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Limits to State Reapportionment through Multimember Districting

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LIMITS TO STATE REAPPORTIONMENT THROUGH MULTIMEMBER DISTRICTING

INTRODUCTION

On October 22, 1971, the Legislative Redistricting Board of Texas promulgated a reapportionment plan for both houses of the Texas Legislature.[1] This plan was characterized by population deviations of almost ten per cent from the mathematically perfect district,[2] and the use of both multimember and single-member districts.[3] Harris County, containing Houston, was divided into twenty-three single-member districts, yet, Dallas and Bexar Counties, containing Dallas and San Antonio, were made into multimember districts.[4]

Texas has a 150-member House of Representatives, making the population of the mathematically perfect district 74,645.[5] Dallas County has a population of 1,327,000 citizens, 220,000 of whom are black.[6] Ninety per cent of these black voters reside in an area that is ninety per cent black.[7]

Bexar County has a population of 830,460,[8] some 160,000 of whom are Mexican-American.[9] This Mexican-American population makes up

1. The Texas Constitution charges the Board with the duty of drawing such a plan if the Texas Legislature fails to redistrict the state at its first regular session after the census is published. TEX. CONST. art. III, § 28. The Board was ordered to comply in Mauzy v. Legislative Redistricting Bd., 471 S.W.2d 570 (Tex. Civ. App. 1971).

2. Graves v. Barnes, 343 F. Supp. 704, 713 (W.D. Tex. 1972).

3. *Id.* at 718.

> Harris County, the largest, is split into 23 single-member districts; all of the other populous and metropolitan counties are put in multimember districts of varying numbers of members, ranging up to 18 for Dallas County. Three of the 11 multimember districts comprise entire Counties (Travis, McLennan, and Dallas); in the other eight multimember districts, the district lines cut boundaries without rhyme or reason.

Id.

4. *Id.*

5. *Id.* at 713.

6. Brief for Appellee Regester at 28, n.38, White v. Regester, 412 U.S. 755 (1973).

7. *Id.*

8. 343 F. Supp. at 730.

9. *Id.*

seventy-eight per cent of a section of San Antonio called "the Barrio," which represents twenty-four per cent of the county.[10]

Aside from the gaping inconsistency in the treatment accorded Houston County, the plan raised an ominous issue. On the basis of the above statistics, it would have been eminently reasonable to assume that single-member districting of Dallas and Bexar Counties would result in the election of three black legislators in Dallas County, and two Mexican-American legislators in Bexar County. Such an assumption was no longer reasonable: Indeed, it was now unreasonable, given the fact that the at-large election of these multimember districted counties made blacks and Mexican-Americans a small minority in their respective counties.

On November 2, 1971, Diana Regester and others[11] filed suit alleging unconstitutional disparities in the population of many House districts, and invidious discrimination resulting from the use of multimember districting.[12] A three-judge court was impaneled, and on January 28, 1972, the district court struck down the Texas plan on both grounds, ordering Texas to reapportion Dallas and Bexar Counties into single-member districts in parity with Harris County.[13]

THE ISSUE

White v. Regester[14] is another in a now familiar line of cases—reapportionment has been the subject of the Court's scrutiny for over a decade.[15] But, as the Court long ago appreciated,[16] consideration of the issue of reapportionment necessarily raises the difficult question of what constitutes *fair* representation.[17] When district lines are drawn, one wonders whether it can be expected that past voting behavior of various constituencies will not be considered—especially given legislators' finely honed political instincts for survival. Once such lines are drawn, resulting in the election of one group of legislators, how can a court respond to allegations that the drawing of different lines would have resulted in the elec-

10. *Id.*

11. *Id.* at 708-710. Four suits were filed in four district courts between October 22, and November 24. *See* note 95, *infra.*

12. 343 F. Supp. at 730.

13. *Id.* at 704.

14. 412 U.S. 755 (1973).

15. The district court had applied the *Reynolds* standard as it stood in 1972, unamended by Mahan v. Howell, 410 U.S. 315 (1973). *See* note 27, *infra.*

16. Colegrove v. Green, 328 U.S. 549 (1946).

17. *See* R.B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL PROTECTION (1970) and R. DIXON, DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS (1968).

tion of a different group of legislators? It was for this very reason that the Court long held the issue to be nonjusticiable, and refused to enter a "political thicket."[18]

Nonetheless, the Court ultimately discerned that there were two types of malapportionment. The first, and more widely acknowledged, was gerrymandering. Gerrymandering most clearly manifested the justiciability problem, and actions predicated upon such allegations have been sustained only given the most blatant of circumstances.[19] In the absence of such circumstances, the courts have been reluctant for fear of being accused of judicial gerrymandering.[20]

A second type of malapportionment lies in unequally populated districts, a once preponderant circumstance in the several states. Through such geographical malapportionment, rural representation had been exaggerated at the expense of urban representation in almost every legislature in the nation. However, unlike the problems that made gerrymandering a nonjusticiable issue, this type of malapportionment was readily identifiable through mathematical facts. In order for every citizen's vote to be of equal weight, each district must contain the same number of citizens. This mathematically perfect district was calculated simply by dividing the number of legislators to be elected into the total population of the state. Any reapportionment plan characterized by districts with population deviations from the "ideal" district was malapportioned. This presumed, of course, that mathematically perfect districting was axiomatically fair representation.

The Supreme Court found this all-pervasive form of malapportionment to be "within the reach of judicial protection under the Fourteenth Amendment," in 1962,[21] put forth the standard of "one-man, one-vote" in 1963,[22] and applied it to state legislative apportionment in 1964.[23] In the years

18. 328 U.S. 549, 556 (1946).

19. *See* Edwards, *The Gerrymander And "One Man, One Vote,"* 46 N.Y.U.L. REV. 879 (1971). *See also* Gomillion v. Lightfoot, 364 U.S. 339 (1960).

20. *See* Wells v. Rockefeller, 311 F. Supp. 48, 51 (S.D.N.Y. 1970).

21. Baker v. Carr, 369 U.S. 186, 237 (1962).

22. Gray v. Sanders, 372 U.S. 368, 381 (1963). *See also* Wesberry v. Sanders, 376 U.S. 1 (1964).

23. *The Reapportionment Cases*: Though Reynolds v. Sims, 377 U.S. 533 (1964), is the best known of these cases, the Court handed down five companion decisions; Lucas v. Colorado Gen. Assembly, 377 U.S. 713; Roman v. Sincock, 377 U.S. 695; Davis v. Mann, 377 U.S. 678; Maryland Comm. for Fair Representation v. Tawes, 377 U.S. 656; and W.M.C.A. v. Lomenzo, 377 U.S. 633. One week later the Court handed down eight additional decisions: Hill v. Davis, 378 U.S. 565; Pinney v. Butterworth, 378 U.S. 564; Hearne v. Symlie, 378 U.S. 563; Marshall v. Hare, 378 U.S. 561; Germano v. Kerner, 378 U.S. 560; Williams v. Moss, 378 U.S. 558; Nolan v. Rhodes, 378 U.S. 556; and Swann v. Adams, 378 U.S. 553.

that followed, a number of states advanced the policy of preserving the integrity of political subdivisions as a rational basis for deviations from the one-man, one-vote standard. They argued that fair representation in their states revolved around more than mathematically perfect districting, that representation of homogeneous groups and political subdivisions should not be compromised merely to comply with an inflexible standard.[24] Their arguments fell on deaf ears. The Court moved unabashedly in refining the standard to permit only de minimis deviations,[25] and expanded its embrace to include local apportionment.[26]

The Court's conception of what constituted fair representation, as embodied in the one-man, one-vote standard, seemed to many to be judicial myopia. The Court's intentions notwithstanding, the standard severely burdened the states,[27] and proved to be conducive to unassailable gerrymandering. District lines could be placed in any configuration, yet escape judicial scrutiny merely because the districts created were equally populated.[28]

In 1973 the Court responded by handing down *Mahan v. Howell*,[29] a landmark decision hailed as a "reform of a reform."[30] Virginia had apportioned itself with a mind to the representation of its various political subdivisions pursuant to its constitution, resulting in population deviations among its House districts. Though denying any broad departure from the basic one-man, one-vote standard, the Court validated Virginia's plan by holding that a policy of maintaining the integrity of political subdivisions represented a rational basis for deviations from the standard.

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24. *See* Wells v. Rockefeller, 394 U.S. 542 (1969); Kirkpatrick v. Priesler, 394 U.S. 526 (1969); Swann v. Adams, 385 U.S. 440 (1967).

25. Swann v. Adams, 385 U.S. 440, 444 (1967).

26. Hadley v. Junior College Dist., 397 U.S. 50 (1970); Avery v. Midland County, 390 U.S. 474 (1968); and Sailors v. Board of Educ., 387 U.S. 105 (1967). *See also* Martin, *The Constitutional Status of Local Government Reapportionment*, 6 VAL. U.L. REV. 237 (1972).

27. By virtue of the *Swann* decision the Court impliedly invalidated judicially approved plans for some twenty-five states. Dixon, *supra* note 17, at 445.

28. With the advent of the application of the computer to districting, the one-man, one-vote standard was but another linear constraint in a computer program. For examples of this unassailable gerrymandering, *see* Edwards, *supra* note 19, and Skolnick v. State Electoral Bd., 336 F. Supp. 839 (E.D. Ill. 1971).

29. 410 U.S. 315 (1973). *See generally* Note, *Constitutional Law—Mahan v. Howell—Forward Or Backward For The One-Man-One-Vote Rule*, 22 DEPAUL L. REV. 912 (1973).

30. Broder, *Reform of a Reform*, Chicago Sun-Times, March 11, 1973, at 37, col. 4.

Prior to the *Mahan* decision, an innovation in districting had become popular as states strived to district in a manner that would afford their political subdivisions representation. In effect, the Court's reapportionment standard precipitated increased use of multimember districting,[31] albeit, with contrasting ramifications, if not intent. Multimember districting enabled representation of large homogeneously populated areas (*e.g.*, cities or counties), whereas single-member districting, by reason of the demand for near perfect mathematical equality, might well result in the breaking up of such homogeneous groups.[32] Yet, multimember districting could well produce very different results. A segment of a multimember district, such as a ghetto, could by itself approximate the size of a single-member district and be represented as a unit. But, by reason of its minority status within the much larger multimember district, it would exert far less, if any, influence on the at-large elections, and thereby be denied representation that would have been available under a single-member district plan.[33] Such "cancellation" of voter influence, though a more subtle form of discrimination, is certainly no less invidious.

The instant case is precisely on point. Texas' use of multimember

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31. Comment, *Effective Representation And Multimember Districts*, 68 MICH. L. REV. 1577 (1970). It is worth noting that in 1963 a number of states had explicitly rejected multimember districting. *See* Dixon, *Apportionment Standards and Judicial Power*, 38 NOTRE DAME LAW. 367, 394 (1963). *See also* Banzhaf, *Multimember Electoral Districts—Do They Violate the 'One Man, One Vote' Principle*, 75 YALE L.J. 1309 (1966).

32. In Mahan v. Howell, 410 U.S. 315, 323-24 (1973), one of the reasons for upholding Virginia's plan and vacating the district court's plan was the diluting effect the latter's plan would have had on the voters of Scott County. Scott County had a population of 24,000, which Virginia had included in a district of 76,000. The district court placed 6,000 Scott County voters in a district of 87,000, leaving 18,000 to be absorbed into a district of 76,000, with the result that Scott County was virtually unrepresented.

33.

> Multimember districting is particularly conducive to the dilution of interest group voting strength because a greater number of voters must be members of an interest group in order for that group to control election results in a multimember district than would be necessary in a single-member district.

68 MICH. L. REV. 1577, *supra* note 31, at 1586.

Note must be taken of an issue never properly addressed within the context of the multimember districting problem. The issue arises out of the fact that the fourteenth amendment protects individuals against discrimination, but does it protect interest groups? Even then, who or what constitutes a judicially recognizable interest group? It will be seen shortly, that no great amount of consideration of the question was necessary for the courts to abandon interest groups and, in their place, turn to the suspect classification of race as the only practical plaintiffs for whom allegations of discrimination by reason of multimember districting could be entertained. *See* note 77, *infra*.

and single-member districts precipitated black and Mexican-American challenges on the grounds of the above described invidious effects of its plan. Such cases are not novel to the Court, as will be seen shortly. But *White v. Regester* is unique, for it represents the first occasion upon which the Court sustained a district court invalidation of a state reapportionment plan, based expressly on the grounds of the invidious effects of multimember districting. Further import of the decision lies in the growing use of multimember districting by states in reapportionment of their legislatures.

The remainder of this note will analyze *White v. Regester* in light of previous multimember districting cases in an effort to define Court doctrine with respect to the necessary elements for a successful challenge to such plans. This analysis will begin with a history of the Court's decisions on the issue, including tangential holdings of substantial relevance, followed by a review of both the district court and Supreme Court opinions in *White*.

THE COURTS AND MULTIMEMBER DISTRICTING

Cancellation

Shortly after the *Reynolds* decision some commentators began to consider the representation problems of multimember districting, even though *Reynolds* seemingly approved of its use.[34] In the companion case of *Lucas v. Colorado General Assembly*,[35] though expressly finding no unconstitutionality,[36] the Court *did* make note of some of the shortcomings of multimember districting.[37]

In late 1964, a three-judge district court in Georgia struck down Georgia's state senatorial reapportionment plan.[38] By statute, Georgia had apportioned its senatorial districts, all equally populated, with respect to its counties. Less popluated areas were made into districts composed of two or more counties, while the heavily populated counties were divided into districts. For these counties, however, senators were elected at-

34. 377 U.S. 533, 576-77 (1964). *See* Dixon, *supra* note 31, at 394-95.

35. 377 U.S. 713 (1964).

36. *Id.* at 731 n.21.

37. Ballots were long and cumbersome, and an intelligent choice among candidates for seats in the legislature was made quite difficult. No identifiable constituencies *within* the populous counties resulted, and the residents of those areas had no single member of the Senate or House elected specifically to represent them.

Id.

38. Dorsey v. Fortson, 228 F. Supp. 259 (N.D. Ga. 1964).

large.[39] The plaintiffs asserted that, unlike voters of single-member districts, they would be denied the right to elect a representative for their district.[40] The district court gave the plaintiffs summary judgment upon findings of "a clear difference in the treatment accorded voters in each of the two classes of senatorial districts,"[41] and invidious discrimination by reason of this "classification of voters in senatorial districts on the basis of homesite . . . ."[42]

On appeal one year later, the Supreme Court reversed in *Fortson v. Dorsey*.[43] The Court began by citing *Reynolds*, holding that Georgia's desire to maintain the integrity of political subdivisions was a legitimate state policy, and further, that the sole concern of the equal protection argument was that all votes be "approximately equal in weight."[44] The Court relied on the facts that the districts were equally populated, legislators had to be residents of different districts within the counties, and further, that at-large elections insured representation of county interests. Yet, the Court went on to say:

> Our opinion is not to be understood to say that in all instances, or under all circumstances, such a system as Georgia has will comport with the dictates of the Equal Protection Clause. *It might well be that, designedly or otherwise, a multimember constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting population.* When this is demonstrated it will be time enough to consider whether the system still passes constitutional muster.[45]

The Court seemed to have asserted a doctrine to protect the voting power of groups threatened by an apportionment plan. But as one commentator noted, indications of types and quantities of evidence neces-

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39. *Id.* at 261-62. Seven counties were divided into from two to seven districts, the largest being Fulton County, containing Atlanta.

40. Plaintiffs asserted that on the basis of the population of the various districts of Fulton County, only 18 percent of the voters in the other six districts could nullify the unanimous choice of the seventh district, and "thrust a representative upon voters of that district." *Id.* at 262.

41. *Id.* at 263.

42. *Id.* The homesite classification was found violative of the equal protection clause in Wesberry v. Sanders, 376 U.S. 1 (1964).

43. 379 U.S. 433 (1965).

44.

> The Equal Protection argument is focused solely upon the question of whether county-wide voting in the several multimember districted counties results in denying the residents therein a vote "approximately equal in weight to that of" voters resident in the single-member districts.

Id. at 436, *citing* 377 U.S. 533, 579.

45. *Id.* at 439 (emphasis added).

sary for such protection were lacking.[46] Indeed, the lower courts rejected several challenges for lack of evidence of cancellation,[47] including *Mann v. Davis*,[48] where blacks challenged the inclusion of 42 per cent black populated Richmond into a multimember district, thereby reducing the percentage of the black population therein to 29 per cent.[49] The district court rejected the challenge on the grounds that there had been no showing of racial discrimination,[50] and that cancellation was not proved merely because a race was not represented by a like legislator.[51] The Supreme Court affirmed without opinion.[52]

However, a district court in Hawaii invalidated a senate apportionment plan containing multimember districts with identical house constituencies.[53] The court applied *Fortson* in finding that "designedly or otherwise"[54] such a plan created "built-in disproportionate representational advantages" to voters not residing in these house-senate multimember districts.[55] In *Burns v. Richardson*,[56] the Supreme Court reversed, holding that there was nothing unconstitutional per se in both houses of a state legislature being multimember districted,[57] and, more importantly, that the record revealed no evidence of the cancelled-out effect *Fortson* required.[58] The Court elaborated:

> It may be that this invidious effect can more easily be shown if, in contrast to the facts in *Fortson*, districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are resident over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one.[59]

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46. Carpeneti, *Legislative Apportionment: Multi-member Districts And Fair Representation*, 120 U. PA. L. REV. 666, 674 (1972).

47. Stout v. Bottorff, 246 F. Supp. 825 (S.D. Ind. 1965); Davis v. Cameron, 238 F. Supp. 462 (S.D. Iowa 1965).

48. 245 F. Supp. 241 (E.D. Va. 1965).

49. *Id.* at 244-45.

50. *Id.* at 245.

51. *Id.*

52. Burnette v. Davis, 382 U.S. 42 (1965).

53. Holt v. Richardson, 240 F. Supp. 724 (D. Hawaii 1965). The plan was produced by the legislature pursuant to a court order in Holt v. Richardson, 238 F. Supp. 468 (D. Hawaii 1965).

54. *Id.* at 731.

55. *Id.* at 729.

56. 384 U.S. 73 (1966).

57. *Id.* at 88.

58. *Id.* The Court chastized the lower court for relying on "conjecture" rather than demonstrated facts.

59. *Id.*

Arguably, this standard of proof failed to be meaningful, for the plan upheld by the *Burns* Court squarely met all three conditions.[60]

Denial of Access

Nonetheless, the stage seemed to be set for a successful challenge to multimember districting when the Court decided to review *Chavis v. Whitcomb*.[61] A challenge had been made to Indiana's apportionment of Marion County, containing Indianapolis, into a multimember district, on the ground that a "cognizable minority interest group" with "unusual interests in specific areas of substantive law" had been invidiously discriminated against by reason of the dilution of its voting influence resulting from such districting.[62] The district court began by identifying a ghetto within Indianapolis, by means of voluminous evidence.[63] The court then noted the gaping disparity in representation of this ghetto, as manifested by the residences of the legislators among the townships of the county.[64] The court next concluded that the at-large elected legislators tend to represent the majority, "[*obviating*] *representation of a substantial, though minority, interest group within that common constituency.*"[65] Further, it noted party control of nominations and the resulting necessity for a legislator to comply with the majority of the delegation.[66] The court thereupon held that the plan operated to minimize and cancel out the voting strength of a minority racial group, and further, that the circumstances suggested by *Burns* as demonstrating the *Fortson* cancellation, were all present.[67]

In 1971 the Supreme Court handed down *Whitcomb v. Chavis*.[68] Writing for the majority, Justice White began by once again reiterating

60. Carpeneti, *supra* note 46, at 677.

61. 305 F. Supp. 1364 (S.D. Ind. 1969), *prob. juris. noted*, 397 U.S. 984 (1970).

62. *Id.* at 1367-68.

63. *Id.* at 1371-83. *See also* Note, *Constitutional Law—Multi-member Districting As A Violation Of Equal Protection*, 1970 WIS. L. REV. 552-53.

64. *Id.* at 1383-85. A relatively wealthy suburban area, representing 13.98 percent of Marion County's population, was the residence of 47.52 percent of the county's senators and 34.33 percent of its representatives, while the ghetto area, with 17.8 percent of the population, had 4.75 percent of the senators and 5.97 percent of the representatives.

65. *Id.* at 1385 (emphasis added). The court added, "partial responsiveness of all legislators is [not] . . . equal [to] total responsiveness and informed concern of a few specific legislators." *Id.* at 1386.

66. *Id.* at 1386.

67. *Id.* at 1386-87.

68. 403 U.S. 124 (1971). Justices Douglas, Brennan, and Marshall dissented, on the ground that the district court's decision had been correctly predicated upon *Fortson*, and that its findings should not be disturbed. 403 U.S. at 180.

Fortson,[69] but found the theory of the district court's holding wholly deficient.[70] As in *Mann v. Davis*, the Court noted that there had been no showing of intent,[71] and went on to emphasize

> the fact that the number of ghetto residents who were legislators was not in proportion to the ghetto population [does not] satisfactorily prove invidious discrimination *absent evidence and findings that ghetto residents had less opportunity than did other Marion County residents to participate in the political processes and to elect legislators of their choice.*[72]

Indeed, the Court noted that Republicans won four of the five elections from 1960 to 1968, that the ghetto voted heavily Democratic, and that in the one election the Democrats did win, in 1964, nine residents of the ghetto were slated, five of whom won:[73]

> The voting power of ghetto residents may have been "cancelled out" as the District Court held, *but this seems a mere euphemism for political defeat at the polls.*[74]

To sustain the district court, Justice White wrote, would be

> expressive of the more general proposition that any group with distinctive interests must be represented in the legislative halls if it is numerous enough to command at least one seat and represents a majority living in an area sufficiently compact to constitute a single-member district.[75]

The Court had come face-to-face with the most profound issue of democratic political theory, surely recalling Justice Frankfurter's warnings about entering the "political thicket."[76] Judicial protection of interest groups, the Court said, was an untenable proposition.[77]

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69. *Id.* at 143.

70. *Id.* at 148-49.

71. That the Court should make this observation in spite of *Fortson's* "designedly or otherwise" holding would take on substantial meaning with respect to supplanting the interest group concept with the suspect classification of race—where some degree of intent, present or past, de facto or de jure, clearly shown or imputed, is necessarily vital. *See* note 93, *infra.*

72. 403 U.S. 124, 149 (emphasis added).

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to vote, to choose the political party they desired to support, to participate in the affairs or be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.

Id. at 149-50.

73. *Id.* at 150-52.

74. *Id.* at 153 (emphasis added).

75. *Id.* at 156.

76. Indeed, Justice Harlan, in a concurring opinion made precisely that recollection. *See* note 18, *supra.*

77. *Id.* at 156-57. *See* Carly and Shanahan, *Supreme Court Declares New Stand-*

The *Fortson* doctrine was not dead, but it had been radically altered by *Whitcomb*: "Cancellation" of voting tsrength was now a subordinate adjunct to "denial of access to the political system," for the former would be but one, albeit, highly visible, manifestation of the latter. Only in this manner could the Court hope to distinguish between defeat at the polls and the abridgement of fundamental, constitutionally protected, rights. But, what constituted "denial of access?" Seemingly, the answer was to be found in a line of voting rights cases—cases revolving around historical traditions of racial discrimination.[78]

Willingness to Intervene

Even before the advent of The Voting Rights Act of 1965,[79] the courts had displayed a willingness to intervene in apportionment cases where racial discrimination was evident: Only with great hesitation has the Supreme Court entered the area of gerrymandering,[80] yet in 1960, the Court struck down a blatantly racially gerrymandered plan.[81] Indeed, an Alabama district court invalidated a multimember districted plan upon a finding of intent to cancel out the voting strength of resident blacks.[82] Of note was the manner in which the court arrived at this finding of intent —by considering the "pattern and practice of discrimination in Alabama as a backdrop."[83]

In 1969, the Supreme Court included changes from single-member to

ard of Proof For Groups Alleging Submergence in a Multi-member District, 3 SETON HALL L. REV. 178 (1971), and Note, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 40, 135 (1971).

78. Carpeneti, *supra* note 46, at 685.

79. Voting Rights Act 42 U.S.C. § 1973 (1970). The Act covers any state or locality, which in 1964 or 1968, used a literacy test and had less than a 50 percent voter registration or turnout. The Act suspends all such devices for five years, and requires these states to get federal clearance of all changes in election laws before implementing them. Seven southern states and scattered counties of a few others fall within the purview of the Act.

80. *See* Edwards, *supra* note 19.

81. Gomillion v. Lightfoot, 364 U.S. 339 (1960).

82. Sims v. Baggett, 247 F. Supp. 96 (M.D. Ala. 1965).

83.

> [Considering the] pattern and practice of discrimination in Alabama as a backdrop, the cavalier treatment accorded predominantly Negro counties in the House plan takes on added meaning. The court is permitted to find the intent of the legislature from consistency of inherent probabilities inferred from the record as a whole. We therefore hold that the Legislature intentionally aggregated predominantly Negro counties with predominantly white counties for the sole purpose of preventing election of Negroes to House membership.

Id. at 109.

multimember districting among those changes in election laws requiring federal clearance under the Voting Rights Act.[84] Such a holding was necessary, the Court explained, because of the threat of cancellation multimember districting posed to racial minorities.[85] The Court reaffirmed this holding two years later.[86]

Shortly after *Whitcomb*, an Alabama district court once again struck down a multimember districted plan,[87] distinguishing its holding from the *Whitcomb* decision in that, unlike Indiana, Alabama had a "long history of racial discrimination."[88] Of perhaps greater moment was the Supreme Court's decision in *Taylor v. McKeithen*,[89] handed down in early 1973. Faced with selecting one of two proposed single-member districting plans, a Mississippi district court selected the one most advantageous to blacks.[90] The Fifth Circuit Court reversed with respect to this selection, insisting that the district court be "colorblind."[91] The Supreme Court reversed the circuit court, adding by way of footnote:

> In *Whitcomb* it was conceded that the State's preference for multimember districting was not rooted in racial discrimination. *Here, however there has been no concession and, indeed, the district court found a long "history" of bias and franchise dilution in the State's drawing of lines.*[92]

It is important to note that the Court spoke not of intent, but of a history of racial discrimination.[93]

INVALIDATION OF MULTIMEMBER DISTRICTING

Graves v. Barnes,[94] as stated previously, represented a hearing on the consolidation of four suits filed in four district courts, challenging

84. Allen v. State Bd. of Elections, 393 U.S 544 (1969).

85. *Id.* at 569. "Voters who are members of a racial minority might well be in the majority in one district, but in a decided minority in the county as a whole. This type of change could therefore nullify their ability to elect the candidate of their choice, just as would prohibiting some of them from voting." *Id.*

86. Perkins v. Mathews, 400 U.S. 379 (1971).

87. Sims v. Amos, 336 F. Supp. 924 (M.D. Ala. 1972).

88. *Id.* at 569. "*Whitcomb* arose in Indiana, a state without the long history of racial discrimination evident in Alabama. Thus we feel justified in pointing out that in Alabama it is reasonable to conclude that multimember districts tend to discriminate against the black population." *Id.*

89. 407 U.S. 191 (1972).

90. Bussie v. Governor of Louisiana, 333 F. Supp. 452 (E.D. La. 1971).

91. 457 F.2d 796 (5th Cir. 1971).

92. 407 U.S. at 193 n.3 (emphasis added).

93. *See* Derfner, *Multi-member Districts and Black Voters*, 2 BLACK L.J. 170 (1972).

94. 343 F. Supp. 704 (W.D. Texas 1972).

Texas' newly promulgated reapportionment plan on grounds of racial gerrymandering of senatorial districts in Houston, impermissable population deviations among house districts, and cancellation of black and Mexican-American voter strength in Dallas and Bexar counties by reason of multimember districting.[95] The three-judge court approved the senate plan for lack of evidence of the alleged racial gerrymandering.[96] The court, however, found unconstitutional disparities in population among the house districts.[97] But, of greater significance was the court's finding that the use of multimember districting in Dallas and Bexar Counties tended to cancel out the votes of resident black and Mexican-American voters therein. The court thus invalidated the plan, "in accordance with the standards of *Whitcomb*."[98]

The court began by reciting the *Fortson* standard of cancellation, and the *Whitcomb* standard of denial of access.[99] Detailing salient features of the Texas electoral system,[100] the court noted: "[U]nlike the State of Indiana, Texas has a rather colorful history of . . . racial discrimination."[101] The Dallas plaintiffs showed not only that the number of legislators resident in the black community was not remotely in proportion to the number of ghetto voters, but "also that the black community has been effectively excluded from participation in the Democratic primary selection process."[102] This showing revolved around evidence that: successful nomination and election in Dallas was extremely difficult without the endorsement of the Dallas Committee for Responsible Government (DCRG); white candidates endorsed by the DCRG could win a

95. These four suits were brought between the day the plan was first promulgated, October 22, and November 24, 1971. The suits were Graves v. Barnes, Regester v. Bullock, Marriott v. Smith, and Archer v. Smith. In addition, the Texas AFL-CIO and Bexar County Mexican-Americans were permitted to intervene.

96. 343 F. Supp. at 734-35.

97. *Id.* at 711-13. *See* note 15, *supra.*

98. *Id.* at 727, 733. The court also noted two additional grounds for invalidating the multimember districting scheme: the disparate treatment of Houston County, and the substantially greater cost of conducting a campaign in a multimember district. The court nonetheless indicated its appreciation that such grounds, independent of others, would be insufficient to invalidate a plan. For references to the former issue, *see* Drew v. Scranton, 229 F. Supp. 310 (M.D. Pa. 1964); and Kruidemier v. McCullock, 258 Iowa 1121, 142 N.W.2d 355 (1966). As to the latter, *see* Goldblatt v. City of Dallas, 414 F.2d 774, 775 (5th Cir. 1969).

99. 343 F. Supp. at 724.

100. *Id.* These features included: a majority requirement in the primary, a "place" requirement on the ballot, and an absence of legislative residency requirements within individual districts of the multimember district.

101. *Id.* at 725.

102. *Id.* at 726. "As a factual matter, Negroes in Dallas County vote primarily . . . Democratic." *Id.*

county-wide race without appealing to black voters; the DCRG decides how many blacks, if any, it will slate without the assistance of black community leaders; throughout the 1950's, Dallas legislators led the fight for segregation in the legislature; and the DCRG still used racial campaign tactics.[103]

With respect to Bexar County and the Mexican-American plaintiffs, the court first noted that "Chicanos, as well as Blacks, require the protective intervention of the Federal Courts."[104] In establishing these plaintiffs as an identifiable racial minority,[105] the court traced the judicial history of findings of discrimination against Mexican-Americans, their poverty and their cultural disorientation.[106] The court concluded:

> [These] impediment[s], conjoined with the poll tax and the most restrictive voter registration procedures in the nation, have operated to effectively deny Mexican-Americans access to the political processes in Texas even longer than blacks were formally denied access by the white primary.[107]

In addition, the court took judicial notice of the fact that only five Mexican-Americans had served in the Texas Legislature since 1880.[108] In doing so the court acknowledged the *Whitcomb* maxim that lack of representation is not proof of denial of access, but interpreted Justice White's opinion as indicating that such facts, considered in conjunction with others, would be persuasive.[109] Further, the court noted, such facts "often provide the best evidence to determine whether votes are cast

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103. *Id.* at 726-27. "In essence, we find that the plaintiffs have shown that Negroes in Dallas County are permitted to enter the political process in any meaningful manner only through the benevolence of the dominant white majority." *Id.*

104. *Id.* at 727.

105. *Id. Citing* Hernandez v. Texas, 347 U.S. 475 (1954).

106. *Id.* at 728-31.

107. *Id.* at 731. Mexican-American voter registration and turnout were approximately 30 percent. The court commented:

> [W]e draw very different conclusions than does the state from the fact that Mexican-Americans register and vote in such low numbers. The state uses those facts to argue that the Mexican-Americans need political organization, not redistricting. We use those facts . . . [to] conclude that the *reason* that the voter participation . . . is so low is that their voting patterns were established under precisely the same sort of discriminatory State actions that we have already found both relevant and condemnatory with regard to Dallas Blacks.

Id. at 733.

108. *Id.* at 732.

109. *Id.* Nonetheless, the court was emphatic in noting: "We are not to be understood as saying, and indeed specifically disavow, any intention of implying that 'any group with distinctive interests' must be represented in the legislative halls. . . ." *Id.* at 734.

on racial lines."[110] The court thereby concluded that race was still an important issue in the Bexar county,[111] and that

> [b]ecause of the continued and continuing discrimination against Mexican-Americans in Bexar County, they are effectively removed from the political processes of Bexar, in violation of all of the *Whitcomb* standards . . . .[112]

The court thereupon adopted a single-member districting plan for Dallas and Bexar Counties to be used in the 1972 elections.[113] A week later Justice Powell denied a stay of judgment,[114] and several months later the Supreme Court noted probable jurisdiction.[115]

The Supreme Court heard oral arguments in February, 1973, and on June 18, handed down *White v. Regester*.[116] As in *Whitcomb*, Justice White wrote for the majority.[117] All but four pages of the opinion dealt with the issue of population deviations, upon which the Court based its reversal.[118] However, the Court affirmed with respect to the invalidation of multimember districting in Dallas and Bexar Counties.

The Court reiterated the *Whitcomb* standard and found that the district court had displayed "due regard" for its dictates.[119] It specifically reviewed the district court's findings,[120] noted that the district court had not made its decision upon a holding that every racial or political group has a constitutional right to be represented,[121] and concluded:

> 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 . . . multimember districts in the light of past and present reality, political or otherwise.*[122]

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110. *Id.* at 732.

111. *Id.*

112. *Id.* at 733.

113. *Id.* at 736. The court, however, suspended the residency requirement—that each legislator be a resident of a different district—for the impending 1972 election.

114. Graves v. Barnes, 405 U.S. 1201 (1972).

115. 409 U.S. 840 (1972).

116. 412 U.S. 755 (1973).

117. Dissents were offered only with respect to the population deviations issue.

118. *Id.* at 765.

119.

> The plaintiffs' burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question—that its members had less opportunity than did other residents in the district to participate in the political processes and elect legislators of their choice.

Id.

120. *Id.* at 765-68.

121. *Id.* at 769.

122. *Id.* (emphasis added).

CONCLUSION

As the preceding discussion has illustrated, multimember districting raises fundamental questions of what constitutes fair representation—questions that, by their very nature, will never be easily answerable. It is clear that multimember districting lends itself to the effectuation of the most valid of state policies—representation of homogeneous groups and political subdivisions, as well as the most invidious type of discrimination—cancellation of minority voting strength. It is likewise clear that disappointing election results should not give rise to a claim of such discrimination.

Since the Supreme Court first recognized the discriminatory potential of multimember districting in *Fortson*, its efforts have been directed to the definition of standards that distinguish between "mere defeat at the polls" and invidious discrimination by reason of the cancellation effect of multimember districting. To effectuate this distinction the Court promulgated the *Whitcomb* standard of "denial of access to the political processes."

In rejecting the allegations of the *Whitcomb* challengers, the Court stated:

> We have discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in the affairs or to be equally represented on those occasions when legislative candidates were chosen. Nor did the evidence purport to show or the court find that inhabitants of the ghetto were regularly excluded from the slates of both major parties, thus denying them the chance of occupying legislative seats.[123]

That same year, the Court handed down a decision in which it said,

> . . . the core of the Fourteenth Amendment is the prevention of meaningful and unjustified official distinctions based on race.[124]

No small degree of discrimination could possibly result in the evidentiary findings the *Whitcomb* Court deemed necessary for a showing of denial of access. Such findings could arise only at the behest of traditions—or a "history"—of discrimination. Historical discrimination necessarily raised the specter of race, implying that the "suspect classifactions" doctrine of the fourteenth amendment shadowed judicial thinking where multimember districting was challenged. Indeed, the voting rights cases mirrored the Court's recognition of de facto discrimination in civil rights cases—proof of intent to discriminate had been supplanted by imputed

123. 403 U.S. 124, 149-50 (1971).

124. James v. Valtierra, 402 U.S. 137, 141 (1971).

intent derived from the histories of racial discrimination.[125] It was no accident then, that the *White v. Regester* district court began its findings with its judicial notice of Texas' "colorful history of racial discrimination." This finding laid the foundation for each and every finding *Whitcomb* had enumerated as necessary for a successful showing of denial of access.

Seemingly, then, there are three elements to a successful challenge to multimember districting upon an allegation of cancellation. The first is statistical evidence that there is a racial minority group whose size and geographic concentration would enable it to elect a legislator in a single-member districted plan. The second is evidence of an enduring history of racial discrimination. The third is evidence of exclusion from the nomination and election processes.

Legislative representation and reapportionment are so inextricably bound together that the Court has necessarily felt restrained in entering an area admittedly easily affected by invidiously discriminatory schemes. It is highly doubtful that there exists a judicial standard that would completely preclude such discrimination. Nevertheless, the Supreme Court has defined three elements that constitute a standard that may serve to prevent the undermining of that most fundamental right incident to citizenship in a democracy—the right to representation.

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125. *See* note 83 *supra.*