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REAPPORTIONMENT AND RACIAL GERRYMANDERING

By CHARLES FISHMAN

I. *INTRODUCTION*

PRIOR TO 1962, federal courts would not decide suits which raised the issue of the constitutionality of malapportioned state legislative bodies or congressional districts, regardless of how egregious the allegations of discrimination were.[2] Although there was confusion among the decisions,[3] the basis for the Court's refusal to decide the issue lay in the Court's belief that the question was political and hence nonjusticiable,[4] rather than a lack of jurisdiction on the part of the federal courts.[5]

Questions concerning a federal court's jurisdiction, and the justiciability of state reapportionment suits were settled in *Baker v. Carr*[6] when the Court "concluded that the complaint's allegations of a denial of Equal Protection presents a justiciable constitutional cause of action . . . ."[7] Similarly, in *Wesberry v. Sanders,*[8] the Supreme Court held that malapportioned congressional districts violated Article I Section 2 of the Federal Constitution.[9]

In 1970, a new round of reapportionment commenced. The shape, size, content and nature of the new districts will determine, at least for the next decade, the extent to which Black Americans are to meaningfully participate within the existing political process.

Although the possibilities for racial progress through enlightened legislation enacted by properly apportioned legislative bodies are apparent, many difficult obstacles presently obstruct those possibilities from becoming realities. Perhaps the greatest such obstacle is the redrawing of electoral districts by legislative bodies along partisan political lines or according to the racial characteristics of the population, in an attempt to prevent the election of Blacks to public office. Thus, the problem in 1970 was how to prevent racial gerrymandering[10] that dilutes the power of the Black vote so as to achieve maximum utilization of that vote to elect Black legislators. In order to suggest solutions to the above problem it will be

1. The research necessary for this article was made possible by a grant from the National Bar Foundation and the Joint Center For Political Study. My thanks to Isaiah Madison of Howard University School of Law and Melvin R. Solomon of Rutgers (Newark) Law School for their valuable asistance.

2. Colegrove v. Green, 328 U.S. 549 (1946); South v. Peters, 339 U.S. 276 (1950); MacDougall v. Green, 335 U.S. 281 (1948); Cook v. Fortson, 329 U.S. 675 (1946); Colegrove v. Barrett, 330 U.S. 804 (1947); Tedesco v. Board of Supervisors, 339 U.S. 940 (1950); Remmey v. Smith, 342 U.S. 916 (1952); Cox v. Peters, 342 U. S. 936 (1952).
3. *See* Baker v. Carr, 369 U. S. 186 (1962).
4. *See* Colegrove v. Green, *supra* note 2 and South v. Peters, *supra* note 2.
5. The United States Constitution, Article III, Sec. 2 reads:
   The judicial power shall extend to all Cases, in Law and Equity, *arising under this Constitution,* the Laws of the United States and Treaties made . . . (Emphasis added)

   The general federal question jurisdiction statute, 28 U.S.C. Sec. 1331 reads:
   (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000 . . . and arises under the Constitution, laws, or treaties of the United States.

   Under the test of Bell v. Hood, 327 U.S. 678 (1946), it would appear that the alleged denial of Equal Protection resulting from malapportionment presents a federal question arising under the Constitution of the United States, over which federal courts have jurisdiction. However, the political question doctrine, first announced in Luther v. Border, 48 U.S. (7 How.) 1 (1849), was the foundation for the Court's refusal to hear such cases.
6. *Supra* note 3.
7. *Id.* at 237. *See also* Smiley v. Holm, 285 U.S. 355 (1932); Koeing v. Flynn, 285 U.S. 375 (1932); Carroll v. Becker, 285 U.S. 380 (1932); Wood v. Broom, 287 U.S. 1 (1932).
8. 376 U.S. 1 (1964).
9. Article 1, Sec. 2 provides, in part, that Congressmen "shall be . . . chose . . . by the people of the several States."
10. According to Black's Law Dictionary (4th edition), "gerrymander" is defined as:
    a name given to the process of dividing a state or other territory into the authorized civil or political divisions, but with such a geographical arrangement as to accomplish a sinister or unlawful purpose, as, for instance, to secure a majority for a given political party in districts where the result would be otherwise if they were divided according to obvious natural lines, or to arrange school districts so that children of certain religions or nationalities shall be brought within the district and those of a different religion or nationality in another district.

necessary to examine the development of the law in the area of reapportionment since *Baker* and *Wesberry*, as well as to revisit the cases dealing with the total denial of the right to vote. Theories to support causes of action will then be suggested. Lastly, an examination into the critical area of burden of proof will be ventured and possible answers suggested to this all-important question.

II. *PRESENT STATE OF THE LAW — REAPPORTIONMENT*

ONCE THE COURT entered the "political thicket"[11] by deciding *Baker* and *Wesberry* as it did, a judicially manageable standard had to be developed. In *Baker* the Court expressly left this problem to the lower federal courts in an apparent attempt to promote experimentation. Mr. Justice Brennan, speaking for the majority in *Baker*, noted that "judicial standards under the Equal Protection Clause are well developed and familiar."[12] In his concurrence, Mr. Justice Douglas maintained that "the traditional test under the Equal Protection Clause has been whether a state has made an invidious discrimination . . ."[13] From *Baker* until *Reynolds v. Sims*[14] the lower federal courts adopted the test of "invidious discrimination" to determine the constitutionality of a challenged apportionment scheme. When the court decided *Reynolds*, it established a new test, that of "one man, one vote" as the standard required by the Equal Protection Clause of the Fourteenth Amendment[15]. Once the standard was established, Mr. Chief Justice Warren, speaking for the Court in *Reynolds*, proceeded to list other factors such as contiguity, compactness, respecting existing political lines and subdivisions which may be legitimately considered as part of a rational state policy for reapportionment,[16] *within* the "one man, one vote" requirement.[17]

In subsequent litigation the Court has reviewed and struck down a variety of apportionment plans which attempt to justify deviation from the "one man, one vote" standard. Thus, the present state of the law holds the following factors to be insufficient justification for a state to deny numerical equality of representation to its citizens: a state's heterogeneous characteristics,[18] balancing urban and rural power,[19] representation for sparsely settled areas,[20] protecting insular minorities,[21] preventing overly large districts,[22] representation for economic or group interests,[23] geographical or topographical considerations,[24] permanent or temporary residence,[25] history or tradition of a state,[26] approval by electorate,[27] state constitutional requirements,[28] federal analogy,[29] and an electoral college analogy.[30]

In *Reynolds* and subsequent cases the Court has held that a state may consider factors other than population in the creation of a reapportionment plan but the resulting system of apportionment must

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11. Coleman v. Green, *supra* note 2. The term was adopted by Mr. Justice Frankfurter to note the apparent lack of a judicially manageable standard to enforce reapportionment upon state legislatures due to its political nature.
12. *Supra* note 3 at 226.
13. *Id.* at 244. See Skinner v. Oklahoma, 316 U.S. 535 (1942).
14. Reynolds v. Sims, 377 U.S. 533 (1964); *see also* WMCA, Inc. v. Lomenzo, 377 U.S. 633 (1964); Maryland Committee for Fair Representation v. Tawes, 377 U.S. 656 (1964); Davis v. Mann, 377 U.S. 678 (1964); Lucas v. Forty Fourth General Assembly, 377 U.S. 713 (1964); Roman v. Sincock, 377 U.S. 695 (1964).
15. *Supra* note 14 at 568:

    . . . as a basic constitutional standard, the Equal Protection Clause requires that the seats in both houses . . . must be apportioned on a population basis. Simply stated, an individual's right to vote for state legslators is unconstitutionally impaired when its weght is in a substantial fashion diluted when compared with votes of citizens living in other parts of the State.

    See also cases collected in footnote 14.
16. *Supra* note 14 at 577-81.
17. *Id.* at 578:

    To do so would be constitutionally valid, so long as the resulting apportionment was one based substantially on population and an equal-population principle was not diluted in any significant way.

    Id. at 581:

    But if, even as a result of a clearly rational state policy . . . population is submerged as a controlling consideration . . . then the right of all of the State's citizens . . . would be unconstitutionally impaired.

    See also Fortson v. Dorsey, 379 U.S. 433 (1965).
18. Lucas v. Forty-Fourth General Assembly, *supra* note 14.
19. Davis v. Mann, *supra* note 14.
20. WMCA, Inc. v. Lomenzo, *supra* note 14; Reynolds v. Sims, *supra* note 14.
21. Lucas v. Forty-Fourth General Assembly, *supra* note 14.
22. Reynolds v. Sims, *supra* note 14.
23. *Id.*
24. WMCA, Inc. v. Lomenzo, *supra* note 14.
25. Davis v. Mann, *supra* note 14.
26. Reynolds v. Sims, *supra* note 14; Maryland Committee for Fair Representation v. Tawes, *supra* note 14.
27. Lucas v. Forty-Fourth General Assembly, *supra* note 14.
28. WMCA, Inc. v. Lomenzo, *supra* note 14.
29. Cases collected, *supra* note 26.
30. Reynolds v. Sims, *supra* note 14.

not violate the "one man, one vote" standard.

The one man, one vote standard adopted in *Reynolds* for state reapportionment cases brought under the Equal Protection Clause was first articulated in *Wesberry,* a congressional reapportionment case brought under Article I §2. In *Wesberry,* the Court held that "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's."[31]

During the next term in the case of *Fortson v. Dorsey,*[32] the first attack was made on a reapportionment plan which provided for multi-member districts. The lower federal court granted a summary judgment[33] finding the plan to be "an invidious discrimination tested by any standard"[34] because it treated voters in the same class in a different manner. On appeal the Supreme Court reversed holding that such a plan was not *per se* unconstitutional.

Since *Reynolds,* the Court in *Sailors*[35] has refused to apply the one man, one vote standard to "local officers of the nonlegislative character . . . chosen by . . . some other appointive means rather than by election."[36] If, however, the state should choose to elect rather than appoint administrative or nonlegislative officials, the Court suggested that the one man, one vote standard would apply.[37]

At issue in *Sailors* was a county school board whose members were appointed, in equal numbers, from the local school board of the county even though the boards served unequal populations. In sustaining the plan, "the Court rested on the administrative nature of the area school board's functions and the essentially appointive form of the scheme employed."[38]

Next, in *Dusch v. Davis,*[39] a unanimous court held that the *Reynolds* standard did not prohibit at large elections (city wide)even when seven of the eleven members must reside within boroughs since each member was elected by all city voters. Reasoning by analogy from its *Fortson*[40] decision, the Court concluded that:[41]

> . . . the present consolidation plan uses boroughs in the city 'merely as the basis of residence for candidates, not for voting or representation.' He is nonetheless the city's, not the borough's councilman . . . . If a borough's resident on the council represented in fact only a front, different conclusions might follow.

WHAT THE COURT failed to decide in *Davis* or *Sailors* — did the constitutional standard of one man, one vote, apply to local governmental bodies — it decided in *Avery v. Midland County, Texas.*[42]

> We hold today only that the Constitution permits no substantial variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body.
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> Our decision today is only that the Constitution imposes one ground rule for the development of arrangements of local

31. *Supra* note 8 at 7-8.
32. *Supra* note 17.
33. Dorsey v. Fortson, 228 F. Supp. 259 (N.D. Ga. 1964).
34. *Id.* at 263.
35. Sailors v. Board of Education of the County of Kent, 387 U.S. 105 (1967).
36. *Id.* at 108.
37. "If we assume *arguendo* that where a State provides for an election of a local official or agency, the requirements of *Gary v. Sanders* and *Reynolds v. Sims* must be met, we are still short of the answer to the present problem . . . " *Id.* at 109.
38. *See* Avery v. Midland County, Texas, 390 U.S. 474, 485 (1968).
38. 387 U.S. 112 (1967).
40. In Fortson, *supra* note 17, at 438 the Court said:
    It is not accurate to treat a senator from a multi-district county as the representative of only that district within the county wherein he resides. The statute uses districts in multi-district counties merely as the basis of residence for candidates, not for voting or representation. Each district's senator must be a resident of that district, but since his tenure depends upon the county-wide electorate he must be vigilant to serve the interests of all people in the county, and not merely those of people in his home district; thus in fact he is the county's and not merely the district's senator.
41. Dusch v. Davis, *supra* note 39 at 115-116.
42. *See supra* note 38 at 484-486. Earlier in its decision, the Court at 480-481 said:
    When the State apportions its legislature, it must have due regard to the Equal Protection Clause. Similarly, when the State delegates lawmaking power to local government and provides for the election of officials from districts specified by statute, ordinance, or local charter, it must insure that those qualified to vote have the right to an equally effective voice in the election process. If voters residing in oversize districts are denied their constitutional right to participate in the election of state legislators, precisely the same kind of deprivation occurs when the members of a city council, school board, or county governing board are elected from districts of substantially unequal population. If the five senators representing a city in the state legislature may not be elected from districts ranging in size from 50,000 to 500,000, neither is it permissible to elect members of the city council from those same districts. In either case, the votes of some residents have greater weight than those of others; in both cases, the equal protection of the laws has been denied.

> government: a requirement that units with general governmental powers over an entire geographic area not be apportioned among single-member districts of substantially unequal population.[43]

In its most recent decision on the subject, the Court in *Hadley v. Junior College District of Metropolitan Kansas City, Missouri,*[44] held that the one man, one vote requirement of *Reynolds* and *Wesberry,* should be applied to a Junior College district even though it did not exercise powers as broad as those in *Avery*. In *Hadley,* the Court did not stop to consider if the powers of the district were administrative or legislative. Rather, they determined the issue under the test announced in *Avery.*

> . . . the trustees perform important governmental functions within the districts, and we think these powers are general enough and have sufficient impact throughout the district to justify the conclusion that the principle which we applied in *Avery* should also be applied here.[45]

The end result of *Avery* and *Hadley* seems to be that the one man, one vote standard will be applied to all nonceremonial elective positions, since virtually all elected officials perform important governmental functions; they normally exercise some general powers; and few, if any, decisions of elective officials do not have a serious impact on people's lives. In *Hadley* the powers of the trustees were as follows:

> . . . levy and collect taxes, issue bonds with certain restrictions, hire and fire teachers, make contracts, collect fees, supervise and discipline students, pass on petitions to annex school districts, acquire property by condemnation, and in general manage the operations of the junior college . . .[46]

To include such a limited elective office (the trustees' powers applied only to a single junior college district) within the one man, one vote standard "forebodes, if indeed the case does not decide, that the rule is to be applied to every elective public body, no matter what its nature."[47] Justices Harlan, Stewart, and Chief Justice Burger, concluded in their dissent that the *Hadley* decision expanded the application of the *Avery* rule to all single purpose governmental entities.[47]

> Before today, the Court's rule was that 'one man, one vote' applied only to local bodies having 'general governmental powers over the entire geographic area served by the body.' 390 U.S., at 485, 88 S. Ct., at 1120. The Court in *Avery* professed no temerity about concluding that the Midland County Commissioners Court was such a body. The Court's mere recitation of the powers of that entity, *ante,* at 794, n. 6, suffices to establish that conclusion. At the same time, it cannot be argued seriously that the Junior College District of Metropolitan Kansas City is the general governing body for the people of its area. The mere fact that the trustees can, with restrictions, levy taxes, issue bonds, and condemn property for school purposes does not detract from the crucial consideration that the sole purpose for which the district exists is the operation of a junior college.[48]

Thus, it would seem that the one man, one vote standard is constitutionally required whenever the state provides for election of public officials.

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43. The facts in *Avery, supra* note 38 at 476-477 were described as follows:
    Midland County has a population of about 70,000. The Commissioners Court is composed of five members. One, the County Judge, is elected at large from the entire county, and in practice casts a vote only to break a tie. The other four are Commissioners chosen from districts. The population of those districts, according to the 1963 estimates that were relied upon when this case was tried, was respectively 67,906; 853; 414; and 828. The vast imbalance resulted from placing in a single district virtually the entire city of Midland, Midland County's only urban center, in which 95% of the county's population resides.
    The Commissioners Court is assigned by the Texas Constitution and by various statutory enactments with a variety of functions. According to the commentary to Vernon's Texas Statutes, the court:
    "is the general governing body of the county. It establishes a courthouse and jail, appoints numerous minor officials such as the county health officer, fills vacancies in the county offices, lets contracts in the name of the county, builds roads and bridges, administers the county's public welfare services, performs numerous duties in regard to elections, sets the county tax rate, issues bonds, adopts the county budget, and serves as a board of equalization for tax assessments."
    The court is also authorized, among other responsibilities, to build and run a hospital, Tex. Rev. Civ. Stat. Ann., Art. 4492 (1966), an airport, *id.,* Art. 2351 (1964), and libraries, *id.,* Art. 1677 (1962). It fixes boundaries of school districts within the county, *id.,* Art. 2766 (1965), may establish a regional public housing authority, *id.,* Art. 1269K, Sec. 23a (1963), and determines the districts for election of its own members, Tex. Const., Art. V, Sec. 18, Vernon's Ann. St.
44. 397 U.S. 50 (1970).
45. Hadley v. Junior College District of Metropolitan Kansas City, Missouri, *supra* note 43 at 53-54.
46. *Supra* note 43 at 53.
47. Mr. Justice Harlan dissenting in *Hadley, supra* note 43 at 60.
48. *Id.* at 62.

III. *THE NEW MATH OF REAPPORTIONMENT*

ONCE THE COURT decided what elections were covered by the *Wesberry-Reynolds* standard, it had to begin the process of resolving the more difficult questions inherent in those decisions.

Thus, the Court had to decide if Article I §2 required more, less, or the same exactness for Congressional reapportionment cases as did the Equal Protection Clause. Aside from population, what factors could a legislature constitutionally consider? Was the standard under the Equal Protection Clause the same for a state legislature as a town, city, or county? What percentage deviations from actual equality of numbers were permissible? What proof was necessary and who shouldered what burden to show that a plan was unconstitutional?

In *Wesberry,* the Court repeatedly emphasized that equality of population was the sole permissible factor to be considered in determining if a challenged Congressional plan was consistent with Article I §2. Indeed, the Court made it quite clear that no other consideration could outweigh the need for districts of equal population:

> [t]he history of the Constitution particularly that part of it relating to the adoption of Art. I, §2, reveals that those who framed the Constitution meant that, no matter what the mechanics of an election, whether statewide or by districts, it was population which was to be the basis of the House of Representatives.
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> * * *
>
> [t]he debates at the Convention make at least one fact abundantly clear: that when the delegates agree that the House should represent 'people' they intended that in allocating Congressmen the number assigned to each State should be determined solely by the number of the State's inhabitants.
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> It would defeat the principle solemnly embodied in the Great Compromise — equal representation in the House for equal numbers of people — for us to hold that, within the States, legislatures may draw the lines of congressional districts in such a way as to give some voters a greater value in choosing a Congressman that others.[49]

However, in *Reynolds,* the Court suggested that there was more flexibility in state reapportionment than in congressional cases. The Court noted that within a State a larger number of seats are available for State legislative bodies than Congress. Thus, the Court concluded — "[s]omewhat more flexibility may therefore be constitutionally permissible with respect to state legislative apportionment than in Congressional districting."[50] Lower federal courts were quick to pick up the apparent distinction between Article I, Section 2, and the Equal Protection Clause. In *Drum v. Seawell,*[51] the court had before it both the congressional and state reapportionment plans of North Carolina. Judge J. Spencer Bell noted that *Reynolds* suggests that "strict adherence to equality of population between districts may more logically be required in congressional than in state legislative representation.[52] To prove the point, the court in *Drum* sustained the state reapportionment plan under the Equal Protection Clause and voided the congressional plan under Article I, §2, even though the numerical disparities were greater in the state than the congressional plan.

In *Abate v. Mundt,*[53] the Court of Appeals of New York had to decide if a county apportionment scheme which provided for a 12% variation was constitutionally permissible. While recognizing that the rule of *Wesberry-Reynolds-Avery* must be applied, the Court said:

> On this point, it should be recognized that the 'one man — one vote' cases have involved at least three levels of legislative reapportionment and that, in dealing with each of these levels, there are quite properly taken into account and weighed in the balance different considerations

49. *Supra* note 8 at 8-9, 13 and 14.
50. *Supra* note 14 at 578.
51. 250 F. Supp. 922 (M.D. N.C. 1966).
52. *Id.* at 924.
53. 25 N.Y. 2d 309 , 253 N.E. 2d 189 (1969), *cert. granted* 397 U.S. 904 (170). *See also* Jackman v. Bodine, 53 N.J. 558, 252 A2d 209, *cert. den.* 396 U.S. 822 (1969). Abate v. Mundt, was argued but not decided when this paper was delivered.

both as to the permissible variations from strict equality and as to the justification for variations from such strict equality. The United States Supreme Court decisions indicate that, in regard to apportionment of congressional districts, the permissible variation from strict equality is indeed almost micrometric and the justification required for such deviation is correspondingly stringent . . . .

Decisions dealing with apportionment of State Legislatures tend to reflect a broader scope for permissible deviations and a more tolerant attitude toward the practical justification for deviations . . . Similarly, and of particular relevance on this appeal, the court has indicated a willingness to allow a still broader scope for permissible deviations from strict population equality and the justification for such deviations when dealing with local, intrastate legislative bodies . . . .[54]

USING THE ABOVE reasoning and over the strong dissent of Chief Justice Fuld, the New York Court sustained the variation "in light of the apparent difference in treatment . . . and the practical and historical justification for the variance . . . ,"[55] Chief Justice Fuld took issue with the majority's conclusion that there is an inverse relationship between the requirements of the Equal Protection Clause and the level of government to be apportioned. In his view the Equal Protection Clause requires as much from cities, towns, and counties as it does from the state legislatures:

There is no doubt that in passing on a plan of apportionment, we are governed by the 'one man, one vote' principle laid down in Reynolds v. Sims, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 and in the cases which followed it. The majority asserts, however, that the strictures of that principle vary and are to be applied differently depending on the 'level *** of legislative reapportionment' involved. More specifically, it is stated that, although the permissible variation in population between congressional districts is 'almost micrometric,' there is a somewhat 'broader scope for permissible deviations' in the apportionment of State Legislatures and a 'still broader scope' where the plan involves 'local, intrastate legislative bodies.'

Significantly, though, the opinion furnishes not a single reason which would justify such a differentiation in the case of counties, and I suggest that there is no basis either in logic or precedent for the distinction sought to be drawn. On the contrary, the very same rationale which requires that all votes be accorded equal weight in elections to Congress and State Legislatures demands rigorous adherence to the one man, one vote principle in a county-wide election of its legislative body. A resident and voter is undoubtedly concerned with the actions of his county or municipal legislature, as he is with those of Congress or the State Legislature. There is no reason in either case why a citizen's voting power — his ability to influence the outcome of the election — should depend upon the district in which he happens to live.[56]

Not long after the ink of Chief Justice Fuld was dry, the Supreme Court decided *Hadley v. Junior College District of Metropolitan Kansas City, Missouri.*[57] In that case Mr. Justice Black made it quite clear that if a state provides for the election of any official, high or low, the same standard is to be applied. Thus, in *Hadley,* where the variation of 10% was arrived at in a manner similar to that in *Abate,* the Court rejected the argument that the limited purpose or "importance" of the election justified the deviation. Instead, the Court looked only to the equality of treatment received by the voters.

When a court is asked to decide whether a State is required by the Constitution to give each qualified voter the same power in an election open to all, there is no discernible, valid reason why constitutional distinctions should be drawn on the basis of the purpose of the election. If one person's vote is given less weight through unequal apportionment, his right to equal voting participation is impaired just as much as when he votes for a state legislator. While there are differences in the powers of different officials, the crucial consideration is the right of each qualified voter to participate on an equal footing in the election process. It should be remembered that in cases like this one we are asked by voters to insure that they are given equal treatment, and from their

54. *Id.* at 191-192.
55. *Id.* at 192.
56. *Id.* at 194.
57. *Supra,* note 43.

perspective the harm from unequal treatment is the same in any election, regardless of the officials selected.[58]

UNLIKE THE DISSENTERS, the majority in *Hadley* was not impressed with the argument that "[t]he need for more flexibility becomes greater as we proceed down the spectrum from the state legislature to the single purpose local entity."[59] On the basis of *Hadley,* it would seem that the dicta in *Reynolds,* — that somewhat more flexibility was permissible in the legislative apportionment than in congressional districting — has been put to rest.

Simultaneously, the Court accepted for decision the case of *Kirkpatrick v. Priesler*[60] for the purpose of elucidating the "as nearly as practicable" standard of *Wesberry.* In *Kirkpatrick* the maximum deviation above the norm was a mere 3.13% and below was 2.84% for a total deviation of only 5.97%.[61] The state of Missouri argued that there was "a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard."[62] In rejecting Missouri's argument as inconsistent with the whole thrust of *Wesberry* and *Reynolds* the Court held that *Wesberry* "requires that the State make a good-faith effort to achieve precise mathematical equality" and concluded that "[u]nless population variances among congressional districts are shown to have resulted despite such efforts, the State must justify each variance, no matter how small."[63]

The Court then examined the justification offered by Missouri to explain the variances and, as noted by Justice Fortas, "proceeds to reject, *seriatim,* every type of justification that has been — possibly, every one that could be — advanced."[64] In this manner the Court rejected Missouri's argument "that variances were necessary to avoid fragmenting areas with distinct economic and social interests and thereby diluting the effective representation of those interests in Congress;"[65] that "[t]he reasonableness of the population differences in the congressional districts . . . must . . . be viewed in the context of legislative interplay;"[66] that "variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions . . . to minimize the opportunities for partisan gerrymandering;"[67] that variances are justified by the "legislature's attempt to ensure that each congressional district would be geographically compared."[68]

The Court rejected two other asserted justifications because the State failed to apply them systematically but rather on an *ad hoc* basis.[69]

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58. *Id.* at 54-55.
59. *Id.* at 67.
60. Probable jurisdiction note 390 U.S. 939 (1968).
61. Kirkpatrick v. Preisler, 394 U.S. 526, 528-529 (1969).
62. *Id.* at 530.
63. *Id.* at 531-532. The Court at 531 rephrased its holding thusly:
    Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes. Therefore, the command of Art. I, Sec. 2, that States create congressional districts which provide equal representation for equal numbers of people permits only the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality or for which justification is shown.
64. *Id.* at 537.
65. *Id.* at 533. The Court's answer at 533 was:
    But to accept population variances, large or small, in order to create districts with specific interest orientations is antithetical to the basic premise of the constitutional command to provide equal representation for equal numbers of people. "(N)either history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes."
    See also, Wells v. Rockefeller, 394 U.S. 542 (1969).
66. *Id.* The Court's response was:
    We agree with the District Court that "the rule is one of 'practicality' rather than political 'practicality'." 279 F. Supp. at 989. Problems created by partisan politics cannot justify an apportionment which does not otherwise pass constitutional muster.
67. *Id.* at 533-534. The Court responded that this:
    is no more than a variant of the argument, already rejected, that considerations of practical politics can justify population disparities.
68. *Id.* at 535. In response the Court cited *Reynolds, supra* note 14 at 580:
    Modern developments and improvements in transportation and communications make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based solely on geographical considerations. Arguments for allowing such deviations in order to insure effective representation for sparsely settled areas and to prevent legislative districts from becoming so large that the availability of access of citizens to their representatives is impaired are today, for the most part, unconvincing.
69. *Id.* at 534-535:
    Missouri further contends that certain population variances resulted from the legislature's taking account of the fact that the percentage of eligible voters among the total population differed significantly from district to district—some districts contained disproportionately large numbers of military personel stationed at bases maintained by the Armed Forces and students in attendance at universities or colleges. *There may be a question whether distribution of congressional seats except according to total population can ever be permissible under Art. I, Sec.* B. But assuming without deciding that apportionment may be based on eligible voter population

Although *Kirkpatrick* is a congressional case arising under Article I, §2 and not a state or local case arising under the Equal Protection Clause the Court cited *Wesberry* and *Reynolds* interchangeably through the decision which suggests that the rule announced there applies equally to state and local reapportionment cases.[70]

THE NEXT PROBLEM the Court resolved was that relating to burden of proof. Normally, legislative enactments carry with them a strong presumption of regularity and constitutionality.[71] However, the *Wesberry-Reynolds-Avery* decisions suggested that the normal presumption was rebutted by a showing of numerical disparity. That suggestion was made the law of the land in *Swann v. Adams,*[72] where a Florida reapportionment statute was overturned because the state failed to explain the deviations established by the evidence. Adopting the reasoning of several lower federal courts,[73] the Supreme Court concluded that the complaints need not "negate the existence of any set of facts which would sustain the constitutionality of the legislation."[74] Rather, the Court held that the state must present "acceptable reasons for the (numerical) variations among the populations of the various legislative districts . . . "[75] *Swann* firmly establishes the principle that the proponents of any redistricting plan must sustain the burden of justifying any deviations from practicable equality of population. The burden shifts to the proponent once the numerical disparities are shown and it seems clear that the weight of the burden increases as the disparities increase.[76]

IV. *RACIAL GERRYMANDERING*

A. *14th Amendment Approach*

THE SUPREME COURT has yet to hold directly that racial gerrymandering violates the Equal Protection Clause of the 14th Amendment. However, after *Brown v. Board of Education,*[77] there is little question about how this issue will be resolved. As was noted by one commentator, the burden on a party challenging a plan under the Equal Protection Clause is to prove the purposeful use of racial factors. However, once the use of a racial criteria is established, the burden shifts to the state to establish a strong justification for its use:

> Where the purposeful use of racial factors is demonstrated, there is at least a strong presumption of invalidity raised which presents a difficult task of rebuttal. A state would apparently be required to show that its use of a racial standard was absolutely necessary, not merely rationally related, to the accomplishment of a legitimate objective.[78]

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rather than total population, the Missouri plan is still unacceptable. Missouri made no attempt to ascertain the number of eligible voters in each district and to apportion accordingly . . . Missouri also argues that population disparities between some of its congresional districts result from the legislature's attempt to take into account projected population shifts. We recognize that a congressional districting plan will usually be in effect for at least 10 years and five congressional elections. *Situations may arise where substantial population shifts over such a period can be anticipated. Where these shifts can be predicted with a high degree of accuracy, States that are redistricting may properly consider them. By this we mean to open no avenue for subterfuge. Findings as to population trends must be thoroughly documented and applied throughout the State in a systematic, not an ad hoc, manner.* Missouri's attempted justification of the substantial under population in the Fourth and Sixth Districts falls far short of this standard. (Emphasis added).

70. In his dissent, Mr. Justice White at 554 noted that:
    . . . the Court invokes *Reynolds* today and in no way distinguishes federal from state districting.
71. *See* Fleming v. Nestor, 363 U.S. 603 (1960).
72. 385 U.S. 440 (1967). *See also* Kilgarlin v. Hill, 386 U.S. 120 (1967).
73. Maryland Citizens Committee for Fair Congressional Redistricting, Inc. v. Tawes, 253 F. Supp. 731 (D.C. Md. 1966), League of Nebraska Municipalities v. Marsh, 242 F. Supp. 357 (D.C. Neb. 1965) and Paulson v. Meier, 246 F. Supp. 36 (D.C. ND. 1965).
74. Kilgarlin v. Martin, 252 F. Supp. 404, 414 (S.D. Tex. 1966).
75. *Supra* note 72 at 443-444.
76. Drum v. Seawell, 250 F. Supp. 922 (M.D. N.C. 1966). Preisler v. Secretary of State of Missouri, 279 F. Supp. 952 (W.D. Mo. 1967) affirmed sub nom Kirkpatrick v. Preisler, 394 U.S. 526 (1969).
77. 349 U.S. 294 (1954).
78. Note, the Apportionment Cases, 1965 Wis. L. Rev. 606, 645. To sustain this position the author properly refers to McLaughlin v. Florida, 379 U.S. 184, 191-192 (1964) where the Court said:
    (W)e deal here with a classification based upon . . . race . . . which must be viewed in light of the . . . central purpose of the Fourteenth Amendment . . . to eliminate racial discrimination emanating from official sources in the States. This strong policy renders racial classifications "constitutionally suspect" . . . and "in most circumstances irrelevant" to any constitutionally acceptable legislative purpose . . .

    Turning to the burden of proving the statute's legitimacy, the Court at 196 continued:

    There is involved here an exercise of the state police power which trenches upon the constitutionally protected freedom from invidious official discrimination based on race. Such a law, even though enacted pursuant to a valid state interest, bears a heavy burden of justification . . . and will be upheld only if it is necessary, and not merely rationally related, to the accomplishment of a permissible state policy.

    This clearly suggests that the burden would be upon a state to show a necessity for its use of a racial criterion in districting; this burden would be far heavier than the "reasonable relation" test generally applied. For a discussion of the problems involved in proving racial classification by a legislature, *see generally* Comment, 63 Mich. L. Rev. 913 (1965).

More recently, and in the context of reapportionment litigation, the Court has suggested that racial gerrymandering would violate the Equal Protection Clause even without proof of intent to discriminate. Thus, in *Fortson v. Dorsey,*[79] after disposing of the main issue (the *per se* constitutionality of multi-member districts) the Court went on to say "it may well be that, designedly or otherwise, a multi-member constituency apportionment scheme . . . would operate to minimize or cancel out the voting strength of racial or *political* elements of the voting population . . . [W]hen this is demonstrated it will be time enough to consider whether the system still passes constitutional muster."[80] Thus for the first time the Court, albeit in dicta, indicated that racial gerrymandering may be actionable under the Equal Protection Clause of the Fourteenth Amendment without proof of actual intent to discriminate.

In *Burns v. Richardson*[81] the Court transformed that dicta into law by holding:

> Where the requirements of *Reynolds v. Sims* are met, apportionment schemes including multi-member districts will constitute an invidious discrimination only if it can be shown that 'designedly or otherwise, a multi-member constituency apportionment scheme, under the circumstances of a particular case, would operate to minimize or cancel out the voting strength of racial or political elements of the voting population.[82]

It now appears to be settled that racial gerrymandering is unconstitutional as a violation of the Equal Protection Clause.[83]

Two lower court decisions are of particular importance here. First, in *Sims v. Boggett,*[84] a three judge District Court held that the Alabama legislature violated the Fourteenth and Fifteenth Amendments when it reapportioned the State House on the basis of race. The Court noted that political gerrymandering may "present a 'political' question with which the judicial branch of government is not equipped to deal,"[85] but concluded "that gerrymandering for purpose of racial discrimination is by itself in violation of the Fourteenth and Fifteenth Amendments to the Constitution."[86] The Court felt that the Constitution required this distinction because of the specific purpose of the Fourteenth and Fifteenth Amendments which was to protect the voting rights of Black people, not political parties, religions, ethnics, or other special interest groups —

> Any limitation of the persons for whom votes may be cast is logically a restriction on the right to vote. Political parties are not mentioned in the Constitution, but the abridgement of voting rights on account of race, color or previous condition of servitude is forbidden by the Fifteenth Amendment. The Supreme Court has long recognized that the Fifteenth and the more inclusive Fourteenth Amendments were adopted with the special intent of protecting Negroes and their voting rights. No student of history could deny that premise.[87]

In *Sims,* the Court found an intent to discriminate based upon four factors: the racial composition of the counties in question; past discrimination in voter registration within those counties; the sudden switch from county units to multi-member districts and the absence of any evidence to support a contrary inference.[88] To ignore these facts, and to proceed as if the all-white Alabama Legislature conceived its plan in a vacuum would, as the Court noted, "prove that

79. *Supra* note 17.
80. *Id.* at 439.
81. 384 U.S. 73 (1966).
82. *Id.* at 88.
83. *See also* Nixon v. Herndon, 273 U. S. 536 (1927); Nixon v. Condon, 286 U.S. 73 (1932); Rice v. Elmore, 165 F. 2d 387 (4 Cir.) *cert. denied* 333 U.S. 875 (1948); Baskin v. Brown, 174 F. 2d 391 (4 Cir. 1949); Chapman v. King, 154 F. 2d 460 (5 Cir.) *cert. denied,* 327 U.S. 800 (196); Davis v. Schnell, 81 F. Supp. 872 (S.D. Ala.) *affd.* 336 U.S. 933 (1949).
84. 247 F. Supp. 96 (M.D. Ala. 1965).
85. *Id.* at 104; *c.f.* Butcher v. Bloom, 415 Pa. 438, 467-68, 203 A2d 556, 573 (S. Ct. Pa. 1964).
86. *Id.* at 104.
87. *Id.* at 105.
88. *Id.* at 109.

> With the pattern and practice of discrimination in Alabama as a backdrop, the cavalier treatment accorded predominately Negro counties in the House plan takes on added meaning. The court is permitted to find the intent of the Legislature from the consistency of inherent probabilities inferred from he record as a whole. We, therefore, hold that the Legislature intentionally aggregated predominantly Negro counties with predominatly white counties for the sole purpose of preventing the election of Negroes to House membership. The plan adopted by the Legislature can have no other effect.

justice is both blind and deaf."[89]

The *Sims* case is, however, a weak one to rest upon because the Court failed to make any meaningful distinction between the burden of proof under the Fourteenth and Fifteenth Amendments. Yet the Court made a specific finding of intent to discriminate thereby suggesting that it meant to apply the standard of the Equal Protection Clause and not the Fifteenth Amendment.

The second case *Chavis v. Whitcomb,*[90] overcomes these difficulties as it is decided strictly under the Equal Protection Clause of the Fourteenth Amendment. The complaint in *Chavis* challenged the creation of a multi-member district scheme used in Marion County to apportion the Indiana House and Senate as violating the *Fortson-Burns* rule against submerging the voting strength of a racial element of the voting population. At another point in the complaint, the plaintiffs alleged the existence of a geographical ghetto area "having demographic characteristics which cause it to contain a cognizable minority interest group, and the existence of a Ghetto Voting Area whose boundaries closely coincide with those of the Ghetto Area. Because of its cognizable minority characteristics, the Ghetto Area is alleged to have an unusual interest in specific areas of substantive law."[91] The complaint also alleged that the existence of the Ghetto Area was involuntary because of racial segregation and discrimination against persons of low incomes and that the Democratic party through its county chairman exercises substantial control over the nomination of prospective state legislators through sponsorship of a slate of candidates. This control exists because of the large number of candidates (23 for Marion County) which a voter is faced with under the multi-member district plan. Judge Kerner for the Court held that the multi-member district plan for Marion County violated the Equal Protection Clause of the Fourteenth Amendment:

> We find that those allegations of the complaint pertaining to a cognizable interest group consisting of Negroes residing in the 'Center Townshop Ghetto' . . . have been proven by a preponderance of the evidence; that the election of legislators at large . . . effects an unjustifiable minimization of the voting power of this sizeable and cognizable minority group, and that members of the group . . . have been invidiously discriminated against in contravention of the Equal Protection Clause . . . .[92]

First, Judge Kerner defined the word "Ghetto"[92] and then found from the evidence submitted by the defendants that a ghetto did, in fact, exist within the center of Marion County. To support this finding, the Court selected two census tracts within and without the area defined in the complaint and then by race compared the housing, social and economic characteristics of each census tract. From these figures the Court then prepared a table of "Critical Differentiating Characteristics" which clearly defined the geographical area within which the residents (mostly Black) have interests in areas of substantive law such as housing regulations, sanitation, welfare programs . . . garnishment statutes and unemployment compensation, among others, which diverge significantly from the interests of nonresidents of the Ghetto."[93]

Further, the Court found that from 1960 to 1968 only 14 of the 88 legislators elected from Marion County resided within Center Township (the Township including the Ghetto Area) while 39 of the 88 legislators resided within Washington Township — an upper middle class and wealthy suburban area. More important, of the 14 legislators elected from Center Township, only 5 resided

89. *Id.*
90. 305 F. Supp. 1364 (S.D. Inc. 1969), *cert. granted* 397 U.S. 979 partially revoked 397 U.S. 984 (1970).
91. *Id.* at 1367.
92. *Id.* at 1369.
93. *Id.* at 1373.
Ghetto—A primarily residential section of an urban area characterized by a higher relative density of population and a higher relative proportion of substandard housing than in the overall metropolitan area which is inhabited predominantly by members of a racial, ethnic, or other minority group, most of whom are of lower socioeconomic status than the prevailing status in the metropolitan area and whose residence in the section is often the result of social, legal, or economic restrictions or custom.

within the Ghetto Area. The Court summarized these inequities as follows:

> The inequity of representation by residence of legislators between Washington and Center Townships is apparent.... Washington Township, the upper middle-class and wealthy suburban area having 14.64% of the population . . . was the residence of 52.27% of the senators and 41.79% of the representatives. Center Township, having 41.14% of the population . . . was the residence of 9.51% of the senators (less than one-fifth of Washington Township) and 17.91% of the representatives (approximately three-sevenths of Washington Township).[94]

If single member districts were used on Marion County, the Court found that the ghetto area was sufficient in size to elect two members of the House and one senator. From the testimony, the Court also found that the county organizations of the major political parties exert a "very substantial influence over the nomination of General Assembly candidates . . . (and) considerable control over (their.. actions . . . after they are elected";[95] that this influence and control results from the use of large multi-member districts and that the use of single member districts would reduce this control and influence.

To FURTHER insulate its decision the Court turned to the facts which the *Burns* case said would establish an unconstitutional minimization of the Black vote:

> It may be that this invidious effect can more easily be shown if . . . districts are large in relation to the total number of legislators, if districts are not appropriately subdistricted to assure distribution of legislators that are residents over the entire district, or if such districts characterize both houses of a bicameral legislature rather than one.[96]

In response, the Court found that the number of officials elected by multi-member districts are larger in relation to the total number of legislators; that Marion County is not properly subdistricted to insure legislators who are resident over the entire county; and that multi-member districts are used by both houses of the Indiana legislature to apportion Marion County. Last, the Court rejected the defendant's contention that it is better for Blacks to partially effect the election of many legislators rather than control the election of a few:

> The defendants argue that the plaintiffs have ample legislative representation because they are part of the constituency of each Marion County legislator, and each legislator must be somewhat responsive to their wishes. Partial responsiveness of all legislators is asserted to equal total responsiveness and the informed concern of a few specific legislators. To the contrary, under the circumstances of this case, and the proof adduced, we find the present districting scheme operates to minimize the voting strength of a cognizable racial element. Burns v. Richardson, *supra.*[97]

From the following cases it would seem that under two theories, intentional use of racial factors and effective submergence of a racial element within the body politic, the Equal Protection Clause prohibits racial gerrymandering. As both *Sims* and *Chavis* noted, this does not mean that any interest group is entitled to representation and the Equal Protection Clause, but rather, only those groups whose interests and injuries are sufficiently identifiable to "raise to the degree of a constitutional deprivation . . . ."[98] Historically and otherwise, Black people have constituted such a group.

(1) *Burden of Proof — Fourteenth Amendment*

WHEN PREPARING a suit under the Equal Protection Clause to challenge an existing mode of apportionment or a new reapportionment scheme as being racially motivated, counsel should examine the mathematical composition of both houses under the "as nearly as practicable" standard established by the Su-

94. *Id.* at 1385.
95. *Id.*
96. 384 U.S. 73, 88 (1966).
97. *Supra* note 90 at 1386.
98. *Id.* at 1389.

preme Court.[99] If the state's plan fails to meet the requirements of *Wesberry* and *Reynolds,* counsel's burden is lightened, for as noted above, the burden shifts to the state.

Assuming that no mathematical disparities exist or that the state has justified them, the quantum of proof necessary to defeat the plan increases. Counsel should examine the applicable state constitutional and statutory provisions to determine if they have been satisfied since they are controlling when not inconsistent with the federal requirements.[100] Then, past reapportionment plans should be carefully examined to determine if the proposed plan differs in any significant way from traditional plans. A showing to this effect along with statistical proof that the new plan "spreads out" the Negro votes constitutes strong evidence.[101]

Counsel should then study and compare the political districts which have been created, for the Court has declared that: "Indiscriminate districting, without any regard for political subdivisions or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering."[102] Following this language proof that political subdivisions, natural or historical boundaries, as well as compactness, and contiguity were not factors in the plan or were compromised wherever high concentrations of Negroes were present would be relevant. If elections have been held under the challenged plan, counsel should examine the returns closely, on a ward by ward basis, and then compare his findings with what the results would have been if the factors listed above were utilized in creating the districts.[103] Following the *Chavis* case, counsel should also use the census information to establish the existence of a Ghetto Area and to identify its differing characteristics. If counsel can then establish the submergence of the Black vote he will have met the requirements of *Chavis.*

The prevention of racial discrimination was a prime factor cited in a recent decision which allowed single member districts over multi-member districts,[104] while another lower federal court found that such districts were created for the purpose of racial discrimination.[105] The two cases in which multi-member plans have been upheld against charges of racial gerrymandering are distinguishable in that such plans were traditionally used by those states and hence represented no departure from long standing practice.[106]

(2) *Quantum of Evidence*

AS NOTED ABOVE, when a statute is challenged as being violative of the Equal Protection Clause the plaintiff normally carries the burden of proving that there is no rational basis for the classification thus making it invidious.[107] The failure of the plaintiff to carry this burden is the reason given by the Court in *Burns,*[108] for refusing to hold the challenged plan unconstitutional. However, the cases cited by the Court are cases dealing not with fundamental rights and liberties but rather with economic regulations. Without doubt, a party challenging an economic regulation must carry that difficult burden of proof while a party alleg-

99. Such proof should include the following:
    1. Percentage variation of each district from the ideal population.
    2. Ratio between most and least populous districts.
    3. Mathematical fraction or percentage of district population to the state population.
    4. Percentage of population which could elect a majority into each branch.
    5. Range in district size in absolute numbers and percentage terms.

100. Kilgarlin v. Martin, *supra* note 74; Sims v. Baggett, *supra* note 84, Long v. Avery, 251 F. Supp. 541 (D.C. Ka. 1966).
101. Although decided under both the Fifteenth Amendment and the Fourteenth *see* Sims v. Baggett, *supra* note 84. In Mann v. Davis, 245 F. Supp. 241 (E.D. Va.) *affd.* Burnette v. Davis, 382 U.S. 42 (1965) and Kilgarlin v. Martin, *supra* note 74, the plans were upheld against charges of racial gerrymandering with both courts relying heavily upon the fact that the scheme proposed by the state was similar to plans which were used over a long period.
102. Reynolds v. Sims, *supra* note 14 at 578.
103. *See* Kilgarlin v. Martin, *supra* note 74 at 435. This technique could be especially important when counsel is arguing that the creation of multi-member or flortorial districts was designed to cancel out the voting strength of a racial minority. *See* Sims v. Baggett, *supra* note 84 at 109.
104. Baker v. Carr, 247 F. Supp. 629, 638 (M.D. Tenn. 1965).
105. Sims v. Baggett, *supra* note 84 at 107.
106. Mann v. Davis, *supra* note 101, Kilgarlinv. Martin, *supra* note 74.
107. Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940); McGowan v. State of Maryland, 366 U.S. 420 (1961); Metropolitan Casualty Insurance Co. of New York v. Brownell, 294 U.S. 580 (1935); Erb v. Morasch, 177 U.S. 584 (1900).
108. *See also* Kilgarlin v. Martin, *supra* note 74.

ing the deprivation of a fundamental liberty does not. His burden of proof is less, for as the Court noted in *Harper v. Virginia State Board of Elections:*

> We have long been mindful that where fundamental rights and liberties are asserted under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined.[109]

Since the right to vote is fundamental and "preservative of other civil and political rights,[110] any claim alleging a deprivation of that right must be judged under the latter standard as the Court expressly held in *Harper* and *Reynolds.*[111] Further, the Court has often noted that state action which results in segregation is unconstitutional, regardless of intent.[112]

B. *Racial Gerrymandering and the Fifteenth Amendment*

SINCE THE *Slaughter House Cases*[113] it has been settled law that the Fifteenth Amendment[114] was enacted for the purpose of protecting the voting rights of Negro Americans. Although the amendment does not attempt to confer the right to vote[115] and speakers in terms of a prohibition, it does create a new federal constitutional right[116] The Amendment was declared to be self-executing at an early date,[117] thus eliminating the need for remedial legislation to enforce the right. However, as history has proven, many states have attempted to avoid the command of the Fifteenth Amendment through subterfuge.

First the states passed statutes which contained what is commonly referred to as a "grandfather clause."[118] These statutes were declared invalid by the Court in the companion cases of *Guinn v. United States*[119] and *Myers v. Anderson.*[120]

The Court reasoned that the statutes were violative of the Fifteenth Amendment since there was no rational state policy to be served by such statutes and their effect was to exclude Negroes from participation in elections which is the evil sought to be remedied by that Amendment.

Next the states passed legislation establishing limited registration periods for anyone over the minimum registration age with loss of all voting rights for those who failed to register during the prescribed period. The Court quickly struck down such plans as violative of the Fifteenth Amendment.[121] In so doing the Court noted that:

> The Amendment nullifies sophisticated as well as simple-minded modes of discrimination. It hits onerous procedural requirements which effectively handicap exercise of the franchise by the colored race although the abstract right to vote may remain unrestricted as to race. (Emphasis added)[122]

Next came the "white primary" cases of *Nixon v. Herndon,*[123] *Nixon v. Condon,*[124] *Groovey v. Townstead*[125] and

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109. 383 U.S. 633, 670 (1966).
110. Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964); Reynolds v. Sims, note 14 at 562.
111. Harper v. Board of Education, *supra* note 109 at 670; Reynolds v. Sims, *supra* note 14 at 562.
112. Eubanks v. Louisiana, 356 U.S. 584, 587-88 (1958); Johnson v. Virginia, 373 U.S. 61 (1963); N.A.A.C.P. v. Alabama, 357 U.S. 449, 461 (1958) and cases cited therein.
113. 83 U.S. (16 Wall.) 36 (1873). *See also* Ex parte Commonwealth of Virginia, 100 U.S. 339 (1880); Civil Rights Cases, 109 U.S. 3 (1883); United States v. Reese, 92 U.S. 214 (1876).
114. Section 1 of the Fifteenth Amendment reads:
    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.
115. United States v. Reese, *supra* note 114. The Fifteenth Amendment does not confer the right of suffrage upon anyone. It prevents the States, or the United States, however, from giving preference, in this particular, to one citizen of the United States over another on account of race, color, or previous condition of servitude.
116. United States v. Reese, *supra* note 114 at 218. It follows that the Amendment has invested the citizens of the United States with new constitutional right which is within the protective power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color, or previous condition of servitude. *See also* United States v. Cruikshank, 92 U.S. 542, 555-556 (1875); Ex parte Yarborough, 110 U.S. 651, 664-665 (1883); Logan v. United States, 144 U.S. 263, 286 (1891)
117. Guinn v. United States, 238 U.S. 347, 362-63 (1914); Myers v. Anderson, 238 U.S. 368 (1914).
118. These statutes stratified electors and prospective electors according to a date which was usually prior to the pasage of the Fifteenth Amendment. All persons who were qualified voters at that time or whose ancestors were qualified voters were automatically eligible as electors. All others were required to submit to and pass a variety of tests before they could register and vote. Naturally most whites were automatically eligible while most Negroes were not since their relatives were slaves prior to the passage of the Fifteenth Amendment and hence unable to vote.
119. *Supra* note 117.
120. *Id.*
121. Lane v. Wilson, 307 U.S. 268 (1938).
122. *Id.* at 275. *See also* Davis v. Schnell, *supra* note 83.
123. *Supra* note 83.
124. *Supra* note 83.
125. 295 U.S. 45 (1935).

Smith v. Allwright.[126] In both *Nixon* cases the Court struck down statutes under the Equal Protection Clause which effectively prohibited Negroes from participating in Texas primaries. Thereafter Texas delegated the operation of its primaries to the various political parties and in *Groovey* the Court held that since the political parties were private they were not within the purview of the Equal Protection Clause and therefore could constitutionally exclude Negroes from membership. Nine years later the Court reexamined its position in *Smith* and expressly overruled *Groovey* but did so by holding that the discriminatory action of the political parties was prohibited by the Fifteenth Amendment. As the *Smith* case dealt with the exact situation depicted in *Groovey* it seems that the state action concept under the Fifteenth Amendment is more expansive than its counterpart under the Fourteenth.

The Court reached the "high water mark" under the Fifteenth Amendment state action concept in the famous *Jaybird*[127] case by holding that a purely private political club established without governmental action or sanction for the purpose of excluding Negroes from membership and therefore meaningful political participation in the political life of their communities was unconstitutional under the Fifteenth Amendment.[128] In so holding the Court noted that:

> It violates the Fifteenth Amendment for a state, by such circumvention, to permit within its borders the use of any device that produces an equivalent of the prohibited election.[129]

In 1960 the Court expressly held that racial gerrymandering was a violation of the Fifteenth Amendment[130] even if done in the guise of realignment of political districts. Mr. Justice Frankfurter noted that:

> . . . The opposite conclusion, urged upon us by respondents, would sanction the achievement by a state of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. 'It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence . . . .[131]

Three years later the Court decided the case of *Wright v. Rockefeller.*[132] In that case petitioners were challenging the redrawing of two famed Congressional districts in New York City: "Harlem," represented by Adam Clayton Powell, and the "Silk Stocking District," then represented by John V. Lindsay. Although the complaint alleged racial gerrymandering in violation of the Fifteenth Amendment, the real issue was the validity of political gerrymandering designed to protect the incumbents from both districts.[133] The lower federal court

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126. 321 U.S. 649 (1944).
127. Terry v. Adams. 345 U.S. 461 (1952). *See also* Rice v. Elmore, *supra* note 83; Baskinv. Brown, *supra* note 83; Chapman v. King *supra* note 83; Davis v. Schnell, *supra* note 83.
128. The theory of *Terry* is that the club assumed a governmental function and is therefore within the ambit of the Fifteenth Amendment. *See* Evans v. Newton, 382 U.S. 296 (1966); Simpkins v. Moses H. Cone Memorial Hospital, 323 F. 2d 959 (4 Cir.) *cert. denied sub. nom.* Case v. Plummer, 353 U.S. 924 (1957); Marsh v. Alabama, 326 U.S. 501 (1945); Public Utilities Commission of the District of Columbia v. Pollak, 343 U.S. 451 (1951); Boman v. Birmingham Transit Co., 280 F. 2d 531 (5 Cir. 1960); Hampton v. City of Jacksonville, 304 F. 2d 320 (5 Cir. 1962); *cert. denied sub. nom* Ghioto v. Hampton, 371 U.S. 911 (1962); Wimbish v. Pinellas County, Florida, 342 F. 2d 804 (5 Cir. 1965); Eaton v. Grubbs, 329 F. 2d 710 (4 Cir. 1964); Kerr v. Enoch Pratt Free Library, 149 F. 2d. 212 (4 Cir. 1945); Rudder v. United States, 226 F. 2d 51 (D.C. Cir. 1955); Steel vs. Louisville and Nashville Ry. Co., 323 U.S. 192 (1944); Tunstall v. Brotherhood of Locomotive Firemen and Enginemen, 323 U.S. 210 (1944).
129. Terry v. Adams, *supra note* VBG *at* DF9. Although eight justices agreed on the result the authority of the *Terry* decision is weakened by the fact that there was no majority opinion. Justices Black, Douglas and Burton felt the state had an affirmative duty to prevent such practices while Justice Frankfurter felt that the facts established state action within the meaning of the Fifteenth Amendment. The remaining four justices felt that Smith v. Allwright, *supra* note 126 was controlling.
130. Gomillion v. Lightfoot, 364 U.S. 339 (1960). *See also* WMCA, Inc. v. Lomenzo, 238 F. Supp. 916, 926 (S.D. N.Y. 1965); Sims v. Baggett, 267 F. Supp. 96 104-105 (M.D. Ala. 1965); Kilgarlin v. Martin, 252 F. Supp. 404 (S.D. Tex. 1966); Meeks v. Avery, 251 F. Supp. 245 (D.C. Ka. 1966); Bush v. Martin, 251 F. Supp. 484, 513 (S.D. Tex. 1966); Jones v. Falcey, 221 A. 2d 101 (N.J. 1966).
131. Gomillion v. Lightfoot, *supra* note 130 at 345.
132. 376 U.S. 52 (1964). The Court, in *Wright* at 56, framed the issue as follows:

    > Whether appellants sustained their burden of proving that the portion of Chapter 980 . . . segregates eligible voters by race . . . in violation of the Equal Protection and Due Process Clauses of the Fourteenth Amendment.

    Throughout its opinion, the Court failed to distinguish between applicable standards under the differing constitutional amendments. Thus, *Wright* could be dealt with as a Fourteenth and not a Fifteenth Amendment case. However, the decision is seriously undercut by the Court's failure to state what Amendment it was proceeding under. *See also* Conner v. Johnson, 279, F. Supp. 619 (S.D. Miss.) *Aff'd.*
133. The true plaintiff was the New York City Democratic Committee and the object of the suit was to destroy a Rockefeller-Lindsay-Powell agreement to protect both incumbents by placing as many Demo-

dismissed the suit for failure of proof[134] and the Supreme Court affirmed with vigorous dissents by Justices Douglas[135] and Goldberg.[136]

From the foregoing, it appears settled that racial gerrymandering, in the guise of reapportionment or otherwise, is a violation of the Fifteenth Amendment. The remaining problem, which is the subject of the next section, is how to establish that a particular plan is the product of a racial gerrymander, or, to put it in the negative, how not to get caught in the *Wright v. Rockefeller* — failure of proof — dilemma.

C. *Burden of Proof*

THE BURDEN of proof under the Fifteenth Amendment[137] appears to be different than under the Fourteenth Amendment. In the *Grandfather Clause Cases* and the *White Primary Cases*[138] the Court struck down the statutes involved not because of any proof that the legislatures intended to discriminate against Negroes but because their *effect,* irrespective of intent, was to discriminate against Negroes.[139]

In the celebrated case of *Rice v. Elmore,* the Fourth Circuit articulated the purpose or effect test by noting:[140]

> Their primary purpose (14th and 15th Amendments) must not be lost sight of, however, and no election machinery can be upheld if its purpose or *effect* is to deny to the Negro, on account of his race or color, any effective voice in the government of his country or the state or communtiy wherein he lives. (Emphasis added).[140]

The Court then cited this language with approval and adopted it in *Terry v. Adams.*

> The Court of Appeals in invalidating the South Carolina practice answered these formalistic arguments by holding that no election machinery could be sustained if its purpose or *effect* was to deny Negroes on account of their race an effective voice in the governmental affairs of their country, state or community . . . .
>
> The South Carolina cases are in accord with the commands of the Fifteenth Amendment. . . . (Emphasis added).[141]

Next came *Gomillion v. Lightfoot,* where Mr. Justice Frankfurter, speaking for the Court held:

> These allegations, if proven, would abundantly establish that Act 140 was not an ordinary geographic redistricting measure even within familiar abuses of gerrymandering. If these allegations upon a trial remained uncontradicted or unqualified, the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters . . . .
>
> It is difficult to appreciate what stands in the way of adjudging a statute having this inevitable *effect* invalid in light of the principles by which this Court must judge . . . (Emphasis added).[142]

Against this backdrop the Court decided the ill-fated case of *Wright v. Rockefeller*[143] which can be read to require proof of legislative *purpose* to discriminate. Such proof is often impossible to secure.[144] The *Wright* case may be distinguished on three grounds; first, as a case actually dealing with political as opposed to racial gerrymandering; secand, there was no history of racial discrimination by the state of New York; third, the districts always had erratic lines.[145] *Wright* may be distinguished by being read narrowly to stand for the proposition that the plaintiffs did not prove their case. However the case is read, the conclusion remains that it is at war with settled principles of burden of proof under the Fifteenth Amendment. Indeed, if such were the case, there would be no distinction between the Fourteenth and Fifteenth Amendments even though the Fifteenth has but one

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crats in Powell's district as possible, leaving Lindsay the Republicians. This conclusion is the result of a series of conversations with the attorney for the plaintiffs.

134. 211 F. Supp. 460 (S.D. N.Y. 1962).
135. *Supra* note 132 at 59.
136. *Id.* at 67.
137. *Supra.* note 117.
138. *Supra* notes 83, 121 and 127.
139. *Supra* note 83.
140. *Id.* at 392. *Se also* Baskin v. Brown, *supra* note 83; Chapman v. King, *supra* note 83.
141. *Supra* note 127 at 466.
142. *Supra* note 130 at 341-342.
143. *Supra* note 132.
144. *Wright* was distinguished in a similar manner in Sims v. Baggett, *supra* note 84 at 109.
145. Pollach, Racial Discrimination and Judicial Integrity, 108 Penn. L. Rev. 1, 22-23.

purpose — to protect Black people's right to effective participation in the political process. As one leading commentator puts it:

> Yet how can the fifteenth amendment apply where the fourteenth does not, since both are addressed to state action? The question generates its own answer: with respect to the particular problem to which the fifteenth amendment is addressed — protecting the right of Negroes not to be discriminated against at the polls — the amendment must impose on the states a heavier affirmative duty to assure an equal franchise than does the fourteenth. If this were not so, the fifteenth amendment would be a redundancy, having no scope for separate and effective application.
>
> * * *
>
> *Smith v. Allwright* and *Terry v. Adams* do not mean that the Constitution would prevent a dominant political party from excluding from its primary the members of a disfavored faith. For the fifteenth amendment speaks only to racial distinctions, not to religious distinctions or any of the other arbitrary classifications interdicted by the equal protection clause.[146]

Much the same justification was put forth in *W.M.C.A., Inc. v. Lorrenzo*[147]

> [T]he Supreme Court [in *Wright*] may have intimated that drawing legislative districts in order to separate native-born whites from Negroes and Puerto Ricans constitutes a violation of the XIV Amendment . . . As the dissenters pointed out, state-sponsored segregation based on race, religion, or ancestry is peculiarly vulnerable to constitutional attack . . . .The integration of Democrats and Republicans, or of Liberals and Conservatives, has no such privileged status under the Federal Constitution.[148]

In *Gaston County v. United States,*[149] the Supreme Court sustained, under a Fifteenth Amendment statute, the application of a ban on literacy tests absent any evidence that the test in question was, discriminatory or that discriminatory applications had occurred within the past seven years. The reasoning behind this result was articulated in *United States v. Arizona*[150] where the Court said that regardless of intent the effective result of allowing *Gaston County* to use the test would be to disenfranchise Blacks.

> [e]ven impartial administration of an impartial test would inevitably result in just the discrimination that Congress and the Fifteenth Amendment sought to prescribe.

IN LIGHT OF the design of the Fifteenth Amendment, the nature of the right to vote, the fact that the state is the only party capable of knowing the real purpose behind the action of the legislature and the impossible burden of proof that would otherwise be placed upon the plaintiff, the Court should quickly reaffirm the "effect" for Fifteenth Amendment cases. If the Court fails to act swiftly, it may be that the recently won gains in the voting area, secured only after decades of struggle, will be a mere illusion of the oasis of equality, with racial gerrymandering the desert of defeat. Our nation cannot long afford to continue placating the American Blackman with the *promise* of equality that is not a reality.

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146. 238 F. Supp. 916, 926 (S.D. N.Y. 1965).
147. 395 U.S. 285 (1965)
149. 91 S. Ct. 260 (1970).
151. *Id.* at 319.
152. At the time of this writing the Supreme Court has yet to decide the *Chavis* case. The critical importance of *Chavis* to the basic questions discussed in this paper is exemplified by the questions presented to the Court in the briefs of the parties:
    Brief for Appellants at 4-5:
    1. Whether the decision of the district court reapportioning the State of Indiana must be reversed because its judgment that the multi-member districting provisions of the Indiana Apportionment Act of 1965, as they related to Marion County, was the result of a fault-ridden analysis erroneously based on social, racial and economic factors and based on the situs of the residence of legislators elected from Marion County.
    2. Whether the decision of the district court reapportioning the State of Indiana should be reversed because it was expressly designed to freeze in place the geographical and political integrity of a cognizable racial minority group found to reside within the Center Township Ghetto area for the sole purpose of preserving its voting strength.

    Brief of the State of Illinois . . . As Amici Curiae at 2:
    1. Does a multi-member districting scheme contravene the equal protection clause merely on the grounds that a cognizable racial-socio-economic group has not, as the lower court found, elected a proportionate share of the representatives?
    2. In the absence of a demonstraed invidious discrimination, is the multi-member district versus the single-member district problem a non-justiciable political question?
    3. Does the equal protection clause require, or does it even permit, legislative district lines to be drawn to protect cognizable racial-socioeconomic groups against dilution of their voting strength?

    If and when the Court decides *Chavis* on the merits several of the most difficult questions should be answered.

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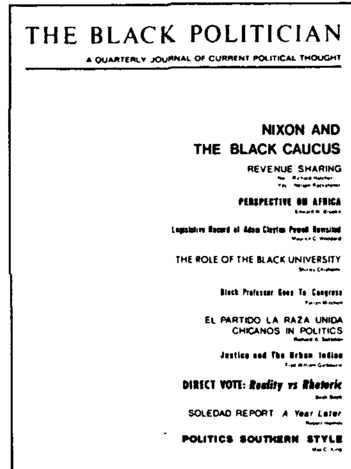

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