7 (referring to “long lines” and “a shortage of voting machines in predominantly minority neighborhoods”).

24 See Brian Kim, *Recent Development, Help America Vote Act*, 40 HARV. J. LEGIS. 579, 597–98 (2003).

25 This is not to say that the history of the franchise has not involved periods of contraction. Indeed, contrary to popular conception, the history of the right to vote in the United States has not involved a smooth upward climb toward universal suffrage. Instead, there have been extended periods when the right to vote was completely stagnant and periods of complete retrogression (most notorious among the latter was the end of the Reconstruction when black voters saw their Fifteenth Amendment rights crumble in the face of state opposition and federal indifference). But on a larger time scale, the right to cast a ballot has been made available to an expanding proportion of the population. See KEYSSAR, *supra* note 8, at 260–73. And though there are distinct possibilities of some contraction now (in the guise of fighting voter fraud, for example), the movement appears to generally be in the direction of expanding the franchise.

a state changes its felon disenfranchisement rules in the direction of allowing a greater number of felons to vote, the effect on minority voting is usually unambiguously positive.<sup>26</sup> For that reason, those who generally favor expanding the franchise and those who favor improving the lot of minority voters tend to line up on the same side of most access issues. This was true at the time the Voting Rights Act was passed, when literacy tests and other such devices kept disproportionate numbers of blacks out of the ballot booths, and it remains largely true today.

Things become trickier, however, when we move from vote access to vote dilution. There are various ways to dilute a group's voting power, but the two most straightforward categories involve (1) numerically diluting the strength of the group's vote and (2) preventing members of the group from combining their votes in a way that results in the election of a preferred candidate.<sup>27</sup> Numerical vote dilution, sometimes called quantitative vote dilution, may occur when voters are placed in a district with a population greater than that of other districts in violation of the one person, one vote standard.<sup>28</sup> The second type of dilution, sometimes called qualitative dilution, may happen in a number of different ways; the use of at-large districting plans, for example, may effectively keep a sizable minority group, racial or otherwise, from electing representatives of its choice.<sup>29</sup> At their core, these two types of vote dilution may be functionally (and perhaps even theoretically) equivalent: both prevent members of a group from aggregating their votes in a way that elects a number of representatives of their choice in rough proportion to their share of the electorate.<sup>30</sup> In practice, however, the two types of dilution have been treated quite differently under the law.

Quantitative vote dilution occurs when votes are assigned different weights, which happens when voters are placed in districts with different populations. This dilutes the voting power of those in the more populous districts and, correspondingly, concentrates the voting power of those in the less populous districts. Numerical disparities in voting power became a real problem over the first half of the twentieth century when state legislatures refused to redraw district lines in the face of significant demographic changes.<sup>31</sup> As a result, the voting power of those in the growing, largely ur-

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<sup>26</sup> To be sure, there remain issues—getting felons to actually register and vote, for example—but we are not confronted with tradeoffs of the sort that plague us in other areas of voting rights law.

<sup>27</sup> See Hayden, *supra* note 15, at 1598 (noting the disproportionate numeric dilution of the votes of members of minority groups); *id.* at 1600 (referring to the use of gerrymandering to divide minorities into several districts, thereby precluding them from constituting a majority in any district, or to pack minorities into one district to limit their voting influence to one representative).

<sup>28</sup> See *id.* at 1596–99 (providing a brief discussion of the history of quantitative vote dilution).

<sup>29</sup> See *id.* at 1600–01 (providing a brief discussion of the history of qualitative vote dilution).

<sup>30</sup> See Grant M. Hayden, *The False Promise of One Person, One Vote*, 102 MICH. L. REV. 213, 259–61 (2003).

<sup>31</sup> See GORDON E. BAKER, *THE REAPPORTIONMENT REVOLUTION: REPRESENTATION, POLITICAL POWER, AND THE SUPREME COURT* 24–31 (1966); ROBERT B. MCKAY, *REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION* 49–53 (1965); Hayden, *supra* note

ban districts became diluted, and the power of those in the rural districts became concentrated.<sup>32</sup> The disparities, over time, became quite large, with differences on the order of twenty or thirty to one.<sup>33</sup>

After some initial resistance, the Supreme Court stepped into the political thicket in *Baker v. Carr*<sup>34</sup> by declaring that population differences in state legislative districts could give rise to a justiciable claim under the Equal Protection Clause.<sup>35</sup> Soon after, the Court settled on the standard for adjudicating such claims—the one person, one vote standard<sup>36</sup>—and applied it to both congressional districts<sup>37</sup> and state legislative districts.<sup>38</sup> Over the next few decades, as the enormous pre-*Baker* disparities were remedied, the Court's application of the standard became increasingly exacting. Congressional districts within a state had to have exactly the same populations: courts could now find minuscule deviations between districts with over 600,000 people to be constitutionally deficient.<sup>39</sup> State legislative districts were given a little more leeway, with up to 10% maximum deviation allowed without justification<sup>40</sup> and slightly more when suitably justified,<sup>41</sup> but even those rules are beginning to be narrowed.<sup>42</sup>

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15, at 1597–98. The most pronounced demographic change was a population shift from rural areas to urban areas, driven in large part by the migration of rural blacks and the immigration of Europeans. See C. Herman Pritchett, *Representation and the Rule of Equality*, in REPRESENTATION AND MISREPRESENTATION: LEGISLATIVE REAPPORTIONMENT IN THEORY AND PRACTICE 1, 3 (Robert A. Goldwin ed., 1968).

<sup>32</sup> See Hayden, *supra* note 15, at 1598.

<sup>33</sup> See *Reynolds v. Sims*, 377 U.S. 533, 545 (1964) (reviewing districts with numerical disparities of up to forty-one to one); *Baker v. Carr*, 369 U.S. 186, 245 (1962) (Douglas, J., concurring) (reviewing districts with numerical disparities of up to approximately twenty to one). Other states had much larger disparities: Vermont, for example, had disparities in voting power of more than nine hundred to one. PAUL T. DAVID & RALPH EISENBERG, *DEVALUATION OF THE URBAN AND SUBURBAN VOTE* 3 (1961).

<sup>34</sup> *Baker v. Carr*, 369 U.S. 186 (1962).

<sup>35</sup> *Baker*, 369 U.S. at 192–93, 237.

<sup>36</sup> *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (“The conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote.”).

<sup>37</sup> *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964).

<sup>38</sup> *Reynolds*, 377 U.S. at 565–68.

<sup>39</sup> The Supreme Court led the way in this regard, see *Karcher v. Daggett*, 462 U.S. 725, 728, 734 (1983) (rejecting a New Jersey congressional districting plan that involved a 0.6984% maximum deviation); *Kirkpatrick v. Preisler*, 394 U.S. 526, 528–30 (1969) (rejecting a Missouri districting plan that involved a 5.97% maximum deviation), and lower courts have followed with even more exacting applications of the one person, one vote rule, see, e.g., *Vieth v. Pennsylvania*, 195 F. Supp. 2d 672, 674, 678, 679 n.6 (M.D. Pa. 2002) (striking down a congressional districting plan with an ideal district size of 646,371 or 646,372 because of a 19-person deviation between the largest and smallest districts).

<sup>40</sup> See *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973).

<sup>41</sup> See *Mahan v. Howell*, 410 U.S. 315, 319, 324–25 (upholding a Virginia state redistricting plan with a maximum deviation of 16.4% on the basis of the state’s interest in preserving the integrity of political subdivision boundary lines).

<sup>42</sup> See *Cox v. Larios*, 124 S. Ct. 2806, 2806, 2808 (2004) (summarily affirming a district court ruling that Georgia’s state legislative redistricting plan, despite having a maximum deviation

Initially, removing the sizable population differences between districts had a positive effect on policy outcomes in areas of civil rights and racial politics.<sup>43</sup> In part, this was because the population disparities that existed prior to the reapportionment cases generally favored rural, and largely white, voters.<sup>44</sup> So in that sense, generally equalizing voting power improved the lot of minority voters in much the same way that generally equalizing access had: it straightforwardly increased the weight of their voting power relative to the white majority. In any case, recent work has confirmed that, regardless of whether the weight of minority votes in the aggregate was increased or decreased, the one person, one vote rule had a positive effect on the advancement of minority legislative interests.<sup>45</sup> This was because, across the country, the urban voters with increased voting power tended to support issues of minority concern.<sup>46</sup> The initial result of the one person, one vote rule, then, was to improve the lot of minority voters.

Qualitative vote dilution has always been viewed as a more complex problem, and has given rise to a more complicated legal response. There are, for example, many different ways to qualitatively dilute the voting power of a particular group.<sup>47</sup> For example, the voting power of members of a racial minority group may be diluted by placing them in an at-large district so that their votes for each representative are swamped by votes of those in the majority.<sup>48</sup> Legislators could also take a minority group that is sufficiently large and compact within a single-member district to elect a representative of its choice and split the group into two districts where it would have no such opportunity.<sup>49</sup> Either way, the members of a minority group could be denied the opportunity to elect a proportionate number of representatives of their choosing despite the guarantee of access to the polls and an opportunity to cast equally weighted votes.

Racial gerrymanders such as these were successfully challenged under the Voting Rights Act and, for awhile, under the Constitution. Section 5 of the Voting Rights Act, which requires preclearance of redistricting plans in certain jurisdictions, was applied to changes that qualitatively diluted voter

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tion of less than 10%, nonetheless violated the one person, one vote requirement of the Equal Protection Clause).

<sup>43</sup> See Stephen Ansolabehere & James M. Snyder, Jr., *Reapportionment and Party Realignment in the American States*, 153 U. PA. L. REV. 433, 434–35, 454 (2004); Robert S. Erikson, *Reapportionment and Policy: A Further Look at Some Intervening Variables*, 219 ANNALS N.Y. ACAD. SCI. 280, 289–90 (1973); Robert S. Erikson, *The Relationship Between Party Control and Civil Rights Legislation in the American States*, 24 W. POL. Q. 178, 179 n.4, 179–80 (1971).

<sup>44</sup> See *supra* notes 31–31 and accompanying text.

<sup>45</sup> See Ansolabehere & Snyder, *supra* note 43, at 454.

<sup>46</sup> See *id.*

<sup>47</sup> See Frank R. Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION 85, 86–99 (Chandler Davidson ed., 1984).

<sup>48</sup> See *id.* at 87–88.

<sup>49</sup> See *id.* at 89–92. The Supreme Court has discussed these strategies of “cracking” and “packing” minority voters in several opinions. See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) (referring to the dilution of minority voting strength by dispersing minority groups into multiple districts or concentrating minority groups into excessive majorities within one district).



power as well as those that disenfranchised minority voters.<sup>50</sup> But the preclearance provisions of section 5, as noted above, only apply to certain jurisdictions, so voting rights advocates brought constitutional claims as well. And the Supreme Court, which had already recognized that vote dilution was generally actionable under the Equal Protection Clause in the malapportionment cases in the early 1960s,<sup>51</sup> soon made clear that this included qualitative dilution claims as well.<sup>52</sup>

The constitutional challenges, however, came to a halt with the Supreme Court's 1980 decision in *City of Mobile v. Bolden*.<sup>53</sup> The *Bolden* Court held that parties alleging vote dilution in violation of either the Fourteenth or the Fifteenth Amendment "must demonstrate that the challenged practice was established or maintained with discriminatory intent."<sup>54</sup> Because section 2 of "the Voting Rights Act was said to add nothing to the constitutional cause of action, the intent requirement also applied to section 2."<sup>55</sup> But when the Voting Rights Act came up for reauthorization the following year, Congress decoupled section 2 claims from constitutional claims by not requiring proof of discriminatory intent for the former.<sup>56</sup> Section 2 soon became the weapon of choice for attacking qualitative vote dilution.

Under both section 2 and section 5, the preferred remedy in the qualitative vote dilution cases was the creation of majority-minority districts.<sup>57</sup> These are political districts where members of a minority group constitute a majority of those in the district.<sup>58</sup> The round of redistricting following the 1990 census resulted in the creation of scores of these districts, and they had an immediate and positive effect on the electoral success of minority candidates.<sup>59</sup> In 1992, for example, thirteen newly created majority-black districts

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<sup>50</sup> See *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969) (holding that Virginia statutes changing elections from district to at-large voting and making certain county positions appointed rather than elected were subject to Section 5 preclearance).

<sup>51</sup> See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 565–66 (1964) (concluding that vote dilution violates the Fourteenth Amendment's equal protection guarantee).

<sup>52</sup> See, e.g., *White v. Regester*, 412 U.S. 755, 761, 765–70 (1973) (holding that, despite nearly equally sized districts, some multimember voting districts excluded minority participation and thus violated the Equal Protection Clause).

<sup>53</sup> *City of Mobile v. Bolden*, 446 U.S. 55, 58–80 (1980) (plurality opinion).

<sup>54</sup> Hayden, *supra* note 15, at 1601–02; see *Bolden*, 446 U.S. at 62, 67; see also *id.* at 90 (Stevens, J., concurring) (disagreeing with the plurality's focus on subjective intent). The intent requirement came on the heels of the Court's similar requirement for more ordinary equal protection claims announced in *Washington v. Davis*, 426 U.S. 229, 238–42 (1976).

<sup>55</sup> Hayden, *supra* note 15, at 1602; see *Bolden*, 446 U.S. at 60–62.

<sup>56</sup> Hayden, *supra* note 15, at 1602; see Voting Rights Act Amendments of 1982, Pub. L. 97-205, § 3, 96 Stat. 131, 134 (1982).

<sup>57</sup> See Hayden, *supra* note 15, at 1602–04.

<sup>58</sup> Sometimes the term "majority-minority district" is used to refer to a district where minority members make up a simple arithmetic majority; other times, because minority registration or turnout rates may be lower, it is used to refer to a district with a somewhat higher proportion of minorities such that they constitute an effective voting majority. Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1384–85 (2001); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. REV. 1517, 1526–27 (2002).

<sup>59</sup> Richard L. Engstrom, *Voting Rights Districts: Debunking the Myths*, CAMPAIGNS & ELECTIONS, Apr. 1995, at 24.

resulted in thirteen new black members of Congress—the largest single-year increase in absolute numbers in U.S. history.<sup>60</sup> Overall, there was a 50% increase in the size of the Congressional Black Caucus and a 38% increase in the size of the Hispanic Caucus as a result of redistricting after the 1990 census.<sup>61</sup> And though the Court subsequently struck down some of these districts under *Shaw v. Reno*,<sup>62</sup> many of the gains in minority representation remain.

With respect to qualitative vote dilution, both the problem and the solution were framed differently than they had been with quantitative vote dilution. For one, race (and concern with racial vote dilution) was not the primary impetus behind remedying the vast differences in district populations that existed in the middle of the twentieth century. The issue was framed in terms of geography,<sup>63</sup> and, even more broadly, in terms of a commitment to majority rule.<sup>64</sup> (At the time, minority access to the political process was limited more directly as blacks and Hispanics were simply prohibited from registering and voting.) And the solution in the numerical dilution cases—equalizing district populations in accordance with the one person, one vote rule—appeared to promote equality in a neutral way, without regard for place of residence (or race).

With respect to qualitative vote dilution, however, the story looks somewhat different. The motivation to deal with differences in qualitative voting power has not been framed in a race-neutral manner; it has been expressly driven by race. Racial gerrymanders have often been designed in order to dilute minority voting strength, and, in any case, they certainly have had that effect. The solution has also been race-conscious, as state legislators, courts, and the Department of Justice have affirmatively paid attention to race in order to ensure compliance with the Voting Rights Act. Indeed, they are legally required to do so. Thus, unlike the issues of access or numerical vote dilution, minority success with respect to qualitative vote dilution has not been incidental to a more general quest for equality in voting.

The fact that the majority-minority districting designed to remedy qualitative vote dilution conspicuously involves making substantive political judgments is what has made it so difficult. A claim for such dilution under section

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<sup>60</sup> *Id.*

<sup>61</sup> See Hayden, *supra* note 15, at 1604.

<sup>62</sup> *Shaw v. Reno*, 509 U.S. 630 (1993).

<sup>63</sup> State legislators refused to redraw district lines in the face of a growing urban population, and, as a result, urban voters had their votes diluted in comparison with their rural counterparts. See Grant M. Hayden, *The Supreme Court and Voting Rights: An Incomplete Exit Strategy*, 83 N.C. L. REV. 949, 955–58 (2005).

<sup>64</sup> Hayden, *supra* note 15, at 1596–99 (discussing the roots of the “one person, one vote” rule in American history and geographic population shifts). The extent of the malapportionment problem was often highlighted by noting the smallest possible minority of the population that could elect a controlling majority in the legislature. See, e.g., *Reynolds v. Sims*, 377 U.S. 533, 545 (1964) (“Under the existing provisions, applying 1960 census figures, only 25.1% of the State’s total population resided in districts represented by a majority of the members of the Senate, and only 25.7% lived in counties which could elect a majority of the members of the House of Representatives.”); MCKAY, *supra* note 31, at 46–47 (listing the minimum percentage of the population that can elect a majority of representatives in each of the fifty state legislative bodies).

2 of the Voting Rights Act, for example, is designed to ensure that particular groups of minority voters are given an equal opportunity to elect a candidate of their choice in certain circumstances. Unlike the access cases or the numerical-vote-dilution cases, the substantive decisions are not hidden in some sort of more generalized quest for equality or in some neat, seemingly procedural, rule.

In fact, it is not that easy to imagine just what a general quest for qualitative voting equality would even look like, for it is almost always conceptualized in terms of a specific subgroup. One could attempt to attain a sort of qualitative equality at this level by drawing district lines in a way such that no group's vote is qualitatively diluted. But, as Larry Alexander once pointed out:

As voters we are Democrats and Republicans, blacks and whites, males and females. But we are also hawks and doves, redistributionists and laissez-faire advocates. We are atheist, agnostic, Catholic, Protestant, Jewish, Muslim, and Buddhist, all of various stripes. We are trade unionists and managers, Main Streeters and cosmopolites. Some of us prefer hot, charismatic candidates; others prefer cooler types. Some of us prefer the well-educated or the well-bred. Others prefer regular Joes and Joans. The list of our voting-relevant divisions is virtually endless.<sup>65</sup>

No districting plan could ensure that no group's vote is diluted, as concentrating one group's voting power inevitably dilutes that of others. The closest one could come to such a system would be, perhaps, a voting system like cumulative voting where individuals could self-identify with one group or with a few groups and vote accordingly.

One could also imagine attempting to qualitatively ensure the meaningfulness of every group's vote with some sort of geometric analog to the one person, one vote rule. Instead of equalizing population, one would standardize district shapes by drawing either the most compact districts or perfectly square districts.<sup>66</sup> This would certainly solve the problem of purposeful qualitative dilution, but it would not eliminate its effects, for dividing up a state into such geometric shapes would mean that political districts would cut across local district boundaries and, more generally, divide communities of interest. There would be a sort of procedural fairness on the front end but no substantive fairness on the back end. Simple geometry does not help much in achieving a fair districting scheme.

But the lesson to be drawn here is not that we should just throw up our hands at claims of racial gerrymandering and qualitative vote dilution. It is, instead, that we have to recognize that all districting involves making norma-

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<sup>65</sup> Larry Alexander, *Lost in the Political Thicket*, 41 FLA. L. REV. 563, 575 (1989).

<sup>66</sup> This would be an extreme version of a preference for compact political districts. Several states have legislated such requirements. See, e.g., IOWA CODE ANN. § 42.4(4) (West 1999) ("It is preferable that districts be compact in form, but the standards established by subsections 1, 2 and 3 take precedence over compactness where a conflict arises between compactness and these standards. In general, compact districts are those which are square, rectangular or hexagonal in shape to the extent permitted by natural or political boundaries.").

tive judgments about political outcomes. This is fairly obvious when the subject is qualitative vote dilution: it is the fact that the issue straightforwardly involves picking political winners that makes it so contentious. There is no way to avoid making those normative judgments, for there is no purely neutral way to draw districts (so that no group's vote is diluted, or in perfect squares) that would be feasible or free from all sorts of undesirable consequences.

But the same may be said of attempts to remedy other forms of voter inequality. Take, for example, the one person, one vote rule. Despite its claim to neutrality, the decision to give all votes equal numerical weight is itself a substantive political judgment.<sup>67</sup> This is generally true because any attempt to assign weight to people's preferences (which one has to do in order to aggregate those preferences) involves making a normative judgment.<sup>68</sup> And while it is certainly true that assigning the same weight to votes within a particular jurisdiction involves a different normative judgment than assigning varying weights to those votes, it is a normative judgment all the same.<sup>69</sup> A more specific version of this point was recognized early on by Justice Frankfurter when he noted that the *Baker* Court was being asked "to choose among competing bases of representation—ultimately, really, among competing theories of political philosophy."<sup>70</sup>

The problem, however, is that while we recognize the normative dimension of qualitative voting power, we ignore it when it comes to quantitative voting power. And this leads us to believe that the two aspects of voting rights are completely different—quantitative dilution is a straightforward problem with a politically neutral solution, while qualitative dilution involves a complex morass of competing values. But, like the simple geometric solution of drawing perfectly compact districts, the simple (even "sixth-grade") arithmetic solution of the one person, one vote rule does not give us a neutral way to resolve districting disputes. And, in any case, it may not always lead to the substantive outcome that we desire.

This may be especially true when it comes to minority participation in politics. The problem is that simply ensuring "equality" with respect to any single aspect of voting rights does not *necessarily* equalize minority participation. With respect to access to the franchise, it turns out that removal of those barriers to the voting booth, from the 1960s until today, tends to help minority interests. The one person, one vote rule, in ensuring numerical equality, initially had the same effect, as minority voters, and more generally those who supported policies that helped minority communities, were among the groups whose votes were numerically diluted. But unlike laws expanding access, the current application of the one person, one vote rule may no longer serve to protect the interests of racial minorities. So we may now need to get past claims of the rule's neutrality and view it for what it is—simply another normatively charged aspect of the law of democracy whose continuing value

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<sup>67</sup> For a longer version of this argument, see Hayden, *supra* note 30, at 214–15.

<sup>68</sup> *Id.* at 216.

<sup>69</sup> *Id.* at 247–49.

<sup>70</sup> *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

and application we should evaluate in light of current issues facing our democracy.

## II

Despite the improvement in minority participation over the last four decades, much work remains to be done. Some of that work involves ridding our political system of neutral restrictions on the franchise—like citizenship requirements and bars to felon voting—that screen out a disproportionate number of blacks, Hispanics, and other racial and ethnic minority groups. On these access issues, there appears to be encouraging movement on the state and local levels in scaling back felon disenfranchisement laws<sup>71</sup> and even some movement in permitting alien suffrage.<sup>72</sup> But some of the work that remains involves ensuring that districting is done in a way that provides minorities with a meaningful chance to elect representatives of their choice to federal, state, and local office. And the task of redistricting, though technically in the hands of state legislatures, continues to be guided by the mandates of the federal Voting Rights Act.

The Voting Rights Act is both an impetus and a backstop for minority-friendly districting practices. Section 2 of the Act, which applies across the country, provides a cause of action when members of certain minority groups have “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”<sup>73</sup> This occurs when a cohesive minority group, large enough to constitute a majority in a redrawn single-member district, has its preferred candidates consistently defeated by a white majority.<sup>74</sup> Under section 5, the federal government is not to preclear proposed redistricting plans in certain covered jurisdictions when the plans “lead to a retrogression . . . with respect to [minority voters’] effective exercise of the electoral franchise.”<sup>75</sup> The baseline for measuring retrogression is the existing districting plan,<sup>76</sup> and section 5 thus provides a backstop to preserve minority political strength in jurisdictions with a history of discrimination.

In practice, both sections 2 and 5 lead to the creation of majority-minority districts. Section 2 effectively requires the creation of such districts for any minority group large enough and cohesive enough to constitute a majority in a redrawn district. And the Department of Justice used its section 5 preclearance power over the last couple of decades to greatly increase, even

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<sup>71</sup> See Karlan, *supra* note 21, at 1147–48.

<sup>72</sup> See Hayden, *supra* note 30, at 263 n.237.

<sup>73</sup> 42 U.S.C. § 1973(b) (2000).

<sup>74</sup> The three-part test was established by *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court’s first interpretation of the 1982 amendments to the Voting Rights Act. First, the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be politically cohesive. Third, the minority must be able to prove that the majority votes as a bloc in such a way that it usually defeats the minority’s preferred candidate. *Id.* at 50–51.

<sup>75</sup> *Beer v. United States*, 425 U.S. 130, 141 (1976).

<sup>76</sup> See *Reno v. Bossier Parish Sch. Bd.* 528 U.S. 320, 329 (2000) (referring to retrogression in light of reapportionment plans that have been submitted to the Court).

maximize, the number of majority-minority districts. After the 1990s round of redistricting, scores of such districts were created, and those districts led to the election of many minority candidates to federal, state, and local office. Those minority gains have largely been preserved through the 2000 round of redistricting.

But the work is far from over. African Americans make up 9% of the House of Representatives despite comprising 13% of the population; Hispanics fare even worse, making up only 6% of the House despite comprising 13.3% of the population.<sup>77</sup> The numbers are similarly dismal at the state level.<sup>78</sup> And while strict proportionality is not necessarily the goal of minority voting rights advocates (and is expressly not guaranteed by the Voting Rights Act),<sup>79</sup> some sort of rough proportionality must be part of the analysis of vote dilution.

But while there is great reason to be hopeful about opportunities to expand minority access to the polls, there is not as much reason to hope for additional progress on the redistricting front. This is because the solution of choice—majority-minority districting—has run into a dead end, and the offered replacements have significant disadvantages. The dead end is the result of a convergence of factors, including demographic considerations such as the geographic distribution of minority voters and doctrinal factors such as the constitutional constraints on districting under cases like *Shaw v. Reno*. But the dead end is also a result of the failure to think more broadly about questioning the continued adherence to constitutional doctrines that have outlived their usefulness.

The demographic limits of majority-minority districting were predicted before such districting became commonplace. David Butler and Bruce Cain, for example, noted that the geographic dispersal of blacks may limit the effectiveness of the racial gerrymander to remedy minority underrepresentation.<sup>80</sup> The application of *Shaw v. Reno* and its progeny also limited the number of majority-minority districts by placing restrictions on the shape of such districts.<sup>81</sup> Within these constraints, majority-

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<sup>77</sup> Population numbers are from JESSE MCKINNON, U.S. CENSUS BUREAU, *THE BLACK POPULATION IN THE UNITED STATES: MARCH 2002*, at 1 (2003), and ROBERTO R. RAMIREZ & G. PATRICIA DE LA CRUZ, U.S. CENSUS BUREAU, *THE HISPANIC POPULATION IN THE UNITED STATES: MARCH 2002*, at 2 (2003). Congressional statistics are from MILDRED L. AMER, LIBRARY OF CONG., *MEMBERSHIP OF THE 109TH CONGRESS: A PROFILE* (2005), <http://www.senate.gov/reference/resources/pdf/RS22007.pdf>.

<sup>78</sup> See NAT'L CONFERENCE OF STATE LEGISLATURES, *NUMBERS OF AFRICAN-AMERICAN LEGISLATORS: 2003*, <http://www.ncsl.org/programs/legman/about/afrAmer.htm> (last modified Dec. 29, 2003) (reporting that 8.1% of state legislators are African American); NAT'L CONFERENCE OF STATE LEGISLATURES, *LATINO LEGISLATORS: 2003*, <http://www.ncsl.org/programs/legman/about/Latino.htm> (last modified Dec. 29, 2003) (reporting that 2.9% of state legislators are Latino).

<sup>79</sup> 42 U.S.C. § 1973(b) (2000).

<sup>80</sup> See DAVID BUTLER & BRUCE CAIN, *CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES* 14–15 (1992).

<sup>81</sup> *Shaw v. Reno*, 509 U.S. 630, 634, 642 (1993) (holding that irregularly shaped districts can, on their face, violate the Equal Protection Clause of the Constitution). That is not to say, however, that merely removing the constraints of *Shaw* would remove limits on the majority-minority districting remedy. To some extent, the Supreme Court has backed away from the

minority districts were drawn just about everywhere possible in the 1990s.<sup>82</sup>

Majority-minority districts also involve a tradeoff that limits their ability to improve minority representation. When a new majority-minority district is created, the additional minority voters must come from somewhere, and that somewhere is the surrounding districts. Thus, while the racial composition of the new majority-minority district is changed, so is that of the surrounding districts. Robbed of a number of their minority voters, these districts become, in effect, more heavily white (hence the reason this is referred to as the "bleaching critique").<sup>83</sup> This, in turn, makes it more likely that the surrounding districts will produce representatives with agendas that are less compatible with minority interests.

Put in more specific terms, although most minority groups overwhelmingly support Democrats, majority-minority districting tends to help Republicans.<sup>84</sup> Political scientists predicted such a result even before much racial redistricting was done.<sup>85</sup> The round of redistricting following the 1990 census proved the truth of those predictions. According to several studies of the 1992 and 1994 congressional elections, the new majority-minority districts allowed Republicans to pick up at least nine additional seats.<sup>86</sup> The districts had a similar effect on the state level.<sup>87</sup> (This side-effect of majority-minority districting also explains why Republicans, despite ideological opposition to race-conscious legislation, generally support the creation of such districts, while Democrats generally oppose them.)<sup>88</sup> Thus, while the majority-minority districts created in the 1990s clearly led to the election of additional black and Hispanic officeholders, those gains may have come with some representational costs.

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harsher results of *Shaw* in later cases, such as *Easley v. Cromartie*, 532 U.S. 234, 255–58 (2001). But even if such constraints were to disappear entirely, there may be good reasons for not stitching together distant groups of minority voters in order to squeeze additional majority-minority districts into an apportionment plan. For example, there are, even in our electronically interconnected world, still communities of interest that are best described geographically.

<sup>82</sup> David Ian Lublin, *Race, Representation, and Redistricting*, in *CLASSIFYING BY RACE* 111, 113 (Paul E. Peterson ed., 1995).

<sup>83</sup> For a rough guide regarding this effect, see Hayden, *supra* note 15, at 1607–08. For a detailed discussion of some of the factors that complicate the tradeoff, see Pamela S. Karlan, *Loss and Redemption: Voting Rights at the Turn of a Century*, 50 *VAND. L. REV.* 291, 294–96 (1997).

<sup>84</sup> See Hayden, *supra* note 15, at 1611.

<sup>85</sup> See, e.g., BRUCE E. CAIN, *THE REAPPORTIONMENT PUZZLE* 170 (1984) (asserting that Republicans benefit from high concentrations of minorities in one district); Robert S. Erikson, *Malapportionment, Gerrymandering, and Party Fortunes in Congressional Elections*, 66 *AM. POL. SCI. REV.* 1234, 1237 (1972) (noting that Republicans would benefit from the packing of high numbers of Democrats into a smaller number of districts).

<sup>86</sup> See LUBLIN, *supra* note 82, at 122. For a general summation of the studies, see Hayden, *supra* note 15, at 1604–05.

<sup>87</sup> See Lisa Handley et al., *Electing Minority-Preferred Candidates to Legislative Office: The Relationship Between Minority Percentages in Districts and the Election of Minority-Preferred Candidates*, in *RACE AND REDISTRICTING IN THE 1990s* 13, 37–38 (Bernard Grofman ed., 1998); David Lublin & D. Stephen Voss, *Racial Redistricting and Realignment in Southern State Legislatures*, 44 *AM. J. POL. SCI.* 792, 802–03 (2000).

<sup>88</sup> See Hayden, *supra* note 15, at 1612.

This is not to say, however, that the costs were not (and are not) worth it. The question of whether there are representational costs associated with majority-minority districting is distinct from the question of whether it nevertheless leads to a net improvement for minority groups. It may well be, for example, that a few black representatives are better than a greater number of white Democratic representatives in advancing issues of importance to the black community.<sup>89</sup> But the point here is that the representational cost of majority-minority districts is a real limitation, and involves an actual cost, to their use in advancing black political interests.

The demographic limitations and representational tradeoffs that came with majority-minority districting did not go unnoticed by commentators or the Supreme Court. Three years ago, for example, Richard Pildes argued for a functional approach to interpreting sections 2 and 5 of the Voting Rights Act.<sup>90</sup> Recent work in social science had revealed that safe majority-minority districts might not be required to ensure that minorities have an equal opportunity to elect their chosen representatives.<sup>91</sup> Instead, various changes, primarily the rise of two-party competition in the South, mean that black candidates may be consistently elected out of coalition rather than safe majority-black districts.<sup>92</sup> Because it is possible to create more coalition districts than safe districts, a formalistic interpretation of the Voting Rights Act—one in which sections 2 and 5 mechanically required the creation or maintenance of majority-minority districts—would stand in the way of improving minority political opportunities.<sup>93</sup> Voting rights law, Pildes warns, would be at war with itself.

The Supreme Court made this move with respect to the tradeoff a couple of years ago, but its solution was less than satisfying. In *Georgia v. Ashcroft*,<sup>94</sup> the Court analyzed a district court's section 5 preclearance decision involving a new districting plan for the Georgia State Senate.<sup>95</sup> The baseline for the plan was the 1997 senate districting plan, which included eleven districts with a total black population of over 50%, ten of which had a black voting age population of over 50%.<sup>96</sup> The 2000 census showed that the growth in black population meant that thirteen of the districts now had a black population of at least 50%, twelve of which had a black voting age population of over 50%.<sup>97</sup>

The Georgia legislature, dominated by Democrats, unpacked the most heavily black districts and distributed those voters to other districts in order to shore up statewide Democratic strength.<sup>98</sup> Because black incumbents

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<sup>89</sup> See *id.* at 1614.

<sup>90</sup> See Pildes, *supra* note 58, at 1567–69.

<sup>91</sup> See Bernard Grofman et al., *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. REV. 1383, 1423 (2001); Pildes, *supra* note 58, at 1533–38.

<sup>92</sup> See Pildes, *supra* note 58, at 1534, 1539–40; Grofman et al., *supra* note 91, at 1403.

<sup>93</sup> See Pildes, *supra* note 58, at 1570–73.

<sup>94</sup> *Georgia v. Ashcroft*, 539 U.S. 461 (2003).

<sup>95</sup> See *id.* at 467–68.

<sup>96</sup> See *id.* at 469.

<sup>97</sup> See *id.*

<sup>98</sup> See *id.* at 469–71.



were crucial to passing the plan, the legislature had to strike a balance between preserving the safety of the black incumbents and spreading black voters around to improve the Democrats' chances in other districts.<sup>99</sup> In the end, the legislature passed a plan that had thirteen districts with a black voting-age population of over 50%, thirteen districts with a black voting-age population of between 30% and 50%, and four other districts with a black voting-age population of between 25% and 30%.<sup>100</sup> The district court refused preclearance because of changes that occurred in specific districts.<sup>101</sup> In several districts, the size of the black majority had been reduced in order to shore up Democratic support in other districts. That, according to the district court, constituted impermissible retrogression because it reduced the chance of a black candidate of choice to win election.<sup>102</sup>

The Supreme Court, however, reversed, and introduced a new standard for identifying retrogression. The Court had previously analyzed retrogression in the way that the district court had analyzed it: did the submitted change reduce the chance of a black candidate of choice to win an election?<sup>103</sup> Now, however, the Court has explicitly distanced itself from that standard and instead looked more broadly at whether the new plan preserves the minority voters' "opportunity to participate in the electoral process."<sup>104</sup> This new standard apparently includes more than the mere ability to elect black representatives; it may also include placing some of them at risk in return for additional white Democrats.<sup>105</sup>

With *Georgia v. Ashcroft*, Professor Pildes got his wish for a more functional approach to voting rights. But the Court may have given him more than he bargained for. The Court did not merely embrace trading a few safe districts for a greater number of coalition districts, but went farther and allowed the trading of those districts for what can only be called influence over elections in surrounding districts.<sup>106</sup> In so doing, the Court seemed to go beyond Professor Pildes's call for coalition districts, for his solution was mostly about improving chances for the election of additional candidates of a minority group's choosing,<sup>107</sup> and not more broadly about trading a few black Democrats for more white ones.

The scholarly debate in the wake of *Georgia v. Ashcroft* is less about whether this new interpretation is the death of section 5 than whether the death of section 5 matters. Pam Karlan takes the position that it does mat-

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<sup>99</sup> See *id.*

<sup>100</sup> *Id.* at 470.

<sup>101</sup> See *Georgia v. Ashcroft*, 195 F. Supp. 2d 25, 93–94 (D.D.C. 2002) (three-judge court), *vacated and remanded*, 539 U.S. 461 (2003).

<sup>102</sup> *Id.* at 91.

<sup>103</sup> See, e.g., *Bush v. Vera*, 517 U.S. 952, 983 (1996); *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969).

<sup>104</sup> *Georgia v. Ashcroft*, 539 U.S. at 482.

<sup>105</sup> *Id.* at 483.

<sup>106</sup> See *id.* at 482–84.

<sup>107</sup> At least this is the impression given by Pildes's definition of "coalitional district," which is a "district with a significant presence, though not a majority, of black voters, but that has a fifty-fifty probability of electing the preferred candidate of those black voters." Pildes, *supra* note 58, at 1539–40.

ter—that section 5 would otherwise continue to serve a useful purpose in preventing retrogression.<sup>108</sup> Sam Issacharoff, on the other hand, argues that it does not matter. He asserts that a more robust political environment in covered jurisdictions means that requiring the maintenance of safe majority-minority districts would put the brakes on the ability of black politicians to participate in the natural pulling and hauling of everyday politics.<sup>109</sup> Both rightly acknowledge that the tradeoff between descriptive and substantive representation has to be made; the disagreement is over who gets to make the decision. For Karlan, the answer remains the federal government; for Issacharoff, the answer is that black politicians in the covered jurisdictions now wield sufficient power to make the decision without outside help (or without more outside help than the Fourteenth Amendment and section 2 of the Voting Rights Act continue to provide).<sup>110</sup>

*Georgia v. Ashcroft* may be troubling for the reasons given by Professor Karlan, but it is troubling in another way as well. The case and the resulting debate over its import reflect a somewhat constrained view of the possibilities of minority political opportunity. The Supreme Court and several commentators have squarely acknowledged the tradeoff involved in maintaining safe majority-minority districts. But they do not confront the possibility that some of the Court's own constitutional decisions—namely, the ones mandating strict application of the one person, one vote standard—make the tradeoff necessary.

It is, of course, the ruthless application of the one person, one vote rule that gives rise to the tradeoff in minority representation.<sup>111</sup> By requiring districts to have the same populations, the rule makes all congressional and state districting, including majority-minority districting, a zero-sum game. The minority voters who are moved into a majority-minority district must be replaced, and the voters who replace them are less likely to support candidates sympathetic to minority interests. Strict application of the one person, one vote rule, then, does not allow the numeric concentration of minority voting power and in that way places limits on the effectiveness of majority-minority districting.

This consequence of the one person, one vote rule was not unforeseen. In the wake of *Baker v. Carr*, several commentators noted that restricting a state's ability to vary the population of its political districts would limit its ability to numerically concentrate a particular group's voting power.<sup>112</sup> Alexander Bickel later commented, "The one man, one vote rule necessarily de-

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<sup>108</sup> See Pamela S. Karlan, *Georgia v. Ashcroft and the Retrogression of Retrogression*, 3 ELECTION L.J. 21 (2004).

<sup>109</sup> See Samuel Issacharoff, *Is Section 5 of the Voting Rights Act a Victim of Its Own Success?*, 104 COLUM. L. REV. 1710, 1710 (2004). For a pointed (and persuasive) response to Issacharoff's essay, see Michael J. Pitts, *Let's Not Call the Whole Thing Off Just Yet: A Response to Samuel Issacharoff's Suggestion to Scuttle Section 5 of the Voting Rights Act*, 84 NEB. L. REV. (forthcoming 2005).

<sup>110</sup> See Issacharoff, *supra* note 109, at 1728–31.

<sup>111</sup> For an extended discussion of this point, see Hayden, *supra* note 15, at 1607–17.

<sup>112</sup> See, e.g., Robert B. McKay, *Political Thickets and Crazy Quilts: Reapportionment and Equal Protection*, 61 MICH. L. REV. 645, 696–97 (1963) (noting this effect but arguing that there was no justification for numerically concentrating a particular group's voting power); Alexander

prives discrete groupings and interests, regional, racial, and other, of direct representation."<sup>113</sup> The rule, then, restrains our ability to remedy minority vote dilution and, more generally, to be more flexible in our ability to reallocate political power to racial minorities.

This reluctance to back off such strict application of the one person, one vote standard and put district population back on the table in the context of minority vote dilution would be understandable if there were significant advantages to precise numerical equality. But there are not.<sup>114</sup> Most of the benefits of the one person, one vote standard could be obtained by just keeping district populations within the same ballpark. The historical malapportionment problem, for example, involved enormous disparities that could have been successfully addressed by merely declaring such large disparities to be unconstitutional or, if a more precise solution was eventually required, by creating a much broader range of acceptable deviation from the ideal district size.<sup>115</sup> Nothing in the original problem demanded such an exacting solution.<sup>116</sup>

Precise application of the one person, one vote rule also does little to cabin judicial discretion. The rule is, at its core, not the objective one that it is purported to be.<sup>117</sup> When it comes to discretion on the issue of the weighting itself, one could come up with any number of bright-line rules to rein in additional exercises in judicial lawmaking.<sup>118</sup> A rule under which courts must strike down districting plans with anything other than perfectly equal districts is one possible bright-line rule (and the one we use in congressional districting). But so is a rule that sets the level of permissible deviation from ideal district size at 50%—where anything under 50% would be constitutionally permissible and anything over that limit would be unconstitutional. While relaxing the equiproportional rule would potentially place a wider array of districting plans in front of a court, this would not significantly increase the court's power, as there are already countless ways to divide jurisdictions into equally populous districts.<sup>119</sup> And relaxing the rule may help keep many of these disputes out of the judiciary's hands in the first place.<sup>120</sup>

This is not to say that numerically concentrating minority voting power is unproblematic.<sup>121</sup> It is just that the one person, one vote standard has become so ossified in the popular (and the judicial) imagination that we do not

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M. Bickel, *The Durability of Colegrove v. Green*, 72 YALE L.J. 39, 43–44 (1962) (noting this effect and arguing that it was a potential drawback to the rule).

<sup>113</sup> Alexander M. Bickel, *The New Supreme Court: Prospects and Problems*, 45 TUL. L. REV. 229, 242 (1971).

<sup>114</sup> See Hayden, *supra* note 15, at 1617–25.

<sup>115</sup> See *id.* at 1618–19.

<sup>116</sup> See Abner J. Mikva, *Justice Brennan and the Political Process: Assessing the Legacy of Baker v. Carr*, 1995 U. ILL. L. REV. 683, 697; Martin Shapiro, *Gerrymandering, Unfairness, and the Supreme Court*, 33 UCLA L. REV. 227, 227–33 (1985).

<sup>117</sup> See, e.g., Hayden, *supra* note 30, at 248–51; RICHARD L. HASEN, *THE SUPREME COURT AND ELECTION LAW: JUDGING EQUALITY FROM BAKER V. CARR TO BUSH V. GORE 4–6* (2003).

<sup>118</sup> See Hayden, *supra* note 63, at 961.

<sup>119</sup> See Hayden, *supra* note 15, at 1620.

<sup>120</sup> *Id.* at 1626.

<sup>121</sup> *Id.* at 1630.

even consider district population when attempting to solve political problems. Merely questioning its strict application is viewed as an attack on the standard itself or upon voting equality more generally. Even though the potential problems associated with allowing numerical concentration of minority voting power are, I think, capable of being solved and do not, in any case, involve different considerations from those we routinely address regarding ballot access and qualitative vote dilution, we nonetheless do not even consider the possibility of numeric concentration. This failure to question the continuing justifications and scope of rules like the one person, one vote standard unduly limits our ability to solve contemporary problems in minority representation.

Reviewing the strict application of the one person, one vote rule is not, of course, the only way to think more broadly about the possibilities of improving minority participation; it is merely the one that is closest to my work. Lani Guinier has long championed cumulative voting as a means of improving minority input.<sup>122</sup> While a cumulative voting scheme is not without its drawbacks, it represents an elegant solution to the problem of minority representation by allowing voters to individually self-identify their priorities in a way that typical districting solutions do not. And Guy-Uriel Charles has more broadly explored reviewing the privileged status of single-member districts in an attempt to deal with minority participation issues.<sup>123</sup> These and other solutions need to be kept in the forefront of our minds as we reach the limits of our current solutions to minority vote dilution, especially when those limits are largely of our own, or the Supreme Court's, creation.

### *Conclusion*

The barriers to full minority participation in our political system continue to exist on many levels. We are clearly making progress on some fronts: laws that prohibit felons and ex-felons from voting, for example, are now under siege in both the courts and the state legislatures. But when it comes to more structural barriers to voting, such as redistricting, we appear to have reached some sort of impasse, wherein the remedies available under statutes like the Voting Rights Act no longer garner significant gains in minority representation and, in some cases, may even work against the very purpose of the Act. This all comes at a crucial time, just a few years before significant sections of the Voting Rights Act are set to expire.

With minority political participation continuing to lag, now is not the time to wave the checkered flag and declare victory in the struggle to fully incorporate racial minorities into the political process. Nor is it a time to wave the white flag of surrender. It is, instead, the time to think more

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<sup>122</sup> See, e.g., Lani Guinier, *The Representation of Minority Interests: The Question of Single-Member Districts*, 14 *CARDOZO L. REV.* 1135, 1135-37 (1993).

<sup>123</sup> See Guy-Uriel Charles, *Racial Identity, Electoral Structures, and the First Amendment Right of Association*, 91 *CAL. L. REV.* 1209, 1277 (2003).

broadly about the possibilities for full minority participation, to question both the statutory and constitutional rules that—however well-intentioned—may stand in the way of those goals, and to not let the “Second Reconstruction” slip away before it is completed.