Manipulated Doctrines, Improper Distinctions, and the Law of Racial Vote Dilution

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

Justice Thurgood Marshall

Introduction

This Paper is about racial vote dilution, a justiciable harm as defined by both a
constitutional and a statutory right to a racially undiluted vote. Racial vote dilution occurs
when a racial minority group is denied access to the political process on the basis of race.
This happens when members of racial minority groups are unable to aggregate their votes
for the chance to achieve a numerical majority. In such circumstances, racial minority
groups may fail to gain electoral results because the votes of their groups have no
currency in the political marketplace: the fact of race makes voters across racial lines
disinclined to form political coalitions, and so the numerical minority status of racial
minorities results in the denial of any effective representation at all. This is the harm of
racial vote dilution. To remedy this harm, States are required to take race into account in
the process of redistricting. States must draw majority-minority, or “safe” minority,

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2 The financial market metaphor for the effective use of the franchise comes from Professor Issacharoff’s
comparison of elements of racial vote dilution law to antitrust. Samuel Issacharoff, Polarized Voting and
districts, in which an excluded racial minority group is the numerical majority and so guaranteed the ability to elect its candidate of choice. The theory here is that if racial discrimination bars entrance of certain groups to the political market, then a special market must be brought to such groups.

There is an open question in the law, however, as to exactly what racial vote dilution is. This confusion, I argue, centers around two questions. The first is about the sort of racial minority population which may suffer racial vote dilution, asking whether a racial minority population must be geographically, politically, or culturally compact to suffer racial vote dilution. The second asks whether or not racial vote dilution must entail intentional racial discrimination by State actors in the process of redistricting. These questions are of great legal significance for the following reason: the Constitution places various limitations on the extent to which States may take account of race in any legislative policy. Because the proper remedy for racial vote dilution is a function of the right to a racially undiluted vote, the legal conception of racial vote dilution defines the extent to which States may take race into account in redistricting in the face of constitutional limitations. These questions are also of great normative significance: if racial vote dilution is defined in such a way as to permit claims only by a limited class of racial minority populations, and only where intentional State discrimination can be shown, the number of viable claims is thereby drastically reduced. This means fewer majority-minority districts, and thus, where the political preferences of racial minorities are denied value across racial lines, racial minority under-representation. It is for this reason that I present legal arguments in the course of this Paper that the class of racial

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3 I use the terms “politically compact” and “politically cohesive” interchangeably. The notion of cultural compactness is explained below. See infra pp. 24-25.

minority populations entitled to bring suit must be defined expansively, and a requirement of proof of intentional State discrimination must be rejected.

In Part I of this Paper, I begin by tracing the law of racial vote dilution from its origin in the right to an effective vote announced in *Reynolds v. Sims*.\(^5\) I then discuss two of the first cases to set the parameters of the law of racial vote dilution, *Whitcomb v. Chavis*\(^6\) and *White v. Regester*.\(^7\) I argue that, while these cases provide some insight into how to define racial vote dilution, they leave two critical questions answered: (1) what racial minority populations may suffer racial vote dilution?; and (2) must racial vote dilution entail intentional discrimination by State legislators in the process of redistricting, or is political exclusion of racial minorities because of private discrimination in the voting public sufficient?

In Part II, I turn to the answers which the Supreme Court has provided to these questions. Analyzing Court doctrine in the cases of *Shaw v. Reno*,\(^8\) *Shaw v. Hunt (Shaw II)*,\(^9\) and *League of United Latin American Citizens (LULAC) v. Perry*,\(^10\) I conclude that the Court has adopted what I will call a natural district population requirement, which is a requirement that geographical, political, and “cultural” compactness are necessary for a racial minority population to claim racial vote dilution. Moreover, while the doctrine on the question of State intent is somewhat muddled, I argue that *LULAC* represents a move towards a State intent requirement by suggesting that a natural district population is necessary because evidentiary of discriminatory State intent. I conclude Part II by

\(^6\) 403 U.S. 124 (1971).
\(^7\) 412 U.S. 755 (1973).
\(^8\) 509 U.S. 630 (1993).
arguing that the Court’s decisions on these two questions are likely to result in under-representation of racial minorities suffering racial animus in the general voting public.

In Part III of this Paper, I mount a constitutional attack on the Court’s decisions. I begin by arguing that a State intent requirement is improper in the law of racial vote dilution, because the context of the right to vote is different from other Equal Protection contexts in which the *Washington v. Davis*\(^\text{11}\) requirement of proof of discriminatory State intent applies. This difference is based on two lines of argument. The first stems from the logic of *United States v. Carolene Products*.\(^\text{12}\) The second is rooted in the fact that the right to an effective vote comes out of the fundamental rights strand of the Equal Protection Clause, as opposed to the suspect classification strand, to which *Davis* applies. In the second portion of Part III, I examine possible justifications for a natural district population requirement other than as evidentiary of State intent. Here I conclude that the traditional arguments for invalidation of so-called “benign” racial classifications fail to uphold a natural district population requirement, because the natural district population requirement cannot be linked to prevention of cognizable harms. As a result, in the course of this Paper, I come to the conclusion that both natural district population and discriminatory State intent requirements are improper as applied to the law of racial vote dilution.

It is beyond the scope of this Paper to flesh out and defend an alternative definition of racial vote dilution to the one adopted by the Court. My purpose here is merely to argue that the choices made by the Court in defining racial vote dilution –

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\(^{11}\) 426 U.S. 229 (1976).
\(^{12}\) 304 U.S. 144 (1938).
choices which are likely to cut against racial minority representation where racial animus exists in the voting public - are constitutionally unfounded.

**Part I. Emergence of the Right to a Racially Undiluted Vote**

This Part provides a brief introduction to the origins of racial vote dilution doctrine. In Subpart (A), I describe the doctrine of the right to an effective vote from which the idea of racial vote dilution emerges. In Subpart (B), I outline two of the first cases to give shape to the constitutional claim of racial vote dilution, *Whitcomb v. Chavis* 13 and *White v. Regester*. 14 In Subpart (C), I introduce the questions which were left open in *Regester* regarding the definition of racial vote dilution. Analysis of Court doctrine in response to these questions forms the bulk of the remainder of this Paper.

(A) The Right to an Effective Vote

The right to a racially undiluted vote grows out of the right to an “effective” vote which emerged in the Warren Court during the 1960’s.15 Before that time, the Supreme Court had only heard what may be called “first generation” voting rights claims.16 These were claims that a State had impeded the rights of individuals to register and cast a ballot, generally through the use of some device such as a poll tax,17 literacy test,18 or

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16 Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663, 1671 (2001); see, e.g., Minor v. Happersett, 88 U.S. 162 (1875) (denying that women have a right to vote under the Fourteenth Amendment’s Privileges and Immunities Clause).
It is important to emphasize that first generation claims concerned individual rights: when the Court ultimately recognized the right to vote as fundamental under the rights strand of the Equal Protection Clause, it thereby protected the right of individuals to register and cast a ballot.

The right to an effective vote was born of a “second generation” voting rights claim, a claim of what may be called vote dilution proper. Second generation claims are different from first generation ones in that they go beyond the right to register and cast a ballot; second generation claims challenge the ways in which votes are grouped and counted. This means that second generation claims are primarily leveled against State redistricting apportionments, because apportionments are the legislative acts which group voters into territorial clusters to be tallied together.

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19 Giles v. Harris, 189 U.S. 475 (1903) (denying equitable enforcement of a political right to vote in the face of an Alabama Constitution which made passing racially biased tests a prerequisite to registration for all voters not registered as of 1903).

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

21 Gerken, supra note 16, at 1671.

22 Since the 1842, State and Congressional legislators have been elected by districts. The use of districts is not constitutionally required. Congress established a districting electoral structure by statute in 1842 under its Article I, §4 powers. This measure was political, and did not reflect a general belief that geographic regions should be represented in districts because of the influence of location on political preferences. Instead, the districting requirement was urged by small States fearful of being overwhelmed by the bloc voting power of large States if at-large elections were allowed. SAMUEL ISSACHAROFF, PAMELA S. KARLAN & RICHARD H. PILDES, THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS 1156-58 (rev. 2d. ed. 2002). Districts are internal to States and are drawn by State legislators in apportionments, which are maps of State districting arrangements passed by legislative act. Districts may be single-member, meaning that one legislator is elected by a given district, or multi-member, meaning that several legislators are elected within the district in at-large, majority rule elections. The combination of single and multi-member districts within a given apportionment is not unconstitutional. Id. at 687 (citing Fortson v. Dorsey, 379 U.S. 433 (1965)).

Second generation claims were unknown outside the districting context until Bush v. Gore, 531 U.S. 98 (2000). In that case, a majority of seven justices agreed that disparate recount policies across groups of voters within the State of Florida presented an Equal Protection problem under the Court’s understanding of second generation voting rights. Id.
Reynolds v. Sims represents the first clear enunciation of second generation voting rights. In Reynolds, the Court considered an apportionment for the State legislature of Alabama in which urban districts were vastly more populated than rural ones, though all such districts elected the same number of legislators. This was vote dilution: the votes of urban voters were simply worth less than their rural counterparts. The Court responded by establishing the one-person/one-vote rule to strike down the apportionment. The one-person/one-vote rule means that, in the process of redistricting, States must create districts of equal population to the extent practicable. In asserting the rationale for this rule, Chief Justice Warren announced the right to an effective vote: “[E]ach and every citizen has an inalienable right to full and effective participation in the political process[] . . . [which] requires . . . that each citizen have an equally effective voice in the election of members of his . . . legislature.”

23 377 U.S. 533 (1964). The Court had recognized an Equal Protection right against apportionments of a certain type in Baker v. Carr. 369 U.S. 186 (1962). However, famously, and over vigorous dissent, in holding the subject of redistricting not a nonjusticiable political question, the Court failed to provide a standard for either determining a violation of this right, or for a judicial remedy. See, e.g., id. at 267 (Frankfurter, J., dissenting) (“A hypothetical claim resting on abstract assumptions is now for the first time made the basis for affording illusory relief for a particular evil even though it foreshadows deeper and more pervasive difficulties in consequence.”).

24 Reynolds, 377 U.S. at 540-41. In the years which followed the national census of 1901, the increased urbanization of American life resulted in a significant population shift from rural to urban settings. ISSACHAROFF, KARLAN & PILDES, supra note 22, at 147. This meant swelling of urban electoral districts, such that urban single-member districts contained populations many times that of their rural counterparts. See, e.g., Colegrove v. Green, 328 U.S. 549, 566 (1946) (Black, J., dissenting) (referring to Illinois congressional districts ranging in population from 112,116 to 914,000). In spite of the Constitutional mandate that representatives be apportioned “according to their . . . numbers,” U.S. CONST. art. I, § 2, cl. 3, States did not reapportion to maintain approximately proportional population-to-representative ratios. This was no accident. State incumbent officials - even those representing the harmed urban electorate - did not want to redistrict and risk destabilizing their support base. Incumbent officials in rural regions had the additional reason to oppose reapportionment that their constituents benefited from overrepresentation. ISSACHAROFF, KARLAN & PILDES, supra note 22, at 147. The result was under-representation of urban voters and over-representation of rural ones.


26 Reynolds, 377 U.S. at 565.
It is clear from the factual context of *Reynolds* that recognition of the right to an effective vote was motivated by the democratic principle of majority rule. Majority rule requires that numerical majorities be honored at the polls with election of their candidates of choice. This principle is violated where State action frustrates the electoral success of numerical majorities. *Reynolds* thus presents a straightforward violation of the principle of majority rule, insofar as urban voters, the numerical majority, were denied greater political representation than their numerically inferior rural counterparts.

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

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

30 This understanding of the right to an effective vote is just one example of the way in which Professor Fiss famously characterized rights under the Equal Protection Clause generally. Owen M. Fiss, *Groups and the Equal Protection Clause*, 5 PHIL. & PUB. AFF. 107 (1976). Professor Fiss contended that the Equal Protection clause embodies an anti-subordination principle as opposed to an anti-discrimination principle, and so must endow groups with rights in the first instance. *Id.* at 150-51.
chance of effective aggregation with those [votes] of like-minded voters to claim a just share of electoral results.”

(B) *Whitcomb v. Chavis* and *White v. Regester*

One of the first cases to raise a claim of racial vote dilution was *Whitcomb v. Chavis*. In *Whitcomb*, a geographically compact, politically cohesive black population living in the Center Township Ghetto (the Ghetto) of Marion County, Indiana, brought suit against the State of Indiana, claiming racial vote dilution on account of its submergence within the majority white multi-member district of Marion County. The Ghetto Blacks aligned behind political issues and candidates that were rejected by Marion County Whites. This phenomenon – the propensity for given racial groups to categorically deny support to candidates across racial lines – is called “racially polarized voting.” The *Whitcomb* plaintiffs claimed that, in combination with racially polarized voting, their placement in a majority white multi-member district denied them the right to an effective vote for the following reason: the Ghetto Black population was sufficiently large and compact to make up the majority in a single-member district, in which they would have been free to elect their candidates of choice. Within the multi-member

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33 Id. at 128-29.
34 Thornburg v. Gingles, 478 U.S. 30, 52-58 (1986). The *Gingles* Court decided that racially polarized voting may be evidenced via simple bivariate analysis of election returns, the two variables being the race of the candidate and the race of the voter: where data suggests a strong positive correlation between these two variables, the Court held that racially polarized voting may be inferred. Id. at 52-58. Much is open for debate in the theory of racially polarized voting. For example, how strong an indicator of voting race must be, and how little political overlap there must be between racial groups, are both open questions. In addition, the Court has been criticized for its allowance of bivariate analysis instead of requiring multiple regression analysis which might filter out hostile voting patterns across racial groups for reasons of politics, rather than race. See, e.g. Issacharoff, *Polarized Voting and the Political Process*, supra note 2, at 1853 n.98. However, these concerns are largely outside the scope of this Paper.
35 *Whitcomb*, 403 U.S. at 128-29.
district, however, they were an entrenched minority, unable to aggregate their votes to gain representation in election after election. In the abstract, the Whitcomb claim was straightforward: the Marion County multi-member district diluted the black vote.

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

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36 Id. at 142-43.
37 Id. at 153 (“On the record before us plaintiffs’ position comes to this: . . . the ghetto, along with all other Democrats, suffers the disaster of losing too many elections.”).
38 Id. at 149-55.
The first case to uphold a constitutional claim of racial vote dilution was *White v. Regester*.\(^{40}\) In *Regester*, the Court was faced with a challenge to two multi-member districts under the 1970 Texas apportionment for the State House of Representatives.\(^{41}\) These multi-member districts corresponded to Dallas and Bexar Counties, in which it was claimed that blacks and Latinos, respectively, suffered racial vote dilution as a result of the use of multi-member districts.\(^{42}\) As a starting point, plaintiffs from both Dallas and Bexar County presented the evidentiary elements of the *Whitcomb* claim: the respective groups of blacks and Latinos both represented geographically and politically compact populations of sufficient size, and racially polarized voting was evidenced for both multi-member districts.\(^{43}\) However, in *Regester*, the Court upheld the lower court’s finding of racial vote dilution in both Dallas and Bexar Counties. The remedy ordered was invalidation of the multi-member districts and subsequent creation of single-member, majority-minority districts. Majority-minority districts are districts in which a racial minority group constitutes the numerical majority. In arriving at this result, the Court distinguished *Whitcomb* on the grounds that the *Regester* plaintiffs were able to show something more than the plaintiffs in *Whitcomb*. This was evidence under what have come to be called the *Regester* Factors, a non-exhaustive list of types of evidence which might permit a Court to find an instance of racial vote dilution under the “totality of the circumstances.”\(^{44}\) The factors which the Court identified were as follows:

\(^{41}\) Id. at 756.
\(^{42}\) Id. at 766-67.
\(^{43}\) Issacharoff, *Groups and the Right to Vote*, supra note 28, at 878 (noting that, prior to *Gingles*, all racial vote dilution claims entailed evidence of the existence of geographically and politically compact racial minority populations, as well as evidence of racially polarized voting).
\(^{44}\) *Regester*, 412 U.S. at 766-69.
(1) a history of racial discrimination in the given jurisdiction, particularly in the electoral context

(2) the presence of election rules which frustrate minority group voting strength

(3) historic under-representation of the racial minority group in the given legislative body

(4) the irrelevance of the racial minority group to the election of representatives

(5) the absence of good-faith concern of elected officials for the concerns of members of the racial minority group

(6) the use of racial campaign tactics to defeat the candidates of choice of the racial minority group in recent elections

(7) the existence of a cultural and language barrier obstructing the participation of the racial minority group in the political process

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

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

46 Id. at 766-769. The Regester Factors as I list them have been abstracted from the context-specific formulation of the Court’s holding.
Produc[ing] evidence to support findings that the political processes leading to nomination and election were not equally open to participation by the group in question – that its members had less opportunity than did other residents in the district to participate in the political processes and to elect legislators of their choice.\(^\text{47}\)

What \textit{Regester} suggests then, is that the combination of the evidentiary elements of \textit{Whitcomb} and evidence under the \textit{Regester} Factors is sufficient to support a claim of racial vote dilution. Racial vote dilution may be loosely defined, then, as an apportionment which renders the political process closed to a given racial minority group because of the fact of racial minority status.

\textbf{(C) Two Questions Left Open}

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

The first question left open in \textit{Regester} is the following: which, if any, of the evidentiary elements of \textit{Whitcomb} is necessary to a claim of racial vote dilution?\(^\text{48}\)

Presumably, the requirements that white bloc voting opposes the racial minority group, and that the electoral structure thereby permits the racial minority votes to be drowned

\(^{47}\) \textit{Id.} at 766.

\(^{48}\) Issacharoff, \textit{Groups and the Right to Vote, supra} note 28, at 877-88. Professor Issacharoff discusses this question more concretely by asking whether or not the \textit{Gingles} Test, which requires evidence of a geographically and politically compact racial minority population and of racially polarized voting, ought properly to be a necessary and/or sufficient condition for a claim of racial vote dilution against a State apportionment, as opposed to a multi-member district. Thornburg v. Gingles, 478 U.S. 30, 48-51 (1986).
out, are essential. But must the racial minority population be as politically cohesive as the Ghetto Blacks of Marion County, for instance? Also, presumably the racial minority population must be sufficiently large to form the majority in a single-member district if the principle of majority rule is to be triggered. Without this requirement, racial minority groups could claim no harm as a result of a particular State apportionment. But must a sufficiently large racial minority population be geographically compact? Putting these questions together, we can ask simply: what degree of geographical and political compactness is required?

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

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49 ISSACHAROFF, KARLAN & PILDES, supra note 22, at 691 (asking whether *Regester* recognizes discriminatory purpose or effects as giving rise to a claim of unconstitutional racial vote dilution).

50 This interpretation, like its alternative, finds support in some of the language of both *Whitcomb* and *Regester*. See, e.g., *Whitcomb* v. Chavis, 403 U.S. 124, 144 (1971) (“[W]e have insisted that the challenger carry the burden of proving that multi-member districts operate to dilute or cancel the voting strength of racial . . . elements.” (emphasis added)); see also *Regester*, 412 U.S. at 766 (“The plaintiffs’ burden is to produce evidence to support findings that the political processes leading to nomination and election were not equally open . . . .” (emphasis added)).
minority electoral results. So the Regester Factors might suggest - and thus the harm of racial vote dilution might be premised on - private discrimination in the voting public.

A second possible interpretation of the Regester Factors is that they provide evidence of racial animus on the part of State legislators in the process of redistricting. Under this interpretation, it is irrelevant whether racially polarized voting is for reasons of political opposition or racial animus in the general public; the harm of racial vote dilution occurs when State legislators capitalize on racially polarized voting in the general voting public to craft an apportionment in which racial minority preferences are certain to be drowned out. This is a view of racial vote dilution as requiring proof of discriminatory State intent.

Part II. Supreme Court Doctrine on the Regester Questions and Its Consequences

I turn now to explore the choices the Court has made in defining racial vote dilution. In Subpart (A), I address the first question left unanswered by Regester: which evidentiary elements of Whitcomb with respect to the characteristics of a racial minority population are necessary to support a claim of racial vote dilution? In this Subpart, I argue that three cases – Shaw v. Reno, Shaw v. Hunt (Shaw II), and League of Latin American Citizens v. Perry (LULAC) – suggest that a racial minority population must be geographically, politically, and “culturally” compact to suffer racial vote dilution. In

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51 As mentioned supra note 50, this position may also be supported by language from Whitcomb and Regester. See, e.g., Whitcomb, 403 U.S. at 149 (“[T]here is no suggestion here that Marion County’s multi-member district, or similar districts throughout the State, were [sic] conceived or operated as purposeful devices . . . .” (emphasis added)); see also Regester, 412 U.S. at 756 (phrasing the question before the Court as “whether the multimember districts provided for Bexar and Dallas Counties were properly found to have been invidiously discriminatory . . . .” (emphasis added)).
Subpart (B), I turn to the second question left open in *Regester*: whose racial animus must be proven to support a racial vote dilution claim? Here I argue that, while the doctrine in this area is exceedingly muddled, the Court suggested a move towards a State intent requirement in *LULAC*. Finally, in Subpart (C) I discuss the likely implications of the Court’s decisions, which may be summed up simply as racial minority under-representation.

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

In the cases of *Shaw*, *Shaw II*, and *LULAC*, the Court was faced with challenges to State apportionments which had the following critical similarity: in each apportionment, a sufficiently large, geographically and politically compact racial minority population was denied the creation of a majority-minority district for the purpose of protecting the seat of an incumbent in the region.\(^55\) §2 of the VRA – the statutory prohibition of racial vote dilution enacted in 1982\(^56\) - was interpreted in *Thornburg v. Gingles* to require creation of a majority-minority district wherever a sufficiently sized, geographically and politically compact racial minority population was denied the ability to elect its candidates of choice because of racially polarized voting.\(^57\)

As a result, fearing §2 liability in light of the fact of State-wide racially polarized voting,

\(^55\) *Shaw*, 509 U.S. at 674 n.10 (White, J. dissenting); *LULAC*, 126 S. Ct. at 2613.


\(^57\) 509 U.S. 30, 48-51 (1986). In this respect, *Gingles* effectively overruled *Whitcomb*. It might seem that *Gingles* thus provides an answer to the first question left open in *Regester* in that it holds that geographical and political compactness are both necessary and sufficient to racial vote dilution claims under §2. This is not the case. *Gingles* represents a doctrine whose logic was predicated on racial vote dilution through the use of multi-member districts; in the context of single-member districting, *Gingles* does not provide an adequate answer to the question of what conditions are either necessary or sufficient for a racial vote dilution claim. Issacharoff, *Groups and the Right to Vote*, supra note 28, at 878-81. For instance, the Court reintroduced the *Regester* Factors as necessary in *Johnson v. De Grandy*, 512 U.S. 997 (1994). More importantly for present purposes, *Shaw*, *Shaw II*, and *LULAC* provide a subtly different and more concrete answer to the question of what characteristics are necessary for a racial minority population to suffer racial vote dilution and so succeed on a claim.
each of the States in *Shaw, Shaw II*, and *LULAC*, created a majority-minority district to substitute for the district not drawn for reasons of incumbent protection. In deciding whether these substitutions were constitutional, the Court grappled with two theoretical issues. First, could the substitute districts be conceived of as remedying racial vote dilution for their own racial minority populations, or were they merely stand-ins for the majority-minority districts not drawn? Second, if the substitute districts were merely stand-ins, under what circumstances, if any, was the substitution proper? To resolve these issues, the Court was forced to identify the sort of racial minority populations which might suffer racial vote dilution, and for this reason, these three cases provide an answer to the first question left open in *Regester*.

(i) *Shaw*

The Court began to shed light on an answer to the first *Regester* question in *Shaw v. Reno*.

The facts of *Shaw* were as follows: the state of North Carolina, a covered jurisdiction under §4 of the Voting Rights Act of 1965 (VRA), submitted its post-1990

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59 42 U.S.C.S. § 1973b. A brief word on the VRA as originally enacted may be informative here as background. Prior to 1965, a number of States, particularly in the South, employed a myriad of adaptive strategies to effectively deny the franchise to blacks. The Department of Justice, along with private civil rights organizations, worked to tackle these devices one at a time, by filing suit against the States in federal courts. This strategy was expensive, time-consuming, and ineffective: by the time an individual suit was resolved, not only had the franchise been denied to blacks in other States for a period of years, but the challenged State had repealed its prior practice to enact a new one, equally discriminatory. Congress responded with the Voting Rights Act of 1965, which essentially flipped the burden onto the offending States to justify their election practices. ISSACHAROFF, KARLAN & PILDES, supra note 22, at 546-48. This was achieved in two parts. First, §4 of the Act contains an ingenious “triggering formula,” which is a test designed to ensnare the various regions which had most recently and aggressively demonstrated hostility to black voting in the era before passage of the Act. Voting Rights Act of 1965, 42 U.S.C.S. §1973b. Second, jurisdictions which fall within the category defined by §4 - declared “covered” – are subject to §5, which requires “preclearance” before enactment of any new election policy. *Id.* at § 1973c. Preclearance can be attained either through approval of the Attorney General or by a three-member panel of the D.C. District Court, with the governing standard being that the new policy cannot be “retrogressive” with respect to the voting power of racial minorities. *Id.*
census redistricting plan to the Attorney General for preclearance. The Attorney General rejected the plan as first proposed, believing it required an additional majority-minority district to comply with the VRA. As a result, the Attorney General advised that a second majority-minority district could be drawn in the south-central to southeastern region of the State, in which the black population was sufficiently large and geographically and politically compact. North Carolina declined to draw a majority-minority district in this region because such a district would have destabilized the seat of an incumbent. Instead, the State drew substitute majority-minority District 12 in the north-central region of the State. The black population in this region was not geographically compact, and so to encircle an effective black majority within a district consistent with the Reynolds one-person/one-vote rule, State legislators had to draw a district which was “160 miles long and, for much of its length, no wider than the I-85 corridor.” In physical appearance, District 12 was “bizarrely” shaped.

In response to District 12, the Shaw Court recognized a new kind of Equal Protection claim against a district “so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification.” To defend against such a claim, a State would need to pass the strict scrutiny review

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60 Shaw, 509 U.S. at 633.
61 Id. at 635.
62 Id.
63 Id. at 674 n.10 (White, J. dissenting).
64 Id. at 635.
65 Id.
66 Id. at 644.
67 Id. at 642.
applied elsewhere in Equal Protection law, by demonstrating that the redistricting was narrowly tailored to a compelling government interest.68

The Shaw claim was new in three respects. First, it brought so-called “benign” race-consciousness in redistricting within the ambit of strict scrutiny review. Maligned race-consciousness in redistricting - the use of race in redistricting to achieve racial subordination - had been outlawed since the time of Gomillion v. Lightfoot over thirty years prior.69 In Gomillion, Alabama had redefined the boundaries of the city of Tuskegee - transforming what was a geographical square into a twenty-eight-sided figure - for the purpose of drawing the majority of black residents of Tuskegee out of the city for municipal voting purposes.70 The Court held that a constitutional claim existed against a redistricting arrangement “solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.”71 In Shaw, on the other hand, racial considerations in redistricting were designed to increase black voting strength in the State of North Carolina. In this sense,

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70 Id. at 340.
71 Id. at 341. The majority in Gomillion recognized a claim under the Fifteenth Amendment: the redistricting was alleged to deny black Tuskegee residents the right to vote in municipal elections. Id. at 342. Justice White noted this distinction in his Shaw dissent. Shaw, 509 U.S. at 668-69. In response to this argument, the Shaw majority cited to Justice Whittaker’s concurring opinion in Gomillion, which rooted the constitutional harm of Gomillion in the Fourteenth Amendment’s prohibition against segregation. Id. at 645. There is reason to think this reliance is improper: Justice Frankfurter, the author of the majority opinion in Gomillion, was vehemently opposed to Equal Protection review of State apportionments. See Colegrove v. Green, 328 U.S. 549, 556 (“Courts ought not to enter this political thicket.”); see also Baker v. Carr, 369 U.S. 186, 325-30 (Frankfurter, J. dissenting). Frankfurter’s opinion regarding the nonjusticiability of challenges to State redistricting had yet to be overturned by Baker at the time of Gomillion, which suggests that, regardless of the relative merit of Justice Whittaker’s reasoning, his source of law might not have carried a majority of the Court to reach the Gomillion outcome in the absence of a Fifteenth Amendment alternative. However, the source of law question from Gomillion is not central to my analysis of the critical distinction between Gomillion and Shaw, and so the Shaw majority position may be accepted arguendo.
Shaw is congruent with a move made by the Court in other Equal Protection areas, applying heightened scrutiny to so-called “benign,” as well as maligned, legislative uses of race in the redistricting context.

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

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

From this third novel feature of the Shaw claim, a partial answer may be tentatively suggested to the Regester question of which elements of Whitcomb are necessary to a claim of racial vote dilution: Shaw implies that a racial minority population must be geographically compact to suffer racial vote dilution. This may be inferred because a racial minority population which is not geographically compact could only be

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74 Id. at 514-515.

captured in a majority-minority district which was bizarrely-shaped. Any such district, after Shaw, would be vulnerable to Equal Protection attack. However, the fact that Shaw did not actually apply strict scrutiny review to District 12, but instead remanded for that purpose, suggests reason to note that an interpretation suggesting a geographical compactness requirement on the basis of Shaw alone can only be tentative. This is because it remained a theoretical possibility after Shaw that District 12 would be upheld under strict scrutiny review because narrowly tailored to the compelling government interest of compliance with §2, and so geographical compactness might not be required after all. Moreover, it is important to note that Shaw’s answer to the first Regester question is only partial for the same reason that it is tentative: because the Court did not apply strict scrutiny review to District 12, the Court did not have to address the questions of whether District 12 was a proper remedy for some harm of racial vote dilution to the population in the north-central region of the State, and so did not fully identify the characteristics of a racial minority population which are necessary for it to suffer racial vote dilution.

(ii) Shaw II

The next piece of the Regester puzzle was put in place in Shaw v. Hunt (Shaw II). In Shaw II, the Court returned to North Carolina District 12 to apply the strict scrutiny review which the Court had deemed proper in Shaw. The facts of both cases were thus identical, save only for the fact that in the interim, the District Court hearing the case on remand had concluded that District 12 did not violate the Constitution because it was narrowly tailored to the compelling government interest of compliance.

with the VRA.\textsuperscript{77} In Shaw II, the Supreme Court reversed the District Court.\textsuperscript{78} The Court presumed, 	extit{arguendo}, that compliance with §2 of the VRA\textsuperscript{79} was a compelling government interest for the use of race in redistricting,\textsuperscript{80} but found that District 12 was not narrowly tailored to that end. This was because District 12 did not remedy the racial vote dilution of the population in the south-central to southeastern region of the State, where the Attorney General had suggested creation of a majority-minority district.\textsuperscript{81} To argue otherwise – that strengthening the votes of blacks of one region of the State could stand-in for dilution in another region - would be to essentialize on the basis of race, meaning presume that the votes of blacks are fungible because all blacks vote the same.\textsuperscript{82} Such an over-generalization is in violation of the Equal Protection Clause.\textsuperscript{83}

Because the Shaw II Court was forced to address the constitutionality of substitution of majority-minority districts, two important pieces emerge in answer to the question of what elements of Whitcomb are necessary to racial vote dilution claims. First, the tentative answer of Shaw I, that geographical compactness is required, may be confirmed. This is because the Court examined District 12 to see whether it was narrowly tailored to the remedy of racial vote dilution of blacks in the south-central to southeastern region of the State. The Court thus implicitly dismissed the possibility that District 12 might remedy racial vote dilution of blacks in the region which was actually

\textsuperscript{77} \textit{Id.} at 901.
\textsuperscript{78} \textit{Id.} at 899.
\textsuperscript{80} Shaw II, 517 U.S. at 915.
\textsuperscript{81} \textit{Id.} at 915-17.
\textsuperscript{82} Gerken, \textit{supra} note 16, at 1693-94. Indeed, there is language is Shaw which suggests this concern was lurking even there, though it was not explicitly held to invalidate District 12. See Shaw v. Reno, 509 U.S. 630, 647 (1993) (“[Bizarre districts] reinforce[] the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.”).
\textsuperscript{83} \textit{See Shaw}, 509 U.S. at 647.
encompassed by District 12.\textsuperscript{84} It may thus be inferred that the Court considers populations such as the blacks of District 12 which are \emph{not} geographically compact to be incapable of suffering racial vote dilution.

Second, \textit{Shaw II} suggests that substitution is unconstitutional where the substitute district is not clearly a political substitute for the geographically compact population deprived of a majority-minority district. This understanding comes out of the Court’s reliance on the anti-essentialism principle to invalidate District 12. This principle is only properly invoked if it is claimed that, under §2, District 12 must be a \textit{political} substitute for a majority-minority district in the south-central to southeastern part of the State. If §2 permits District 12 to be merely a race-based substitute, meaning that one black majority-minority district is swapped out for another, then the anti-essentialism principle is improperly invoked, because there is no harm in the generalization that all blacks are black.\textsuperscript{85} The use of the anti-essentialism principle thus manifests a heightened political cohesion requirement for a racial minority group to suffer racial vote dilution. This is clear because it only makes sense to require the substitute district to be politically cohesive with the deprived population if the deprived population is itself internally politically cohesive.

I refer to this political cohesion requirement as “heightened” because some threshold degree of racial minority political cohesion is necessary to the existence of racially polarized voting. If, for instance, a black population was in no way politically cohesive, it would be impossible for a white population to systematically oppose the

\textsuperscript{84} \textit{Shaw II}, 517 U.S. at 916 (“District 12 could not remedy \emph{any} potential § 2 violation.” (emphasis added)).

\textsuperscript{85} This claim might be challenged if different conceptions of “black” are taken into account between the first and second instance of the word “black” in the phrase “all blacks are black.” I do not consider such complexities here, because the law of racial vote dilution does not examine issues of race at this level of nuance.
black population’s political preferences. The requirement of *Shaw II* must be greater than this for the following reason: if racially polarized voting existed at the State level in North Carolina, which it did, then the blacks across the entire State were presumptively politically cohesive in the minimal sense that their preferences permitted comprehensive white opposition. If only this threshold degree of political cohesion were required, then application of the anti-essentialism principle in *Shaw II* would have been improper, given State-wide racially polarized voting in North Carolina. As a result, use of the anti-essentialism principle in *Shaw II* must be understood to signal a requirement of some heightened degree of political cohesion among racial minority populations in order to suffer racial vote dilution.

(iii) *LULAC*

In *League of United Latin American Citizens (LULAC) v. Perry*, the Court provided the most recent piece of the *Regester* puzzle. In *LULAC*, the Court was faced with a challenge to a Texas reapportionment plan that dismantled one safe Latino district, District 23, for the purpose of protecting an incumbent in the region. The Texas State legislature simultaneously created a new safe Latino district, District 25, as a substitute to comply with §2. In terms of Latino geographical compactness, former District 23 and new District 25 were substantially similar: both spanned several hundred miles between Latino communities at the bookends of the districts. However, neither former District

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89 *LULAC*, 126 S. Ct. at 2657 (Roberts, J., dissenting).
23 nor new District 25 was bizarrely-shaped – both represented what have been called “bacon-strip districts,” which were considered “inevitable, given the geography and demography of that area of the State.” As a result, the case did not implicate Shaw claims and so was not primarily concerned with geographical compactness.

The Court’s focus, as evidenced in Justice Kennedy’s opinion for the majority, was trained instead on the socio-economic and ethnic characteristics of the relevant racial minority populations. New District 25 was divided between two discrete Latino populations which were socio-economically and ethnically disparate, while former District 23 had captured a fairly socio-economically and ethnically homogenous Latino population. New District 25 thus lacked what has been termed “cultural compactness,” whereas former District 23 had not. It was largely for this reason that the Court struck down new District 23: new District 25, because lacking in cultural compactness, could not be a constitutional substitute for former District 23. As Justice Kennedy stated, “We emphasize it is the enormous geographical distance separating the Austin and Mexican-border communities [of new District 25], coupled with the disparate needs and interests of these populations--not either factor alone--that renders District 25 noncompact for §2 purposes.”

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90 Id. at 2655 (Roberts, J., dissenting) (citation omitted).
91 Id. at 2618 (“The Latinos in the Rio Grand Valley and those in Central Texas . . . are ‘disparate communities of interest,’ with ‘differences in socio-economic status, education, employment, health, and other characteristics.’” (citation omitted)).
92 Id. at 2619 (“There has been no contention that different pockets of the Latino population in old District 23 have divergent needs and interests, and it is clear that, as set out below, the Latino population of District 23 was split apart particularly because it was becoming so cohesive.”).
93 Pildes, supra note 88 (manuscript at 7, on file with author).
94 Id. (manuscript at 5, on file with author) (“Justice Kennedy’s concerns about this district [District 25] . . . appear to have driven his invalidation of District 23, rather than the other way around.”).
95 LULAC, 126 S. Ct. at 2619 (emphasis added).
much the same degree of geographical noncompactness as new District 25, the fact of cultural noncompactness must be understood as driving Justice Kennedy’s opinion.

Having determined new District 25 to be culturally noncompact, the fact that Justice Kennedy declined to invalidate District 25 is a bit perplexing. In fact, Justice Kennedy’s rebuke of District 25 was so strong that Justices Souter and Ginsburg, the critical votes in giving Justice Kennedy a majority, mistakenly believed that District 25 had, in fact, been struck down.96 However, Justice Kennedy’s invalidation of new District 23 instead of new District 25 should not be taken to detract from the core addition of \textit{LULAC} to the law of racial vote dilution. As Professor Pildes notes,

\begin{quote}
[F]rom a legal perspective, the least Justice Kennedy’s approach might mean…is that the Act is not violated [meaning there is no racial vote dilution] even when there is racially polarized voting unless an election district can be created in which minority voters are not just a numerical majority, but in which the district is also geographically and culturally compact.97
\end{quote}

The idea here is that Justice Kennedy imputed a cultural compactness requirement just as certainly by invalidating new District 23 as he might have done by invalidating new District 25: the reason for both actions would have been the same, that new District 25 could not substitute for former District 23 because it was lacking cultural compactness. If the Latinos of new District 25 were not culturally compact, then new District 25 could not be culturally compact with the Latinos of former District 23, and because the

\begin{footnotes}
96 Pildes, \textit{supra} note 88 (manuscript at 7-8, on file with author).
97 \textit{Id.} (manuscript at 8, on file with author).
\end{footnotes}
substitution of majority-minority districts was therefore invalid, new District 23 represented an instance of racial vote dilution.

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

(B) Court Doctrine on the Second Question Left Open in *Regester*

The Court has not yet resolved in a decisive way the question of what evidence under the *Regester* Factors must prove, whether discriminatory State intent or racial animus in the voting public. However, the Court’s holding in *LULAC* suggests that the law of racial vote dilution is moving towards a State intent requirement. In this Subpart, I will begin by discussing the case law prior to *LULAC*, in which the doctrine was very much undecided. I turn then to discuss the implications of *LULAC* on this question.
(i) Doctrinal Indeterminacy Prior to LULAC on the Question of State Intent

In the 1980 case of *City of Mobile v. Bolden*, the Court turned racial vote dilution law on its head by imputing the formal State intent requirement which *Washington v. Davis* announced for Equal Protection claims in 1976 into the racial vote dilution context. The factual backdrop of *Mobile* was substantially similar to *Whitcomb* and *Regester*: black plaintiffs in Mobile, Alabama, sued the city, claiming that the electoral structure of its city commission, which elected three members at-large, unconstitutionally diluted the black vote. The *Mobile* plaintiffs represented a natural district population and presented evidence under the *Regester* Factors that “no Negro had ever been elected to the City Commission… [and] that city officials had not been as responsive to the interests of Negroes as to those of white persons.” Furthermore, it must be noted that Alabama has a lengthy and nefarious history of racial discrimination against blacks in the voting context, which is evidentiary under the *Regester* Factors, as well. Nonetheless, the Court denied relief.

The *Mobile* holding worked a significant disruption of racial vote dilution law because the Court not only imputed a State intent requirement into the law of racial vote dilution, it also held that *Regester* Factor evidence was insufficient to support an inference of discriminatory State intent. As a formal matter, the *Mobile* Court claimed fidelity to *Regester* and nowhere explicitly overruled it. However, in reversing the lower

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100 *Mobile*, 446 U.S. at 58-59.
101 Id. at 71.
102 See, e.g., Giles v. Harris, 189 U.S. 475 (1903) (concerning the Alabama Constitution of 1901 which grandfathered-in white voter registration and made black voter registration contingent on meeting numerous invidious obstacles); see also Gomillion v. Lightfoot, 364 U.S. 339 (1960) (striking down a 1957 enactment by the Alabama State legislature which redefined the city of Tuskegee so as to exclude blacks from residence and so political participation in city government).
court’s finding of racial vote dilution, the Mobile Court held that the lower court’s reliance on Zimmer v. McKeithen\textsuperscript{103} represented legal error.\textsuperscript{104} This must be seen as an attack on Regester, because Zimmer and Regester stand for the same thing: “[i]n the lower court effort to apply the Whitcomb/Regester principles . . . [Zimmer represented] the most important touchstone.”\textsuperscript{105} Zimmer elucidated the Regester Factors, and if anything presented a more comprehensive list of types of evidence which might give rise to an inference of political exclusion on the basis of race.\textsuperscript{106} As a result, the Court’s attempt to uphold Regester while rejecting Zimmer is nonsensical. Regester was, for all intents and purposes, overturned.

However, Mobile was not the final word on the intent/effects question. The Mobile holding sparked considerable public outcry, notably from civil rights groups, and in 1982, such groups were successful in lobbying for Congressional remedy.\textsuperscript{107} Congress responded by amending §2 of the VRA under its Fourteenth Amendment §5 powers. As amended, §2 reinstated Regester’s totality of the circumstances test\textsuperscript{108} and listed the Regester Factors as the determinative evidence in the Senate Judiciary Committee Report which accompanied the amendment.\textsuperscript{109} Here the matter has stood with respect to the elements of a §2 claim of racial vote dilution: plaintiffs do not need the sort of evidence which would be required by either Mobile or Davis standards to make out a claim of vote dilution under §2. Whether Regester Factor evidence is understood to give rise to an inference of racial animus on the part of the State or the voting public remains an open

\textsuperscript{103} 485 F.2d 1297 (5th Cir. 1973) (en banc).
\textsuperscript{104} Mobile, 446 U.S. at 73.
\textsuperscript{105} Issacharoff, Karlan & Pildes, supra note 22, at 689.
\textsuperscript{106} Id.
\textsuperscript{107} Id. at 713-14.
\textsuperscript{108} 42 U.S.C.S. 1973c.
question in §2 claims,¹¹⁰ but it is clear that some combination of the evidentiary elements of Whitcomb and Regester is sufficient to succeed on a claim of racial vote dilution.

However, the State intent question was significantly complicated by the Court’s opinion in City of Boerne v. Flores,¹¹¹ which postdates the 1982 amendment to §2. The context of Boerne was as follows. In the case of Employment Division v. Smith, the Court held that a showing of discriminatory State intent is required to assert a First Amendment challenge to State action which interferes with the free exercise of religion.¹¹² Congress responded with the Religious Freedom Restoration Act (RFRA),¹¹³ which, notably, was modeled on amended §2 of the VRA’s response to Mobile, both in its substantive content and procedural enactment.¹¹⁴ In Boerne, the Court struck down the RFRA as in excess of Congress’ Fourteenth Amendment §5 powers. This was justified by the separation of powers principle, dating to Marbury v. Madison,¹¹⁵ that the Court is the final arbiter of questions of Constitutional interpretation.¹¹⁶ Boerne required that any congressional enactment under §5 of the Fourteenth Amendment be marked by “congruence and proportionality” to the relevant Court Fourteenth Amendment doctrine.¹¹⁷ This requirement of congruence and proportionality means that Congress must produce a substantial record when legislating under its §5 powers to show not only that Congress is employing the same conception of constitutional harm as the Court, but

¹¹⁰ Legislative history suggests that Congress was itself uncertain of what Regester Factor evidence was supposed to prove, whether discriminatory State intent or not. Issacharoff, Karlan & Pildes, supra note 22, at 720-21 (citing Subcommittee on the Constitution hearings on the meaning of the totality of the circumstances test).
¹¹⁵ 5 U.S. 137 (1803).
¹¹⁶ Boerne, 521 U.S. at 536.
¹¹⁷ Id. at 540.
also that the legislative remedy being enacted is proportional to the Court’s understanding of the gravity of the harm.\textsuperscript{118}

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

\textsuperscript{118} \textsc{Issacharoff, Karlan & Pildes}, supra note 22, at 861 (discussing the reason the Court determined the RFRA to fail the congruence and proportionality test).
proportional to *Mobile*, which post-dates *Regester*, or again, racial vote dilution must be excepted from the *Boerne* requirement.

(ii) *LULAC* on the Question of State Intent

In a forthcoming article, Professor Pildes suggests that *LULAC* adds a new wrinkle on the question of State intent in the law of racial vote dilution:

[T]he Court is groping for what seems to be a way to confine the concept of minority vote dilution to cases the Court views as ones of truly intentional state discrimination. The touchstone appears to be the concept of a “naturally arising” minority district, one that exists or would exist due to the geographic concentration of minority voters whose proximity also reflects common socioeconomic and other interests.\(^{119}\)

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

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\(^{119}\) Pildes, *supra* note 88 (manuscript at 22, on file with author).
minority populations which suggest a political threat, and so only failure to draw a
district around such populations gives rise to a presumption of discriminatory intent.

(C) The Likely Consequence of Court Doctrine on the Regester Questions

The Court’s seeming adoption of natural district population and State intent
requirements is likely to result in racial minority under-representation. In this Subpart, I
will first discuss the implications for the natural district population requirement. I will
then examine those for the requirement of State intent.

(i) The Consequences of the Natural District Population Requirement

Before I begin the discussion in this section, I need to define a concept that I will
call “remedial proportionality.” Remedial proportionality is the creation of majority-
minority districts in a number which allows a given racial minority group to elect
candidates of choice in a number proportional to the group’s percentage of the State
population as a whole. So, for example, in a State of population 1000 with a black
population of 100, remedial proportionality would require one safe black district for
every ten districts State-wide.

Turning now to the repercussions of the Court’s doctrine, a natural district
population requirement signals that where racial animus, whether in the State legislature
or the voting public, functions to exclude racial minorities from the political process,
remedial proportionality will not be guaranteed, but will place a cap on the creation of
majority-minority districts. In this sense, proportionality under the Court’s definition of
racial vote dilution is a ceiling but not a floor.
That remedial proportionality is not a floor follows directly from the natural
district population requirement. The natural district population requirement means that
only natural district populations may be drawn majority-minority districts – all other
majority-minority districts will be subject to strict scrutiny under Equal Protection
review, where they are likely to be struck down as in violation of the anti-essentialism
principle. This means that if a given racial minority group’s population is not clustered in
natural district populations of a number which permits remedial proportionality, remedial
proportionality would be held unconstitutional. Taken to the logical extreme, if a given
racial minority group’s population is politically and culturally disjointed and scattered
across a State, the Court’s doctrine may well forbid the drawing of even a single
majority-minority district. Because Regester Factor evidence might still suggest the
political exclusion of a racial minority group on the basis of race in such a scenario, the
natural district population requirement thus permits racial animus to effect under-
representation of racial minorities approaching the vanishing point.

It might be thought that the natural district population requirement could equally
allow for over-representation of racial minority groups. For instance, if racial minority
groups were clustered in natural district populations of sufficient size and number to
permit the creation of majority-minority districts which exceeded the racial minority
group’s population relative to the population of the State as a whole, remedial
proportionality could be exceeded. However, this possibility is foreclosed: remedial
proportionality represents a ceiling on racial minority representation in light of the
Court’s holding in Johnson v. De Grandy. In De Grandy, the Court considered a §2
racial vote dilution claim brought by Cuban-American plaintiffs who represented a

\footnote{512 U.S. 997 (1994).}
natural district population. These plaintiffs had already been allotted a number of
majority-minority districts proportional to their population, but claimed that their size
permitted the drawing of an additional majority-minority district.\textsuperscript{121} This
“maximization”\textsuperscript{122} claim was rejected by the Court, which held that, “[o]ne may suspect
dilution from political famine, but one is not entitled to suspect (much less infer)
dilution from mere failure to guarantee a political feast.”\textsuperscript{123}

The problems with maximization are two-fold. First, because of the zero-sum
game nature of racial politics,\textsuperscript{124} a State could not exceed remedial proportionality for one
racial group without depriving another racial group of its share in violation of the
principle of majority rule. In other words, maximization for one group entails racial vote
dilution for other groups. In \textit{De Grandy}, the racial group threatened by maximization was
black,\textsuperscript{125} but the Court has held that the same principle protects whites against
maximization, as well.\textsuperscript{126} Second, the remedy of maximization is excessive with respect
to the harm of racial vote dilution. In the language of the Court, the remedy of majority-
minority districts is “the politics of second best,”\textsuperscript{127} which is shorthand for the idea that
majority-minority districts stand in for the democratic ideal in which racial animus would
not frustrate cross-racial aggregation and racial minority groups would attain

\textsuperscript{121} Issacharoff, \textit{Groups and the Right to Vote}, supra note 28, at 873-75.
\textsuperscript{122} Id. at 874.
\textsuperscript{124} Issacharoff, \textit{Groups and the Right to Vote}, supra note 28, at 904 (“Once the principle of group
representation is pushed beyond the initial question of the complete exclusion of black representation in at-
large elections, the voting rights analysis of who should be afforded representation in single-member
districts quickly borders on the impossible.”).
\textsuperscript{125} De Grandy, 512 U.S. at 1024 (“[T]he [district] court did not . . . think it was possible to create both
another Hispanic district and another black district on the same map . . . .”).
\textsuperscript{126} United Jewish Organizations of Williamsburg v. Carey, 430 U.S. 144 (1977).
\textsuperscript{127} \textit{De Grandy}, 512 U.S. at 1020 (citation omitted).
representation in proportion to their numbers.\textsuperscript{128} Because any claim that racial minorities would achieve representation beyond their bloc voting strength would be speculative, racial vote dilution does not create a right to maximization, even where the size of a natural district population would permit it.

It is in this sense that remedial proportionality is a ceiling but not a floor given the natural district population requirement: majority-minority districts may be drawn only around natural district populations, but not in a number which represents maximization. As a result, where evidence under the \textit{Regester} Factors suggests political exclusion on the basis of race, except where natural district populations exist in a manner which fortuitously permits the achievement of remedial proportionality, we must expect under-representation of subordinated racial minorities under the prevailing Court definition of racial vote dilution.

(ii) The Consequences of the State Intent Requirement

The requirement of a showing of discriminatory State intent is a notoriously difficult burden for plaintiffs to meet in Equal Protection claims.\textsuperscript{129} However, at first glance, it might seem that the difference between a requirement of State intent and the allowance of claims premised on private discrimination is merely analytic. This is because, in either event, racial vote dilution may be proven under the Court’s current doctrine with some combination of the elements of \textit{Whitcomb} and \textit{Regester} evidence; the more demanding requirement of proving State intent under \textit{Davis} and \textit{Personnel}

\textsuperscript{128} Id. at 1017 (“However prejudiced a society might be, it would be absurd to suggest that the failure of a districting scheme to provide a minority group with effective political power 75 percent above its numerical strength indicates a denial of equal participation in the political process.”).

Administrator of Mass. v. Feeney\textsuperscript{130} adopted in Mobile has seemingly been abandoned.\textsuperscript{131} But such an understanding of a State intent requirement would be mistaken for two reasons. First, if State intent is indeed to be proven through a combination of the Regester Factors and evidence of a natural district population as LULAC suggests, then the sort of under-representation which follows from a natural district population requirement, described above, will follow from a State intent requirement, as well. If a natural district population requirement is justified on this ground alone, because, as I will argue in the next Part, a natural district population cannot otherwise be justified under the Constitution, then a State intent requirement would make a real difference by denying the floor of remedial proportionality where appropriate.

Second, under Boerne, a State intent requirement would be susceptible to the challenge that permitting racial vote dilution claims premised on Regester Factor evidence and evidence of a natural district population is not congruent and proportional to the Court’s holding in Mobile. This means that the constitutionality of §2 would turn on whether Congress could produce sufficient findings to suggest that failure to draw a majority-minority district around a natural district population presenting Regester Factor evidence is highly correlated with discriminatory State intent in the process of redistricting. The problem is that no such findings have ever been systematically amassed.\textsuperscript{132} In 1982, Congress did not seem to know what the Regester Factors were

\textsuperscript{130} 442 U.S. 256 (1979).
\textsuperscript{131} Under Davis and Feeney, plaintiffs are required to produce evidence to show that a given State action was taken “‘because of,’ not merely ‘in spite of’” a discriminatory outcome. Feeney, 442 U.S. at 279. This creates a much more stringent burden on plaintiffs, because it denies relief to plaintiffs who would be able to prove under the Regester Factors that “the combination of an electoral structure and historical and social factors” rendered the quashing of the racial minority vote foreseeable in the case of a given apportionment. Mobile, 446 U.S. at 111 (Marshall, J., dissenting).
\textsuperscript{132} Professor Karlan argues to the contrary that ample evidence of intentional State discrimination prompted amendment of the VRA in 1982, and that Congress needed to cast a wide net via federal law to ensnare all
supposed to prove. The Congressional motive was not nuanced in this regard, but was instead a blunt one: to side-step Mobile and return the law of racial vote dilution to the Regester totality of the circumstances test.\textsuperscript{133} Moreover, in 2006, when Congress renewed the VRA, no comprehensive findings were recorded to suggest a correlation between a combination of evidence of a natural district population and the Regester Factors, on the one hand, and discriminatory State intent on the other.\textsuperscript{134}

It is not my purpose here to suggest that §2 would be struck down under Boerne; I intend only to show that §2 is vulnerable to Boerne challenge, and that the continuing vitality of §2 would therefore depend on the ability to either deny the applicability of Boerne or to meet congruence and proportionality requirements, both of which suggest real obstacles. If §2 were to fall, then the law of racial vote dilution would revert to Mobile, as that opinion has not been touched by the Court. This would mean that even a natural district population presenting Regester Factor evidence would not be entitled to an inference of discriminatory State intent, and instead, plaintiffs would face the more daunting task of proving racial vote dilution under the standards of Davis and Feeney, which would significantly stunt the viability of such claims, resulting in less racial minority representation. This is not a problem faced by the opposing view – that only

\textsuperscript{133} See supra note 107 and accompanying text. Nonetheless, my argument for the vulnerability of §2 does not hinge on the necessity of finding §2 unconstitutional, but only on the risk. That Professor Karlan presents a strong argument for §2’s constitutionality does not undermine this risk.

\textsuperscript{134} E-mail from Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law, to Avram D. Frey, Student, New York University School of Law (April 9, 2007, 10:05 EST) (on file with author).
private racial discrimination must be proven – because such a view might preempt Boerne applicability by arguing that Mobile was wrongly decided.

Part III. Constitutional Attack of Court Doctrine Answering the Questions Left Open in Regester

In this Part, I attempt to provide constitutional arguments for rejecting the Court’s answers to the questions left open in Regester. It is my position that the Constitution does not require the under-representation of racial minorities, but just the opposite. In Subpart (A), I begin by challenging the notion that racial vote dilution should be defined as entailing a requirement of State intent. In this manner, I attempt to foreclose the justification for a natural district population requirement which Professor Pildes identifies as motivating Court doctrine in LULAC. In Subpart (B), I turn to the question of whether other justifications may be provided for a natural district requirement. Ultimately, I conclude that none exist under the Constitution.

(A) Constitutional Arguments Against the Requirement of State Intent

In this Subpart, I attempt to defend a position which rejects the Court’s holding in Mobile, essentially arguing that the Davis State intent requirement is improperly applied to the context of racial vote dilution. This argument rests on two constitutional hooks. The first comes out of interpretation of the Court’s opinion in United States v. Carolene Products Co. The second stems from the position taken by Justice Marshall in his Mobile dissent, that the State intent requirement is properly applied to the suspect classification strand of Equal Protection law, not the fundamental rights strand, which

135 304 U.S. 144 (1938).
covers racial vote dilution. I then discuss a group of voting cases called *The White Primary Cases* as exemplary of the Court’s own recognition of the uniqueness of the voting context with regard to a State intent requirement.

(i) *Carolene Products*

In *United States v. Carolene Products Co.*,\(^{136}\) the Court departed from the *Lochner* era view of the Court as “super-legislature” to adopt the current practice of broad deference to the legislative branch.\(^{137}\) The Court’s decision reflects respect for democratic principles, giving voice to the idea that the will of the majority should be given priority over the beliefs and values of unelected judges.\(^{138}\) This holding manifests the rule of law ideology that the best prevention against substantive harms is procedural: the political process provides a better means of achieving substantive fairness in the law than the case-by-case review of substantive policies by courts.\(^{139}\) However, in Footnote 4 of the Court’s opinion, Justice Stone recognized three circumstances in which deference to the legislative branch would be improper: protection of enumerated rights, correction of political process failures, and protection of “discrete and insular minorities.”\(^{140}\) These circumstances represent instances in which the political process cannot be trusted to make substantively fair law. In such circumstances of process failure, the Court must play a more active role in policing substantive outcomes.\(^{141}\)

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\(^{136}\) *Id.*


\(^{138}\) *Id.*

\(^{139}\) Issacharoff, *Polarized Voting and the Political Process*, supra note 2, at 1866-68 (citing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)).

\(^{140}\) *Carolene Products*, 304 U.S. at 153 n.4.

\(^{141}\) Ackerman, *supra* note 137 at 715 (“Whereas the Old Court had protected property owners who enjoyed ample opportunity to safeguard their own interests through the political process, the New Court would accord special protection to those who had been deprived of their fair share of political influence.”).
The philosophy of *Carolene Products* suggests rejection of a State intent requirement in the voting rights context. Racial vote dilution, as Professor Issacharoff has noted, touches on two on the Footnote 4 triggers for heightened judicial involvement: election law, and discrimination against discrete and insular minorities.\(^{142}\) The logic of requiring judicial involvement regardless of discriminatory State intent is straightforward: if the political process is the preferred protection of substantive fairness, then fairness must be secured *ex ante* in the substantive law of election structures, particularly where fairness concerns touch upon discrete and insular minorities. As Professor Issacharoff notes, “there [can] be [no] reliance on the political process to protect or restore minority voting rights.”\(^{143}\) If the Court were to take a passive role in the law of democracy, then the protection provided by the vote would be “an empty form.”\(^{144}\)

The *Davis* model is an outgrowth of *Carolene Products*: it suggests trust in substantive outcomes which emerge from a legislative body free of the taint of discriminatory intent.\(^{145}\) However, just as *Carolene Products* does not suggest deference without exception, the *Davis* presumption of fairness must not be understood to hold across the board. Instead, following *Carolene Products*, an exception must be carved out for the political process. In this sense, far from *Davis* requiring proof of discriminatory intent in the context of election law, the logic of *Davis* would seem to entail the viability of election law claims regardless of State intent to insure an equally effective vote across racial lines. Only if all races have an equally effective vote can their be any merit to

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\(^{143}\) Issacharoff, *Polarized Voting and the Political Process*, supra note 2, at 1866.

\(^{144}\) Giles v. Harris, 189 U.S. 475, 488 (1903).

legislative deference on issues which result in racially disparate impact in non-voting contexts. This logic was powerfully voiced by Dr. Martin Luther King, Jr.:

Give us the ballot, and we will no longer have to worry the federal government about our basic rights. . . . Give us the ballot and we will fill our legislative halls with men of good will. . . . Give us the ballot and we will help bring this nation to a new society based on justice and dedicated to peace.146

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

(ii) Justice Marshall’s *Mobile* Dissent

In *Mobile*, Justice Marshall rooted his dissent in the following argument: the State intent requirement of *Davis* is properly applied in claims which fall under the strict scrutiny strand of the Equal Protection clause; racial vote dilution claims fall under the fundamental rights strand of the Equal Protection clause, and so application of the *Davis* standard is improper.147 Suspect classification Equal Protection doctrine comes out of

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

But racial vote dilution claims fall under the fundamental rights strand of Equal Protection law; this strand of the Equal Protection Clause protects infringements upon rights which the Court has deemed fundamental over the years, such as the right to travel, the right to equal access to criminal procedure, and the right to vote. Under the fundamental rights strand of the Equal Protection Clause, there is no State intent requirement: strict scrutiny review is triggered wherever a legislative policy has the effect of impinging upon a fundamental right.

The distinction between suspect classification and fundamental rights strands of the Equal Protection Clause is not merely formal; there is a principled reason why Davis might be sensibly applied to the former but not the latter. As Justice Marshall noted, the impetus for the Davis State intent requirement was fear that disparate impact claims would interfere with the government’s determination of how to dole out constitutional

149 323 U.S. 214 (1944).
150 388 U.S. 1 (1967).
152 Mobile, 446 U.S. at 113 (Marshall, J., dissenting).
153 Id. at 118 (Marshall, J., dissenting).
157 Mobile, 446 U.S. at 113-14 (Marshall, J., dissenting).
benefits. \textsuperscript{158} In \textit{Davis} itself, the Court was faced with discrimination in public employment, a benefit to which no citizen enjoys a constitutional right. \textsuperscript{159} But in the case of fundamental rights, the alleged State impingement is upon enjoyment of a constitutional entitlement. For purposes of a State intent requirement, this makes all the difference. A constitutional entitlement to a thing means that denial of that thing for any purpose suggests a remediable harm. Justice Marshall’s \textit{Mobile} dissent quotes Professor Ely for a powerful statement of this point: “It would be a tragedy of the first order were the Court to expand its burgeoning awareness of the relevance of motivation into the thoroughly mistaken notion that a denial of a constitutional right does not count as much unless it was intentional.” \textsuperscript{160} In this manner, the source of law for racial vote dilution claims argues that a State intent requirement is improper as applied to such claims and represents confusion \textsuperscript{161} as to the constitutional significance of what is being protected.

\textbf{(ii) The White Primary Cases}

The special position of the vote with respect to a State intent requirement has been given effect in voting rights jurisprudence. The most prominent examples are \textit{The White Primary Cases}. \textsuperscript{162}

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

At first, in *Nixon v. Herndon*, the Court dealt with a State of Texas mandate that blacks were to be excluded from the Democratic Primary. This was the easy case: State action had clearly discriminated on the basis of race, and the exclusionary act was struck down. In *Nixon v. Condon*, the Court faced a slightly more difficult set of facts. The State of Texas enacted a law which permitted the Democratic Party Executive Committee to determine eligibility for participation in the Democratic Primary, and the Executive Committee subsequently denied eligibility to blacks. The Court struck down the State delegation of authority to the Executive Committee, holding that the distinction between the Executive Committee and State legislators was too formal, given the one-party nature of Texas politics, to deny State action. In *Smith v. Allright*, the Court was

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163 Issacharoff, Karlan & Pildes, supra note 22, at 117 (suggesting that exclusion of blacks was necessary to maintain stability among an otherwise sharply divided State Democratic Party).
164 237 U.S. 536.
165 286 U.S. 73.
166 Id. at 81-82.
167 Id. at 84-85.
forced to go a step further: the Democratic Party nominating convention voted to exclude blacks from the primary, and therefore the act of discrimination was clearly internal to private actors divorced from the State.\textsuperscript{168} The Court responded by fusing the primary election into the general election, holding that the significance of the primary made the two elections a “a single instrumentality for choice of officers.”\textsuperscript{169} Because the general election was a function of State law, this fusion brought the Democratic Primary within the purview of State action.

The final step came in \textit{Terry v. Adams}.\textsuperscript{170} The Texas Jaybird Association was the effective nerve center of the Texas Democratic Party. For years, the Jaybirds had slated the candidates which were ultimately elected.\textsuperscript{171} \textit{Terry v. Adams} concerned the exclusion of blacks by the Jaybirds from their primary, a process at one remove from the Democratic Primary.\textsuperscript{172} The Court could not agree on a principle which could push this private discrimination within the realm of State action. Nevertheless, the Court struck down the exclusion and required that blacks be provided access to the Jaybird nominating procedures.\textsuperscript{173}

In this manner, \textit{The White Primary Cases} manifest the constitutional weight of the right to vote as recognized by the Court. Though First Amendment law protected white discrimination which shut blacks out of the political process, the special importance of the right to vote inspired the Court to bend the law of State intent to insure black access to meaningful political participation. Although the Court could no longer agree on a

\begin{itemize}
\item \textsuperscript{168} 321 U.S. 649, 656-57 (1944).
\item \textsuperscript{169} Id. at 660 (citing \textit{United States v. Classic}, 313 U.S. 299 (1941), for the proposition that the primary may be fused into the general election).
\item \textsuperscript{170} 345 U.S. 461 (1953).
\item \textsuperscript{171} Id. at 484 (Clark, J., concurring) (“Over the years . . . [the Texas Jaybirds’] balloting has emerged as the locus of effective political choice.”).
\item \textsuperscript{172} Id. at 462.
\item \textsuperscript{173} Id. at 469-71.
\end{itemize}
doctrinal footing by the time of *Terry v. Adams*, the majority of the Court recognized the urgency of protecting racial minority voting, even in the face of existing doctrine requiring proof of discriminatory intent. As discussed above, two doctrinal sources have emerged since the time of *The White Primary Cases* to provide a constitutional hook for the Court’s intuition in the *The White Primary Cases*. It is on the basis of these hooks and the Court’s own intuition that I contend that the *Mobile* State intent requirement for claims of racial vote dilution should properly be rejected.

(B) Constitutional Arguments Against the Requirement of a Natural District Population

*Shaw, Shaw II*, and *LULAC* collectively hold that sufficiently large racial minority populations must be geographically, politically, and culturally compact to suffer racial vote dilution. In the preceding Subpart, I attempted to argue that this cannot be justified by appeal to a State intent requirement; that is, a natural district population requirement should not be maintained as necessary to evidence State intent, because a State intent requirement is improper. I turn now to examine whether any other justification for a natural district population requirement is constitutionally sustainable. I wish to proceed here systematically, so I will begin by trying to identify the several types of justifications.

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174 It should be noted that *The White Primary Cases* were presented by the appellees in *Mobile* in opposition to the Court’s adoption of an intent requirement in the law of racial vote dilution. The *Mobile* Court distinguished *The White Primary Cases* from the racial vote dilution context on the grounds that *The White Primary Cases* concerned first generation voting rights claims under the Fifteenth Amendment, as opposed to the second generation voting rights claims under the Fourteenth Amendment at issue in the law of racial vote dilution. City of *Mobile* v. *Bolden*, 446 U.S. 55, 64-65. This is a distinction without a difference. The whole point of the second generation voting rights movement is recognition that the right to vote, without more, means nothing in terms of access to the political process. In this sense, if *The White Primary Cases* embody the principle that State intent doctrine must be bent to accommodate equal access to political participation across racial lines, then that principle must be extended to the law of racial vote dilution.
that might exist for a natural district population requirement. I will then address each potential justification individually, and ultimately conclude that none can withstand close examination.

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

In this vein, the natural district population requirement which originated in Shaw brings strict scrutiny review to so-called benign racial classifications. The use of race in redistricting to create majority-minority districts may seemingly be subjected to heightened scrutiny wherever race is known to be the predominant factor in the creation of a given district, and insofar as the contested district does not capture a natural district population, the district will be held unconstitutional. The natural district population requirement thus brings the law of racial vote dilution within the jurisprudence of “color-

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176 For purpose of clarification, it should be noted that “respect for the integrity of political subdivisions” does not mean respect for cognizable interest group pockets. “Political subdivisions” here refers to geographical locations with a distinct local government structure, such as a city, or a town. The traditional principle of districting entails that such locally governed entities not be split where practicable.
blindness.” Any argument that racial vote dilution is irrespective of geographical, political, and cultural compactness, places the fact of race at the forefront in the definition of racial minority numerical majorities, and subsequently permits the creation of districts with the same racial prioritization. The naked use of race is to be distrusted, according to the theory of a color-blind Constitution, because however seemingly benign, racial classifications may result in cognizable harms. Strict scrutiny review is proper, according to this view, to snuff out the harms which may lurk within seemingly benign legislation. Accordingly, if strict scrutiny review is proper to find and invalidate the creation of majority-minority districts which do not satisfy the natural district population requirement, then it must be possible to link majority-minority districts which do not comply with this requirement to constitutional harm.

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

First, a purportedly preferential race assignment may in fact disguise a policy that perpetuates disadvantageous treatment of its supposed beneficiaries...Second, even in the pursuit of remedial objectives, an explicit policy of assignment by race may serve to stimulate our society’s latent race consciousness, suggesting the

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utility and propriety of basing decisions on a factor that ideally bears no relationship to an individual’s worth or needs…Third…we cannot well ignore the social reality that even a benign policy of assignment by race is viewed as unjust by many in our society, especially by those individuals who are adversely affected by a given classification. This impression of injustice may be heightened by the natural consequence of our governing processes that the most “discrete and insular” of whites often will be called upon to bear the immediate, direct costs of benign discrimination.\footnote{Id. at 172-75 (citations omitted).}

What this means for the natural district population requirement is that it might be sustained by appeal to any of the three harms which Justice Brennan identifies. In other words, the predominance of race in redistricting - manifested by deviation from the natural district population requirement – may justifiably be held unconstitutional if it results in either harm to the intended beneficiary racial minority group, or harm to whites, particularly under-represented whites, or if it results in the societal harm of heightened race-consciousness. I turn now to address each of these harms in turn, and to argue that in the context of creation of majority-minority districts, none of the above harms exist.

(i) Harm to Racial Minorities: The Court’s Anti-Essentialism Principle

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

However, the reasoning of Shaw II and LULAC is logically flawed, because when a State draws a majority-minority district around a non-natural district population, essentialism need never enter the picture.\textsuperscript{183} To see this point, consider the facts of Shaw II. First, the State of North Carolina perceived political exclusion of blacks across the state on the basis of race. Next, to protect against this harm, the State sought to provide remedial proportionality for blacks, which was achieved by the drawing of District 12. At what point in these two steps did the State practice essentialism? The State need not have presumed that the blacks of District 12 all vote the same on the basis of race, nor need it have presumed that District 12 blacks vote the same as the blacks of the natural district population in the south-central to southeastern region of the State. Instead, the State necessarily presumed only the commonality of race - which is ascertained through self-identification in census data - and the weak form of political cohesion manifested by racially polarized voting.\textsuperscript{184} Essentialism would only be involved if it were the case that

\textsuperscript{183} Gerken, supra note 16, at 1731-33.

\textsuperscript{184} Id. Professor Gerken takes the view that my argument here oversimplifies the nature of racial politics by presuming two polar opposites for racial minorities in the political process: inclusion and exclusion. Because, instead, there is a gradient along the axis of exclusion of racial minorities, Professor Gerken contends that racial vote dilution should properly respond with sensitivity to the level of exclusion of different racial minority populations. This assessment requires the remedy of giving voice to specific communities as defined by heightened political cohesion, and as evidenced by geographical and cultural
only racial minority populations of heightened political cohesion may suffer racial vote dilution; only then would the suggestion that District 12 suggests a remedy for racial vote dilution of either the District 12 population or the south-central to southeastern natural district population betray a belief that all blacks vote the same. But this requirement of heightened political cohesion, an element of the natural district population requirement, is itself unsubstantiated. So application of the anti-essentialism principle is question-begging: why must a community be politically cohesive in a heightened sense to suffer racial vote dilution? If the harm of racial vote dilution, as Regester suggests, is political exclusion of a racial group on the basis of race, then it would seem to follow that only the weak form of political cohesion manifested in racially polarized voting would be required.

But the case against application of the anti-essentialism principle as justificatory of a natural district population requirement is even stronger in light of the Court’s holding in United Jewish Organization of Williamsburg (UJO) v. Carey. In that case, the Court was presented with a claim of racial vote dilution brought by Hasidic Jews in a majority black district. Relying on the perhaps contentious view that the Hasidim were racially white, the Court denied relief, holding that whites have no claim under the Constitution compactness, and so requires a degree of essentialism in the creation of majority-minority districts which disregard the natural district population requirement. Id. at 1731-32. This is a strong challenge, but I think it can be met, if only briefly here. There are, indeed, differences in the degree of exclusion of populations within a single racial minority group, and constitutional remedies should be sensitive to the differences along this spectrum. However, it is my contention that wherever Regester Factor evidence suggest a threshold level of exclusion on the basis of race across a jurisdiction, the creation of majority-minority districts to achieve remedial proportionality across the jurisdiction is constitutionally required and entails no essentialism. However, within the framework of remedial proportionality, States should take account of differences across racial minority populations within the same group in terms of both degrees of exclusion and numerical size, the latter in accordance with the principle of majority rule. Therefore, out of respect for both anti-essentialism and the principle of majority rule, States may be required to give preference to natural district populations as the proper place to begin in meeting remedial proportionality.

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

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187 Id. at 165-66.
188 Id. at 166 (“[E]ven if voting in the [challenged district] . . . occurred strictly according to race, whites would not be underrepresented relative to their share of the population. . . [Therefore] the individual voter in the nonwhite majority has no constitutional complaint . . . [because] [s]ome candidate, along with his supporters, always loses.”).
189 Professor Gerken suggests that the Court endorses the anti-essentialist position largely as a result of confusion regarding the aggregate nature of voting rights. Gerken, supra note 16, at 1718. According to Professor Gerken, since the Court has misapplied the individual rights conception of the Equal Protection Clause favored by the Rehnquist Court to the voting context, the right of individuals within a racial minority group suffering racial vote dilution seemingly cannot be said to be protected by creation of majority-minority districts elsewhere without essentialism. Id at 1665-66, 1691. This preference for an individual rights conception of the Equal Protection Clause, Professor Gerken argues, is itself motivated by discomfort with essentialism, because the notion of group rights relies on a notion of sameness across a given group. Id. at 1718. However, in the context of racial vote dilution, as noted in the text accompanying this footnote, there is no essentialism in the definition of relevant racial minority groups: the weak political cohesion required is satisfied not by unconstitutional presumption, but by a showing of racially polarized voting coupled with Regester Factor evidence.

Professor Issacharoff suggests a different causal explanation for the Court’s adoption of the natural district population requirement: fixation on the factual context of multi-member districts. Issacharoff, Groups and the Right to Vote, supra note 28, at 880-88. I read Professor Issacharoff as lending support to the following argument: in the era of multi-member districts, the jurisdictional denominator was sufficiently small that political exclusion was almost by necessity of natural district populations. In the
I conclude that the justification for the natural district population requirement cannot be rooted in Justice Brennan’s first identifiable harm of injury to the intended beneficiary racial minority groups.

(ii) Harm to Whites

It might be argued that the natural district population requirement is a principle which protects the interests of whites. This argument would proceed roughly as follows. When States draw majority-minority districts around non-natural district populations, they must make certain to fill the district with a substantial numerical minority of individuals of a different racial group from the group composing the majority.\textsuperscript{190} This is because a majority-minority district which was, for instance, 100% black, would itself represent unconstitutional racial vote dilution: blacks in such a district would be “packed.”\textsuperscript{191} The Court has determined that a racial minority population need only reach the 65% marker to be safe for a given group within a given district.\textsuperscript{192} A district significantly in excess of 65% is unconstitutionally packed because it “wastes” the votes of the surplus, which might be more effective in another district.\textsuperscript{193} This prohibition of packing thus necessitates the presence of other racial groups in the majority-minority expanded denominator of redistricting, the Court failed to adjust and evaluate the logic of the natural district population requirement as divorced from the question of political exclusion on the basis of race. \textit{Id.}

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


\textsuperscript{191} \textit{Id.}

\textsuperscript{192} ISSACHAROFF, KARLAN & PILDES, supra note 22, at 890.

\textsuperscript{193} \textit{Id.}
district called “filler people,” whose function is that of “electoral fodder,” placed within the minority-safe district for the express purpose of losing while taking up space. It is known in advance that filler people are likely to lose because of racially polarized voting: the State will be aware, for instance, that blacks and whites vote in opposition to each other, so when it fills a 65% black district with 35% whites, the whites can reasonably be expected to lose, unless they cross-over. Because filler people will often be whites, Justice Brennan’s identifiable harm of injury to whites may be manifested in the requirement of filler people in the creation of majority-minority districts: majority-minority districts require the purposeful invalidation of white votes because they are white votes.

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

194 Alienkoff & Issacharoff, supra note 190, at 630-31.

195 Id. at 633.
The first contention, that there is a qualitative difference, is clearly question-begging: the qualitative difference between natural and non-natural district populations is exactly what a justification for the natural district population requirement must prove.

The second possible contention, of a quantitative difference, is initially more compelling. As noted in Part II, the natural district population requirement is likely to cap the number of majority-minority districts which may be drawn at a number below remedial proportionality. In the absence of this requirement, a greater number of majority-minority districts would likely be drawn, and so a greater number of filler people would be required. This avenue is also a dead-end, however, in light of the Court’s holding in *UJO*. In that case, the Court denied relief to the Hasidim because whites enjoyed rough proportionality of representation in the challenged apportionment.\(^{196}\) *UJO* thus stands for the proposition that the rights of racial groups to an effective vote protect the diminution of their group voting power below proportionality, but not against impingement on surplusage. But because of *De Grandy*, it can never be the case that the creation of majority-minority districts will diminish the voting strength of other racial groups below proportionality. The harm which *UJO* recognizes, diminution below proportionality, is effectively safe-guarded by *De Grandy*’s prohibition of maximization. As a result, since no theory of racial vote dilution permits the creation of majority-minority districts above the ceiling of proportionality, there can thus be no argument that injury to whites informs the natural district population requirement.

(iii) The Harm of Raised Racial Consciousness

In their paper, *Expressive Harms, “Bizarre Districts,” and Voting Rights: Evaluating Election District Appearances After Shaw v. Reno*, Professors Pildes and Niemi make the case that the bizarre district at issue in *Shaw* gave rise to a constitutional claim because it resulted in an “expressive”, as opposed to material, harm.\footnote{Pildes & Niemi, supra note 73.} Expressive harms, according to Professors Pildes and Niemi, are administered when government action offends the deeper norms of our society by manifesting “value reductionism.”\footnote{Id. at 500.} Value reductionism happens when State action prioritizes one consideration above all others.\footnote{Id.} This is offensive to the extent that we expect our government to weigh all the relevant factors in legislative decision-making and not privilege one improperly, particularly one such as race to which the notion of a color-blind constitution suggests we ought to attribute value only in the limited circumstances where policy is narrowly tailored to a compelling State interest.

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

In response to this argument, I contend that the constitutional doctrine outside of *Shaw* does not recognize any such thing as a purely expressive harm in the use of race, and that instead, prohibition of value reductionism has been implicated only where linked to material harms. Professors Pildes and Niemi argue against this challenge that *Shaw*
reflects the Court’s war on value reductionism in other areas of Equal Protection law, particularly in the so-called affirmative action context, where the Court has held that Equal Protection norms will not permit that race be the predominant factor. If this is so, then there is a cognizable jurisprudence of expressive harms which may support the natural district population requirement. However, the doctrine to which Professors Pildes and Niemi refer outside of racial vote dilution must be distinguished. In education and employment, the traditional contexts of affirmative action law, the use of race in admissions, hiring, and contracting results in material harms: white people are denied seats in universities and law schools, construction contracts, and teaching positions. In fact, in order to have standing to challenge the use of race in these contexts – unlike in Shaw, where seemingly any person in the State has standing to challenge a bizarre district - a plaintiff must have suffered a material harm. As a result, the more traditional affirmative action doctrine does not suggest a precedent for the recognition of expressive harms proper, because in that doctrine, it is likely that material harms were doing all the work.

Professors Pildes and Niemi suggest another instance of expressive harms outside the context of race in the doctrine which has emerged for the “endorsement test” under the Establishment Clause. In short, the endorsement test holds that government endorsement of religion is an expressive harm. In response, I contend that the

\[\text{\textsuperscript{200}}\text{Id. at 503 (“Justice O’Connor’s opinion in Shaw resonates with Justice Powell’s opinion in } \text{Regents of the University of California v. Bakke.” (citations omitted)).}\]

\[\text{\textsuperscript{201}}\text{See Grutter v. Bollinger, 539 U.S. 306 (2003).}\]

\[\text{\textsuperscript{202}}\text{See Gratz v. Bollinger, 539 U.S. 244 (2003).}\]

\[\text{\textsuperscript{203}}\text{See Adarand Constructors v. Pena, 515 U.S. 200 (1995).}\]

\[\text{\textsuperscript{204}}\text{See Wygant v. Jackson Bd. of Education, 467 U.S. 267 (1986).}\]

\[\text{\textsuperscript{205}}\text{Pildes & Niemi, supra note 73, at 514-15.}\]

\[\text{\textsuperscript{206}}\text{Id. at 511-12 (citing Lynch v. Donnelly, 465 U.S. 668 (1984), as the founding endorsement test case).}\]

\[\text{\textsuperscript{207}}\text{Id.}\]
endorsement test is a poor paradigm for the law of racial vote dilution. This is because 
the endorsement test is premised on a logic which is lacking in the context of racial vote 
dilution. When the government endorses any particular religion, or even religion 
generally over “no-religion,” the government is expressing partiality towards a particular 
class of citizens. The expression itself violates the norm of a divided Church and State 
which is supposed to be essential to impartial government, and so the very expression 
threatens inequality. But when the government acts on the basis of race, nothing can 
necessarily be determined about the values behind such action. In fact, promotion of 
equality may provide the impetus.

But there are two further reasons to reject value reductionism as a justification for 
a natural district requirement. First, the idea that pure value reductionism existed in Shaw 
is unsound. In Shaw, race was decidedly not the central consideration in the State’s 
challenged redistricting plan – incumbency protection was. If race had been North 
Carolina’s first priority, the State would likely have drawn an additional majority-
minority district in the south-central to southeastern region because the Attorney General 
suggested it. By examining District 12 in isolation to note that that district was created 
solely on the basis of race, the Court ironically suggests that it would prefer that North 
Carolina had made race the first concern in the State-wide redistricting so as to avoid the 
outcome of bizarre districts which bring the use of race to the public’s attention. In this 
manner, it becomes clear that the Court’s objection cannot be rooted in true value 
reductionism, but rather stems from discomfort with “apparent” value reductionism.
Second, the Court seems to have abandoned the notion of value-reductionism as the harm underlying the natural district population requirement. As Professor Gerken notes, in the years since Shaw, “[o]nly those opinions written by Justice O’Connor consistently identify Shaw as addressing “expressive” harms . . . and only her first such opinion [Shaw] garnered a majority of the Court.” Professor Gerken’s assessment was written before the Court’s opinion in LULAC, but her prognosis was further reinforced there. The Court seems to have made a decisive move away from the notion of expressive harms towards anti-essentialism as the dominant justification for the natural district population requirement. This shift may be interpreted as the Court’s recognition that purely expressive harms are a poor fit for the context of the use of race in redistricting.

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

Conclusion

In this Paper, I attempt to untie some of the troublesome knots in racial vote dilution doctrine. My purpose is to leave open an interpretation of racial vote dilution

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208 Gerken, supra note 16, at 1692-93.
209 Id. at 1693.
210 Id. at 1693-94.
which will allow for remedial proportionality of racial minority representation where racial animus would otherwise exclude racial minorities from the political process. I do not propose and defend an alternative view: undoubtedly, any such view must face complications and arouse controversies given the political stakes, as well as the close overlap of factors such as race, class, and politics. Nevertheless, where doctrine emerges which is fairly certain to result in judicial complacency in the face of racial minority under-representation, that doctrine must be scoured, challenged, and where flawed, expunged. It is for this reason that I conclude that the Court’s understanding of racial vote dilution has grown disturbingly narrow, and that constitutional and normative arguments suggest a reinterpretation of racial vote dilution going forward.