United Jewish Organizations v. Carey and the Need to Recognize Aggregate Voting Rights

By preventing voters who have a collective interest from combining their votes, the structural characteristics of the electoral process can deny them the opportunity for effective political representation. The Supreme Court has recognized this problem, but it has never fully identified the extent to which the Constitution provides a solution.

In United Jewish Organizations v. Carey, the Court missed an opportunity to define more precisely both the nature of voting rights in general and the state's obligation to prevent debasement of potential political representation in particular. The Court upheld a form of special treatment for minorities—racially conscious redistricting by the state of New York designed to enhance the ability of nonwhites to elect representatives of their choice. Although nearly unanimous in its judgment, the Court was sharply divided over the justification for such a departure from the ideal of equal treatment. By referring several times to the interests of blocs of white and nonwhite voters, however, the plurality implied that racial groups might be able to assert some form of group voting rights.

1. John Stuart Mill recognized the problem faced by minority groups in a representative system:

In a really equal democracy, every or any section would be represented, not disproportionately, but proportionately. A majority of the electors would always have a majority of the representatives, but a minority of the electors would always have a minority of the representatives. Man for man, they would be as fully represented as the majority. Unless they are, there is not equal government, but a government of inequality and privilege: one part of the people rule over the rest: there is a part whose fair and equal share of influence in the representation is withheld from them, contrary to all just government, but, above all, contrary to the principle of democracy, which professes equality as its very root and foundation.

J.S. MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT 146 (New York 1862).


4. Of the participating Justices, only Chief Justice Burger dissented. Justice Marshall took no part in the consideration or decision of the case. 430 U.S. at 146.

5. 430 U.S. at 160-61 (plurality opinion of White, J.) (state may create black majorities to comply with statutory mandate); id. at 166-68 (state may act to alleviate effects of racial bloc voting); id. at 167 (state may not invidiously minimize voting strength of racial or political groups).
This Note argues that the Court should have expanded on these tentative suggestions in *United Jewish Organizations* by recognizing an aggregate right to potential proportional representation for racial groups. Such a holding would have buttressed the Court's reasoning by linking *United Jewish Organizations* with the Fifteenth Amendment's proscription against abridging the right to vote on account of race. Recognition of an aggregate right, moreover, would not compel the Court to endorse racially conscious state action or group rights in contexts that may not share the peculiar characteristics of voting. Nor would enforcement of such a right place onerous administrative burdens on the states or require courts to make political decisions.

I. The Court's Overtures to Group Voting Interests

Without finding that the right to vote is a necessary incident of national citizenship, courts have nevertheless held consistently that once the entitlement to vote has been extended, it may not be denied in a discriminatory manner. Under both the Fourteenth and Fifteenth Amendments, this right to vote was traditionally defined in individual terms as the ability to register, cast a ballot, and have one's vote counted. But this narrow definition of the right to vote proved inadequate to protect even rudimentary privileges of equal repre-

6. See, e.g., United States v. Reese, 92 U.S. 214, 217 (1875) (voiding statute unauthorized by Fifteenth Amendment, which "does not confer the right to vote upon anyone"); Minor v. Happersett, 88 U.S. (21 Wall.) 162, 171 (1874) (rejecting claim for women's suffrage and noting that "the Constitution has not added the right of suffrage to the privileges and immunities of citizenship").


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sentation in a democratic system. As the courts sought to remedy persistent problems, they found themselves impelled to protect group aspects of voting as well.

The Supreme Court dramatically expanded the notion of voting rights in *Reynolds v. Sims* by deriving the “one man, one vote” doctrine from the Fourteenth Amendment. The Court held that state legislative districts must be substantially equal in population, because anyone living in a relatively overpopulated district suffers “dilution” of his vote. But the Court failed to make clear whether the type of voting right entitled to protection under the one man, one vote principle was an individual right to affect the outcome of elections and influence legislators or a group right to equal representation. Most cases after *Reynolds v. Sims* have treated the “dilution” problem as exclusively affecting individual voting rights, and even under this limited view courts have declined to accept the full implications of the “full and effective participation” standard.

10. See, e.g., United Jewish Organizations v. Carey, 430 U.S. 144, 167 (1977) (state may not invidiously minimize voting strength of racial or political groups); White v. Regester, 412 U.S. 755, 766 (1973) (constitutional violation if political process not equally open to all groups).
11. 377 U.S. 533 (1964). *Reynolds* held that where legislative districts are not substantially equal in population, voters are denied equal protection of the laws. *Id.* at 568. Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964), had previously held that U.S. Const. art. I, § 2 requires that congressional districts be equal in population. The Court had already held that the problem of equality of representation was a justiciable issue and not a political question. Baker v. Carr, 369 U.S. 186 (1962).
12. 377 U.S. at 555.
13. The Court relied on precedent treating voting rights primarily as individual. See 377 U.S. at 754-55 (citing cases). In individual terms, a voter in a disproportionately large district theoretically has less of a chance to affect the outcome of a vote or to exert influence on the legislator after election than does his counterpart in a smaller district.
14. By requiring population equality among voting districts, *Reynolds v. Sims* facilitated equalization of group interests in voting, even though these interests were defined by geography rather than race. Specifically, the apportionment scheme struck down in *Reynolds* as a violation of equal protection systematically favored rural groups over the more rapidly expanding urban interests. *Id.* at 543, 567 n.43, 580; cf. 43 Tex. L. Rev. 236, 238 (1964) (*Reynolds* interpreted as holding that states may not use balancing between rural and urban interests as excuse for unequal districts).
17. In Whitcomb v. Chavis, 403 U.S. 124 (1971), the plaintiffs argued in part that the individual right to vote is diluted in any system that includes districts of varying sizes, even when some districts are represented by several legislators to take account of their relatively large size. They reasoned that voters in the larger, multimember districts have
Even if the Court had endorsed a principle of absolute theoretical equality among individual voters, equal representation would not be guaranteed, since manipulations of the electoral process such as gerrymandering can minimize the political power of a group and can undercut the one man, one vote standard. If, for example, district boundaries are drawn so that nonwhite voters are scattered among many districts but do not constitute a majority in any, the special interests of these voters may be denied representation. Having the same theoretical chance of affecting the outcome of an election as other voters in districts of equal size is of little consequence if racial bloc voting ensures that a nonwhite minority will never, in fact, influence any election.

In White v. Regester the Court, responding to this tension between individual and group interests in voting, took a tentative step toward a constitutional mandate for group representation. The Court found that an apportionment system including multimember districts impairs the potential for effective representation of black and Hispanic voters. These minorities could probably have elected their favored candidates by bloc voting under a system of single-member districts, but they were foreclosed from representation by inclusion in multimember districts with white majorities. This districting system, together with certain balloting rules and a past history of discrimi-
nation, ensured election of only white representatives. The Court found that these factors combined to deny representation to minority groups. The decision thus suggested that effective participation might entail at least some assurance of potential representation for group interests.

The suggestion has never ripened into doctrine. Although continuing to refer in general terms to "effective representation," the Court has found a violation of equal protection only where a class of voters has carried the extraordinary burden of showing that it will be totally excluded from representation. This hesitance to act on the broad implications of Regester results from a concern that the concept of group political representation may not be easy to limit—that the clamor of multitudinous racial, religious, ethnic, and po-

23. The Court in Regester pointed to the discriminatory effects of "place rules" and the requirement of a majority vote as a prerequisite to nomination. Id. at 766. Place rules pair-off candidates on the ballot so that they must engage in head-to-head contests. Id. at 766. Under alternative rules the candidates with the highest overall vote totals would fill the available seats. In the latter scheme, minorities have a chance of electing representatives if the majority splits its votes among many candidates, but the place rules ensure that minorities will be less able to take advantage of dissension within the majority during the first round of primaries.

Although the Court alluded to the history of discrimination as a factor in its decision, id. at 766, it did not clarify the relation between past constitutional violations and the fairness of the present political system. The Court may have been considering the practical effects of past discrimination in discouraging racial minorities from participation and the likelihood that informal barriers to political activity would remain. In order to ensure that minority participation would be facilitated, it was not enough to remove official discrimination while forcing nonwhites to seek a voice in predominantly white districts.

24. Id. at 765.

25. Id. at 765-66 (political processes "not equally open to participation" may invidiously cancel out or minimize voting strength of racial groups). At least one case prior to Regester had treated the right to vote in terms of the effectiveness of group expression. Williams v. Rhodes, 393 U.S. 23 (1968) (excessive petition requirement for placing minor party on ballot upset). Nevertheless, it was far from clear that Regester signaled a complete endorsement of a group effectiveness principle. See Casper, supra note 21, at 111 (case simply "a temporary 'corrective action,' a slight departure from the ordinary denial of a right to representation to specific segments of the population").

26. The retrenchment after Regester has been evident in the leeway that the Court has given states to consider political factors in designing electoral systems. For example, states are permitted to consider political party affiliation in apportionment, Gaffney v. Cummings, 412 U.S. 735 (1973), and to impose obstacles to the placement of independent candidates on the ballot, Storer v. Brown, 415 U.S. 724 (1974).

27. See, e.g., Chapman v. Meier, 420 U.S. 1, 17 (1975) (disproportionate actual representation insufficient without proof that minorities are denied access "equal to the access of other groups"). Lower courts have followed the Supreme Court's lead. See, e.g., Ferguson v. Winn Parish Police Jury, 528 F.2d 592, 597-98 (5th Cir. 1976) ("bizarre" plan upheld in absence of showing of invidious discrimination); Kendrick v. Walder, 527 F.2d 44, 48 (7th Cir. 1975) (minority voters required to demonstrate actual impact of electoral system). Cf. Comment, Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence, 41 U. Cin. L. Rev. 398, 406-09 (1974) (plaintiffs required to show actual denial of effective representation).
political groups for effective representation might draw the courts into a futile effort to restructure state political systems to maximize the political potential of all groups simultaneously.\textsuperscript{28}

The courts have failed to recognize that the Fifteenth Amendment provides an alternative basis for a principle of political effectiveness that preserves voting rights where they are most fragile without threatening traditional representation systems. By its terms, the Fifteenth Amendment prohibits the denial or abridgment of voting rights on account of race.\textsuperscript{29} Thus if courts apply the Fifteenth Amendment rather than the equal protection clause where racial groups are involved, they will avoid an uncontrolled expansion of the effectiveness principle to countless interest groups. Because of the Fifteenth Amendment's strict command to protect voting interests from abridgment and its applicability only to racial classifications, groups seeking its protection should not be saddled with the inflexible requirement of showing total exclusion from the political process. Rather, they should be able to assert an aggregate right to political processes that provide, to the greatest extent possible, for potential proportional representation of racial groups.

II. United Jewish Organizations: An Opportunity Missed

In \textit{United Jewish Organizations v. Carey},\textsuperscript{30} the Supreme Court neglected a chance to recognize the existence of an aggregate right and thus failed to resolve the uncertainties that persisted after \textit{Regester}. Certain counties in the state of New York were required by section 5 of the Voting Rights Act of 1965\textsuperscript{31} to submit to the United States Attorney General any reapportionment plans.\textsuperscript{32} The Justice Department had rejected a 1972 plan because New York had failed to prove that the apportionment would not have the effect of abridging the right to vote on account of race, in view of past use of a literacy test.\textsuperscript{33} A revised plan issued in 1974 received Justice Department approval because it enlarged black population majorities in certain districts to

\textsuperscript{28} See note 94 infra.

\textsuperscript{29} "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

\textsuperscript{30} 430 U.S. 144 (1977).

\textsuperscript{31} Any state or political subdivision that had utilized a "test or device" for screening potential voters and that had a turnout of less than 50% of "persons of voting age" in the 1968 Presidential election was subject to the provisions of the Act. 42 U.S.C. § 1973b(b) (1970).

\textsuperscript{32} 430 U.S. at 148-49.

\textsuperscript{33} Id. at 150.
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sixty-five percent to reflect the overall population ratio. The revised plan split the Williamsburgh district containing a community of Hasidic Jews among several state senate and assembly districts. Under both the 1972 plan and previous apportionments, this community had been contained in a single senate and assembly district. The Hasidim charged that the new plan's dilution of the value of their vote contravened their Fourteenth and Fifteenth Amendment rights as white voters.

The Court upheld the constitutionality of the plan, but the Justices divided in their reasoning. Justice White's plurality opinion treated the use of racial criteria as the threshold constitutional issue and sustained the state's use of racial considerations as in compliance with section 5 of the Voting Rights Act of 1965. Apart from his reliance on the statute, Justice White argued that the state's attempt in redistricting was necessary to achieve a fair allocation of political power among racial groups. Both of the plurality's rationales provide indirect support for recognizing an aggregate voting right: the statutory reasoning is insufficient without it, and the constitutional approach alludes to group interests in voting though it does not appreciate their full constitutional significance.

A. The Statutory Argument

1. Reasoning of the Plurality in United Jewish Organizations

The plurality opinion relied heavily on section 5 of the Voting Rights Act of 1965, which applies to states and their subdivisions that have in the recent past utilized literacy tests and experienced low elec-

34. Id. at 152.
35. 430 U.S. at 152; Brief for Petitioners at 6, id.
36. 430 U.S. at 152-53. In dismissing the complaint, the court below held that the plaintiffs had no equal protection claim as representatives of the Hasidic community. United Jewish Organizations v. Wilson, 510 F.2d 512, 520-21 (2d Cir. 1975), aff'd sub nom. United Jewish Organizations v. Carey, 430 U.S. 144 (1977). This holding was not challenged on review, and before the Supreme Court the plaintiffs alleged deprivation of their rights only as white voters. Brief for Petitioners at 2, 18-19, 430 U.S. 144 (1977).
37. Justice White wrote the plurality opinion. Justice Stevens concurred in this opinion in its entirety, while Justices Brennan, Blackmun, and Rehnquist concurred in part. Justice Brennan also wrote a separate opinion in which he emphasized the relation between the state's action and the Voting Rights Act. 430 U.S. at 168-69. Justice Stewart, joined by Justice Powell, wrote a separate opinion concurring in the judgment but relying on the plaintiffs' failure to show either that the votes of whites had been undervalued or that the requisite invidious discriminatory purpose was present. Id. at 179-80.
39. 430 U.S. at 165.
toral participation. Section 5 requires these jurisdictions to show that any proposed modifications in electoral procedures do not have the purpose or effect of denying the right to vote on account of race. Modifications not meeting this test may not be implemented. The constitutionality of this extraordinary mechanism has been upheld as a proper response to pervasive patterns of discrimination. The mechanism operates both to remedy past discrimination and to prevent future violations of voting rights.

In applying the Voting Rights Act in United Jewish Organizations, the plurality made three critical steps in its analysis. First, it reasoned that the use of racial criteria may be permissible in designing a remedy for a statutory violation. This step is well supported both by the Voting Rights Act cases cited in the opinion and by precedent developed outside the context of voting rights. Second, the plurality noted that the Justice Department had approved the 1974 plan. It argued that this approval created a presumption that the plan complied with the Act and specifically with the nonretrogression principle of Beer v. United States, which prohibits a reapportionment plan from reducing minority representation. This presumption may be appropriate when determining whether a plan is retrogressive, since the Attorney General is specifically charged with the duty of protecting minority interests from being disadvantaged. But the Attorney General’s role as advocate does not ensure equal zeal in protecting the interests of whites, the allegedly disadvantaged group in this case. The presumption of legitimacy was accordingly unjustified.

The third step in the plurality’s reasoning was that the plaintiffs failed to overcome the presumption of compliance with the Act because they introduced no evidence that the action taken by the state

41. Id. § 1973b(b).
42. Id. § 1973c.
45. Id. at 161.
46. The Court relied in particular on Beer v. United States, 425 U.S. 130, 141-42 (1976) (redistricting using racial criteria approved when minority voting power not reduced), and City of Richmond v. United States, 422 U.S. 358, 370-71 (1975) (racially conscious districting approved as means of preventing annexation from abridging minority voting rights).
48. 430 U.S. at 153.
50. 430 U.S. at 164.
of New York in creating nonwhite majority districts went beyond the requirements of the Act.\textsuperscript{52} The plurality thus concluded that the deliberate creation of nonwhite majority districts in Williamsburgh should be upheld,\textsuperscript{53} and it accepted the specific sixty-five percent guideline used to obtain viable nonwhite majorities.\textsuperscript{54} This reasoning is problematic. By stressing the plaintiffs' failure to show that the 1974 plan enhanced nonwhite voting power\textsuperscript{55} and by assuming that the Attorney General's approval indicated that the plan did not disadvantage nonwhites,\textsuperscript{56} the plurality adopted the improbable assumption that the 1974 plan in fact exactly restored the allocation of political power among racial groups to 1966 levels.\textsuperscript{57} It is more likely either that nonwhite majorities exceeded 1966 levels, consistent with the plaintiffs' claim of being disadvantaged, or that nonwhite voting power was reduced, contrary to the presumption that the 1974 plan complied with the nonretrogression principle. Even if this assumption of exact replication of the prior political balance was warranted in the absence of contrary evidence, the Court was harsh to affirm dismissal of the complaint\textsuperscript{58} when it might have remanded for evidence on this point.\textsuperscript{59}

\textsuperscript{52} Id. at 162-63.
\textsuperscript{53} Id. at 162.
\textsuperscript{54} Id. at 162-64. The plurality found the 65% figure a reasonable estimate of the nonwhite population majority needed to achieve a nonwhite majority of eligible voters. \textit{Id.} at 164.
\textsuperscript{55} Id. at 163.
\textsuperscript{56} Id. at 164 (Attorney General's approval authorized by § 5).
\textsuperscript{57} In redistricting, New York was influenced by the need to meet one man, one vote requirements, the constraints of the Voting Rights Act, and, of course, political considerations. It strains credibility to assume that eight years after the original apportionment, with demographic patterns constantly changing, the state was able to develop a plan that preserved nonwhite majorities exactly as they had been in 1966 and also achieved almost exact population equality. Brief for the United States at 54 (statistical appendix).
\textsuperscript{58} The failure of the plaintiffs to carry a burden of proof would be fatal in most situations. Here, however, the plaintiffs had made out a prima facie case showing violation of Fourteenth Amendment rights. The defendants raised the issue of compliance with the Voting Rights Act as an affirmative defense. Brief for State Respondents at 16. It seems incorrect to reject the plaintiffs' claim for failure to demonstrate that the defense was unavailable. See United Jewish Organizations v. Carey, 430 U.S. 144, 183-84 (1977) (Burger, C.J., dissenting) (lack of evidence on compliance with nonretrogression principle makes remand appropriate). Compare McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (affirmative duty to desegregate schools held full defense for racially conscious plan) with Castro v. Beecher, 429 F.2d 725, 732-33 (1st Cir. 1972) (in equal protection cases involving racial classifications, state bears burden of justification). Although the Court seemed to accept the Attorney General's approval as a prima facie defense, this deference to the Department of Justice was unwarranted. \textit{See} p. 578 & note 51 \textit{supra}.
2. Application of a Least Drastic Means Test in
United Jewish Organizations

The remedies allowed states under the Voting Rights Act must
be limited to prevent states from engaging in invidious discrimination
by exceeding the legislatively required use of racial classifications.
Justice White's plurality opinion in United Jewish Organizations at-
tempted to resolve the conflict between the statutory remedy and the
constitutional proscription against racial classifications by assuming
that New York's use of racial criteria was presumptively valid. Once
it has been shown that the plurality's assumption of validity was un-
warranted, an alternative means of reconciling statutory and constitu-
tional requirements must be found that can justify the decision in
United Jewish Organizations. Without recognizing an aggregate right
to vote, the Court could only have upheld a statutory remedy that
was the least drastic means for correcting violations of voting rights,
and the redistricting in United Jewish Organizations failed to meet
such a test.

To guard against overstepping the constitutional boundary, two re-
quirements should be met before a remedial action made pursuant to
the Voting Rights Act can be upheld. Since the state's action can be
justified only in terms of its corrective or preventive effect, the ju-
diciary first should disregard state concerns unrelated to past or po-
tential statutory violations. In United Jewish Organizations, New
York met this subject matter limitation because it offered no justi-
fication for its redistricting beyond those relating to protection of
minority voting interests.

The Court also should impose a more specific nexus requirement
that obligates the state to show that its corrective action is necessary

60. The Court has always used special care in scrutinizing classifications based solely
on race because such distinctions contravene both the doctrine of equality, Hirabayashi
v. United States, 320 U.S. 81, 100 (1943) (wartime curfews upheld despite racial criteria
only because of extraordinary circumstances), and American social traditions, Bolling v.
Sharpe, 347 U.S. 497, 499 (1954) (racially segregated schools contrary to tradition of equal
treatment), and conflict with the central purpose of the Fourteenth Amendment, Hunter
v. Erickson, 393 U.S. 385, 395 (1969) (referendum requirement for fair housing legislation
disadvantages minorities); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (interracial
cohabitation). In most circumstances racial criteria are irrelevant to any permissible legis-
lative purpose, id. at 192; Hirabayashi v. United States, 320 U.S. 81, 100 (1943).

61. In the context of voting rights, the Supreme Court previously overturned a court-
imposed remedy in part because less drastic correctives might have been available.
disestablishing multimember district system).

62. For example, the state could not assert as a justification the benefits racial redis-
tricting might have in protecting the seats of incumbent legislators.
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to meet the requirements of the Act. This nexus limitation should be a constitutional necessity because of the potential impact of racial classifications on vital interests in voting. As the Court acknowledged in United Jewish Organizations, redistricting affects the ability of groups to have a voice in governance. Unless a state were obligated to show that its action is the least drastic means for remedying or preventing violations of the Act, it would have a free hand to re-allocate political power to the disadvantage of racial groups, a power contrary to the spirit of the equal protection clause. The Voting Rights Act does not provide such open-ended authority.

63. In contexts other than voting, courts have allowed remedies based on explicit racial classifications where there has been a finding that past discrimination imposes a duty on the state for complete eradication of a wrong, but where the violation has been fully eliminated additional race-conscious state action cannot be required. Compare Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976) (plan disadvantaging whites necessary to remedy specific, individual violations of employment rights of minorities) and McDaniel v. Barresi, 402 U.S. 39, 41 (1971) (upholding race-conscious desegregation plan designed by school board) with Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 427, 435-36 (1976) (district court exceeded authority by enforcing desegregation order after constitutional violation fully remedied) and Milliken v. Bradley, 418 U.S. 717, 744-45 (1974) (multidistrict remedy inappropriate where constitutional violation occurred in single school district).

64. The Supreme Court's failure to date to recognize the constitutional necessity for a nexus limitation for remedies under the Voting Rights Act can be attributed to the dearth of cases in which it has considered the substantive requirements of § 5. The Court acknowledged in Beer v. United States that it was considering for the first time the criteria that a legislative reapportionment would have to meet under § 5. 425 U.S. 130, 139 n.11 (1976). It had previously held, consistent with the nexus limitation, that a ward system fairly reflecting potential nonwhite voting strength would be permissible as necessary to prevent a municipal annexation from undervaluing minority political power in the enlarged city. City of Richmond v. United States, 422 U.S. 358, 371 (1975).

65. 430 U.S. at 162 (plurality opinion of White, J.) (bolstering black majority necessary means for ensuring opportunity to elect black representatives).

66. See note 84 infra (discussing extraordinary justification required to uphold racial classification).

67. The Act does provide for extraordinary remedies. The Court has upheld the constitutionality of suspending existing literacy tests and reviewing proposed changes in the electoral processes of covered states before they become effective. South Carolina v. Katzenbach, 383 U.S. 301, 324, 333-35 (1966) ("As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.") It has also been held that the Act's purpose is to "eliminate the discriminatory effects of the past as well as bar like discrimination in the future." Louisiana v. United States, 380 U.S. 145, 154 (1965). This mandate has been relied upon to justify the establishment of racial quotas. See Comment, Reverse Discrimination: The Balancing of Human Rights, 12 Wake Forest L. Rev. 852, 862 (1976).

The Court's approval of the exceptional remedies provided in the Voting Rights Act was based, however, on extensive legislative factfinding that bears little relation to the circumstances in United Jewish Organizations. See Oregon v. Mitchell, 400 U.S. 112, 132-33 (1970) (opinion of Black, J.) (literacy tests used extensively to disenfranchise nonwhites); South Carolina v. Katzenbach, 383 U.S. at 313-15 (review mechanism was justified by widespread evasion of court orders). These findings provide no justification for the redistricting in United Jewish Organizations, since Congress made no findings that districting had been so widely used as a discriminatory device that compensatory racial redistricting
Three types of relationships between a remedy and a violation of voting rights can occur. As the link between the state’s action and the statutory purpose weakens, use of a racial classification begins to take on a “suspect” character. First, the most direct relationship occurs when the state’s remedy corrects the violation that triggered application of section 5. Such an immediate nexus to protection of a constitutional right ensures validity. The districting plan in United Jewish Organizations was not a remedy of this type since the plan was not necessary for correction of New York’s triggering violations—use of a literacy test and failure to print ballots in Spanish for the benefit of Hispanic voters. The individual rights of access to the ballot box violated by these devices had been secured by eliminating the literacy test and printing the required ballots, leaving no further impediments to voter registration.

Second, the remedy may be unrelated to the initial violation but necessary to prevent additional changes in the electoral system from abridging voting rights. Such state action falls clearly within the ambit of the Act’s purpose, but its link to specific constitutional or statutory protections may be problematic. Remedies of this sort have nonetheless been upheld on a number of occasions. To find that the

would be warranted. Hence, the Court’s heavy reliance in United Jewish Organizations on its prior decisions was inappropriate.

The Act, moreover, cannot empower the Attorney General to command the states to undertake a course that Congress itself could not force upon them. The Voting Rights Act is narrowly circumscribed by constitutional limits on federal intervention in state electoral affairs. The Constitution grants to the states the power to set voter qualifications, U.S. Const. art. I, § 2, cl. I, and Congress’s ability to legislate in this realm is confined to enforcement of Fourteenth and Fifteenth Amendment rights. See Oregon v. Mitchell, 400 U.S. 112, 125-26 (1970) (opinion of Black, J.) (state power to set voter qualifications limited only by specific constitutional amendments); id. at 122 (no qualification more important to Framers than geographical qualification embodied in districting).

68. Cf. McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (racial classification not sufficiently related to legitimate state purpose to validate law against interracial cohabitation); Hirabayashi v. United States, 320 U.S. 81, 100 (1943) (racial discriminations that are “irrelevant” are prohibited) (dictum).

69. 430 U.S. at 148; id. at 184 n.2 (Burger, C.J., dissenting).


Redistricting, moreover, does not affect the right to register, but reallocates political power among voters who are already registered. Hispanics, who were largely responsible for triggering coverage of the Act because of the failure to print ballots in Spanish, were not aided by the 1974 plan. See 430 U.S. at 184 n.2 (Burger, C.J., dissenting). Cf. Torres v. Sachs, 381 F. Supp. 309 (S.D.N.Y. 1974).

71. See City of Richmond v. United States, 422 U.S. 358 (1975); City of Petersburg v. United States, 354 F. Supp. 1021 (D.D.C. 1972) (three-judge court), aff’d mem., 410 U.S. 962 (1973). In both cases the annexation of largely white areas by these cities threatened to result in the submergence of the black majority of the old city in a political structure wholly controlled by the white majority of the enlarged city through an at-large voting system. In order to preclude such an effect, the municipalities were obligated to engage in districting that would not undervalue nonwhite political power in the expanded cities.
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state's action in *United Jewish Organizations* was of this type would have required the Court to hold that reallocation of voting power in favor of nonwhites was necessary to prevent future abridgment. Unfortunately, the Court sidestepped this issue and merely noted the lack of proof that New York did more than the Attorney General could require it to do.72 This assertion fails to allay the suspicion that New York's redistricting plan was a remedy of a third type—unrelated to the triggering violation and only tenuously related to obtaining the Attorney General's approval of the proposed changes—and would be unnecessary to prevent the abridgment of voting rights. Actions of this third type are constitutionally suspect and their endorsement by the Court would indicate a general willingness to accept racially conscious redistricting.73

This ambiguity in the plurality's statutory argument—the failure to decide whether the remedy was of the second or third type—suggests lingering uncertainty concerning the full reach of the Voting Rights Act. Without explicitly saying so, the Justices implied that affirmative enhancement of a traditionally underrepresented minority's voting power comes within the spirit of the Act and thus the ambit of the Fifteenth Amendment.74 But the form of analysis used to reach this result, through its failure to scrutinize carefully the relation between statute and remedy, carries the danger of conferring on states a broader discretion in the use of racial criteria than equal protection permits. This danger could have been eliminated had the Court formally recognized an aggregate voting right.

72. 430 U.S. at 162-63.

73. The plurality was unclear as to the limits it would place on a state's use of race in redistricting. The most reasonable reading of the plurality opinion is that enhancement of a minority's voting power is compelling and permissible so long as no other disadvantaged groups lose political power as a result. The problem then becomes one of determining which groups have been previously disadvantaged and can consequently object to changes that affect them adversely. In *United Jewish Organizations*, the interests of Jewish voters were considered insufficient to afford them a constitutional claim. 430 U.S. at 153. Had the state designed the 1974 plan to enhance the voting power of Jews, disadvantaged nonwhite voters could have challenged it, but it is an open question whether objections could have been raised by Italians, Irish, or other identifiable groups in Brooklyn.

74. In upholding the constitutionality of the Voting Rights Act, the Supreme Court found that the statute was promulgated to satisfy the command of the Fifteenth Amendment. *South Carolina v. Katzenbach*, 383 U.S. 301, 309 (1966). Later, the Court upheld one section of the Act as an enactment enforcing Fourteenth Amendment equal protection. *Katzenbach v. Morgan*, 384 U.S. 641, 652-53 (1966) (upholding elimination of English literacy tests for Spanish-speaking residents educated in American-flag schools). Finally, the Court split over the basis for upholding a suspension of all literacy tests. Some Justices relied on the Fourteenth Amendment, *Oregon v. Mitchell*, 400 U.S. 112, 118 (1970) (opinion of Black, J.) (also adopted Fifteenth Amendment rationale); *id.* at 144-45 (opinion of Douglas, J.), while others based their conclusion exclusively on the Fifteenth Amendment, *id.* at 216 (opinion of Harlan, J.); *id.* at 255-56 (opinion of Brennan, J.); *id.* at 282 (opinion of Stewart, J.).
B. The Court's Constitutional Analysis

The subsequent section of the plurality opinion put aside the statutory justification and held that even without the Act's authorization the redistricting did not contravene the Constitution. The reasoning supporting this conclusion is ambiguous, but two theories are discernible: either the plan did not abridge the rights of white voters or the state had a compelling interest in distributing political power proportionately among racial groups.

In supporting its finding that the redistricting did not violate the rights of white voters, the plurality vacillated between two conceptions of voting. First, the opinion emphasized that individual rights of whites had not been affected by the reapportionment: they did not suffer a racial slur nor were they "fenced out" of the political system. Such observations fail to support the result in United Jewish Organizations, however, because reallocation of political power among groups by changes in the electoral system can violate voting rights even when individuals are not barred from participating in the resulting system.

Since New York's use of race as a criterion in redistricting unquestionably made it easier for nonwhites and correspondingly more difficult for whites to elect representatives, the plaintiffs' complaint made a prima facie showing of a state-imposed disability based on race that should have been sufficient to withstand a motion to dismiss.

Second, the plurality reasoned that white voters had no constitutional complaint because they had more than a proportional share of seats in the state legislature. This rationale, by focusing on rela-

75. 430 U.S. at 166 ("whites would not be underrepresented relative to their share of the population") (plurality opinion); id. at 179-80 (record could "not support a finding that the redistricting plan undervalued the political power of white voters relative to their numbers in Kings County") (Stewart, J., concurring).

76. 430 U.S. at 167 (plurality opinion of White, J.) (characterizing state as seeking "to achieve a fair allocation of political power").

77. 430 U.S. at 165. Had the United Jewish Organisations opinion focused exclusively on individual aspects of voting, the absence of a "fencing out" of white voters would have been sufficient justification for affirming dismissal of the complaint. However, the plurality acknowledged its concern with group aspects of voting by reference to minimization of voting strength and fair representation for racial groups. 430 U.S. at 167-68.

78. See note 71 supra (citing cases).

79. See Loving v. Virginia, 388 U.S. 1, 8 (1967) (racial classification inherent in ban on interracial marriage not only raises equal protection cause of action but also triggers strict scrutiny); United States v. Jefferson County Bd. of Educ., 372 F.2d 836, 878 (5th Cir. 1966), modified en banc, 380 F.2d 385 (5th Cir.), cert. denied, 389 U.S. 840 (1967) (to avoid conflict with equal protection clause, classification denying benefit, causing harm, or imposing burden must not be based on race); Moss v. Stamford Bd. of Educ., 350 F. Supp. 879, 881-82 (D. Conn. 1972) (despite absence of explicit racial classification, motion to dismiss equal protection claim denied where busing plan burdens minority on account of race).

80. 430 U.S. at 165-66.
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tive white and nonwhite voting power, implied some recognition of a group interest in voting. Although the opinion did not make clear why the possible overrepresentation of white voters necessitated rejection of their equal protection claim, there are several possible rationales.

The plurality might have considered the impact of redistricting on an overrepresented group too insignificant to constitute an injury to voting rights. This approach departs from traditional equal protection analysis. Since voting rights are generally accorded great protection, the opinion must have been focusing not on the type of interest affected, but on the degree of impact that the state's action had on this interest. If the plurality was in fact characterizing the impact on voting in this case as insubstantial in spite of an explicit racial classification, however, it was implying that "overrepresented" groups could explicitly and intentionally be disadvantaged because of their race. Furthermore, the plurality's reasoning has uncertain consequences. The opinion in United Jewish Organizations provides few guidelines for limiting review of the "substantiality" of the impact

81. The plurality equated the complaint of the plaintiffs with that of any voter whose candidate loses at the polls. Id. at 166. The opinion thus implied that despite the presence of race-consciousness in United Jewish Organizations, the plaintiffs' claims were no more cognizable than those of any group that failed to gain representation for any reason whatever. Cf. Whitcomb v. Chavis, 403 U.S. 124, 153 (1971) (mere failure at polls is not evidence of constitutional violation).
82. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 336 (1972) (right to equality of participation in electoral system fundamental, constitutional right).
83. Stigmatic harm alone has been found sufficient to subject state action to strict scrutiny. See Brest, Foreword: In Defense of the Anti-Discrimination Principle, 90 Harv. L. Rev. 1, 8-10 (1976). The closest that the Supreme Court has come to rejecting a racially based equal protection claim on the ground that the harm was minimal was in Palmer v. Thompson, 403 U.S. 217 (1971), when it permitted the closing of municipal swimming pools, despite allegations that the closings were designed to avoid integration. Palmer and United Jewish Organizations are distinguishable, however. In Palmer the effect was nondiscriminatory; neither whites nor blacks could use the municipal pools. In United Jewish Organizations the ongoing state action had a deliberately disproportionate effect: nonwhite voting power was enhanced at the expense of white voting power.
84. Racial classifications traditionally create a presumption of unconstitutionality. Hunter v. Erickson, 308 U.S. 388 (1960) (singling out fair housing laws for referendum discriminates against racial minorities); Loving v. Virginia, 388 U.S. 1, 10 (1967) (statute forbidding interracial marriage violates equal protection); see Dixon, The Supreme Court and Equality: Legislative Classifications, Desegregation, and Reverse Discrimination, 62 Cornell L. Rev. 494, 503-04 (1977) (racial classification imposing detriment on affected group upheld only once in history by Supreme Court); Emerson, Malapportionment and Judicial Power, 72 Yale L.J. 64, 74 (1962) (suggesting that racially conscious redistricting would be impermissible).
85. See Ely, The Constitutionality of Reverse Racial Discrimination, 41 U. Chi. L. Rev. 723, 727 (1974) ("It is not 'suspect' in a constitutional sense for a majority, any majority, to discriminate against itself"). The Supreme Court has never explicitly endorsed such a doctrine.
to the context of voting rights, since the general concept of "over-
representation" might apply to other interests as well. 86

A second possible rationale is that even if the state's action had an
adverse effect on voting rights, overrepresentation of the plaintiffs
would permit application of a lower degree of judicial scrutiny to the
redistricting. 87 This approach also departs from the usual form of equal
protection inquiry. Under the customary two-step process, the Court
initially determines whether the state action uses a racial classification
or affects a fundamental interest and thus requires strict scrutiny. 88
If strict scrutiny is appropriate, as it was in United Jewish Organiza-
tions, the Court then conventionally shifts its focus to the state in-
terest to determine if it is a compelling one justifying the apparent
discrimination. 89 In United Jewish Organizations, however, the Court
seemed to view overrepresentation of white voters as a factor that could
counteract the triggering effect of a racial classification, since it ap-
plied less than strict scrutiny to the redistricting plan from the outset. 90

Finally, the plurality might have found the state's interest in the
redistricting sufficient to overcome the plaintiffs' claims regardless
of the level of scrutiny applied. 91 Although more consistent with tra-
ditional forms of equal protection analysis, this approach has serious
problems of implementation. The opinion would permit a state to

86. For example, a variety of factors has led to "overrepresentation" of whites in
higher education and in employment. See, e.g., Bakke v. Regents of University of Cali-
ifornia, 18 Cal. 3d 54, 553 P.2d 1152, 1169, 132 Cal. Rptr. 690, 697 (1976), cert. granted,
97 S. Ct. 1098 (1977) (underrepresentation of nonwhites in medical school not sufficient
to show past discrimination); Associated Gen. Contractors of Mass., Inc. v. Alshuler,
490 F.2d 9, 18 (1st Cir. 1973), cert. denied, 416 U.S. 957 (1974) (continuing racial imbalance
in employment, even where history of past discrimination, only justifies remedy related
to desired end). Were the Court to adopt the insubstantial impact approach implicit
in the United Jewish Organizations opinion, whites would be unable to claim a violation
of equal protection if public schools or employers adopted quota systems, since the im-
pact on their interests as members of the overrepresented group would be deemed
insubstantial.

87. By drawing support from cases involving the right to representation for political
groups rather than racial minorities, the plurality implied that the state's action in
United Jewish Organizations should be subjected only to low level scrutiny, 430 U.S. at 167.

88. See Shapiro v. Thompson, 394 U.S. 618, 629-31 (1969) (fundamental right to travel
triggers strict scrutiny); McLaughlin v. Florida, 379 U.S. 184, 191-92 (1964) (racial clas-
sification in prohibition against interracial cohabitation subject to strict scrutiny); De-
velopments in the Law—Equal Protection, 82 HARV. L. REV. 1065, 1076-1132 (1969) (com-
paring two tests of "restrained review" and "active review").

89. See, e.g., Dunn v. Blumstein, 405 U.S. 330, 335 (1972).

90. 430 U.S. at 167. See Note, Discriminatory Purpose Under the Equal Protection
Clause: Washington v. Davis, Arlington Heights, Mt. Healthy, and Williamsburgh, 12
HARV. C.R.-C.L. L. REV. 755, 755 (1977) (Court in United Jewish Organizations applied
"lower-tier scrutiny").

91. By emphasizing the importance of providing a "fair allocation of political power," the
plurality implied that the state's interest in racial redistricting to alleviate the con-
sequences of bloc voting might be a compelling one. 430 U.S. at 167-68.
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claim a compelling interest in readjusting political power among racial groups by providing for at least temporary overrepresentation, as through designation of "minority representatives." Moreover, the plurality did not explicitly confine its reasoning regarding proportionality to the area of voting rights. The plurality's failure to provide detailed guidelines on the general issue of reverse discrimination and the imminence of its decision in Bakke v. Regents of the University of California indicate that it did not intend in United Jewish Organizations to endorse all types of racially compensatory programs. Yet none of the opinions provides support for singling out voting as an interest appropriate for racial classification. Finally, the Court's logic does not prevent extension of the state interest to enhancement of the political power of any previously disadvantaged group, whether defined by race or by some other criteria.

III. United Jewish Organizations Resolved: The Source and Justification for an Aggregate Right

The Court might have resolved the statutory and constitutional issues more adequately in United Jewish Organizations by recognizing an aggregate voting right for racial groups. This right would have

92. If a racial group has historically been underrepresented, a state could make an argument that it has an interest in facilitating overrepresentation of that group for some period of time to enable it to develop a political base and work for the passage of the substantive legislation of which it has been deprived. Similarly, a state could argue that it has a compelling interest in actual proportional representation of racial groups, since such a plan would ensure that minority representatives would be able to reflect the wishes of their constituencies in legislative assemblies. But see Chapman v. Meier, 420 U.S. 1, 17 (1975) (suggesting that claim by minorities to actual proportional representation would be dismissed) (dictum).


94. Dissenting from the court of appeals decision in the United Jewish Organizations case, Judge Frankel noted the impossibility of districting in a manner that would provide proportional power to all of Brooklyn's racial, ethnic, and religious groups, since the groups may be scattered and many individuals may fall into more than one category. United Jewish Organizations v. Wilson, 510 F.2d 512, 533-34 (2d Cir. 1974), aff'd sub nom. United Jewish Organizations v. Carey, 430 U.S. 144 (1977). Cf. Kirksey v. Bd. of Supervisors, 402 F. Supp. 658, 677 (S.D. Miss. 1975), rev'd en banc, 554 F.2d 139 (5th Cir. 1977) (impossibility of confining proportional representation to racial groups). In Paige v. Gray, 399 F. Supp. 459 (M.D. Ga. 1975), vacated and remanded, 538 F.2d 1108 (5th Cir. 1976), the court recognized the danger inherent in basing reapportionment decisions on the Fourteenth Amendment. In order to nullify a plan that would have disadvantaged Negro voters, the court relied exclusively on the Fifteenth Amendment and Gomillion v. Lightfoot, 364 U.S. 339 (1960). See 19 Howard L.J. 177, 178 (1976).

95. Chief Justice Burger charged that the United Jewish Organizations plurality's definition of racial blocs was overbroad. 430 U.S. at 185 (Burger, C.J., dissenting). Whatever the truth of this assertion in the context of that case, it does not mean that racial groups entitled to claim an aggregate right could not be identified. Blacks, whites, American Indians, and Orientals are certainly racial groups within the intention of the
provided the Court with a substantial reason for rejecting the claims of overrepresented white voters in that case: protection of the interest of white voters in overrepresentation would deny to nonwhites their constitutional right not to be underrepresented. The aggregate right would also provide the basis for defining precisely a state's authority to alter its electoral structure, since the state would have not only a compelling interest but also a duty to secure proportionality in potential voting power among racial groups.

A. The Constitutional Basis for an Aggregate Voting Right

The recognition of the aggregate right is a novel proposition; it requires extension of the Fifteenth Amendment beyond original or current understanding of its scope. But such an extension is consistent both with the broad remedial concerns of the Amendment and with democratic theory. The framers of the Amendment undoubtedly conceived of it primarily in terms of individual rights. This perception was based at least in part on the belief that a guarantee of the individual franchise would suffice to enable racial groups to attain the equality they had previously been denied. Nonetheless, the framers included in the Fifteenth Amendment a proscription against "abridgment" as well as "denial" of the vote. This reflects an understanding that substantial restraints, explicit or subtle, on any racial group's political participation were to be within the reach of the Amendment.

Many current theories of participation in the political process support


95. See W. Gillette, supra note 95, at 50 (objective of amendment simple franchise; provisions for banning literacy tests and poll taxes and for guaranteeing right to hold office voted down); U.S. Cong. Globe, 39th Cong., 1st Sess. 2767 (1866) (Sen. Howard) (reference to abridgment in U.S. Const. amend. XIV § 2 is "not an abridgment to a caste or class of persons, but the abridgment or the denial applies to the persons individually").

96. J. Mathews, Legislative and Judicial History of the Fifteenth Amendment 21-22 (1909) (wide belief that universal suffrage antidote to all political ills; task of federal government to secure universal equality in political rights).

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port the proposition that group access to legislative representation is fundamental to significant political participation. Group rather than individual expression is the primary source of political influence. Under a representative system, in contrast to a direct democracy, the danger arises that selection of delegates could operate to deny some groups the ability to combine their votes in order to exert any influence. In these circumstances it is not enough merely to ensure individual minority group members the right to cast a ballot.

Race remains a dominant form of social division, and barriers erected by representational schemes undeniably can and do interfere with representation of racial minorities. The Court should thus recognize that structural barriers to minority representation constitute "abridgment" of the right to vote, and it should give effect to the broad purposes of the Fifteenth Amendment by endorsing an aggregate voting right.

Although the Fifteenth Amendment provides a basis for the aggregate voting right, it also marks the boundaries of such an entitlement. Since the aggregate right is properly confined to racial groups, it should be enforced only where bloc voting is established by evidence

99. See, e.g., Banzhaf, supra note 17, at 1310-11 (implying that actual representation depends on existence of ethnic blocs); Casper, supra note 15, at 32 (Court's notion of representation "multifaceted" and includes representation of racial or ethnic interests); Dixon, The Court, The People, and "One Man, One Vote," in REAPPORTIONMENT IN THE 1970s 7, 18-19 (N. Polsby ed. 1971) (representation depends on relation of voter to "partisans" with similar interests).

In addition, testimony at congressional hearings concerning the extension of the Voting Rights Act indicated that Congress now recognizes the importance of proportionality. Senator Bayh, one of the sponsors of renewal of the Act, remarked that appraisal of a proposed change in electoral processes should involve consideration of whether such changes afford minorities "representation roughly equivalent to their voting strength."


100. See Casper, supra note 21, at 105, 109 (mere individual vote does not entail representation, which depends on shared interests).

101. See note 9 supra (citing authorities).

102. Statistical analyses demonstrate that voters cast their ballots along racial lines. P. Abramson, Generational Change in American Politics 22, 71 (1975) (race is the one enduring cleavage in American electorate, more dramatic than class differences, and growing in importance); W. Flanagan & N. Zingale, Political Behavior of the American Electorate 70 (5d ed. 1968) (of all socioeconomic variables, only membership in minority racial group good predictor of voting). Of course, some voters will cross racial lines to form coalitions with respect to certain issues, but this does not vitiate the characterization of race as a more important cleavage in American voting than such factors as class identity. Indeed, the force of the racial factor is demonstrated by the frequency with which candidates play upon racial identification to gain election. See U.S. Comm'n on Civil Rights, The Voting Rights Act: Ten Years After 155-60 (1975) (reporting difficulties faced by minority candidates in overcoming racial appeals) [hereinafter cited as The Voting Rights Act].

103. Efforts to extend the Fifteenth Amendment to cover discrimination based on "race, color, nativity, property, education, or religious belief" were voted down by Congress. W. Gillette, supra note 95, at 58-62.
that racial groups differ sharply from one another in their electoral behavior across a wide range of issues and candidates. Unless racial groups have common interests that would otherwise be denied expression, extension of the aggregate right lacks significance. Identification of bloc voting and enforcement of the aggregate right is unlikely to undercut the spirit of the Fifteenth Amendment by exacerbating racial divisions. On the contrary, it will encourage other groups to join minorities in coalitions and encourage candidates to appeal to racially nondivisive issues as the political power of nonwhite groups rises to a level commensurate with their size.

B. Potential Conflicts with Precedent

This newly formulated aggregate voting right can be reconciled with existing precedent, though it does not emerge directly from the case law. The nonretrogression principle in Beer v. United States

104. See pp. 599-600 infra (outlining mechanics of identifying bloc voting).
105. See City of Petersburg v. United States, 354 F. Supp. 1021, 1025 (D.D.C. 1972) (three-judge court), aff'd mem., 410 U.S. 962 (1973) ("The simple transformation of a potential black voting majority into a clear minority has no effect on relative racial voting strengths unless votes are cast along racial lines."). Cf. Dove v. Moore, 539 F.2d 1152, 1155-56 (8th Cir. 1976) (charge of discriminatory effect of at-large voting rejected where "blacks and whites alike have rejected race as the overriding criterion in voting.").
106. The Court should not ignore the existence of bloc voting, even if it may be an undesirable phenomenon. In United Jewish Organizations, Justice White noted that bloc voting by race is not rare. 430 U.S. at 166 (plurality opinion). This is consistent with the findings of the United States Civil Rights Commission that "many white voters refuse to vote for black candidates solely because of their race." The Voting Rights Act, supra note 102, at 155-56. Cf. Beer v. United States, 425 U.S. 130, 144 (1976) (White, J., dissenting) (bloc voting "fact of life").

The increased political power of racial minorities that would flow from recognition of the aggregate right would promote racial harmony. Politically impotent minorities become alienated from the government and often resort to protest and violence, further increasing their political isolation. R. Dahl, Pluralist Democracy in the United States: Conflict and Consent 451-52 (1967) (cycle of political alienation and violence); W. Flanagan & N. Zingale, supra note 102, at 183-84 (blacks discouraged by failure of government programs losing trust in political process). Thus, actions taken to reduce political inefficacy will also reduce the chance of disruptive behavior and racial hostility. In addition, because the individual voting right is unaffected by districting, there is no incentive to make decisions about residential location based on legislative boundary lines. Only persons for whom successful political participation rather than representation is the overriding concern would base residential choice on an apportionment plan. Such persons might include potential candidates for office and active political campaigners.

If minority groups develop political strength, they will attract attention from other groups seeking to form coalitions. P. Abramson, supra note 102, at 71-72 (blacks sought out by white groups for political alliances).

108. The Civil Rights Commission has noted that enhanced minority political power has led to a decline in racial appeals by candidates. The Voting Rights Act, supra note 102, at 155. But cf. The Supreme Court, 1970 Term, 85 Harv. L. Rev. 135, 142 (1971) (arguing that proportional representation is potentially inconsistent with spirit of compromise); Comment, supra note 27, at 400 (noncompetitive, fixed constituencies inconsistent with ideal political system).

109. 425 U.S. 130 (1976). In Beer the City of New Orleans reapportioned its city council so that blacks were likely to elect at least as many councilmen as they had
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invalidates only reapportionments that reduce minority voting power and thus, because it would protect disproportionate allocations of power from effective challenge so long as current levels of underrepresentation or overrepresentation were maintained, seems inconsistent with proportionality of voting rights. The Court in *Beer*, however, explicitly linked the nonretrogression principle to statutory requirements of the Voting Rights Act and suggested that, in this respect at least, the Act may not extend to the limits of constitutional authority.\(^1\) The Fifteenth Amendment, then, may require affirmative protection of group voting rights at the same time that the Voting Rights Act prohibits reduction of the potential representation of a group that is underrepresented or proportionally represented.\(^1\)

*Whitcomb v. Chavis*\(^1\) is a somewhat more problematic precedent to reconcile. The Court refused to find a blanket constitutional right to proportional representation for racial and political groups sufficient to force replacement of multimember state legislative districts with single-member districts.\(^13\) Although the language of this decision is contrary to the spirit of an aggregate right, there are important distinguishing features. First, the *Whitcomb* case was brought under the Fourteenth Amendment,\(^14\) and the Court was reluctant to embrace the district court's proposition that groups with distinctive interests must be represented in the legislature for fear that this principle could not be restricted to groups defined by race.\(^15\) This apprehension is unfounded where an aggregate voting right is derived from the Fifteenth Amendment. Second, the remedy of racially conscious appor-

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\(^1\) Id. at 141.

\(^10\) The Court in *Beer* defined the question as "not one of constitutional law, but of statutory construction. A determination of when a legislative reapportionment has 'the effect of denying or abridging the right to vote on account of race or color,' must depend, therefore, upon the intent of Congress in enacting the Voting Rights Act and specifically §5." *Id.* at 139-40 (footnote omitted).

\(^11\) In *Beer* the Court reserved the possibility that a nonretrogressive plan receiving the Attorney General's approval might nevertheless be subject to constitutional challenge. *Id.* at 142 n.14. This is consistent with an aggregate voting right if the Fifteenth Amendment is viewed as creating two different rights: a right of underrepresented groups not to experience retrogression (the right enforced through the Voting Rights Act) and the right of all racial groups to potential proportional representation (the aggregate right). *Beer*, then, would stand for the proposition that the Voting Rights Act authorizes the Attorney General to act to enforce only the first of these rights.

\(^12\) *403 U.S.* 124 (1971).

\(^13\) *Id.* at 149. See *Beer v. United States*, 425 U.S. 130, 136 n.8 (1976).


\(^15\) *403 U.S.* at 156 (district court holding "not easily contained" and might be extended to "any group with distinctive interests").
tionment and establishment of single-member districts was too drastic, and less intrusive remedies might have been available. Finally, the Court rejected the plaintiffs' claim apparently because it relied in part on their actual failure to win elections and would require courts to intrude into the political process to determine if failure at the polls could be attributed to factors other than race. Such judicial encroachment would be unnecessary in proving a violation of aggregate voting rights, since the courts would focus solely on the relationship between the electoral process and the potential for representation of racial groups.

C. The Distinct Nature of Racial Voting Rights

The Fifteenth Amendment is concerned exclusively with racial dimensions of the right to vote. At the same time, certain characteristics of voting make it a distinctive interest and justify the extension of the aggregate right to voting in particular. First, recognition of such a right can enhance important interests in representation without jeopardizing significant individual rights of participation. An individual's preferences are manifested in the government when voters with the same interests vote together to gain representation. In order for members of a racial group to be able to have their interests represented, then, the districting system cannot foreclose their achieving potential proportional representation. Yet restructuring the political system to conform to the racial proportionality required by the aggregate right will not impair the opportunity of all individuals to participate at each stage of the electoral process, whether by engag-

116. See p. 598 infra (arguing that minority rights in multimember districts can be preserved by cumulative voting).
117. 403 U.S. at 153-55.
118. See pp. 599-602 infra (describing mechanism for enforcing aggregate rights).
119. Although this Note focuses on voting rights, it may be that other interests have characteristics that make recognition of group rights under the Fourteenth Amendment appropriate in some contexts. See Fiss, Groups and the Equal Protection Clause, 5 Pub. & Pub. Aff. 107, 154-55 (1976) (general theory of group entitlements under Fourteenth Amendment).
120. As the plurality noted in United Jewish Organizations, though the redistricting affected the relative political power of racial groups, individuals were not "fenced out" from political participation. 430 U.S. at 167. The single fact that individuals with differing political interests would begin to participate in districts previously dominated by white voters did not adversely affect any voter's ability to participate. Cf. Fiss, The Fate of An Idea Whose Time Has Come: Antidiscrimination Law in the Second Decade after Brown v. Board of Education, 41 U. Chi. L. Rev. 742, 760 n.49 (1974) (individual voting rights not affected by participation of other voters).
121. See note 1 supra.
122. See note 99 supra. In contrast to an individual's interests in political participation, his actual ability to affect an electoral outcome is insignificant. Whitcomb v. Chavis,
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ing in nominations, casting a ballot, pooling their strength by forming coalitions, or working to influence a representative after the election.123

Second, the distinct nature of voting is also evident in the congruity of an aggregate right with the axioms that underlie the democratic, representative political system. Acknowledgment of an aggregate right to vote is harmonious with the pluralist assumption that voters will form groups to further collective interests.124 By contrast, implementation of aggregate rights in school admissions or employment by the use of quota systems to reverse prior discrimination can disadvantage individual whites who by their merits alone would receive a place in the classroom or a job. Thus recognition of group interests in fields other than voting might conflict with the individual and meritocratic value assumptions that underlie our educational and economic systems.125

A third special characteristic of voting is that it is an instrument that helps minority groups to attain equal access to basic social needs such as jobs, education, and housing.129 Recognition of the aggregate right maximizes the opportunity for minority self-help without in-

123. When switched from one district to another, of course, the individual's vote may become an insignificant part of the minority within his district, instead of an insignificant part of the majority, but the Supreme Court has consistently held that no individual right is violated merely because the candidates favored by the voter fail to win election. United Jewish Organizations v. Carey, 430 U.S. 144, 166 (1977) (plurality opinion); Whitley v. Chavis, 403 U.S. 124, 153-55 (1971). As long as the race-specific interests of an individual are protected by ensuring potential proportional representation of his racial group, his aggregate rights are preserved. Thus, the aggregate right does not guarantee that an individual black in a particular district will influence the political process, but rather that blacks as a group will share in the governmental process to the benefit of each individually.
125. The adverse impact that any discriminatory device may have on the disadvantaged group will vary with the right at issue. For example, one commentator distinguished between school desegregation where no one is denied an education and employment where members of the disadvantaged group will be denied jobs. Comment, supra note 67, at 870; cf. Franks v. Bowman Transp. Co., 424 U.S. 747, 774 (1976) ("arguably innocent" employees disadvantaged by racially conscious remedy). On the other hand, in the controversial case of Bakke v. Regents of University of California, 18 Cal. 3d 34, 553 P.2d 1152, 132 Cal. Rptr. 680 (1976), cert. granted, 97 S. Ct. 1098 (1977), the dissent argued that children bused to a lower quality school are not merely discommoded, but suffer a serious loss in education. See Dixon, supra note 84, at 558 n.324.
126. The Supreme Court has characterized the right to vote as fundamental "because preservative of all rights." Yick Wo v. Hopkins, 118 U.S. 356, 370 (1886). See Katzenbach v. Morgan, 384 U.S. 641, 652 (1966) (removing obstacles to minority political participation instrumental to nondiscriminatory allocation of public services).
interrupting or displacing the existing mechanism for allocation of socioeconomic benefits. The aggregate voting right gives disadvantaged groups a base of strength for bargaining, a forum for voicing dissent, and a toehold for achieving socioeconomic equality. Recognition of the aggregate right underscores the need for participation by minority groups so that representative bodies reflect the interests of the public as a whole.\textsuperscript{127}

A final concern favoring extension of racial group rights to voting is the resistance of the political system to change from within. Legislators may be expected to apportion legislative districts so as to maximize their chances for election and then to resist changing the system that brought them to office.\textsuperscript{128} Although periodic redistricting is now required by the one man, one vote doctrine, the courts are loath to interfere with apportionment plans merely because they discriminate in favor of incumbents.\textsuperscript{129} When the effect of this process is to lock minority groups out, the system cannot be purged unless courts override the self-interest of legislators and take the countervailing factor of race into account.

IV. Implementation of the Aggregate Right to Vote

A. The Presence of “State Action”

The aggregate right may be abridged even when the state has not acted affirmatively to change its electoral system. Governmental failure to rectify a discriminatory system, as the Fifteenth Amendment commands, becomes a constitutional violation in itself when the state has

\textsuperscript{127} “To be representative, a legislature must be an accurate map of the whole nation, a portrait of the people, a faithful echo of their voice, a mirror which reflects accurately the various parts of the public.” Pitkin, \textit{The Concept of Representation}, in \textit{Representation} \textbf{1}, 10 (H. Pitkin ed. 1969). When large segments of the society fail to gain representation, the combined constituency represented by a majority of legislators may be a minority of the total population.

\textsuperscript{128} \textit{See} Baker, \textit{supra} note 124, at 74-77 (legislatures loath to correct malapportionment, necessitating judicial intervention). In Alabama, for example, entrenched legislators managed to avoid reapportionment from 1901 until the Supreme Court dealt with the problem in 1964, despite uneven growth in population leading to serious malapportionment. Reynolds \textit{v.} Sims, 377 U.S. 533, 539-40 (1964); \textit{see} Baker \textit{v.} Carr, 369 U.S. 186, 191 (1962) (Tennessee legislature did not reapportion itself from 1901 until 1960s). Justice Clark concluded that “the legislature had riveted the present seats in the Assembly to their respective constituencies, and by the votes of their incumbents a reapportionment of any kind is prevented.” \textit{Id.} at 259 (concurring opinion).

\textsuperscript{129} Burns \textit{v.} Richardson, 384 U.S. 73, 89 n.16 (1966) (districting to minimize contests between present incumbents not invidious). Consideration of political factors in districting can be used to exclude racial minorities. \textit{See} Comment, \textit{supra} note 27, at 403 (gerrymandered districts may minimize need to include small interest groups in electoral coalitions).
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monopoly power over creation and maintenance of that system. The state is necessarily responsible for apportionment in the first instance, and by holding elections the state implicitly endorses the existing electoral scheme. As under the one man, one vote standard, then, the courts in enforcing the aggregate right should focus not on the origin of any apportionment, but on its impact on voters.

A corollary to such automatic enforcement of the aggregate right is the irrelevance of any proof of intent to discriminate. Although United Jewish Organizations and Justice Stewart’s opinion in particular refer to intent, discussion of this concept was directed primarily

130. See Pollak, Racial Discrimination and Judicial Integrity: A Reply to Professor Wechsler, 108 U. Pa. L. Rev. 1, 22-23 (1959) (Fifteenth Amendment imposes affirmative duty to assure equal franchise); cf. Reynolds v. Sims, 377 U.S. 553, 562-63 (1964) (maintaining districts of unequal size equivalent to enacting law permitting some voters to cast several ballots); Davis v. Mann, 377 U.S. 678, 691 (1964) (malapportionment resulting from “prolonged legislative inaction” violates equal protection).

The nonretrogression principle endorsed in Beer v. United States, 425 U.S. 130 (1976), seems to indicate that in some instances affirmative state action is required before a violation of voting rights can be found. In Beer, however, the court was exclusively concerned with statutory interpretation and did not imply that a state must act affirmatively to change electoral rules before a constitutional claim will be sustained. See p. 591 and notes 110-11 supra. Indeed, the statutory nonretrogression principle illustrates the difficulties inherent in attempting to apply a requirement of state action in the context of rights like voting that depend on a political structure created by the state in the first instance. Suppose, for example, that population shifts lead to a drastic underrepresentation of minority voters when the state has reauthorized but not altered boundaries. The Court could use as its basis for measuring “retrogression” either (1) the proportional voting power of minorities at the time of the original apportionment, in which case reenactment of the same district boundaries after population shifts would constitute retrogression, or (2) the actual physical lines of original apportionment, in which case reenactment without change would always be permissible. Thus the statutory requirement of recent state action altering the electoral system causes uncertainty that can be avoided by proceeding under a constitutional analysis that emphasizes the result rather than the means.

Scholars have often chafed at the distinction between affirmative action and nonaction by the state. See, e.g., Fiss, A Theory of Fair Employment Laws, 58 U. Chi. L. Rev. 235, 313 (1971). Indeed, the Court has sometimes indicated that permitting certain acts constitutes endorsement by the state and is subject to judicial scrutiny. Evans v. Newton, 382 U.S. 296, 299 (1965) (previously public park could not be maintained privately on segregated basis). This view is particularly appropriate in the context of political organization over which the state has a monopoly. See R. Dixon, supra note 18, at 13.

131. See, e.g., Reynolds v. Sims, 377 U.S. 553, 562-63 (1964) (maintaining districts of unequal size equivalent to enacting law perpetuating disparity in voting rights).

132. In the one man, one vote cases, there is no requirement of proof that the state “intended” to discriminate against individuals in overpopulated districts. See Reynolds v. Sims, 377 U.S. 553, 562-63 (1964) (dealing exclusively with discriminatory effects of malapportionment).

133. 430 U.S. at 165 (plurality opinion); id. at 180 (Stewart, J., concurring). Professor Brest seems to agree with Justice Stewart that the state displayed no invidious intent in United Jewish Organizations.

The mere fact that a political gerrymander designed to aid blacks diminishes the voting power of a neighboring Jewish community does not trigger the antidiscrimination principle. But if the circumstances suggest that the decision was motivated
to the plaintiffs' Fourteenth Amendment claims.\textsuperscript{134} Cases decided under the Voting Rights Act have always implicitly recognized that proof of intent is unnecessary to find a violation of the Fifteenth Amendment,\textsuperscript{135} and the Voting Rights Act itself proscribes changes in the electoral process that have either the "purpose or effect" of abridging the right to vote.\textsuperscript{136} The actual purpose of the legislature should be unimportant where citizens have a right to a system of governance with

by anti-Semitic prejudice, it should be treated like any other nonbenign race-dependent decision.

Brest, \textit{supra} note 83, at 17 (footnote omitted).


134. Justice Stewart's intent argument relies on equal protection cases such as Washington \textit{v. Davis}, 426 U.S. 229 (1976) (disproportionate impact of recruiting procedures challenged under equal protection component of Fifth Amendment due process clause), and Arlington Heights \textit{v. Metropolitan Housing Dev. Corp.}, 429 U.S. 252 (1977) (zoning policies challenged under equal protection clause). 430 U.S. at 179. Because the equal protection clause applies to state action of any type, a test of disproportionate effect alone would result in nullification of virtually all legislation. Some limitations must be imposed, and the Court has chosen to focus on intent. In contrast, the Fifteenth Amendment is limited by its terms to voting rights.

135. See, \textit{e.g.}, Howard \textit{v. Adams County Bd. of Supervisors}, 453 F.2d 455, 457-58 (5th Cir. 1972) (proof of intent alternative to proof of effect in showing constitutional violation); City of Petersburg \textit{v. United States}, 354 F. Supp. 1021, 1024, 1031 (D.D.C. 1972) (three-judge court), \textit{aff'd mem.}, 410 U.S. 962 (1973) (plan unconstitutional even though "nothing in the annexation . . . indicated that it had a racial purpose"). Though the Supreme Court has referred to intent in Fifteenth Amendment cases, see Wright \textit{v. Rockefeller}, 376 U.S. 52, 56 (1964); Gomillion \textit{v. Lightfoot}, 364 U.S. 339, 341 (1960) (redrawing of boundary lines alleged to be "device to disenfranchise Negro citizens," "solely concerned with segregation"); it did not hold intent to be a necessary element of a constitutional violation, and these cases are therefore not contrary to the principle suggested here. The Court in \textit{Gomillion} alluded to the "inevitable effect" of the gerrymandering.

364 U.S. at 342. It also observed that the effect of the gerrymandering of Tuskegee was so blatantly discriminatory that an invidious intent could be inferred, 364 U.S. at 346-47, and this can be read merely as emphasis of the magnitude of the effect rather than as a finding of an additional necessary element. In \textit{Wright} the Court noted that the evidence did not prove that the apportionment was racially motivated. 376 U.S. at 56. Thus the Court found merely that discriminatory intent, which might have been sufficient in itself, was not proved. It did not reach the question of whether the effect of the plan was to abridge minority voting rights, since the plaintiffs framed their complaint in terms of segregation rather than underrepresentation. \textit{Id.} at 53-54.

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certain objectively defined characteristics such as population equality among districts or proportional voting power among races.\textsuperscript{137}

B. Application of the Aggregate Right to Different Electoral Systems

The aggregate right should apply to the electoral systems of federal, state, and local governments alike.\textsuperscript{138} At each of these levels representational schemes fall into two general categories: those employing only single-member districts and those using multimember districts with at-large voting. Aggregate voting rights have different implications for each system.

For a single-member electoral system, an approximation of racial proportionality requires the type of race-conscious redistricting that New York attempted in United Jewish Organizations. But this type of districting can only assure proportionality where racial groups are geographically concentrated. A tension thus might arise between the goal of absolute proportionality and the state's interests in designing compact and contiguous districts and in preserving existing political subdivision boundaries. As in the one man, one vote cases, the Court should take a flexible approach and preserve the state interests wherever possible. Use of compact, contiguous districts increases the likelihood that voters will share common interests and engage in personal interchange during election campaigns, and it protects against gerrymandering.\textsuperscript{139} Similarly, adherence to the boundaries of local govern-

\textsuperscript{137} Cf. Note, Wright v. Rockefeller and Legislative Gerrymanders: Decision Plus a Problem of Proof, 72 YALE L.J. 1041, 1059-60 (1963) (state should carry burden of showing permissible basis for gerrymander after plaintiff has refuted commonly known, non-racial motivations); Note, supra note 2, at 998 (design of electoral scheme without invidious intent can nevertheless result in unequal treatment of voters). As the Supreme Court has noted, a "politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results." Gaffney v. Cummings, 412 U.S. 735, 753 (1973). Indeed, discriminatory effect can prove conclusive by raising a presumption of unconstitutionality, even in areas other than voting. See Alexander v. Louisiana, 405 U.S. 625, 632 (1972) ("good faith" selection of jurors nevertheless resulted in discrimination); Eubanks v. Louisiana, 356 U.S. 584, 587-88 (1958) (selection of "best qualified" jurors resulted in exclusion of blacks). See generally Fiss, supra note 130, at 291 (in voting, use of facially innocent criteria not immune to challenge if disproportionate effect); Note, Reading the Mind of the School Board: Segregative Intent and the De Facto/De Jure Distinction, 86 YALE L.J. 317, 355 (1976) (Court has failed to specify who must exhibit discriminatory purpose, what it consists of, and how to prove it).

\textsuperscript{138} It is clear that the Fifteenth Amendment applies to state and local as well as federal elections. See, e.g., Gomillion v. Lightfoot, 364 U.S. 339, 341-42 (1960) (racial gerrymandering of municipality invalid under Fifteenth Amendment); Smith v. Allwright, 321 U.S. 649, 663-64, 666 (1944) (Fifteenth Amendment forbids statewide white primary).

\textsuperscript{139} See, e.g., Reynolds v. Sims, 377 U.S. 533, 578-79 (1964) (state interest in preserving political subdivision boundaries and creating compact and contiguous districts justifies some deviation from absolute population equality between districts); Bickel, The Dur-
mental entities enhances the ability of each legislator to represent a constituency with common concerns.\textsuperscript{140}

At-large voting presents a different problem. Minorities are submerged not by boundary drawing, but by the choice of electoral mechanisms. Where voters are both required to cast as many votes as there are positions to be filled and forbidden from casting more than one vote for any single candidate, a minority can effectively be denied representation.\textsuperscript{141} A jurisdiction using at-large voting should thus be limited to cumulative voting, which allows individuals to cast all of their votes for a single candidate.\textsuperscript{142} With cumulative voting, a cohesive minority by selective voting can elect a number of representatives approximately proportional to the group’s size.\textsuperscript{143}

Where a minority group is geographically scattered, an at-large system that permits cumulative voting would ensure the potential for proportional representation whereas a system of geographic districts would not.\textsuperscript{144} Nevertheless, the Fifteenth Amendment should not be

\textit{bility of Colegrove v. Green}, 72 YALE L.J. 39, 40 (1962) (representative system “stable and effective” when “interests, groups, and regions” as well as individuals considered in political structure).

\textsuperscript{140} See Mahan v. Howell, 410 U.S. 315, 323 (1973). The common concerns that bind a political subdivision supplement those normally associated with racial, economic, or political groups. For example, a congressman who represents a single city can devote his full attention to “pork barrel” legislation that will benefit his constituency. If a congressman represents parts of two adjacent cities, many of his efforts may benefit one but not the other of these subdivisions.

\textsuperscript{141} White v. Regester, 412 U.S. 755, 765-70 (1973); see Carpenti, Legislative Apportionment: Multimember Districts and Fair Representation, 120 U. Pa. L. Rev. 666 (1972); Comment, Effective Representation and Multimember Districts, 68 Mich. L. Rev. 1577, 1588-87 (1970) (interest group must be larger in multimember district than in single-member district in order to gain representation).

\textsuperscript{142} See generally E. LAKEMAN, HOW DEMOCRACIES VOTE 85-88 (3d ed. 1970) (definition and discussion of cumulative voting).

\textsuperscript{143} In order for cumulative voting to secure precise proportionality, interest group leaders must accurately estimate the size of the group and issue explicit directions on voting. E. LAKEMAN, supra note 142, at 87. Even with cumulative voting, a system that combines districting with the election of some representatives at large can frustrate the goal of proportional representation. As long as the numbers of at-large seats is kept small enough, even cumulative voting will not ensure that minorities will be represented among these delegates. Therefore, a mixed system should be treated like geographic apportionment with racial minorities entitled to potential representation that would take all seats into consideration.

The problem posed by mixed plans was illustrated in Beer v. United States, 425 U.S. 130 (1976). In that case, although the New Orleans districts were so apportioned that they would meet a proportionality test, id. at 136-37 n.8, 141-42, the existence of at-large seats that blacks could not win served to dilute minority strength.

\textsuperscript{144} At-large voting at least avoids the possibility that a minority of voters will effectively control the legislature, a result possible under a geographic representational system. See E. LAKEMAN, supra note 142, at 73-76 (describing instances of minority control in systems of geographical representation). To illustrate the dangers of a district system, consider a configuration of nine voters, five blacks and four whites, assigned to three districts. Although the blacks have a majority of voters, they can be outvoted
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construed to dictate the state's initial choice between district and at-large representational systems. Neither the language nor the history of that Amendment justifies uprooting every system of geographical districting, and the aggregate right should be construed to require simply the minimization of bias within the existing structure. As in the one man, one vote context, values of federalism argue in favor of allowing the states to retain certain traditional prerogatives in the design of their electoral processes.

C. Mechanics of Enforcement

The aggregate voting right proposed here can be enforced by the judiciary. A court initially must determine if the precondition of bloc voting is present. Defining the degree of cohesiveness in voting behavior that constitutes bloc voting is necessarily arbitrary, and for this reason it would be appropriate for Congress to create rules for identifying a racial bloc. Nevertheless, since the aggregate right is a constitutional entitlement, the courts may act independently to en-

in the legislature if the whites are divided between two districts and constitute the majority in each. Were the same nine voters to elect three representatives at-large with a mechanism for cumulative voting, the blacks could win two of the three seats.


146. Geographical representation has certain structural advantages that led to its adoption originally and now argue for its maintenance, even where it does not permit full proportional representation. It provides stability by ensuring that no region of the country goes without representation, and it aids the achievement of a popular consensus by forcing disparate groups within an area to form coalitions in order to gain representation. Dixon, The Warren Court Crusade for the Holy Grail of "One Man—One Vote," 1969 Sup. Ct. Rev. 219, 254-55.

147. See pp. 600-01 infra (values of compactness and contiguity may justify deviations from perfect districting). The Tenth Amendment reserves to the states the powers not delegated to the federal government. U.S. Const. amend. X. Since the aggregate right is derived from the Fifteenth Amendment, however, its enforcement does not encroach upon state prerogatives. The question thus becomes one of determining which state powers the Fifteenth Amendment withdrew from the states. There is no evidence that the Amendment contemplated total redesign of the traditional geographic basis for representation.

See Casper, supra note 21, at 103-04.

148. For example, a court might conclude that bloc voting is present within a municipality when 95% of all black voters voted together in nine of the last ten elections, while only 10% of the white voters ever supported candidates favored by the black voters. Although voting statistics for statewide elections might be considered in determining local bloc voting, they should not be accorded as much weight as elections for local office where racial divisions in the slating of candidates would also be reflected. Only where bloc voting occurs over an extended period of time should it lead to an inference of racial cleavages in the electorate justifying recognition of an aggregate right.
force it in the absence of legislatively designed rules, as they did in
implementing the one man, one vote principle.\textsuperscript{140}

Bloc voting in one city would not, of course, require redistricting
to ensure proportional representation for all election contests held
within an entire state. Thus, in \textit{United Jewish Organizations}, if ra-
cial groups in Brooklyn voted by bloc, but those elsewhere in the
state did not, the state would be obligated to engage in racially con-
scious redistricting only in Brooklyn, and would not be required to
reapportion other legislative districts. An objective test for bloc voting
would be more manageable than tests used in voting cases such as
\textit{White v. Regester}, where the Court made subjective judgments about
the adequacy of actual representation.\textsuperscript{150}

Once bloc voting has been identified, a court must determine the
extent to which the existing political structure deviates from one
that would guarantee potential proportional representation. In a city
with a concentrated minority population of twenty percent and a five-
person city council, for example, apportionment would be inadequate
unless one council district had a nonwhite majority. To determine
the proportion of minority persons in the electorate and in each dis-
trict, the court would look to eligible voting age population. The
number and distribution of eligible voters do not change as precipi-
tously as do voter registration figures;\textsuperscript{151} statistics using the eligible
voting population are considered relevant under the Voting Rights
Act;\textsuperscript{152} and they lead to the most equitable results.\textsuperscript{153}

If deviations from proportionality are found, the courts must then

\textsuperscript{149} In the one man, one vote cases, the Court developed its own standards to enforce
a constitutional right in the absence of congressional initiative. \textit{See}, \textit{e.g.}, \textit{Gaffney v. Cummings}, 412 U.S. 735, 751 (1973) (deviation between district populations of eight percent acceptable); \textit{Swann v. Adams}, 385 U.S. 440, 442-45 (1967) (deviation from 18.28% overrepresented to 15.27% underrepresented invalid).

\textsuperscript{150} In \textit{White v. Regester}, the Court referred both to the failure of nonwhites to
win political office in the past and to the good faith concern for the interests of minority
voters shown by white legislators. 412 U.S. 755, 766-67 (1973). A court utilizing such a good
faith test would necessarily examine legislative acts themselves. In fact, courts dealing with
this problem seem to have escaped such inquiry because the appropriate proof has
not been offered. \textit{See}, \textit{e.g.}, \textit{Wallace v. House}, 515 F.2d 619, 639 (5th Cir. 1975), \textit{vacated},

\textsuperscript{151} This can be contrasted to the number of voters actually registered. "[F]luctua-
tions in the number of registered voters in a given election may be sudden and sub-
stantial, caused by such fortuitous factors as a peculiarly controversial election issue,
a particularly popular candidate, or even weather conditions." \textit{Burns v. Richardson}, 384
U.S. 73, 92-93 (1966) (quoting \textit{Ellis v. Mayor \& City Council of Baltimore}, 352 F.2d 123,
130 (4th Cir. 1965)).

\textsuperscript{152} \textit{See} \textit{28 C.F.R. § 51.10(b)(6) (1977) (issued pursuant to 42 U.S.C. § 1973c (Supp. V
1975)).

\textsuperscript{153} Considering only the number of registered voters would cause underrepresentation
of groups that have traditionally been discriminated against in the political process and
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determine if they can be remedied. Because the ability to achieve precise proportionality depends on the distribution of minority group members throughout the population, a uniform level of tolerance for deviation cannot be established. Deviation from absolute proportionality by even a single district may be unacceptable where nonwhites are residentially concentrated, but such deviations may be inevitable where minority voters are dispersed. Enforcement should involve selection of the plan consistent with compact districting that comes closest to ensuring proportionality.

Enforcement of an aggregate voting right in this manner will not unduly tax existing administrative capabilities or restrict flexibility of state decisions. Only a single factor is added to the constraints already placed on the states by the one man, one vote principle, and a vast number of possible patterns of districting remain.

154. In some cases, it may be easier to achieve proportionality if the requirement of population equality between districts is relaxed, but the individual right to vote protected by the one man, one vote standard is necessary to make the aggregate right meaningful and should remain legally dominant. In practice, the significance of any resulting limitations on the aggregate right to vote will be diminished by the residual flexibility in districting. See Georgia v. United States, 411 U.S. 526, 534-35 n.6 (1973) (little conflict between demands of one man, one vote doctrine and those of Voting Rights Act has been experienced).

155. "Tolerance" levels must vary not only with the residential concentration of minorities, but also with the number of representatives elected to the legislative body. A tolerance level of 10%, for example, would permit even a wholly concentrated black population constituting 20% of the total electorate to be excluded from representation in a three-member city council. If the legislative body had 100 members, on the other hand, there would ideally be a black majority in 20% of the districts, but a 10% margin would permit blacks to have potential majorities in as few as 18 districts and as many as 22.

156. There is a temporal as well as a geographical dimension to districting. A state could contend, for example, that its plan is designed to reflect not the current racial proportions of its population, but the anticipated racial composition some years hence. Because of the potential abuse inherent in such future-oriented plans, courts should subject them to the strictest scrutiny. See Kirkpatrick v. Preisler, 394 U.S. 526, 535 (1969) (adjustments for future population trends must be based on full documentation and be applied systematically).

157. The state has extensive leeway in districting as long as proportionality is maintained. Thus, once a particular district has been designated to have a white majority, the state may make the majority anything greater than 50% of the eligible voting population. The courts would thus be relieved from the responsibility of determining what constitutes an "effective majority." Cf. Note, Compensatory Racial Reapportionment, 25 STAN. L. REV. 84 (1972) (suggesting tolerances for concentration of minorities in legislative districts).

Even when complying strictly with the requirements of the aggregate right to vote and the one man, one vote principle, states would retain a surprising number of alternatives in designing apportionment plans. For example, in a city with three districts, four black voters and eight white voters, one black majority district would be required. Theoretically, there are 2,310 ways of insuring that one district has either three or four black voters. Of course, the actual number of possibilities will be reduced by considerations of compactness, but it will increase again as more voters are included in a more realistic model.
As a constitutional standard derived from the Fifteenth Amendment, the aggregate right to vote should be enforceable independently of the Voting Rights Act. A private right of action should be permitted for abridgment of the aggregate right to vote similar to the right of action allowed for many other violations of constitutional rights. Plaintiffs should carry the burden of proving bloc voting, showing that the existing system fosters underrepresentation, and suggesting alternative plans. The defendant governmental units could then raise any affirmative defense challenging the proposed plans for failure to consider factors such as compactness, and they might also present alternative plans.

Conclusion

Without recognition of an aggregate right to vote, racial minorities may continue to suffer denial of significant representation in the system of legislative governance. Although in United Jewish Organizations v. Carey the Supreme Court neglected the occasion to recognize such a right, it should take full advantage of the next such opportunity to extend the Fifteenth Amendment protections afforded to racial groups. Enforcement of the aggregate right can help prevent the promise of racial equality from being an empty one.

158. Such a right would not wholly supplant the need for the Voting Rights Act, however, and indeed it would be wise for Congress to extend the Act to provide for enforcement of the aggregate right by the Justice Department. The review of electoral changes would still be important to prevent states from introducing devices that would abridge either the individual or the aggregate voting right. The disadvantages of case-by-case litigation would remain even after acknowledgment of an aggregate voting right.


160. This allocation of burden would rectify an existing asymmetry between Fourteenth and Fifteenth Amendment cases. “While states must carry the burden of justifying any population variances in their plans, the burden of proof in racial gerrymander cases has to date rested with the plaintiffs.” Note, supra note 9, at 596.